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# Attorneys' Fees--Public Interest Litigation--Absent Statutory Authorization, Federal Courts May Not Award Fees Under the "Private Attorney General" Exception--Alyeska Pipeline Service Co. v. Wilderness Society

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**Attorneys' Fees—PUBLIC INTEREST LITIGATION—ABSENT STATUTORY AUTHORIZATION, FEDERAL COURTS MAY NOT AWARD FEES UNDER THE “PRIVATE ATTORNEY GENERAL” EXCEPTION—*Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975).**

In March 1970, three environmental groups<sup>1</sup> (collectively referred to as Wilderness Society) instituted an action seeking declaratory and injunctive relief against the Secretary of the Interior in an attempt to prevent issuance of permits required for the construction of the trans-Alaska oil pipeline.<sup>2</sup> In a four-to-three decision, the court of appeals reversed<sup>3</sup> a district court judgment for the Department of the Interior and intervenor Alyeska Pipeline Service Company (Alyeska).<sup>4</sup> Congress subsequently enacted legislation which terminated the merits of the litigation by allowing issuance of the permits sought by Alyeska.<sup>5</sup>

Turning to Wilderness Society's request for an award of attorneys' fees, the court of appeals held that by bringing the suit Wilderness Society ensured proper functioning of the government system and vindicated important statutory rights of all citizens.<sup>6</sup> Although the United States and the State of Alaska were not held liable, Alyeska was required to pay one-half of the reasonable attorneys' fees incurred by Wilderness Society in performing the function of a “private attorney general.”<sup>7</sup>

The Supreme Court reversed, holding that since Congress

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1. Wilderness Society, Environmental Defense Fund, Inc., and Friends of the Earth.

2. The suit was brought on the ground that the proposed right-of-way and special land use permits violated the statutory width restrictions of the Mineral Lands Leasing Act of 1920, § 28, 30 U.S.C. § 185 (1970), and the environmental impact study requirements of the National Environmental Policy Act of 1969, §§ 91 *et seq.*, 42 U.S.C. §§ 4321 *et seq.* (1970).

3. *Wilderness Soc'y v. Morton*, 479 F.2d 842 (D.C. Cir.) (en banc), *cert. denied*, 411 U.S. 917 (1973).

4. Alyeska's stock is owned by ARCO Pipeline Co., Inc., Sohio Pipeline Co., Humble Pipeline Co., Mobil Pipeline Co., Phillips Petroleum Co., Amerada Hess Corp., and Union Oil Co. of California. Dominick & Brody, *The Alaska Pipeline: Wilderness Society v. Morton and the Trans-Alaska Pipeline Authorization Act*, 23 AM. U. L. REV. 337-38 n.3 (1973).

Alyeska, the real party in interest, was the party who requested the permits from the Department of the Interior. Alyeska intervened to ensure that its interests were properly represented in the litigation.

5. Act of Nov. 16, 1973, Pub. L. No. 93-153, tit. I, § 101, 87 Stat. 576, *amending* Mineral Lands Leasing Act of 1920, § 28, 30 U.S.C. § 185 (1970) (codified at 30 U.S.C. § 185 (Supp. III, 1973)); Trans-Alaska Pipeline Authorization Act §§ 201 *et seq.*, 43 U.S.C. §§ 1651 *et seq.* (Supp. III, 1973).

6. *Wilderness Soc'y v. Morton*, 495 F.2d 1026 (D.C. Cir.) (en banc), *rev'd sub nom.* *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240 (1975).

7. *Id.* at 1036-37.

dictates the exceptions to the general "American rule" against awarding attorneys' fees to the successful litigant, the federal courts are not free to fashion new rules for allowance of such fees, and that federal courts should not adopt the private attorney general approach when it will operate only against private parties and not against the government.

## I. BACKGROUND

In contrast to the English rule entitling the prevailing party to collect his attorneys' fees from the loser,<sup>8</sup> the American rule is that attorneys' fees are not ordinarily recoverable as costs from the losing party.<sup>9</sup>

### A. Statutes Affecting the American Rule

The court-created American rule against fee shifting developed early in this country's history.<sup>10</sup> Statutes in force during the period from 1789 to 1799 required federal courts to award attorneys' fees according to the practice of the courts of the state in which they sat.<sup>11</sup> From 1799 to 1853, federal courts continued to

8. Among the justifications most often given for the English rule are the following: (1) it fully compensates the successful litigant by allowing him to recover counsel fees; (2) it discourages specious claims; (3) it encourages meritorious claims by the promise of reimbursement of fees; (4) it encourages settlements; (5) it enables more financially burdened plaintiffs to bring suit. See 6 J. MOORE, FEDERAL PRACTICE ¶ 54.70 [2], at 1304 (2d ed. 1975).

9. Among the justifications most often given for the American rule are the following: (1) it encourages resolution of controversies through the courts by removing the threat of paying an adversary's counsel fees; (2) it enhances predictability and thus promotes the security and confidence of the prospective litigant; (3) the time, expense, and difficulty of proof inherent in determining reasonable attorneys' fees argue against fee shifting; (4) uncertainties of litigation might make an award unjust; (5) attorneys' fees are potentially excessive; (6) one should not be penalized for prosecuting or defending a lawsuit; (7) fee shifting would flood the courts with litigation. See *Fleischman Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 718 (1967); 6 J. MOORE, *supra* note 8, ¶ 54.70 [2], at 1304.

A number of attacks on the American rule have recently been launched. See, e.g., King & Plater, *The Right to Counsel Fees in Public Interest Environmental Litigation*, 41 TENN. L. REV. 27 (1973); Kuenzel, *The Attorney's Fee: Why Not a Cost of Litigation?*, 49 IOWA L. REV. 75 (1963); McLaughlin, *The Recovery of Attorneys' Fees: A New Method of Financing Legal Services*, 40 FORD. L. REV. 761 (1972); Stoebeck, *Counsel Fees Included in Costs: A Logical Development*, 38 U. COLO. L. REV. 202 (1966); Comment, *Court Awarded Attorney's Fees and Equal Access to the Courts*, 122 U. PA. L. REV. 636, 648-55 (1974); Note, *Attorney's Fees: Where Shall the Ultimate Burden Lie?*, 20 VAND. L. REV. 1216 (1967).

10. Speaking about fee awards in 1796, the Supreme Court stated, "The general practice of the *United States* is in opposition [*sic*] to it; and even if that practice were not strictly correct in principle, it is entitled to the respect of the court, till it is changed, or modified, by statute." *Arcambel v. Wiseman*, 3 U.S. (3 Dall.) 306 (1796).

11. See *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 248 n.19 (1975).

refer to state rules governing fee awards although the legislative authority for doing so had expired.<sup>12</sup> In 1853, Congress standardized costs awarded in federal courts by limiting the sums recoverable from the losing party to specified amounts.<sup>13</sup>

The 1853 cost statute was reenacted in substantially the same language until 1948.<sup>14</sup> When interpreting pre-1948 cost statutes, the United States Supreme Court almost uniformly held that "costs" means amounts assessable under such statutes and does not include attorneys' fees.<sup>15</sup> In 1948, the phrase used in the previous acts that "no other compensation [than that prescribed by the statute] shall be . . . allowed" was deleted.<sup>16</sup> No major change has been made in the cost statute since 1948.<sup>17</sup>

### B. *Exceptions to the American Rule*

The American rule has been subject to an increasing number of exceptions, falling generally into contractual, statutory, and equitable categories. Under the contractual class of exceptions, fees are shifted when parties to a contract have made specific provision for such a shift.<sup>18</sup> Under the statutory exceptions, the fee award is legislatively authorized. These statutory exceptions to the American rule variously (1) require mandatory awards for the successful plaintiff,<sup>19</sup> (2) permit awards for the successful

12. *Id.* at 250 & nn.22 & 23.

13. Act of Feb. 26, 1853, ch. 175, § 12, 10 Stat. 161-62, provides in pertinent part: [T]he 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: . . . .

14. *See* Rev. Stat. §§ 823-24, at 154 (1874); Judicial Code of 1911, ch. 231, § 297, 36 Stat. 1168-69; 28 U.S.C. §§ 571-72 (1926).

15. *See* *The Baltimore*, 75 U.S. (8 Wall.) 377, 392 (1869) (an attorney may charge his client reasonably for his services but the cost of those services may not be taxed against the opposite party); *In re Paschal*, 77 U.S. (10 Wall.) 483, 493 (1870) (between party and party in a cause, the statutory fee bill fixes the amount of costs to be recovered); *Flanders v. Tweed*, 82 U.S. (15 Wall.) 450, 452-53 (1872) (it is well settled that lawyers' fees cannot be taxed against the opposite party); *Kansas City S. Ry. Co. v. Guardian Trust Co.*, 281 U.S. 1, 9 (1930) ("costs" means amounts taxable under statutory enactment and does not include attorneys' fees); *Rude v. Buchhalter*, 286 U.S. 451, 452 (1932) ("The only costs allowed to be included in the money judgement against petitioner are those taxable as between party and party; counsel fees or other expenses not so taxable are not to be included."); *cf.* *Oelrichs v. Spain*, 82 U.S. (15 Wall.) 211, 230-31 (1872).

16. 28 U.S.C. § 1920 (1948).

17. *Id.* (1970).

18. *See* 2 S. SPEISER, ATTORNEYS' FEES ch. 15 (1973).

19. *See, e.g.*, Packers and Stockyards Act of 1921, § 309(f), 7 U.S.C. § 210(f) (1970); Perishable Agriculture Commodities Act of 1930, § 7g(b), 7 U.S.C. § 499g(b) (1970); Bankruptcy Act of 1898, § 64, 11 U.S.C. § 104(a)(1) (1970); Clayton Act § 4, 15 U.S.C. §

plaintiff at the court's discretion,<sup>20</sup> or (3) permit awards for the prevailing party (whether plaintiff or defendant) at the court's discretion.<sup>21</sup> Under the equitable exceptions, federal courts employ their historic equity powers to allow fees when "the interests of justice so require."<sup>22</sup>

The equitable category of exceptions may be further subdivided into four specific exceptions: bad faith, common fund, substantial benefit, and private attorney general. The bad faith exception is applied to award fees as a punitive measure when "the main ground of the suit is false, unjust, vexatious, wanton, or oppressive."<sup>23</sup> The common fund exception is traditionally applied where the successful party has created, protected, or brought into court a fund in which others have an interest; the fee award is exacted from the fund to prevent the holders of those other interests from being unjustly enriched.<sup>24</sup> The substantial

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15 (1970); Unfair Competition Act § 801, 15 U.S.C. § 72 (1970); Truth in Lending Act § 130(a)(2), 15 U.S.C. § 1640(a)(2) (1970); Consumer Product Safety Act § 24, 15 U.S.C. § 2073 (Supp. III, 1973); Organized Crime Control Act of 1970, § 901(a), 18 U.S.C. § 1964(c) (1970); Norris-La Guardia Act § 7, 29 U.S.C. § 107 (1970); Fair Labor Standards Act § 16(b), 29 U.S.C. § 216(b) (1970); Railway Labor Act of 1926, § 3(p), 45 U.S.C. § 153(p) (1970); Shipping Act of 1916, § 30, 46 U.S.C. § 829 (1970); Ship Mortgage Act of 1920, § 30(c), 46 U.S.C. § 941(c) (1970); Merchant Marine Act of 1936, § 810, 46 U.S.C. § 1227 (1970); Communications Act of 1934, § 206, 47 U.S.C. § 206 (1970); Interstate Commerce Act of 1887, §§ 8, 15(9), 16(2), 308(b), 49 U.S.C. §§ 8, 15(9), 16(2), 908(b) (1970).

20. See, e.g., Educational Amendments of 1972, § 718, 20 U.S.C. § 1617 (Supp. III, 1973); Labor Management Reporting and Disclosure Act of 1959, §§ 201(c), 501(b), 29 U.S.C. §§ 431(c), 501(b) (1970); Longshoremen's and Harbor Worker's Compensation Act § 28, 33 U.S.C. § 928 (1970); Civil Rights Act of 1964, tit. II, § 204(b), 42 U.S.C. § 2000a-3(b) (1970); Civil Rights Act of 1964, tit. VII, § 706e-5(k), 42 U.S.C. § 200e-5(k) (1970); Fair Housing Act of 1958, § 812(c), 42 U.S.C. § 3612(c) (1970).

21. See, e.g., Bankruptcy Act of 1898, §§ 241-44, 11 U.S.C. §§ 641-44 (1970); Securities Act of 1933, § 11(e), 15 U.S.C. § 77k(e) (1970); Securities Exchange Act of 1934, §§ 9(e), 18(a), 15 U.S.C. §§ 78i(e), 78r(a) (1970); Trust Indenture Act §§ 315, 323, 15 U.S.C. §§ 7000(e), 77www(a) (1970); Copyright Act, 17 U.S.C. § 116 (1970); Federal Water Pollution Control Act Amendments of 1972, § 505(d), 33 U.S.C. § 1365(d) (Supp. III, 1973); Marine Protection, Research, and Sanctuaries Act of 1972, § 105(g)(4), 33 U.S.C. § 1415(g)(4) (Supp. III, 1973); Patent Act, 35 U.S.C. § 285 (1970); Servicemen's Readjustment Act § 5(c), 38 U.S.C. § 1822(b) (1970); Voting Rights Act of 1965, § 14, 42 U.S.C.A. § 1973l(e) (Supp. Oct. 1975); Noise Control Act § 12(d), 42 U.S.C. § 49ii(d) (Supp. III, 1973).

22. *Hall v. Cole*, 412 U.S. 1, 5 (1973).

23. *Guardian Trust Co. v. Kansas City S. Ry.*, 28 F.2d 233, 241 (8th Cir. 1928), *rev'd on other grounds*, 281 U.S. 1 (1930). The bad faith rationale may also be used to award counsel fees for contempt of court, *Toledo Scale Co. v. Computing Scale Co.*, 261 U.S. 399 (1923); fraud perpetrated upon the court, *Universal Oil Prods. Co. v. Root Refining Co.*, 328 U.S. 575 (1946) (dictum); and willful and persistent default in performing a clear statutory duty, *Vaughan v. Atkinson*, 369 U.S. 527 (1962). See 20 AM. JUR. 2d *Costs* § 74 (1965).

24. In the seminal case of *Trustees v. Greenough*, 105 U.S. 527 (1881), the plaintiff, who acted as a trustee by suing on behalf of other bondholders to prevent waste and

benefit exception is applied where (1) the litigation confers a substantial *but not necessarily pecuniary* benefit upon a class, (2) the members of the benefited class are ascertainable, and (3) the court's jurisdiction over the subject matter of the suit makes possible an award that will operate to spread the costs proportionately among the class.<sup>25</sup>

### C. *The Private Attorney General Exception*

The private attorney general concept was first introduced as a basis for standing to sue.<sup>26</sup> The recent trend expanding application of the concept to allow awards of attorneys' fees stemmed

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destruction of a fund, was held to be entitled to reimbursement of attorneys' fees from the fund. The Court reasoned that allowing the plaintiff alone to shoulder the cost of litigation would provide unjust enrichment to others in the bondholder class. *Id.* at 532-34.

In *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161 (1939), a depositor, who successfully sued a bank to protect her trust deposits by impressing a lien on the proceeds of bonds, established a right of recovery for other trust depositors. In granting the request for attorneys' fees, the Court held that although the usual case does create a fund for the benefit of a class, the fact that the plaintiff neither purported to sue for a class nor formally established a fund did not affect the Court's equity power to award fees. *Id.* at 166-67. *Sprague* is significant as a departure from the traditional fund case requirements, presaging the substantial benefit rationale. For another case employing the common fund exception, see *Central R.R. & Banking Co. v. Pettus*, 113 U.S. 116 (1885); *cf.* *Hobbs v. McLean*, 117 U.S. 567 (1886).

See generally Dawson, *Lawyers and Involuntary Clients: Attorney Fees From Funds*, 87 HARV. L. REV. 1597 (1974).

25. *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 393-94 (1970). Under this exception, the costs are not actually paid by the class but by the corporation, union, or other entity in which the class has a direct interest.

In *Mills*, stockholders instituted an action to set aside a corporate merger procured through misleading proxy solicitation. Even though the suit had not produced and perhaps would never produce a fund, the Court held that shareholders, "who have established a violation of the securities laws by their corporation and its officials, should be reimbursed by the corporation or its survivor for the costs of establishing the violation." *Id.* at 389-90, 392. In contrast to the pecuniary benefit to the corporation required by the common fund cases, "corporate therapeutics" or vindication of statutory policy were deemed significant enough benefits under the substantial benefit exception. *Id.* at 393-96.

The substantial benefit exception was further established as an independent exception in *Hall v. Cole*, 412 U.S. 1 (1973), in which a union member expelled from his union sought reinstatement and damages. The Court held that by vindicating his own right of free speech, plaintiff rendered a substantial service to his union as an institution and to all of its members. *Id.* at 8. Neither a fund nor pecuniary benefit were involved in *Hall*; the fee award was based solely on the substantial common benefit derived from the suit.

See generally Comment, *The Changing American Rule Against Attorney Fee Shifting: Mills v. Electric Auto-Lite Co. and Hall v. Cole*, 28 SW. L.J. 542 (1974); Comment, *The Allocation of Attorney's Fees After Mills v. Electric Auto-Lite Co.*, 38 U. CHI. L. REV. 316 (1971).

26. See *Associated Indus. v. Ickes*, 134 F.2d 694, 704 (2d Cir.), *vacated as moot*, 320 U.S. 707 (1943).

from the Supreme Court's 1968 decision in *Newman v. Piggie Park Enterprises, Inc.*<sup>27</sup> It should be emphasized, however, that the fee award in *Newman* was statutorily authorized.<sup>28</sup> Lower courts evolved the equitable private attorney general exception from *Newman* in cases where statutes were silent as to fee awards.<sup>29</sup> As expressed in *Newman*, attorney's fees may be awarded to a prevailing private attorney general who has acted in the public interest by vindicating congressional policy of the highest priority, where enforcement of the law relies in part on private litigation, and where the financial burden of private enforcement would discourage litigation.<sup>30</sup> Although lower courts have varied in their emphasis of which of these elements are most important, they have generally followed the Supreme Court's approach and required the presence of all of the listed elements.<sup>31</sup>

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27. 390 U.S. 400 (1968) (per curiam).

It has been suggested that socially conscious application of the substantial benefit rationale led to application of the private attorney general rationale to fee award questions. King & Plater, *supra* note 9, at 43; Comment, *The Allocation of Attorney's Fees After Mills v. Electric Auto-Lite Co.*, 38 U. CHI. L. REV. 316, 328 (1971).

28. 390 U.S. at 401-02.

29. See, e.g., *Souza v. Trivisono*, 512 F.2d 1137 (1st Cir. 1975); *Bond v. White*, 508 F.2d 1397 (5th Cir. 1975); *Taylor v. Perini*, 503 F.2d 899 (6th Cir. 1974), *vacated and remanded*, 421 U.S. 982 (1975); *Fowler v. Schwarzwald*, 498 F.2d 143 (8th Cir. 1974); *Wilderness Soc'y v. Morton*, 495 F.2d 1026 (D.C. Cir. 1974); *Hoitt v. Vitek*, 495 F.2d 219 (1st Cir. 1974); *Cornist v. Richland Parish School Bd.*, 495 F.2d 189 (5th Cir. 1974); *Brandenburger v. Thompson*, 494 F.2d 885 (9th Cir. 1974); *Fairly v. Patterson*, 493 F.2d 598 (5th Cir. 1974); *Morales v. Haines*, 486 F.2d 880 (7th Cir. 1973); *Donahue v. Staunton*, 471 F.2d 475 (7th Cir.), *cert. denied*, 410 U.S. 955 (1973); *Cooper v. Allen*, 467 F.2d 836 (5th Cir. 1972); *Knight v. Auciello*, 453 F.2d 852 (1st Cir. 1972); *Lee v. Southern Home Sites Corp.*, 444 F.2d 143 (5th Cir. 1971); *Sims v. Amos*, 340 F. Supp. 691 (M.D. Ala.), *aff'd*, 409 U.S. 942 (1972); *La Raza Unida v. Volpe*, 57 F.R.D. 94 (N.D. Cal. 1972).

*But see Bradley v. School Bd. of the City of Richmond*, 472 F.2d 318, 327-31 (4th Cir. 1972), *vacated on other grounds*, 416 U.S. 696 (1974).

See generally Dawson, *Lawyers and Involuntary Clients in Public Interest Litigation*, 88 HARV. L. REV. 849 (1975); Nussbaum, *Attorney's Fees in Public Interest Litigation*, 48 N.Y.U.L. REV. 301 (1973); Comment, *Court Awarded Attorney's Fees and Equal Access to the Courts*, 122 U. PA. L. REV. 636 (1974).

30. 390 U.S. at 402.

31. See, e.g., *La Raza Unida v. Volpe*, 57 F.R.D. 94, 98 (N.D. Cal. 1972):

The rule . . . is that whenever there is nothing in a statutory scheme which might be interpreted as precluding it, a "private attorney-general" should be awarded attorney's fees when he has effectuated a strong Congressional policy which has benefitted a large class of people, and where further the necessity and financial burden of private enforcement are such as to make the award essential.

The rationale for awarding fees under this exception has been identified variously as vindication of strong congressional policy, *Brandenburger v. Thompson*, 494 F.2d 885, 888 (9th Cir. 1974); *Lee v. Southern Home Sites Corp.*, 444 F.2d 143, 144 (5th Cir. 1971); championing of the public interest, *Natural Resources Defense Council, Inc. v. EPA*, 484 F.2d 1331, 1333 (1st Cir. 1973); *cf. Brewer v. School Bd.*, 456 F.2d 943, 951-52 (4th Cir.), *cert. denied*, 409 U.S. 892 (1972); *Wyatt v. Strickney*, 344 F. Supp. 387, 408 (M.D. Ala.

Further, the lower courts have not been hesitant to apply the exception; courts of appeals of seven circuits have adopted and applied the exception in numerous post-*Newman* cases.<sup>32</sup>

## II. INSTANT CASE

The Supreme Court, in a five-to-two decision,<sup>33</sup> concluded that none of the traditional exceptions to the American rule were involved in *Alyeska*.<sup>34</sup> Noting the explicit but varied statutory exceptions to the American rule and the role of Congress in determining which public policies are significant enough to warrant statutory fee shifting, the Court concluded that "the circumstances under which attorneys' fees are to be awarded and the range of discretion of the courts in making those awards are matters for Congress to determine."<sup>35</sup>

The Court reasoned that it would be difficult for the courts to weigh the relative importance of various statutes, to decide whether awards should be mandatory or discretionary, to fashion rules governing whether prevailing defendants as well as prevailing plaintiffs should be granted awards, and to determine whether a presumption for or against awards of fees would ordinarily operate in a case.<sup>36</sup>

Finally, the Court explored the conflict between the rational application of the private attorney general exception and 28 U.S.C. § 2412. Section 2412 precludes assessing attorneys' fees against the United States except as otherwise provided by statute; as a consequence, only the private parties to an action involving the United States can be held liable for fee awards. The Court concluded that federal courts should not allow fee awards under the private attorney general rationale when the award would op-

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1972); or providing the public benefits of legal or social therapeutics, *Wilderness Soc'y v. Morton*, 495 F.2d 1026, 1033 (D.C. Cir. 1974). The flexibility of the exception has led to some disparity between the courts, and may be partially responsible for the Court's decision in *Alyeska*.

32. See cases cited note 29 *supra*.

33. Justices Douglas and Powell took no part in the consideration or decision of the case.

Justices Brennan and Marshall each filed dissenting opinions, stating that the federal courts' equity jurisdiction empowered the courts to award attorneys' fees and that the instant case was a proper case for the exercise of that power. 421 U.S. at 271-88.

34. *Id.* at 259. *Newman* is not controlling since the fee award in that case was statutorily authorized. See note 28 and accompanying text *supra*.

35. *Id.* at 262. The Court also pointed out that congressional reliance on private enforcement to implement public policy does not grant authority to the courts to award nonstatutory fees. *Id.* at 263.

36. *Id.* at 263-64.

erate only against private parties and not against the government.<sup>37</sup>

### III. ANALYSIS

This case note first questions whether Congress has reserved for itself the issue of fee awards. Second, it analyzes the proper scope of the federal courts' equity jurisdiction in light of evolving equitable exceptions to the American rule and the Supreme Court's interpretations of various statutory provisions for fee awards. Third, the case note examines the problems that could be encountered in applying the private attorney general exception insofar as they bear on the Court's decision. Finally, the propriety of the Court's decision and its implications for future public interest litigation are explored.

#### A. Congressional Reservation of the Fee Award Issue

The requirement of early cost statutes that "no other compensation [than that prescribed by the statute] shall be . . . allowed" was deleted in 1948.<sup>38</sup> In addition, rather than stating that the designated fees<sup>39</sup> "shall" be assessed, section 1920, the current cost statute, states that they "may" be assessed as costs. The Court in *Alyeska* attempted to minimize the importance of these changes by finding no clearly expressed intent to depart from the previous rule.<sup>40</sup> The changes in statutory language described above, however, are too significant to justify the assumption that no change in policy was intended. The 1948 changes in the Code suggest that the courts may now exercise their discretion in awarding fees in equity.

It is true that Congress has from time to time determined that certain public policies are significant enough to warrant fee shifting and has therefore made explicit provision for fee awards in many widely differing statutes.<sup>41</sup> Nevertheless, by failing to statutorily limit the equitable jurisdiction of the federal courts, Congress may have purposely refrained from reserving exclusively for itself the issue of fee awards.<sup>42</sup> It is both logical and acceptable

37. *Id.* at 265-69.

38. 28 U.S.C. § 1920 (1948). Compare this statute with statutes cited note 14 *supra*.

39. The designated fees are set forth in 28 U.S.C. §§ 1921-23 (1970).

40. "[A] well-established principle governing the interpretation of provisions altered in the 1948 revision is that 'no change is to be presumed unless clearly expressed.'" 421 U.S. at 256 n.29, quoting *Tidewater Oil Co. v. United States*, 409 U.S. 151, 162 (1972).

41. See notes 19-21 and accompanying text *supra*.

42. The Court addressed the issue of implied statutory limitations on federal courts' general equity jurisdiction in *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946):

for the courts to declare that fee shifting "is consistent with a remedy increasingly furnished by Congress,"<sup>43</sup> and to view such statutory remedies as examples of areas of significant public concern rather than as evidence of reservation of the fee award issue. Clearly Congress has the power to limit the equity jurisdiction of federal courts and circumscribe remedial fee shifting,<sup>44</sup> but no recent Supreme Court decision until *Alyeska* recognized the current cost statute as mandating such a result.<sup>45</sup> Indeed, the Court had previously characterized the cost statute as an exception to the judicially created American rule.<sup>46</sup> It would appear that the Court's emphasis on the cost statute in *Alyeska* is a makeweight argument attempting to buttress a conclusion already arrived at by the Court.

### B. *The Proper Scope of the Federal Courts' Equity Powers*

The Court's holding that federal courts are not free to fashion new rules governing the allowance of attorneys' fees<sup>47</sup> is overbroad for three reasons.

#### 1. *Equity jurisdiction empowers federal courts to fashion new rules*

In 1939, the Court held that allowance of extra-statutory costs such as attorneys' fees "in appropriate situations is part of the historic equity jurisdiction of the federal courts."<sup>48</sup> In speak-

[T]he comprehensiveness of . . . equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command. Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied.

Cf. *Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944).

43. *Stanford Daily v. Zurcher*, 366 F. Supp. 18, 24 (N.D. Cal. 1973).

44. *Hall v. Cole*, 412 U.S. 1, 9 (1973). In *Fleischman Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 719 (1967), the Court held that the meticulous detail of remedies available under the Lanham Act and the failure in Congress of several attempts to include a provision for fee awards precluded fee shifting.

45. Compare the present case with *F.D. Rich Co. v. United States ex rel. Industrial Lumber Co.*, 417 U.S. 116 (1974); *Bradley v. School Bd.*, 416 U.S. 696 (1974); *Hall v. Cole*, 412 U.S. 1 (1973); *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970); *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968); *Fleischman Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714 (1967); *Vaughan v. Atkinson*, 369 U.S. 527 (1962).

46. *Fleischman Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 718 & n.11 (1967).

47. 421 U.S. at 269.

48. *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161, 164 (1939). "Plainly the foundation for the historic practice of granting reimbursement for the costs of litigation other than the conventional taxable costs is part of the original authority of the chancellor to do equity in a particular situation." *Id.* at 166.

ing of general equitable powers, the Court has explained that "[t]he essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it."<sup>49</sup> Elsewhere, the Court has stated that courts of equity may go much farther in advancing the general public interest than they are accustomed to when only private interests are involved.<sup>50</sup> Since "[q]uestions of costs in . . . equity are discretionary and the action of the court is presumptively correct,"<sup>51</sup> fee awards under the private attorney general exception should be upheld in proper situations.

2. *All equitable exceptions to the American rule have been created subsequent to enactment of cost statutes*

All of the equitable exceptions to the American rule have been sanctioned by the Supreme Court itself *after* cost statutes had already been enacted. For example, the common fund cases of *Trustees v. Greenough*<sup>52</sup> and *Sprague v. Ticonic National Bank*<sup>53</sup> were decided under cost statutes allowing "no other compensation" than that statutorily prescribed. The current practice of specifically awarding attorneys' fees under the bad faith exception also developed under restrictive cost statutes.<sup>54</sup> If the courts may create these exceptions when statutes allow "no other compensation" than that prescribed, certainly no legal or logical impediment could exist to bar the creation of a private attorney general exception when no such statutory preclusion exists.<sup>55</sup> Fur-

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49. *Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944).

Indeed, the Court has stated that "individualization in the exercise of a discretionary power will alone retain equity as a living system and save it from sterility." *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161, 167 (1939).

50. *United States v. First Nat'l City Bank*, 379 U.S. 378, 383 (1965).

51. *Newton v. Consolidated Gas Co.*, 265 U.S. 78, 83 (1924).

52. 105 U.S. 527 (1881). The common fund rationale was first noted in *Bronson v. La Crosse & Mil. R.R.*, 69 U.S. (2 Wall.) 283, 312 (1863), ten years after enactment of the 1853 cost statute.

53. 307 U.S. 161 (1939).

54. See cases cited note 23 *supra*. Courts now specifically use the amount of attorneys' fees as the measure of damages awarded under the bad faith exception; however, one year before enactment of the 1853 cost statute, the Court held that attorneys' fees "cannot be taken as a measure of punishment" when awarding exemplary damages for bad faith, indicating that the current practice under the bad faith exception developed subsequent to the passage of cost statutes. *Day v. Woodworth*, 54 U.S. (13 How.) 363, 371 (1852).

55. The Court has stated that in equity, "costs not otherwise governed by statute are given or withheld in the sound discretion of the court according to the facts and circumstances of the case." *Kansas City S. Ry. v. Guardian Trust Co.*, 281 U.S. 1, 9 (1930) (dictum).

ther, the substantial benefit exception was promulgated by the Supreme Court while 28 U.S.C. § 1920, which deleted the "no other compensation" language, was in effect.<sup>56</sup> Even if the "no other compensation" language is implied in section 1920, a possibility the Court entertained in *Alyeska*,<sup>57</sup> the Court's recent creation of the substantial benefit exception is a continuing indication that federal courts remain free to fashion new rules with respect to the allowance of attorneys' fees, including the private attorney general exception.

3. *The Court has freely developed new rules in its treatment of statutory provisions for fees*

Finally, an analysis of the Court's treatment of various statutory provisions for attorneys' fees lends further support to the proposition that federal courts have continuing freedom to fashion new rules. Section 204(b) of title II of the Civil Rights Act of 1964 explicitly provides that the prevailing party is entitled to reasonable attorneys' fees in the court's *discretion*.<sup>58</sup> The Court altered the specific provisions of that statute by declaring that one who obtains an injunction under title II "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust."<sup>59</sup> The Court thus transformed a discretionary award into a virtually mandatory award.<sup>60</sup> In another case, the plaintiff brought suit under section 14(a) of the Securities Exchange Act of 1934,<sup>61</sup> which makes no provision for fee awards. Although express provisions for recovery of attorneys' fees are found in sections 9(e) and 18(a) of the Act for other types of suits, the Court held that neither the fee provisions in the other sections nor the absence of express statutory authorization for an award of attorneys' fees in section 14(a) precluded such an award.<sup>62</sup>

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56. The change was made in the 1948 revision of the Code. The major cases establishing the substantial benefit exception are *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970), and *Hall v. Cole*, 412 U.S. 1 (1973).

57. 421 U.S. at 256 n.29.

58. 42 U.S.C. § 2000a-3(b)(1970). "[T]he court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs . . . ."

59. *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968); *accord*, *Northcross v. Board of Educ.*, 412 U.S. 427 (1973).

60. As one commentator pointed out, "No logical imperative leads to the conclusion that Congress intended a mandatory fee. If Congress had so intended, it could have explicitly done so." 4 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 223, 225 (1969).

61. 15 U.S.C. § 78n(a) (1970).

62. *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 390-91 (1970). *But cf.* *F.D. Rich Co. v. United States ex rel. Industrial Lumber Co.*, 417 U.S. 116 (1974); *Fleischman Distilling*

These decisions illustrate the activity of the Court in altering or implying fee award provisions in statutes. When the Supreme Court has itself been so active in this area, it can only damage its credibility by holding that Congress has reserved this policy question for itself. Congressional enactments may have combined with Court decisions to establish a *general* American rule against fee awards that cannot be wholly abrogated by unilateral court action, but the equity courts clearly may depart from the rule when "the interests of justice so require."<sup>63</sup> Concern should therefore be focused not on *whether* the courts have power to award fees in equity under the private attorney general exception, but on *when* such an award would be appropriate.

### C. *Problems in Applying the Private Attorney General Exception*

The Supreme Court was properly concerned about potential difficulties in applying the private attorney general exception. The exception could be a vehicle for abuse if it were used, as some have suggested, to award fees to the successful plaintiff in every case arguably promoting societal benefit.<sup>64</sup> Narrowing the scope of the exception would necessarily entail greater demands on the courts since each case would require detailed analysis of whether it fit specified criteria for the award. Unfortunately, the Court concluded prematurely that the task would be too difficult for the judiciary.

#### 1. *Identifying statutes important enough to justify nonstatutory fee awards*

In reviewing the potential problems of applying the private attorney general exception, the Court first contended that "it would be difficult, indeed, for the courts without legislative guidance to consider some statutes important and others unimportant and to allow attorney's fees only in connection with the former."<sup>65</sup>

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Corp. v. Maier Brewing Co., 386 U.S. 714 (1967).

Along the same line is *Hall v. Cole*, 412 U.S. 1 (1973), wherein the Court held that congressional authorization of fees in §§ 201(c) and 501(b) of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. §§ 431(c), 501(b), and the absence of such authorization in § 102 of that Act, 29 U.S.C. § 412, did not dictate an intent to preclude fee awards under § 102. 412 U.S. at 5.

63. *Hall v. Cole*, 412 U.S. 1, 5 (1973).

64. See, e.g., Note, *Awarding Attorneys' Fees To The "Private Attorney General": Judicial Green Light To Private Litigation In The Public Interest*, 24 HASTINGS L.J. 733, 758 (1973); Comment, *The Allocation of Attorney's Fees After Mills v. Electric Auto-Lite Co.*, 38 U. CHI. L. REV. 316, 328 (1971).

65. 421 U.S. at 263-64.

Congress is undoubtedly the branch of government best suited to formulate public policies based on thorough research and evaluation.<sup>66</sup> Yet it would often be possible for the Court to discern the relative "importance" of legislation<sup>67</sup> from statutory statements of purpose,<sup>68</sup> inferences drawn from language in related statutes,<sup>69</sup> records of congressional debates,<sup>70</sup> or statements of executive officers or agencies.<sup>71</sup> The Court could have seized upon the opportunity presented by *Alyeska* to establish workable guidelines for handling marginal cases,<sup>72</sup> thus curtailing any anticipated flood of litigation under this exception.

## 2. *Determining under what conditions and to whom an award should be made*

The Court was also troubled by whether a presumption should operate for or against the award, whether awards should

66. Although the courts lack the time and machinery to research public policy, some commentators have argued that the courts are actually in the best position to sense changes in public policy direction and to adapt to them. See, e.g., J. SAX, *DEFENDING THE ENVIRONMENT* ch. 4 (1970); Sive, *Thoughts of an Environmental Lawyer in the Wilderness of Administrative Law*, 70 COLUM. L. REV. 612 (1970).

67. For example, the courts promptly recognized the significance of civil rights legislation. See, e.g., *Curtis v. Loether*, 415 U.S. 189 (1974) (right to jury trial under fair housing statute); *Northcross v. Board of Educ.*, 412 U.S. 427 (1973) (school desegregation); *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205 (1972) (standing granted to maintain balanced racial atmosphere in apartment house complex); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971) (school desegregation); *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968) (racial discrimination in public accommodations).

68. See, e.g., National Environmental Policy Act of 1969, § 101(c), 42 U.S.C. § 4331(c) (1970): "The Congress recognizes that each person should enjoy a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment."

69. See, e.g., Federal Water Pollution Control Act Amendments of 1972, § 505(d), 33 U.S.C. § 1365(d) (Supp. III, 1973); Marine Protection, Research, and Sanctuaries Act of 1972, § 105(g)(4), 33 U.S.C. § 1415(g)(4) (Supp. III, 1973); Clean Air Amendments of 1970, § 340(d), 42 U.S.C. § 1857h-2(d) (1970); Noise Control Act, § 12(d), 42 U.S.C. § 4911(d) (Supp. III, 1973).

70. See the Court's reliance on statements of Congressmen in the instant case, 421 U.S. at 251 & n.24, 262 n.36.

71. See, e.g., President Nixon's August 1971 Message to Congress, 7 WEEKLY COMP. OF PRES. DOC. 1133 (1971):

In the final analysis, the foundation on which environmental progress rests in our society is a responsible and informed citizenry. My confidence that our Nation will meet its environmental problems in the years ahead is based in large measure on my faith in the continued vigilance of American public opinion and in the continued vitality of citizen efforts to protect and improve the environment.

The National Environmental Policy Act has given a new dimension to citizen participation and citizen rights . . . .

72. See notes 82-89 and accompanying text *infra*.

be discretionary or mandatory, and whether fee awards should be granted to prevailing plaintiffs only or also to prevailing defendants.<sup>73</sup> These obstacles are far from insuperable. The general American rule already provides a framework to resolve these questions.

Under the American rule a strong presumption, which can be overcome only by cases falling within narrow and exacting strictures, already operates against fee awards.<sup>74</sup> Similarly, no justification exists for making fee awards mandatory; the basis of the present equitable exceptions to the American rule is the courts' *discretionary* equitable power. Finally, the award would be granted only to prevailing plaintiffs, as is the accustomed procedure under the other equitable exceptions,<sup>75</sup> since awarding fees to the prevailing defendants could chill the initiation of important litigation and is often unnecessary in any event.<sup>76</sup> Thus, merely by counseling adherence to the tenor of the established general rule against fee awards, the Court would have mitigated these problems.

### 3. *Sovereign immunity*

The final problem troubling the Court was the immunity of both state<sup>77</sup> and federal governments from judgment for attor-

73. 421 U.S. at 264.

74. All of the equitable exceptions operate under presumptions against fee awards. That Congress occasionally creates presumptions in favor of awards should not affect the courts in their handling of nonstatutory awards. Nevertheless, the Court's concern that the private attorney general exception would render the American rule the exception rather than the rule is implicit in *Alyeska*.

For the strictures referred to, see notes 82-89 and accompanying text *infra*.

75. See, e.g., *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 392 (1970); *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968); cf. *Hobbs v. McLean*, 117 U.S. 567, 581-82 (1886).

76. The defendant in any public interest suit would probably be a "sufficiently large entity" to assume the cost of litigation or pass the cost on to consumers. Note, *Awarding Attorney and Expert Witness Fees in Environmental Litigation*, 58 CORNELL L. REV. 1222, 1241 n.114 (1973).

However, courts could stipulate that frivolous nuisance suits would be grounds for awarding fees to the defendant under the bad faith rationale. See *Natural Resources Defense Council, Inc., v. EPA*, 484 F.2d 1331, 1337-38 (1st Cir. 1973) (dictum).

77. Consideration of the sovereign immunity of state governments lies outside the scope of this case note. Several recent articles have treated the matter, however. See, e.g., Comment, *The Eleventh Amendment and Awards of Attorneys' Fees Against States After Edelman v. Jordan*, 46 MISS. L.J. 249 (1975); Comment, *Who is to Guard the Guardians: Awarding Attorneys' Fees Against a State Defendant in Public Benefit Litigation*, 9 U. SAN FRANCISCO L. REV. 465 (1975); Comment, *The Eleventh Amendment Does Not Bar an Award of Attorney's Fees Based on the Private Attorney General Theory*, 32 WASH. & LEE L. REV. 133 (1975).

Compare *Sims v. Amos*, 340 F. Supp. 691 (M.D. Ala. 1972), with *Taylor v. Perini*, 503 F.2d 899 (6th Cir. 1974).

neys' fees. Since 28 U.S.C. § 2412<sup>78</sup> precludes fee awards against the federal government absent a contrary statutory provision, the Court rightly indicated that "the rational application of the private attorney general rule would immediately collide with the express provision of 28 U.S.C. § 2412."<sup>79</sup> Because many successful public interest suits are brought against government agencies, an award of attorneys' fees against the federal government would often be appropriate under the private attorney general exception.<sup>80</sup> Unless Congress alters section 2412, however, that remedy is unquestionably not available. Even so, its unavailability should not have led the Court to deny any remedy whatsoever; a partial remedy, such as an assessment of *part* of the attorneys' fees against the private party or parties defendant, as was awarded to Wilderness Society by the court of appeals,<sup>81</sup> is better than none. In effect, the Supreme Court's holding in *Alyeska* is an unjustified judicial extension of 28 U.S.C. § 2412 to private parties.

#### 4. Guidelines for implementing the private attorney general exception

The Supreme Court should have allowed trial courts to examine the following factors under the private attorney general exception to determine if the plaintiff has overcome the presumption against a fee award: 1) whether the party prevailed;<sup>82</sup> 2) whether the suit vindicated strong congressional policy;<sup>83</sup> 3)

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78. That statute provides:

Except as otherwise specifically provided by statute, a judgment for costs, as enumerated in section 1920 of this title but *not including the fees and expenses of attorneys* may be awarded to the prevailing party in any civil action brought by or against the United States or any agency or official of the United States acting in his official capacity, in any court having jurisdiction of such action.

(emphasis added).

The Senate Report on the bill that amended § 2412 to its present form stated that "[t]he costs referred to in the section do not include fees and expenses of attorneys." S. REP. No. 1329, 89th Cong., 2d Sess. 3 (1966).

79. 421 U.S. at 265-66.

80. In addition, federal tax receipts create the fund from which an award could be made under the common fund or substantial benefit rationales.

81. *Alyeska* was required to pay one-half the reasonable value of attorneys' fees incurred by Wilderness Society. *Wilderness Soc'y v. Morton*, 495 F.2d 1026, 1036 (D.C. Cir. 1974) (en banc). The court of appeals acted with considerable discretion in requiring *Alyeska*, the real party in interest, to pay only the amount it would have paid had the government also been liable, rather than the entire amount of Wilderness Society's legal fees.

82. *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968). In other words, was the party wholly successful in some important aspect of the suit?

83. Did the plaintiff vindicate a clearly demonstrable "policy Congress considered of

whether the suit advanced broad public interests or rights;<sup>84</sup> 4) whether the suit created significant public benefit;<sup>85</sup> 5) whether the necessity for private enforcement existed;<sup>86</sup> 6) whether the comparative resources of the opposing parties and the financial burden of private enforcement suggested an award;<sup>87</sup> 7) whether an adequate basis existed for shifting fees *to* the losing party (as contrasted with shifting fees *from* the winning party);<sup>88</sup> 8) whether the case was meritorious.<sup>89</sup> These guidelines could act as strictures limiting the range of discretion available to federal courts in awarding attorneys' fees.

#### D. *Implications of the Decision*

The broad holding of *Alyeska* was unnecessary for resolving the narrow conflict of the particular parties involved in the litigation.<sup>90</sup> Because the Court decided to reach the broader issues,

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the highest priority?" *Id.* Would the legislative purpose of an act be frustrated by a refusal to award fees?

84. Questions to be considered here are the following: Are the basic issues of substantial public importance? Is the public interest involved so vital as to be subsidized by an award?

85. Questions to be considered in resolving this issue are the following: Are the societal benefits widespread? Does the benefit extend beyond the actual litigants? Is the plaintiff advancing essentially private or public interests? Is the benefit questionable? Would an award in this case help to vindicate the rights of others in similar situations? Does the suit yield significant service to the Nation, the general public, a community, a race, or other large class? Would a fee award aid enforcement of federal laws or render other service to the legal system? Would an award have a deterrent effect on other violators?

86. Questions to be considered in resolving this issue are the following: Does the governing statute preclude, allow, rely on, or require enforcement via private suits? Does vindication largely rest with private individuals? Can public officials adequately investigate violations and enforce the laws?

87. Questions requiring consideration in resolving this issue include the following: Does the financial burden of private enforcement render a fee award essential? Would the absence of an award penalize the plaintiff for civic-minded and beneficial litigation and prevent him from bringing suit in future public interest controversies? Would the possibility of an award discourage a party from defending the suit or intervening to protect his interests? Would a fee award give too much financial incentive for bringing future litigation? Can the cost of the award be passed on to the group benefited by the litigation?

88. Was the party against whom the award is sought the actual violator of the statute? If the defendant prevailed, was the suit so frivolous as to justify an award in his favor? See 36 Ohio St. L.J. 201, 216 (1975).

89. In sum, is this such an exceptional case that dominating reasons of justice require that an award of attorneys' fees be granted? See *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161, 167 (1939).

90. Narrower grounds on which the decision not to award fees could have been based are: (1) The congressional amendments allowing construction of the pipeline indicated that rather than vindicate a strong congressional policy, Wilderness Society had acted in opposition to the prevailing policy. (2) It is highly unlikely that a mere technicality such

*Alyeska* appears to be yet another in a line of cases tending to discourage public interest suits.<sup>91</sup> Whether or not that is true, the Court's overbroad holding contains grave implications for future public interest litigation.

### 1. *Implications for future litigation*

If it is assumed that public interest actions by concerned citizens are inherently valuable,<sup>92</sup> particularly in fields such as civil rights, the way should be cleared for the institution of such actions. This is especially true where a violation of a statute causes little harm to any one individual but great harm to important public interests. In many cases the Nation must rely on

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as the proper width of rights-of-way would be the subject for strong congressional policy. Focus here should be on the statutory provisions in question, not on environmental protection in general. (3) The resolution of rights-of-way disputes could hardly be termed an advancement of broad public interests. (4) The Department of the Interior, not *Alyeska*, was the actual violator in this case, so fees should not have been awarded at *Alyeska*'s expense. See *Environmental Defense Fund v. Froehlke*, 473 F.2d 346 (8th Cir. 1972); *NRDC v. Morton*, 458 F.2d 827 (D.C. Cir. 1972); *Greene County Planning Bd. v. FPC*, 455 F.2d 412, 420 (2d Cir.), *cert. denied*, 409 U.S. 849 (1972); *Calvert Cliffs' Coordinating Comm., Inc. v. AEC*, 449 F.2d 1109 (D.C. Cir. 1971). See also *Kelly v. Guinn*, 456 F.2d 100, 111 (9th Cir. 1972) (fees should not be assessed where there is substantial doubt as to the legal obligation of the defendant). (5) Assuming *arguendo* that the general public would have benefited them the suit, no evidence showed that the cost of the award could be passed on to them. (6) The award granted by the court of appeals covered issues under the National Environmental Policy Act on which the plaintiffs had not succeeded. 495 F.2d at 1034. (7) Since plaintiffs' lawyers had represented that they did not expect reimbursement for their *pro bono publico* effort, 495 F.2d at 1042-43 (Wilkey, J., dissenting), and since plaintiffs were large privately-funded foundations, necessity for the award was lacking. (8) The Nation was in the midst of an "energy crisis" that rendered development of a domestic oil supply, including completion of the trans-Alaska pipeline, a matter of substantial national concern.

91. See, e.g., *Schlesinger v. Reservists Committee To Stop The War*, 418 U.S. 208 (1974) (standing to sue—"generalized citizen interest" is not a sufficient basis for standing to sue); *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974) (class action—individual notice is required in class actions even though the cost might be prohibitive); *O'Shea v. Littleton*, 414 U.S. 488 (1974) (concreteness—threat of injury to the class is too remote to satisfy the "case or controversy" requirement); *Laird v. Tatum*, 408 U.S. 1 (1972) (concreteness—no specific present or future objective harm); *Sierra Club v. Morton*, 405 U.S. 727 (1972) (standing to sue—a litigant not properly in court because of an individualized injury cannot use "public interest" as the basis for standing to sue); *Boyle v. Landry*, 401 U.S. 77 (1971) (concreteness—allegations lacked showing of threat of irreparable injury to the class bringing suit); *Snyder v. Harris*, 394 U.S. 332 (1969) (class action—each member of a class in a diversity action must meet the requisite federal jurisdictional amount of \$10,000).

92. See *La Raza Unida v. Volpe*, 57 F.R.D. 94, 100-01 (N.D. Cal. 1972). This type of litigation is different from mere private cases between individuals; it is inappropriate to view the parties as engaged in a routine private lawsuit. See *Bradley v. School Bd.*, 416 U.S. 696, 718 (1974).

private litigation to ensure broad compliance with the law.<sup>93</sup> Those injured should be encouraged to seek judicial relief. Since public interest suits so often seek injunctive relief rather than money damages, only by awarding attorneys' fees can courts encourage such litigation.

## 2. *Alternative avenues to fee awards in future litigation*

One avenue remaining open to federal courts desirous of awarding fees to successful public interest litigants is to expand the use of the bad faith and substantial benefit exceptions. A party whose violation of a statute evidences flagrant disregard for the public interest could be declared guilty of bad faith, providing a basis for shifting fees to that party. This type of fee award based on flouting of the law is supported by some cases<sup>94</sup> and commentators.<sup>95</sup> It should be noted, however, that the evidentiary burden in establishing bad faith would frequently preclude awards<sup>96</sup> and that this remedy has ordinarily been applied in private rather than public suits. Expanded application of the bad faith exception would require substantial stretching of the doctrine.

Fee awards based on the substantial benefit exception have also been supported by courts<sup>97</sup> and commentators.<sup>98</sup> This approach is more consistent with *Alyeska* and the American rule since costs are spread among the beneficiaries rather than assessed against the opposite party. The drawbacks of this exception are that the benefits must be clearly traceable to an ascertainable class of beneficiaries, the beneficiaries must have performed some voluntary act that implies assent to involuntary

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93. 421 U.S. at 263; *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 401-02 (1968).

94. See *Vaughan v. Atkinson*, 369 U.S. 527 (1962) (disregard for statutory duty to private interest); *Cato v. Parham*, 403 F.2d 12 (8th Cir. 1968) (judicial prodding to ensure desegregation justifies fee award); *Reynolds Metals Co. v. Lampert*, 324 F.2d 465 (9th Cir. 1963) (punitive damages).

95. See, e.g., Note, *Awarding of Attorneys' Fees in School Desegregation Cases: Demise of the Bad-Faith Standard*, 39 BROOKLYN L. REV. 371 (1972); Note, *Allowance of Attorney Fees in Civil Rights Actions*, 7 COLUM. J.L. & SOC. PROB. 381 (1971); Note, *Allowance of Attorney Fees in Civil Rights Litigation Where the Action Is Not Based on a Statute Providing For an Award of Attorney Fees*, 41 U. CIN. L. REV. 405 (1972).

96. *King & Plater*, *supra* note 9, at 59-60.

97. See, e.g., *Natural Resources Defense Council, Inc. v. EPA*, 484 F.2d 1331, 1333 & n.1 (1st Cir. 1973); *Brewer v. School Bd.*, 456 F.2d 943, 951-52 (4th Cir. 1972).

98. Note, *Awarding Attorney and Expert Witness Fees in Environmental Litigation*, 58 CORNELL L. REV. 1222, 1236-37 (1973); Note, *The Allocation of Attorneys' Fees After Mills v. Electric Auto-Lite Co.*, 38 U. CHI. L. REV. 316, 328-31 (1971); Note, *Attorneys' Fees: What Constitutes a "Benefit" Sufficient to Award Fees From Third Party Beneficiaries*, 1972 WASH. U.L.Q. 271, 284.

participation in the costs of vindicating the rights of all the beneficiaries,<sup>99</sup> and some type of joint resource (such as corporate or union assets) from which the award may be drawn must be available.<sup>100</sup> By definition, the general public is deemed to be the beneficiary of most public interest litigation; yet the general public has contributed to no central fund other than government tax revenues exempted by 28 U.S.C. § 2412 from use in fee awards. The exception is therefore of limited value in public interest litigation, being confined primarily to formally organized classes.<sup>101</sup>

Proponents of public interest litigation should take heart from the fact that numerous statutes provide for awards of attorneys' fees in specified types of cases.<sup>102</sup> In addition, proposals before Congress could create means for more effective public interest litigation<sup>103</sup> and provide for fee awards under additional statutes.<sup>104</sup> Finally, *Alyeska* does not affect the ability of state courts to award fees under the private attorney general exception.

#### IV. CONCLUSION

The actions of both Congress and the Court indicate that Congress has not reserved exclusively for itself the question of fee awards. The historic equity jurisdiction of the federal courts provides adequate grounds for the implementation of the private attorney general exception. Although difficulties would necessarily have arisen in applying the exception, guidelines could have been established that would have lessened the obstacles.

In interdicting use of the private attorney general exception by federal courts, the Supreme Court passed far beyond the requirements of the case before it.<sup>105</sup> The private attorney general

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99. King & Plater, *supra* note 9, at 52-53.

100. See note 25 and accompanying text *supra*.

101. The Court's failure in *Alyeska* to distinguish the substantial benefit cases from the common fund cases could signal a retreat from the broader substantial benefit exception to the traditional and more narrow common fund doctrines. See cases cited in 421 U.S. at 257-58.

102. See notes 19-21 and accompanying text *supra*.

103. *E.g.*, Consumer Protection Act, S. 200, 94th Cong., 1st Sess. (1975) (establishing the Agency for Consumer Protection; the Senate and the House have passed the bill, but President Ford has promised to veto it.).

104. See, *e.g.*, S. 2278, 94th Cong., 1st Sess. (1975) (The Civil Rights Attorneys' Fees Award Act of 1975, allowing awards to the prevailing plaintiff in civil rights suits). Also, bills introduced in the House during the first session of the 94th Congress would allow attorneys' fee awards under the Mineral Lands Leasing Act (H.R. 7825), in civil suits where the interests of justice so require (H.R. 7826), in actions for injunctive relief under the Clayton Act (H.R. 7827), to prevailing plaintiffs under civil rights laws (H.R. 7828), and under the National Environmental Policy Act of 1969 (H.R. 7829).

105. See note 90 and accompanying text *supra*.

exception is a concept not yet resolved into clear definition. *Alyeska* presented the Court with the opportunity to shape that concept into an acceptable, narrowly defined, workable instrument of equity. By electing to wholly prohibit fee awards under the exception rather than to structure and clarify it, the Court squandered an exceptional opportunity to develop a useful equitable doctrine.