Curtailment of Court Awarded Attorneys’ Fees in Public Interest Litigation

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CURTAILMENT OF COURT AWARDED ATTORNEYS’ FEES IN PUBLIC INTEREST LITIGATION

The United States is one of the few countries in the world which requires each party in federal litigation to pay its own attorneys’ fees. Although English courts allow an award of fees to the prevailing party in a suit, American courts will not ordinarily allow such an award absent statutory authorization. The American rule, barring the shifting of attorneys’ fees to the prevailing litigant, originated during the eighteenth century; the first relevant statutory mention is contained in an Act passed in 1789 regulating the processes of the courts of the United States. The Act required that federal courts follow the procedure for attorneys’ fees practiced by the state in which they were sitting. In the middle 1800’s, Congress decided to standardize the fees that could be charged to a losing party in federal litigation. The resulting court costs and docketing statute limited the amount a victorious litigant could charge the losing party for attorneys’ fees. The

1. Treatment of the state courts’ procedures is beyond the scope of this article. For a discussion by one court, see Culbertson v. Jno. McCall Coal Co., 495 F.2d 1403 (4th Cir.), cert. denied, 419 U.S. 1033 (1974) (application of the Erie doctrine allowing state procedure to govern the grant or denial of awards of attorneys’ fees in ordinary diversity cases). See also 6 J. MOORE, MOORE’S FEDERAL PRACTICE ¶ 54.77(2), at 1712-13 (1974).


5. Act of Feb. 26, 1853, ch. 80, 10 Stat. 161. The statute provided in relevant part: [in] lieu of the compensation now allowed by law to attorneys . . . the following and no other compensation shall be taxed and allowed . . .

Fees of Attorneys, Solicitors, and Proctors. In a trial before a jury, in civil and criminal causes, or before referees, or on a final hearing in equity or admiralty, a docket fee of twenty dollars: Provided, That in cases in admiralty and maritime jurisdiction, where the libellant shall recover less than fifty dollars, the docket fee of his proctor shall be but ten dollars.

In cases at law, where judgment is rendered without a jury, ten dollars, and five dollars where a cause is discontinued.

For scire facias and other proceedings on recognizances, five dollars.

For each deposition taken and admitted as evidence in the cause, two dollars and fifty cents.

A compensation of five dollars shall be allowed for the services rendered in cases removed from a district to a circuit court by writ of error or appeal

Id.
Supreme Court has interpreted this statute throughout the years to forbid awards other than those expressly allowed in it, and the statute has thus provided the substantive basis for the present American rule.

Nevertheless, court costs and docketing statutes have never acted as a complete bar against awarding attorneys’ fees to the prevailing party, for Congress has enacted certain statutes containing fee shifting provisions.

6. See, e.g., Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714 (1967) (counsel fee not awarded prevailing party in suits involving Lanham Act violations); Flanders v. Tweed, 82 U.S. (15 Wall.) 450 (1872) (award of counsel fee not permitted against treasury agent who illegally seized plaintiff’s property); The Baltimore, 75 U.S. (8 Wall.) 377 (1869) (award of $500 counsel fee to prevailing party not permitted in admiralty court).


A judge or clerk of any court of the United States may tax as costs the following:

(1) Fees of the clerk and marshall;
(2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;
(3) Fees and disbursements for printing and witnesses;
(4) Fees for exemplification and copies of papers necessarily obtained for use in the case;
(5) Docket fees under section 1923 of this title.

A bill of costs shall be filed in the case and, upon allowance, included in the judgment or decree.

Section 1923(a), Docket Fees and Costs of Briefs, provides:

Attorney’s and proctor’s docket fees in courts of the United States may be taxed as costs as follows:

$20 on trial or final hearing (including a default judgment whether entered by the court or by the clerk) in civil, criminal, or admiralty cases, except that in the cases of admiralty and maritime jurisdiction where the libellant recovers less than $50 the proctor’s docket fee shall be $10.

$20 in admiralty appeals involving not over $1000;
$50 in admiralty appeals involving not over $5000;
$100 in admiralty appeals involving more than $5000;
$5 on discontinuance of a civil action;
$5 on motion for judgment and other proceedings on recognizance;
$2.50 for each deposition admitted in evidence.

These statutory provisions for fee shifting either make the award mandatory, as is the case with antitrust laws, or discretionary, as exemplified by the Civil Rights Act of 1964. In addition to specific congressional provisions for fee shifting, another group of exceptions to the American rule grew out of the courts' equitable powers to allow attorneys' fees "in particular situations, unless forbidden by Congress . . . ." There are two well-established situations under which awards have been granted without statutory authority. First, courts have awarded fees for "willful disobedience of a court order . . . as part of a fine to be levied on the defendant," or when the losing party has "acted in bad faith, vexatiously, wantonly or for oppressive reasons.

9. Section 15 of the Clayton Act, for example, provides that:

   Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefore . . . and shall recover threefold the damages by him sustained, and the cost of the suit, including a reasonable attorney's fee.


10. The Civil Rights Act of 1964 provides in relevant part:

   In any action commenced pursuant to this subchapter, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, and the United States shall be liable for costs the same as a private person.

42 U.S.C. § 2000a-3(b) (1970). The Supreme Court has held that, in actions brought under this section, Congress intended that successful plaintiffs should normally recover unless exceptional circumstances dictate otherwise. Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400, 402 (1968). Other statutes which make such awards discretionary include the Securities Act of 1933 § 9, 15 U.S.C. § 77k(e) (1970) (cost may be assessed against either party when the court believes suit or defenses were without merit); Securities Exchange Act of 1934 § 9, 15 U.S.C. § 78i(e) (1970) ("the court may, in its discretion . . . assess reasonable . . . attorneys' fees, against either party litigant"); Copyright Act § 116, 17 U.S.C. § 116 (1970) (reasonable attorneys' fees may be awarded in favor of the "prevailing" party in an action for copyright infringement); Serviceman's Readjustment Act § 1822(b), 38 U.S.C. § 1822(b) (1970) (reasonable attorneys' fees may be awarded to the successful party).


The second situation in which nonstatutory fees have been allowed involves the "common fund" exception. Under this doctrine, a person preserving, recovering or enriching a fund or property for the benefit of himself and others is allowed to obtain attorneys' fees either from the fund itself or from the person receiving the benefit.

In recent years, many lower federal courts have awarded successful plaintiffs attorneys' fees in public interest litigation based on a third exception to the American rule. Under this third theory, when a plaintiff brings suit under a federal statute to vindicate the rights of others as well as himself, he is considered to be acting as a "private attorney general" and thus should be awarded attorneys' fees to encourage such suits.


A Title II [of the Civil Rights Act of 1964] suit is thus private in form only. When a plaintiff brings an action under that Title . . . he does so not for himself alone but as a "private attorney general", vindicating a policy that Congress considered of the highest priority.
Court abruptly terminated further use of the private attorney general exception. In 1970, plaintiffs, the Wilderness Society, the Environmental Defense Fund, and the Friends of the Earth, seeking to halt construction of the trans-Alaska pipeline, brought suit for declaratory and injunctive relief against the Secretary of the Interior on the grounds that the Secretary intended to issue right-of-way and special land use permits for the pipeline in violation of the Mineral Leasing Act of 1920 and the National Environmental Policy Act of 1969 (NEPA). When the district court granted a preliminary injunction against the Secretary, the state of Alaska and Alyeska Pipeline intervened on behalf of the Interior Department. Following three years of litigation and environmental studies by the principle parties, Congress enacted the Trans-Alaska Pipeline Authorization Act, which amended the width requirements of the Mineral Leasing Act and thereby allowed Alyeska to proceed in its construction of the pipeline. The Act also declared that no further action under NEPA was required in order for construction of the pipeline to begin.

With the merits of the case thus resolved, the environmentalists applied to the United States Court of Appeals for the District of Columbia Circuit for an award of attorneys' fees, claiming that they were entitled to reimbursement for the costs resulting from the successful litigation of a suit in the public interest. The court noted that there was no applicable statutory provision under the Mineral Leasing Act permitting such an award, and found that the facts of the case did not justify an award under either of the two generally approved exceptions to the American rule against fee shifting. However, the court did find a basis for fee shifting under the private

20. 30 U.S.C. § 185 (1970). The crux of plaintiffs' allegation was that Alyeska's permits violated the width requirements of the Act.
23. The permits were to be issued to a consortium of oil companies which owned Alyeska Pipeline Service Co. The consortium sought to transport Alaskan oil to markets in the lower 48 states.
25. Following the issuance of the mineral and right-of-way permits, the district court dissolved its preliminary injunction and refused to grant a permanent injunction. On appeal, the decision of the district court was reversed on the issue of the Mineral Leasing Act. 479 F.2d 842 (D.C. Cir.), cert. denied, 411 U.S. 917 (1973). The appeals court declined to decide the NEPA issues because of their complexity, the need for a rapid decision, and the fact that the construction of the pipeline would be effectively enjoined because of Mineral Leasing Act violations. The subsequent passage of the Trans-Alaska Pipeline Authorization Act, 43 U.S.C. §§ 1651-55 (Supp. 1973), permitted construction to proceed.
27. The environmentalists claimed over 4,500 hours of attorneys' time was spent in the litigation. Id. at 1032.
28. See notes 11-15 & accompanying text supra.
attorney general exception and, after suggesting standards for the award of fees to the environmentalists on that basis, remanded the case to the district court for a determination of the amount of such fees.\textsuperscript{29}

The Supreme Court reversed and specifically refused to employ the private attorney general theory absent statutory fee shifting authority.\textsuperscript{30} This article will examine the implications of this limitation on the use of the private attorney general exception in public interest litigation. Additionally, it will examine the history and trends in the use of the common fund exception to the American rule and its possible expansion in light of the decision in \textit{Alyeska}.

\section*{I. The Rise and Fall of the Private Attorney General Exception}

Prior to its demise in \textit{Alyeska}, the private attorney general theory had emerged as a third nonstatutory basis upon which to award attorneys' fees. The private attorney general concept was initially used by the Supreme Court

\textsuperscript{29} The fee should represent the reasonable value of the services rendered, taking into account all the surrounding circumstances, including, but not limited to, the time and labor required on the case, the benefit to the public, the skill demanded by the novelty or complexity of the issues, and the incentive factor. 495 \textit{F.2d} at 1036.

Although the Department of the Interior and the state of Alaska were defendants along with Alyeska Pipeline, only Alyeska was made to bear the burden of the costs incurred by the environmentalists. The court felt that attorneys' fees were barred from being awarded against the United States by 28 U.S.C. § 2412 (1970), and that it would be unfair to award any of the costs against the state of Alaska. 495 \textit{F.2d} at 1036 & n.8. Since the costs could not be spread among the defendants, the court determined that Alyeska should pay only one half of the plaintiff's attorneys' fees and that the Wilderness Society should absorb the other half. \textit{Id.} at 1036.

\textsuperscript{30} The Court stated:

It appears to us that the rule suggested here and adopted by the Court of Appeals would make major inroads on a policy matter that Congress has reserved for itself. Since the approach taken by Congress to this issue has been to carve out specific exceptions to a general rule that federal courts cannot award attorneys' fees beyond the limits of 28 U.S.C. § 1923, those courts are not free to fashion drastic new rules with respect to the allowance of attorneys' fees to the prevailing party in federal litigation . . . .

421 U.S. at 269. See also note 41 \textit{infra} for an account of some of those cases decided by the lower federal courts which the \textit{Alyeska} Court stated had been erroneously decided using the private attorney general theory to award fees. One case deserves special note here. In Sims v. Ames, 340 F. Supp. 691 (M.D. Ala.), \textit{aff'd}, 409 U.S. 942 (1972) (fees awarded in section 1983 reapportionment suit “to remove impediments to \textit{pro bono publico} litigation” benefiting plaintiff and his class and effectuating strong congressional policy), fees were awarded by the district court using the private attorney general exception. The 1972 Supreme Court's summary affirmance was justified by the \textit{Alyeska} majority on the grounds that the district court had available alternative bad faith grounds upon which to base its decision. 421 U.S. 270 n.46.
in *Newman v. Piggie Park Enterprises, Inc.* In *Piggie Park*, plaintiffs brought suit under Title II of the Civil Rights Act of 1964, alleging racial discrimination by a chain of restaurants. Although Title II allowed a discretionary award of fees, the Court held that in order to encourage those suffering racial discrimination to bring suits in the public interest under the Civil Rights Acts, attorneys' fees would be awarded routinely "unless special circumstances would render such an award unjust." Persons bringing suits to implement important congressional policy were termed private attorneys general by the Court.

This language seemed to set the stage for courts to award attorneys' fees whenever a citizen acted as a private attorney general and furthered an important congressional policy. The fact that the *Piggie Park* decision was based on a statute which allowed for discretionary fee shifting constituted the only impediment to the application of this theory in a variety of other public interest cases in which there was no statutory provision for awarding attorneys' fees.

The Supreme Court's decision two years later in *Mills v. Electric Autolite Co.*, however, appeared to remove even that stumbling block. In *Mills*, minority stockholders successfully sued a corporation for a violation of proxy regulations under the Securities Exchange Act of 1934. The Act was silent on the question of attorneys' fees. The Supreme Court, although basing its decision to award counsel fees on the common benefit exception to the American rule, stated that an award of fees was permissible when the litigation conferred a substantial benefit on members of an ascertainable class, when the court's jurisdiction over the subject matter of the suit made it possible to make an award that would operate to spread the costs proportionately among them, and when permitting others to derive full benefit from the plaintiff's efforts without contributing equally to the litigation expenses would serve to enrich others at the plaintiff's expense.

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31. 390 U.S. 400 (1968). See note 10 supra. Originally, the term "private attorney general" was used to refer to one who had standing to bring a suit to challenge federal government action. *See* Associated Indus. Inc. v. Ickes, 134 F.2d 694, 704 (2d Cir.), vacated, 320 U.S. 707 (1943). The phrase has now come to refer to a civic-minded taxpayer who brings suit to prevent or correct official misconduct. *See* Dawson, *Lawyers and Involuntary Clients in Public Interest Litigation*, 88 HARV. L. REV. 849, 888 (1975).
33. See note 10 supra.
34. 390 U.S. at 402.
37. See 396 U.S. at 392-97.
38. Id.
Curtailment of Attorneys' Fees

In spite of the fact that the Mills Court did not adopt the private attorney general theory as the basis for its decision, lower federal courts lost no time in applying a broad reading of the combined Piggie Park-Mills doctrine to a host of public interest cases. But while many commentators hailed the combined Piggie Park and Mills decisions as the beginning of a new era in public interest litigation, at least one commentator as early as 1973 saw

39. There has been some disagreement among commentators as to the basis for this decision. At least one author stated that Mills was decided under the private attorney general theory, while another disagreed, arguing that it was determined under the common benefit theory. Compare Note, Awarding Attorneys' Fees to the "Private Attorney General": Judicial Green Light to Private Litigation in the Public Interest, 24 HASTINGS L.J. 733, 741 (1973) with Note, Sierra Club v. Lynn: The Shifting of Attorney Fees in Private Environmental Suits, 5 ENVIRONMENTAL L.J. 175, 179-80 (1974). However, the Alyeska Court categorized Mills with its other common fund decisions. See p. 158 infra.

40. According to one commentator:

Read together the two cases stand for the broad principle that attorney's fees should be granted to successful plaintiffs in order to effectuate important social policies. We will refer to this principle as the "Piggy Park-Mills doctrine."

Nussbaum, supra note 17, at 321.

41. See, e.g., Knight v. Auciello, 453 F.2d 852 (1st Cir. 1972) (fee awarded in section 1982 civil rights case to enable plaintiff to vindicate a public right); Fairley v. Patterson, 493 F.2d 598 (5th Cir. 1974) (fee awarded in fourteenth amendment reapportionment case in which important public policies were effectuated); Cooper v. Allen, 467 F.2d 836 (5th Cir. 1972) (fee awarded in section 1981 civil rights case to encourage individual injured by racial discrimination to seek judicial relief); Lee v. Southern Home Sites Corp., 444 F.2d 143 (5th Cir. 1971) (fee awarded in section 1982 civil rights case to enable individuals to act as private attorneys general); Taylor v. Perini, 503 F.2d 899 (6th Cir. 1974) (fee awarded in section 1983 prisoner rights case to encourage persons to vindicate important rights); Fowler v. Schwarwalder, 498 F.2d 143 (8th Cir. 1974) (fee awarded in sections 1981 and 1983 civil rights case to allow plaintiff to act as a private attorney general and vindicate important congressional policy); Brandenburger v. Thompson, 494 F.2d 885 (9th Cir. 1974) (fee awarded in section 1983 right to travel and welfare case because plaintiff benefited a significant class, vindicated a federally protected right, had insufficient monetary interest to bring suit and could not rely on the state attorney general to protect her rights); La Raza Unida v. Volpe, 57 F.R.D. 94 (N.D. Cal. 1972) (fee awarded in environmental protection and housing assistance case brought under Department of Transportation Act of 1966 and various federal housing statutes because of the strength of the congressional policy, the number of people benefited by the litigants' efforts, and the necessity and financial burden of private enforcement). See 421 U.S. at 270 n.46 for additional cases which the Alyeska court held were wrongly decided using the private attorney general theory.

42. See, e.g., King & Plater, The Right to Counsel Fees in Public Interest Environmental Litigation, 41 TENN. L. REV. 27 (1973); Nussbaum, supra note 17; Comment, Balancing the Equities in Attorney's Fees Awards: Losing Plaintiffs and Private Defendants, 62 GEO. L.J. 1439 (1974); Comment, Award of Attorney's Fee in Alaska: An Analysis of Rule 82, 4 U.C.L.A.-ALASKA L. REV. 129 (1974); Note, Awarding Attorney and Expert Witness Fees in Environmental Litigation, 58 CORNELL L. REV. 1222 (1973); Note, Private Attorney General Fees Emerge From the Wilderness, 43 FORDHAM L. REV. 258; Note, HASTINGS L.J., supra note 39; Fees Awarded under Equity to
the dangers inherent in the broad language used by the Court in *Mills* and accurately forecast the *Alyeska* result.48

In *Alyeska*, the Court buttressed its conclusion with three major arguments. First, it analyzed the docketing fees and court costs statutes to demonstrate that the American rule is statutory in origin and that absent congressional directive, fee shifting should not be allowed.44 Having erected this statutory barrier, the Court was then forced to distinguish the two nonstatutory exceptions which it had sanctioned in its previous decisions. The bad faith doctrine was only briefly discussed in *Alyeska* as part of the inherent power of the courts to make an award in the interests of justice. However, this exception had been explained by the Court in previous cases as a part of its original equity power received from the English chancery courts.45 The common fund exception was distinguished by the Court as a permissible construction of the fee statute rather than a true exception to the statute. The Court simply determined that this theory allowed shifting of the fees, not to the defendant, as is proscribed by the statute, but to the benefited class, about which the statute is silent. The only time a defendant could be made to pay attorneys' fees would be when he or she could spread them to the beneficiaries of the action, thus passing the costs of the litigation on to others.46

Second, noting the number of statutes which Congress has enacted containing specific fee shifting provisions,47 the majority concluded that those statutes which did not have such provisions were to be regarded as pos-

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43. Logically, one of two things must happen: either judicial discretion to grant fees on policy grounds will result in universal fee shifting from the successful party, or the courts will withdraw to the traditional position, denying any fee transfer without specific statutory authorization. *Mills* represents an uneasy half-way house between these two extremes.

44. See notes 5-7 & accompanying text supra.

45. See note 11 supra. The English chancery courts, whose purpose was to do justice, had the power to grant costs according to the facts of each case. See Kansas City S. Ry. v. Guardian Trust Co., 281 U.S. 1 (1930).

46. Although this doctrine has undergone considerable expansion in the 90 years since its birth in Board of Trustees v. Greenough, 105 U.S. 527 (1881), a vital ingredient of this method of fee shifting has always been the ability of the party who must pay to pass these costs on to the appropriate benefiting class rather than forcing the defendant or a nonbenefiting party to absorb those costs. See notes 62-81 and accompanying text infra for discussion of this doctrine and cases decided under it.

47. See note 8 supra.
sessenct a negative implication proscribing fee shifting. Finally, the Alyeska Court raised the question of which public interest cases should qualify for fee shifting. If courts allowed fee shifting in all cases, the American rule would be rendered meaningless. If only some of the cases were to qualify, courts would be forced to make value judgments; the majority questioned how courts would decide to which litigants fees should be awarded and under what conditions. Additionally, the Court was concerned about what method should be used to determine how much money to allocate for fees.\[50\] Congress, not the judiciary, was seen as the appropriate body to make determinations with respect to the creation of further exceptions to the American rule.

It is readily apparent that had the Alyeska Court wished to do so, it could have avoided overturning the private attorney general exception. Alternate grounds existed for the Court to deny fees. For example, it might have determined that the appeals court wrongly shifted the burden of paying attorneys' fees to Alyeska, since in reality it was the Department of the Interior which had directly violated the law by issuing the permits in

\[48\] Interestingly, Justice Stewart, dissenting in Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 723 (1967), believed that this same congressional silence in certain statutes evidenced an implied consent to shift fees. He reasoned that if Congress had not wanted the courts to authorize fee shifting in those silent statutes, it would have said exactly that. See note 73 infra for a discussion of Fleischmann.

\[49\] In a country with as many diverse groups as ours, what is of interest to one sector of the public may not be of interest to another. See note 87 infra.

\[50\] 421 U.S. at 263-64. Certain statutes award fees to the prevailing party. See note 10 supra. Others make such awards to prevailing plaintiffs only. See, e.g., Fair Labor Standards Act § 16, 29 U.S.C. § 216(b) (1970) ("The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action."); Ship Mortgage Act § 30, 46 U.S.C. § 941(c) (1970) ("Upon judgment for the plaintiff in any such suit, the court shall include in the judgment an additional amount for costs of the action and a reasonable counsel's fee, to be fixed by the court.").

\[51\] Courts have used many different factors in arriving at an award of "reasonable" attorneys' fees. See, e.g., note 29 supra; City of Detroit v. Grinnell Corp., 495 F.2d 448, 470 (2d Cir. 1974) (starting point of every award of attorneys' fees must be calculation of number of hours attorney spent on the case); Ranger Ins. Co. v. Algie, 482 F.2d 861, 864 (5th Cir. 1973) (hours spent by attorney in preparation of a case are of dubious value; custom of the place is a relevant consideration as well as the briefs filed, the record, the difficulty of appeal, the result obtained, and the experience of counsel); Milstein v. Werner, 58 F.R.D. 544, 550 (S.D.N.Y. 1973) (benefit conferred is the most important factor to be used in determining fee award). For a detailed discussion of guidelines recommended in determining fee awards by two different courts, see Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 717-19 (5th Cir. 1974); Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp., 487 F.2d 161, 166-69 (3d Cir. 1973).
question. Alternatively, the Alyeska Court might have found that the environmentalists had not in fact vindicated a strong congressional policy. The rapidity with which Congress amended the provision in question to comply with Alyeska's requirements and the fact that a six-year congressional study of the original bill made no mention of the width requirements whose violation was the crux of plaintiffs' complaint against Alyeska might have been seized upon by the Court as evidence that the Mineral Leasing Act width requirements were not strong congressional policy concerns. Thus, in at least two ways the Court might have denied fees without destroying the private attorney general theory.

Instead, it seems clear that the Supreme Court wished to call an abrupt halt to the broad reading of the Piggie Park and Mills decisions. The Court emphasized that the Piggie Park holding was made under a discretionary fee shifting statute and that therefore there had been congressional authorization for the award. Piggie Park had simply held that the fee shifting provision should be awarded routinely absent special circumstances. The Alyeska Court referred to Mills, without discussion, as one of a number of cases which had been decided under the common fund exception to the American rule, thus dispelling any notion that it considered Mills to have been decided under the private attorney general exception.

Justice Marshall dissented in Alyeska, sharply criticizing the majority for its narrow view of the judiciary's power to award fees. While Justice Marshall admitted that the Court had always acknowledged Congress' power to limit awards of attorneys' fees, he argued that since the Court had interpreted the common fund exception to the American rule more and more generously through the years, it should not abandon this trend. Although disagreeing with the majority's narrow statutory interpretation, Justice Marshall admitted that the Court had a legitimate concern in ascertaining what standards to use in awarding fees to private citizens acting in the public interest. He determined that three criteria should be used in

53. Petitioner's Brief for Certiorari at 10, 27-30, Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240 (1975). The brief suggests several alternate ways of distinguishing Alyeska from other cases in which awards were made under a private attorney general theory.
54. See note 10 supra.
55. 421 U.S. at 273 (Marshall, J., dissenting). See text accompanying notes 62-72 infra for a discussion of the increasingly liberal approach the Court has taken in common fund cases.
56. 421 U.S. at 273-74.
57. Arriving at a set of uniform standards upon which such awards could be made appears to be one area of disagreement among the many commentators and courts which
 awarding fees to private attorneys general. Fees should be shifted to the defendant when:

(1) the important right being protected is one actually or necessarily shared by the general public or some class thereof; (2) the plaintiff's pecuniary interest in the outcome, if any, would not normally justify incurring the cost of counsel; and (3) shifting that cost to the defendant would effectively place it on a class that benefits from the litigation.58

58. 421 U.S. at 285 (Marshall, J., dissenting). See notes 87-89 & accompanying text infra for the majority's discussion of Justice Marshall's first criterion. Justice Marshall's second criterion, although not discussed by the majority, was addressed by the dissenting justices in the Wilderness Society opinion, in which Judge MacKinnon stated that the major, albeit hidden, premise in the decision to award fees in that case was the fact that "oil companies are prosperous, appellants are poor, and therefore oil companies should finance both sides of this litigation." 495 F.2d at 1042 (MacKinnon, J., dissenting). Indeed, one commentator has noted that the taking of money from a corporation to award it to a public interest law firm may violate the equal protection clause. The corporation would have to pay because of the financial status of its opponent, not because of any actual principle of justice. See Comment, U. Pa. L. Rev., supra note 57, at 671-2 & n.219. But see Comment, U.C.L.A.-Alaska L. Rev., supra note 42, at 177 n. 278. Another answer to the question of where to obtain attorneys' fees and a justification for taxing the public for maintaining public interest law firms rather than the defendant can be found in Comment, U. Pa. L. Rev., supra note 57, at 678-79. The author points out that the federal government is subsidizing large corporations in their litigation costs by allowing them to deduct up to 50 percent of such costs. Thus the public interest firms, supported by private contributors who seldom qualify for such large scale deductions, are additionally disadvantaged and should be reimbursed by the public treasury. This theory has been used by one commentator to support his contention that public interest law firms should be allowed to proceed in forma pauperis, thereby forcing the
The majority, however, declined to accept Justice Marshall’s criteria. It viewed his third qualification for fee shifting, the necessity of spreading the costs of the suit to the benefiting class, as a part of the common fund rationale and thus inapplicable to a decision to award fees under a private attorney general theory. The Court distinguished Justice Marshall’s application of the fund doctrine from others which it had endorsed by stating that in those previous cases

the benefits could be traced with some accuracy, and there was reason for confidence that the costs could indeed be shifted with some exactitude to those benefiting. In this case, however, sophisticated economic analysis would be required to gauge the extent to which the general public, the supposed beneficiary, as distinguished from selected elements of it, would bear the costs.

The Alyeska Court thus not only eliminated the private attorney general exception but also sought to foreclose Justice Marshall’s inclusion of Alyeska within a broadened reading of the common fund doctrine.

II. THE COMMON FUND EXCEPTION

Although the Alyeska Court rejected Justice Marshall’s attempt to combine the private attorney general theory with an expanded version of the common fund exception, the Court did not explicitly overrule expansion of this latter doctrine. It must be determined, then, if under the common fund exception, any possibilities remain for the award of attorneys’ fees to private citizens who bring suits in the public interest.

The common fund theory originated in the 1881 case of Trustees v. Greenough, in which the Court allowed an award of attorneys’ fees to a plaintiff who, by his successful litigation, had created a fund which benefited others. The plaintiff brought suit on behalf of himself and all other bondholders against the trustees who were to secure the bonds. The action public to absorb the costs of litigation. See Comment, Proceeding In Forma Pauperis in Federal Court: Can Corporations Be Poor “Persons”? 62 CALIF. L. REV. 219, 248-49 (1974).

59. See text accompanying note 38 supra.
60. 421 U.S. at 264-65 n.39. As outlined by the court in La Raza Unida v. Volpe, 57 F.R.D. 94 (N.D. Cal. 1972), the first lower federal court utilizing the private attorney general theory in an environmental case, the criteria for determining such an award were three-fold: 1) strong congressional policy must be effectuated; 2) a large class of people must be benefited because of this effectuation; 3) the necessity of and financial burden of private enforcement must be such as to make the award essential. Id. at 98. The appeals court’s Wilderness Society decision followed these general guidelines in arriving at the decision to grant an award of fees. 495 F.2d at 1030.
61. 421 U.S. at 265 n.39.
62. 105 U.S. 527 (1881).
resulted in the recovery of trust assets in which all the bondholders shared. Not providing for a fee award, the Court felt, would unjustly enrich the beneficiaries who would receive the benefits of the litigation without having to pay for them.

In Sprague v. Ticonic National Bank, the common fund concept established in Greenough was held to include persons suing on behalf of other named plaintiffs rather than on behalf of a class. The plaintiff in Sprague had established her rights to a trust as an individual and in so doing had established the rights of fourteen other persons who had not been parties to the suit. Although the plaintiff had not established a true fund which could be taxed to pay the attorneys' fees, but had merely protected an existing fund, the Supreme Court held that under the common fund doctrine it was unnecessary that a new fund be established by the litigation.

The Supreme Court's decision in Mills v. Electric Auto-Lite Co. allowed fee shifting in stockholder suits when no monetary recovery was sought. The successful enforcement of the statutory policy of the Securities and Exchange Act was considered by the Court to be a substantial enough benefit to justify such an award even in the absence of a fund. The Mills Court was extremely vague, however, in establishing guidelines to determine when an ascertainable class existed to whom the benefits might be distributed. Additionally, the Court neither stated what degree of statutory enforcement was necessary to constitute a "substantial benefit" nor limited its holding to stockholder suits.

Thus the path was opened for an award of attorneys' fees in a common benefit case not involving a stockholder's claim. In Hall v. Cole, the Supreme Court awarded the plaintiff attorneys' fees under the common benefit rationale of Mills. A union member brought suit claiming that his union had violated his right of free speech as guaranteed under the Labor-
Management Reporting and Disclosure Act. The Court held that the vindication of his rights conferred a benefit upon himself and the other members of the union, a benefit which should be paid from the union's treasury.

The broad language of the Mills and Hall decisions, when read together, appeared to allow for expansion of the common benefit exception to any situation in which the benefits of the litigation could effectively be spread to an ascertainable class which profited from the suit. Therefore, at least until the Court's discussion in Alyeska, the potential for a broadened version of the common benefit doctrine under which fees could be shifted in public interest litigation to the parties benefiting from the enforcement of federal statutes seemed a real possibility. Indeed, some commentators saw the private attorney general concept, at least under some conditions, as the common benefit exception carried to its farthest extension.

Justice Marshall in his dissent in Alyeska stated that he was at a loss to understand how [the Court] can also say that this independent power [to allow fee shifting under the common benefit exception] succumbs to Procrustean statutory restrictions—indeed, to statutory silence—as soon as the far from bright line between "common benefit" and "public benefit" is crossed.

Although theoretical expansion of the common benefit doctrine to include the public as the benefited class seemed possible, even before the Alyeska decision the lower courts generally had not used the theory to apply to situations in which the public as a whole had benefited from the plaintiff's

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72. 412 U.S. at 8-9. The treasury then had the power, however, to assess the union members for this benefit.
73. One potential limitation to this doctrine is found in Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714 (1967). In Fleischmann, the Supreme Court held that an award of fees could not be granted to the prevailing party when the section of the federal statute under which the suit arose was silent on the issue of fees, while other sections in the same statute meticulously detailed the remedies available to the plaintiff. Id. at 719-21. However, the Mills Court limited the holding in Fleischmann to suits arising under the Lanham Act, under which Fleischmann was decided, and to other legislation that similarly had extensive detailing of remedies available to plaintiffs. 396 U.S. at 391.
74. See King & Plater, supra note 42, at 61-62 & n.169; Comment, U. Pa. L. Rev., supra note 57, at 667-8. Interestingly, the main difference between a joint reading of Mills and Piggie Park, and Mills and Hall, is the same difference between the private attorney general theory and the common benefit theory—the ability to spread the costs to the party benefiting from the litigation is still a necessity, albeit rather vague in its requirements, under the Mills-Hall common benefit theory, while it is eliminated in the Mills-Piggy Park private attorney general theory.
75. 421 U.S. at 277-78 (Marshall, J., dissenting).
suit. Perhaps this was because the courts viewed the emerging private attorney general theory as an easier and more direct exception under which to fit their awards of fees. On the other hand, some courts believed that the spreading of costs among the members of the public would not be feasible, either because all members of the public did not benefit equally, or because the defendant was not the appropriate party to spread those costs to the public beneficiaries.

The reason for the confusion and the parameters of possible expansion which surrounded the joint readings of Mills and Hall become readily apparent if one keeps in mind the three oblique criteria of the Mills decision. The Mills Court gave no indication of whether the three requirements were to be read narrowly or broadly. Thus if the criterion of ability to pass the costs on to the benefiting party could be interpreted liberally, the necessity of an exact fit between the benefited class and the class paying the costs would be eliminated. In this way, an award of attorneys' fees with the public as the benefited class could fall within the common benefit rationale.


77. See discussion in Comment, U. CHI. L. REV., supra note 43, at 333, in which the author pointed out that in the common benefit case of Mills more than 50 percent of the beneficiaries opposed the litigation that had presumably vindicated their rights. See also Brief for Respondent, at 37, 81, Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240 (1975), in which inequities in the fee shifting used by the Court in Sprague are noted. Respondents asserted that even in the early court cases fee shifting did not result in a perfect fit between the class benefited and the class which had to bear the costs. For an example of a court's judicial gymnastics in trying to justify an award of fees against the defendant using the common benefit doctrine when the defendant was not able to pass the costs to the party which benefited, see Brewer v. Norfolk School Bd., 456 F.2d 943 (4th Cir.), cert. denied, 406 U.S. 933 (1972).

78. See Sierra Club v. Lynn, 364 F. Supp. 834, 851-52 (W.D. Tex. 1973), rev'd in part, 502 F.2d 43 (5th Cir. 1974), in which the defendant housing developer was held not to be in a position to distribute the costs of litigation which had resulted in the preservation of San Antonio's water supply to the one million residents in the San Antonio area who had benefited from this preservation. 502 F.2d at 65. In Alyeska, Justice Marshall attempted to show that the defendant oil companies could spread the costs of the litigation to the public since their oil sales constituted 20 percent of the United States market. 421 U.S. at 288 (Marshall, J., dissenting). It should be noted that the Wilderness Society court had taken a contrary view and held the common benefit theory to be inapplicable:

This litigation may well have provided substantial benefits to particular individuals and, indeed, to every citizen's interest in the proper functioning of our system of government. But imposing attorneys' fees on Alyeska will not operate to spread the costs of litigation proportionately among these beneficiaries, the key requirement of the "common benefit" theory.

495 F.2d at 1029.

79. See text accompanying note 38 supra.
Indeed, this seemed to be the theory under which those who heralded new possibilities for public interest litigation under an expanded version of this doctrine were operating.\textsuperscript{80} However, if the Mills criteria were read narrowly, an exact correlation between the class which benefited from the litigation and the class which was to absorb the costs of those fees would be regarded as an essential requirement.

The majority in \textit{Alyeska} was unwilling to afford the criterion of ability to spread costs equally among the members of the benefiting class a liberal interpretation.\textsuperscript{81} Since the ability of a private defendant to pass the costs of public interest litigation equitably to the public is a common problem in cases such as \textit{Alyeska}, it appears that this expanded version of the common benefit theory would have scant utility after \textit{Alyeska}. Possibly the only defendant in a position to spread costs equally to the public for benefits received is the federal or a state government. But absent statutory provisions, suits against the federal government are not allowed,\textsuperscript{82} and the eleventh amendment generally bars suits against state governments without their consent.\textsuperscript{83} Even these limited possibilities, then, are of extremely narrow scope.

\textbf{III. \textit{Alyeska}'s Relevance to Public Interest Litigation}

\textit{Alyeska} indicates that absent statutory authorization, fee shifting will not be allowed in public interest litigation unless bad faith or a benefit to an easily ascertainable class can be demonstrated. The result is to transfer to Congress the responsibility for making any changes in previously established fee shifting policies. This result may well have the effect of discouraging public interest litigation.

Certainly the Court's refusal to encourage public interest litigation\textsuperscript{84} has

\textsuperscript{80} See Note, HASTINGS L.J., supra note 39, at 741 & n.35; cf. Note, Reimbursement for Attorneys' Fees from the Beneficiaries of Representative Litigation, 58 MINN. L. REV. 933, 955 (1974). Justice Marshall, in his discussion of the Court's other common fund cases, stressed the importance of avoiding unjust enrichment and of enforcing a statute for the benefit of a class including the plaintiff. See 421 U.S. at 274-78. However, he devoted only a small part of his dissent to the issue of equitably spreading the costs among the beneficiaries of the litigation. \textit{Id.} at 288. See also note 78 supra. Although Justice Marshall also attempted to show that attorneys' fees under the common benefit doctrine could be assessed against the defendant as opposed to being spread to the beneficiaries, his argument was expressly rejected by the majority. See note 46 & accompanying text supra.

\textsuperscript{81} See text accompanying note 61 supra.

\textsuperscript{82} See Note, CORNELL L. REV., supra note 42, at 1246-54.

\textsuperscript{83} See, e.g., Edelman v. Jordan, 415 U.S. 651 (1974); San Antonio Conservation Soc'y v. Texas Highway Dep't, 496 F.2d 1017, 1026 (5th Cir. 1974).

\textsuperscript{84} For other recent cases in which the Supreme Court has narrowed those situations in which public interest suits could be brought, see United States v. Richardson,
some forceful reasoning behind it. Disallowing attorneys’ fees in public interest cases will discourage the introduction of new suits to an already overcrowded court system, and refusing to empower the courts with authority to grant fees in an additional area will save court time that otherwise might be spent on such endeavors as a calculation of reasonable fees.85

The Alyeska decision also could be viewed as relieving the difficulties which the Court might face in establishing standards for a change that has such far-reaching legal implications in our society. An examination of the majority’s response to Justice Marshall’s suggested first criterion, that of the effectuation of an important right shared by the public, is instructive. That criterion was the sine qua non in all cases decided under a private attorney general rationale.86 However, the fulfillment of this requirement was seen by the majority as impossible to determine objectively87 unless all federal statutes were automatically assumed to be of great public importance.88 Also, the majority’s specific questions as to whether such fee awards should be granted to the party which prevailed, or only to the prevailing plaintiff, and whether

418 U.S. 166 (1974) (standing denied to taxpayer who claimed refusal of executive branch to reveal expenditures of CIA violated statement and account clause of Constitution); Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208 (1974) (standing denied antiwar activists who as citizens and taxpayers argued that membership of congressmen in the armed forces reserves was prohibited by the incompatibility clause of the Constitution); Eisen v. Carlisle & Jacqueline, 417 U.S. 156 (1974) (plaintiff in class action required to give individual notice to all identifiable class members irrespective of size of class and to bear cost of such notice even if prohibitively high).

85. See Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 718 (1967), for the Court’s comments on the time-consuming aspects of determining fee awards. See also note 51 supra for the variability in criteria used by different courts in arriving at such awards.

86. See cases cited note 41 supra.

87. The dissenting opinion of the three judges in Wilderness Society was cited by the Court as evidence of the difficulty in determining what is of great importance to the public. Judge MacKinnon stated that the Wilderness Society was preventing the effectuation of strong public policy. 495 F.2d at 1041 (MacKinnon, J., dissenting). Judge Wilkey likewise had strong doubts that the environmentalists were seeking to vindicate a policy strongly supported by the public:

It is hard to visualize the average American in this winter of 1973-74, turning down his thermostat and with a careful eye on his auto fuel gauge, feeling that warm glow of gratitude to those public-spirited plaintiffs in the Alaska Pipeline case.

Id. at 1042 (Wilkey, J., dissenting). Additionally, Alyeska asserted in its brief that the width requirements of the Mineral Leasing Act were hardly an example of strong congressional policy. See note 53 & accompanying text supra.

88. Commentators have seen as one of the dangers inherent in such a broad expansion the fact that plaintiffs could bring nuisance suits for minor violations of statutes, harassing defendants and clogging the courts. See Note, HASTINGS L.J., supra note 39, at 756. One suggested way to handle this difficulty would be to deny standing to plaintiffs bringing such suits. See Nussbaum, supra note 17, at 333 n.146.
the award of those fees should be discretionary or mandatory, are further evidence of the difficulties the Court might have met in arriving at appropriate standards for such awards.89

The *Alyeska* decision is certain to be viewed by many as a giant step backward in the field of public interest litigation. Yet the very wealth of conflicting values, goals and opinions advanced by the courts and commentators on the question of fee shifting90 may be proof that it is preferable to move with the deliberation and careful study of which Congress is capable91 in an area that is obviously fraught with so many difficulties and possessed of so few clear cut answers.

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89. See 421 U.S. at 264.

90. See Comment, U. Pa. L. Rev., *supra* note 57, at 648-655; Note, Vand. L. Rev., *supra* note 2, at 1231-33, for discussions on several different proposals for reform of the American rule and the difficulties with each. See also note 57 *supra*.