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## Alternatives for Recovery of Attorney's Fees in Environmental litigation

Fritz Ledbetter

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# ALTERNATIVES FOR THE RECOVERY OF ATTORNEYS' FEES IN ENVIRONMENTAL LITIGATION AFTER *ALYESKA v. WILDERNESS SOCIETY*

In the United States, absent contrary statutory authority, the prevailing litigant in a civil action is not entitled to collect attorney and expert witness fees from the loser.<sup>1</sup> There are, however, notable statutory and judicially created exceptions to this "American Rule" against fee shifting. As the Supreme Court in *Alyeska Pipeline Service Co. v. Wilderness Society et. al.*<sup>2</sup> noted, the judicially created exceptions arise out of the "inherent power in the courts to allow attorneys' fees in particular situations, unless forbidden by Congress."<sup>3</sup> Although commentators have vigorously urged that the traditional American Rule be abolished,<sup>4</sup> the recent approach taken by the lower federal courts has been to broaden the application of the equitable exceptions. This trend was particularly discernable in the attorney and witness fee awards that were the product of public interest environmental litigation. At the root of this liberalizing trend was a genuine concern that responsible standard bearers, acting on behalf of the general public welfare, not be discouraged from pursuing their environmental concerns in the courts. In the democratic

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1. The "American Rule" generally includes reasonable attorneys' fees in both Federal and State courts. See 6 J. Moore, Federal Practice ¶ 54.71 [2], at 1703-04 and note 2 (2 ed. 1972). See also 28 U.S.C. § 2412 (1970) which reads:

Except as otherwise specifically provided by statute, a judgment for costs, . . . 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.

Note, however, that 28 U.S.C. § 2412 makes no mention of expert witness fees. In view of the fact that attorneys' fees are expressly excluded from the statute, it could be argued that the failure to similarly exclude witness fees would imply Congressional authorization for their recovery. See King & Plater, *The Right to Counsel Fees In Public Interest Environmental Litigation*, 41 Tenn. L. Rev. 27, 30, at note 10 (1973).

2. *Alyeska Pipeline Service Company v. Wilderness Society et. al.*, 421 U.S. 240, 95 S. Ct. 1612, 44 L.Ed.2d 144 (1975) [hereinafter cited as *Alyeska*].

3. 421 U.S. 240, 259 (1975).

4. A particularly forceful and compelling argument against the "American Rule" may be found in Professor Ehrenzweig's own personal experience with America's fee shifting anomaly. Ehrenzweig, *Reimbursement of Counsel Fees and the Great Society*, 54 Cal. L. Rev. 792 (1966). See also Kuenzel, *The Attorneys' Fee: Why Not a Cost of Litigation?* 49 Iowa L. Rev. 75 (1963); McCormick, *Counsel Fees and Other Expenses of Litigation as an Element of Damages*, 15 Minn. L. Rev. 619 (1931).

tradition, it is only the private citizen that can be expected to "guard the guardian."<sup>5</sup>

Reacting to the exhortations of the President<sup>6</sup> and the apparent will of Congress,<sup>7</sup> lower federal courts, in the early 1970's, began to fashion judicially created exceptions to the general rule against fee shifting in causes concerning the protection of the environment. Cognizant of the fact that most public interest environmental litigation seeks to advance a conservation goal on behalf of the general public and, moreover, that environmental litigants usually seek specific relief, such as declaratory judgments, injunctions or mandamus, federal courts began awarding fees in increasing numbers of suits. Prevailing parties,<sup>8</sup> losing parties,<sup>9</sup> and those parties whose action was mooted by Congress<sup>10</sup> were awarded fees for their

5. *La Raza Unida v. Volpe*, 57 F.R.D. 94, 101 (N.D. Cal. 1972).

6. In his August, 1971 "Message to the Congress," former President Nixon delivered the following encouraging words to would be citizen litigants who were inclined to preserve the quality of the environment through suits in the court system:

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—as is evidenced by the numerous court actions through which individuals and groups have made their voices heard.

7 Weekly Comp. of Pres. Doc. 1132, 1133 (1971).

8. Congress, under the new environmentally conscious legislation of the early 1970's, granted standing to any private citizen-litigant regardless of the amount in controversy or the citizenship of the parties. *See also* U.S. v. SCRAP, 412 U.S. 669, 37 L.Ed.2d 254, 93 S.Ct. 2405 (1973). Moreover, any private citizen may bring a civil action in Federal District Court against violators of standards issued by the Environmental Protection Agency (EPA) as well as suits against EPA Administrators or similar federal officials who have failed in performing non-discretionary duties. It was thought that such Congressional intent to dispose of potential barriers was evidence of a desire to encourage privately initiated environmental litigation. *See* 33 U.S.C.A. § 1365(e), § 1415(g)(5) (Supp. 1970); 42 U.S.C.A. § 1857h-2(e) (Supp. 1976); 42 U.S.C.S. § 4911(e) (1973).

9. Attorneys' fees were awarded by lower federal courts under the private attorney general theory in numerous instances. *See e.g.*, *Natural Resources Defense Council v. FRI*, F.2d (D.C. Cir. 1975); *La Raza Unida v. Volpe*, 57 F.R.D. 94 (ND Cal. 1972). *See also, supra* note 11.

10. *Sierra Club v. Lynn*, 364 F. Supp. 834 (W.D. Tex. 1973); *Citizens Ass'n. of Georgetown v. Washington*, 383 F.Supp. 136 (D.D.C. 1974).

11. The action, brought by the Wilderness Society sought declaratory and injunctive relief against the Secretary of the Interior for noncompliance with the provisions of the Mineral Leasing Act of 1920, sec. 28 as amended, 30 U.S.C. § 185 (1970), and the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4321, *et seq.* The State of Alaska and Alyeska Pipeline Service Company were later permitted to intervene. Subsequently, respondent Wilderness Society's cause of action based on a violation of NEPA was mooted by Congressional passage of Pub. L. 93-153, Tit. 1, § 101, 87 Stat. 576m, 93rd Cong., 1st Sess. (Nov. 16, 1973). The allowance of fees was based on both the mooted cause of action

assertion of the public interest. Indeed, six circuits had adopted the "private attorney general" rationale for justifying their awards of attorney and witness fees.<sup>11</sup>

In *Alyeska*, the United States Supreme Court was asked to affirm this lower-court-sanctioned exception to the American Rule. Speaking for a five to two majority,<sup>12</sup> Mr. Justice White refused to extend the "private attorney general" doctrine into the area of environmental litigation.<sup>13</sup> The Court noted that it was within the sole discretion of the Congress to determine whether fee shifting should be permitted to further the public welfare. The underlying rationale for the majority opinion was enunciated by Mr. Justice White:

... [C]ongressional utilization of the private attorney general concept can in no sense be construed as a grant of authority to the Judiciary to jettison the traditional rule against non-statutory allowances to the prevailing party and to award attorneys' fees whenever the courts deem the public policy furthered by a particular statute important enough to warrant the award.<sup>14</sup>

Thus, faced with the fundamental policy decision of balancing the interests of those who would seek the award of fees, as a necessary incident to making the injured party "whole," against those who would argue that parties should not be penalized for seeking to prosecute or defend their rights, the Court chose to defer to the Congress.

Faced with the clear language of the Supreme Court, the question

and the unaffected cause arising out of *Alyeska Pipeline Company's* violation of the Mineral Leasing Act of 1920. For a full chronology of the events surrounding the progress of the *Alyeska* case through the courts see Dominick and Brody, *The Alyeska Pipeline; Wilderness Society v. Morton and the Trans-Alaska Pipeline Authorization Act*, 23 Am. U. L. Rev. 337 (1973).

11. *Sousa v. Travisono*, F.2d , (1st Cir. 1975); *Cornist v. Richland Parish School Board*, 495 F.2d 189 (5th Cir. 1974); *Taylor v. Perini*, 503 F.2d 899 (6th Cir. 1974); *Morales v. Haines*, 486 F.2d 880 (8th Cir. 1974); and *Brandenburger v. Thompson*, 494 F.2d 885 (9th Cir. 1974). See also Leed, *Development of the Fee Shifting Doctrine: Aftermath of the Alyeska Decision*, Barrister 36, at note 3 (Winter, 1976).

12. Justices Blackmun, Burger, Rehnquist and Stewart concurred with the opinion of Justice White. Justices Brennan and Marshall filed dissenting opinions. Justices Douglas and Powell took no part in the decision.

13. Arguably court watchers were put on notice of the Supreme Court's willingness to leave the question of the awarding of fees to Congress in the earlier opinion found in *F. O. Rich Co. Inc. v. United States ex rel. Industrial Lbr. Co.*, 417 U.S. 116 (1974) wherein the Court wrote:

The perspectives of this profession, the consumers of legal services, and other interested groups should be weighed in any decision to substantially undercut the application of the American Rule in such litigation. Congress is aware of the issue. Thus whatever the merit of arguments for a further departure from the American Rule ... those arguments are properly addressed to Congress. 417 U.S. at 131 (footnote omitted).

14. 421 U.S. 240, 263 (1975).

confronting the private attorney contemplating the initiation of public interest environmental litigation must be to appraise the various avenues for the recovery of fees which remain open after *Alyeska*. Before examining these specific alternatives, however, this comment will first look to the development of the American Rule and its judicially created exceptions. The comment will then explore the expansion of the private attorney general exception into the area of environmental litigation and, finally, it will analyze the limiting language of the Supreme Court and its effect on the attorney who seeks to initiate public interest litigation but who is unsure as to the prospects for his compensation.

### DEVELOPMENT OF THE "AMERICAN RULE"

In the United States, absent contrary statutory authority, the prevailing litigant is not entitled to collect his attorneys' fees from the loser. This American Rule governing the allocation of the relative burden of the costs of litigation, is an anomaly in the jurisprudential world. Analysts and legal commentators have sharply criticized the prevailing persistence in denying fee shifting.<sup>15</sup> Most critical discussions of the American Rule begin by comparing the English system to that found in the United States. Although the history of American jurisprudence is rooted in the common law of England, it is and has been a common understanding in the United States that the difference between the American and English rules as to fees lies in the fact that under the English system the successful party may recover the charges he has to pay his own attorney.<sup>16</sup> This distinction, however, is both an understatement as well as an exaggeration, for, even though English costs are regularly imposed at the discretion of the Court, they rarely include the entire financial burden paid to the barrister and solicitor, and yet they may also cover the cost of many items not allowed in the United States.<sup>17</sup>

The American Rule, given the status of black letter law by the Court in *Alyeska*, has been repeatedly challenged. Its development has been the object of scholarly analysis and the winding course that the evolution of the Rule has taken has led at least one commentator to argue that the "American Rule" is a "historical accident."<sup>18</sup> Whatever its final label, the development of the American Rule is noteworthy. For without an understanding of the nature of the Rule,

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15. *Supra* at note 3.

16. 421 U.S. 240, 247 (1975).

17. Goodhart, *Costs*, 38 Y. L. J. 849, 856 (1929).

18. Ehrenzweig, *supra* note 3, at 799.

the reader would be ill-equipped to understand the exceptions to the Rule and the ramifications of the limiting language of the *Alyeska* decision.

### *The Development of the Allocation of Attorneys' Fees in England*

The history of the allocation of costs in England follows a relatively orderly path of development in comparison with that in the United States, although a distinction must be drawn between the costs and attorneys' fees awarded in the common law courts and those awarded in equity.<sup>19</sup>

At common law, the rule as to costs was based entirely on statute. If the plaintiff failed in his action, he was amerced *pro falso clamore*; if he succeeded, the defendant was in *miser cordia* for the detention of the plaintiff's right.<sup>20</sup> At that time, however, the award of attorneys' fees was at the Court's discretion. It was not until the Statute of Gloucester, in 1278,<sup>21</sup> that the plaintiff could recover his costs at law. Similarly, since 1607 English courts have been empowered to award counsel fees to defendants in all actions where such awards might be made to plaintiffs.<sup>22</sup> These statutory provisions remained the basis for the law of allocation of costs until 1875 when an important change in the principle on which costs were awarded was made by the Supreme Court of Judicature Acts of 1873 and 1875.<sup>23</sup> The short, nine line order stated that, with certain exceptions, "the costs of and incident to all proceedings in the High Court shall be in the discretion of the Court." Although the Rules of the Court were rewritten and greatly expanded in 1883, this general principle is still found today.<sup>24</sup>

In equity, the giving of costs was entirely discretionary. The difference between equity and the common law, however, lay in the fact that in equity costs were in the discretion of the Court while at common law they followed the event. Therefore, Mr. Goodhart was able to conclude that the 1875 Rules of the Court, while placing equity costs on a statutory basis, made no change of principle in them as they did in common law costs.<sup>25</sup>

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19. Goodhart, *supra* note 17, at 851.

20. *Id.* at 851-52.

21. Stat. of Gloucester, 6 Edw. I, c. 1 (1278).

22. Stat. of Westminster, 3 Jac. I, c. 3 (1607). This statute, which expressly mentioned only "the costs of this writ purchased," was from the outset liberally construed to include all costs of the suit including counsel fees. Goodhart, *supra* note 17, at 842.

17, at 842.

23. 36 & 37 Vict., c. 66 (1873); 38 & 39 Vict., c. 77 (1875).

24. Goodhart, *supra* note 17, at 854.

25. *Id.* at 854.

Today, it is customary in England, after litigation of the substantive claims, to conduct separate hearings before a special "taking Master" in order to determine the appropriateness and size of the counsel fee award. To prevent these ancillary proceedings from becoming unduly lengthy and burdensome, fees which may be included in an award are usually prescribed.<sup>26</sup>

*The Development of the Allocation of Attorneys' Fees in the United States*

In the United States, the development of the allocation of fees took a different course from that which evolved in England, and that course often defies easy analysis.

During the first years of the federal court system, Congress provided through the Federal Judiciary Act of 1789,<sup>27</sup> and subsequent legislative enactments, that the federal courts were to follow the practices with respect to the awarding of attorneys' fees in the courts of the states in which the federal courts were located. By 1800, however, these statutory provisions had either expired or had been repealed.<sup>28</sup>

During this early stage in our nation's history, the Court first enumerated what would later become the black letter law in the area of fee shifting. The Court ruled that the judiciary would not create a general rule allowing the award of fees in the federal court system absent contrary statutory authority. In 1796, in *Arcambel v. Wiseman*, the Supreme Court wrote:<sup>29</sup>

The general practice of the United States is in opposition to it [the award of attorneys' fees as damages]; 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 statutes.

Although the Court has repeatedly been criticized for its failure to examine the underlying policy considerations of the American Rule by its insistence on deferring to Congress, the Supreme Court has consistently adhered to this earlier decision.<sup>30</sup> Moreover, the Court,

26. *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 717 (1967).

27. By the passage of the Judiciary Act of September 29, 1789, the Federal Courts were to follow the State practice with respect to rates of fees under admiralty and maritime jurisdiction. The Federal Judiciary Act, 1 Stat. 73, ch. 20 touched on costs in Sections 9, 11, 12, 22, and 23, but as to counsel fees only provided that the U.S. Attorney in each district "shall receive as compensation for his services such fees as shall be traced therefor in the respective courts before which the suits or prosecutions shall be."

28. *See generally* 421 U.S. 240, 247-250 (1975).

29. 3 U.S. (3 Dall.) 306, (1796).

30. *See Day v. Woodworth*, 54 U.S. (13 How.) 362, 14 L.Ed. 181 (1851); *Oelrichs v. Spain*, 82 U.S. (15 Wall.) 211, 21 L.Ed. 43 (1872); *Flanders v. Tweed*, 82 U.S. (15 Wall.)

in *Alyeska v. Wilderness Society*, expressly stated that its refusal to sanction the lower federal court award of fees was not intended to be interpreted as an assessment of the validity of the Rule. The Court wrote:

We do not purport to assess the merits or demerits of the "American Rule" with respect to the allowance of attorneys' fees. It has been criticized in recent years, and courts have been urged to find exceptions to it. It is also apparent from our national experience that the encouragement of private action to implement public policy has been viewed as desirable in a variety of circumstances. But the rule followed in our courts with respect to attorneys' fees has survived.<sup>31</sup>

Thus, we note that there is a marked similarity between the Supreme Court's initial enunciation of the American Rule at the turn of the 19th Century and the pronouncement of the Court in 1975. Absent statutory encouragement to the contrary, it appears that the Court will continue to refrain from breaking with tradition.

In 1842, however, Congress did grant to the Court authority to prescribe the items and the amounts which could be taxed in the federal system.<sup>32</sup> The brief legislative history of the statute indicated that the purpose was to implement the reduction of fee bills in the federal courts. The Supreme Court, however, took no action under this statutory mandate.<sup>33</sup>

In 1853, apparently acting at the invitation of the Supreme Court, Congress undertook the standardization of allowable costs in federal court proceedings.<sup>34</sup> Congress recognized the fact that there was great diversity as to the amounts and the award of attorneys' fees in the various courts. The proposed legislation was designed to mitigate some of the excessive fee awards that had inspired the bill.<sup>35</sup> The

450, 21 L.Ed. 203 (1872); *Stewart v. Sonneborn*, 98 U.S. 187, 25 L.Ed. 116 (1879); *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 717-18, 87 S.Ct. 1404, 18 L.Ed2d 475 (1967); *F. D. Rich Co. v. Industrial Lumber Co., Inc.*, 417 U.S. 116, 126-31, 94 S. Ct. 2157, 2163-66 (1974); *See also Alyeska v. Wilderness Society*, 421 U.S. 240 (1975).

31. 421 U.S. 240, 270-71 (1975).

32. 5 Stat. 518, ch. 188, § 7 (August 23, 1842).

33. 421 U.S. 240, 250 (1975).

34. The proposed legislation closely follows the Supreme Court's affirmation of their earlier decision in *Arcambel v. Wiseman*. In *Day v. Woodworth*, 354 U.S. (13 How.) 362 (1851) the Court was again given the opportunity to affirm the award of attorneys' fees. The Court, however, concluded that legal taxed costs were "all the law allows." *Id.* at 372.

35. Evidence of this Congressional intent may be found in Senator Bradbury's remarks recorded in 27 Cong. Globe App., 32d Cong. 2d Sess., 207 (February 12, 1853):

There is now no uniform rule either for compensating the ministerial officers of the courts, or for the regulation of the costs in actions between private suitors. One system prevails in one district, and a totally different one in another; and in some cases it would be difficult to ascertain that any attention had been paid to any law whatever designed to regulate such proceedings. . . .



legislation specified in detail the nature and amounts of taxable items in the federal courts,<sup>36</sup> and the Supreme Court repeatedly enforced the stated goal of the Act in limiting excessive fee awards. In *The Baltimore*, the Court deemed a counsel fee award of \$500.00 to be excessive and ordered that judgment be set aside. The Court concluded:

Fees and costs, allowed to the officers therein named, are now regulated by the act of the 26th of February, 1853, which provides, in its 1st section, that in lieu of compensation now allowed by law to attorneys, solicitors, proctors, district attorneys, clerks, marshals, witnesses, jurors, commissioners, and printers, the following and no other compensation shall be allowed.

Attorneys, solicitors, and proctors may charge their clients reasonably for their services, in addition to the taxable costs, but nothing can be taxed as cost against the opposite party, as an incident to the judgment, for their services, except the costs and fees therein described and enumerated. . . .<sup>37</sup>

In *Flanders v. Tweed*,<sup>38</sup> decided only three years later, the Court employed nearly identical language to that found in *The Baltimore* in justifying its refusal to sustain a similar jury award of \$6,000.00 for attorneys' fees.

Although Congress has made certain provisions allowing the award of attorneys' fees under statute, it has nevertheless refrained from extending the general statutory rule that fee shifting be limited to sums specified by this costs statute. The Court in *Alyeska* took judicial notice of the fact that the 1853 Act has been carried forward to the revised code of 1948 in Sections 1920 and 1923 (a) without any apparent Congressional intention to alter the controlling rule.<sup>39</sup>

Thus, on the basis of this analysis of the American Rule which has spanned the history of the American judicial system, the United States Supreme Court was able to conclude that "the rule followed in our courts, with respect to attorneys' fees, has survived. It is deeply rooted in our history and in congressional policy; and it is not for us to invade the legislature's province. . . ."<sup>40</sup>

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It will hence be seen that the compensation of the officers, and the costs taxed in civil suits, is made to depend in a great degree on that allowed in the State courts. There are no two States where the allowance is the same.

The abuses that have grown up in the taxation of attorneys' fees which the losing party has been compelled to pay in civil suits, have been a matter of serious complaint.

36. Act of Feb. 26, 1853, ch. 175, § 12, 10 Stat. 161.

37. 75 U.S. (8 Wall.) 377, 392 (1869).

38. 82 U.S. (15 Wall.) 450, 452-53 (1872).

39. 421 U.S. 240, 255 (1975).

40. *Id.* at 271.

To be sure, there are judicially created exceptions to this general rule which remain unaffected by the Court's ruling in *Alyeska*. As the Supreme Court noted, "These exceptions are unquestionably assertions of inherent power in the Courts to allow attorneys' fees in particular situations, unless forbidden by Congress."<sup>41</sup>

However, as the Supreme Court in *Alyeska Pipeline Service Co. v. Wilderness Society* observed, the lower federal court expressly refrained from employing any of the recognized exceptions. Rather, the lower court chose to base its award of counsel fees on an expansion of the private attorney general theory, heretofore only affirmed by the Supreme Court in the area of civil rights.<sup>42</sup> In striking down this expansion of the private attorney general concept into the area of public interest environmental litigation, the Supreme Court has deposited a barrier to the recovery of fees and consequently has, to some degree, limited the initiation of public interest litigation altogether. Before examining alternatives, however, it is necessary to examine existing exceptions to the American Rule. The practicing attorney may choose to frame his cause of action so as to capitalize on the inherent equitable power of the court to award counsel and witness fees.

#### EQUITABLE EXCEPTIONS TO THE AMERICAN RULE

As the Court in *Alyeska* observed, it is well within the province of the judiciary to create equitable exceptions to the American Rule in order that the expenses of the litigation be awarded, even though they would not normally be taxed as costs. Traditionally, the judicially created exceptions to the American Rule have been limited to three areas. Attorneys' fees could be recovered when: (1) "the losing party has 'acted in bad faith, vexatiously, wantonly or for oppressive reasons'";<sup>43</sup> (2) a party to the action has disobeyed an order of the court;<sup>44</sup> and (3) the litigation has created an "equitable fund."<sup>45</sup> In addition to these three well-settled exceptions, we must add the newly evolved private attorney general exception as well.

As we have previously noted, however, in the area of environmental public interest litigation, this court exception has been dealt a

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41. *Id.* at 259.

42. *Id.* at 260.

43. *Id.* at 258 quoting *F. D. Rich Co. v. Industrial Lumber Co.*, 417 U.S. 116, 129 (1974), see e.g. *Fowler v. Schwarzwald*, 498 F.2d 143, 144 (8th Cir. 1974) (dictum); *Bell v. School Board of Powhatan County Virginia*, 321 F.2d 494, 500 (4th Cir. 1963); *Hall v. Cole*, 412 U.S. 1, 4-5 (1973).

44. *Toledo Scales Co. v. Computing Sale Co.*, 261 U.S. 399, 428 (1923).

45. *Sprague v. Ticonic National Bank*, 307 U.S. 161, 167 (1938).

serious, if not fatal, blow by the Court in *Alyeska*.<sup>46</sup> The development of this exception in the area of environmental litigation will be explored at greater length in a later portion of this comment. For the moment, let us focus on the settled exceptions of the American Rule. For within them it may be possible to frame a cause of action which would allow the private attorney to tax the losing party for the expenses he incurred in bringing the action.

### *The "Bad Faith" Exception*

It is, and has been, a long standing rule of law that a court may penalize bad faith by shifting from the innocent party to the recalcitrant or vexatious party the legal expenses incurred either in bringing or defending the action in controversy.<sup>47</sup> Fee awards arising out of the "bad faith" exception have been awarded at the discretion of the court in a variety of factual settings. For example, in *Universal Oil Co. v. Root Refining Co.*<sup>48</sup> the Court found in the case of fraud:

No doubt, if the court finds after a proper hearing that a fraud has been practiced upon it, or that the very temple of justice has been defiled, the entire cost of the proceedings could justly be assessed against the guilty parties. Such is precisely the situation where "for dominating reasons of justice" a court may assess counsel fees as a part of the taxable costs.<sup>49</sup>

In *City Bank of Honolulu v. Rivera Davila*,<sup>50</sup> the Ninth Circuit upheld a court award of \$15,000.00 in attorneys' fees. Noting that the defendant had "greatly and unnecessarily prolonged the trial by injecting irrelevancies, by refusing to admit facts patently true, and by making statements and later contradicting himself," the court held that this conduct provided "ample basis for awarding attorneys' fees."<sup>51</sup>

The award of attorneys' fees for bad faith conduct on the part of the fraudulent or harassing party carries an implicit caveat which should be recognized by the litigant contemplating the initiation of a public interest environmental action. Either the plaintiff or the defendant may be held guilty of bad faith and thus assessed legal fees

46. 421 U.S. 240 (1975). It is conclusively established within the language of the *Alyeska* Pipeline opinion that the "private attorney general" exception to the general rule against fee shifting only exists where provided for by congressional enactment.

47. The exception was first enunciated in admiralty. See e.g., *The Apollon*, 22 U.S. (9 Wheat.) 362, 379 (1824) (dictum).

48. 328 U.S. 575 (1946).

49. *Id.* at 580.

50. 438 F.2d 1367 (9th Cir. 1971).

51. *Id.* at 1371.

under the doctrine. Thus, in *Gazon v. Vadsco Sales Corp.*,<sup>52</sup> for example, the court allowed a fee award in a stockholder's suit for injunctive relief initiated "without any basis" and brought "solely for the purpose of annoying and harassing the defendant corporation and its business."<sup>53</sup>

The lawyer contemplating the initiation of a public interest lawsuit solely as a dilatory tactic designed to postpone or thwart a proposed development should take heed to the warning issued by the *Gazon* court. In *Gazon*, the court employed strong language in admonishing against just such a tactic. The court termed the plaintiff's action a "fishing expedition" and noted that "every fisherman, including novices, realizes that anyone who contemplates a fishing trip must be prepared to pay the expenses."<sup>54</sup>

The bad faith exception has found acceptance as a vehicle for the recovery of attorneys' fees subsequent to the Supreme Court's decision in *Alyeska*, however. In *Doe v. Poelker*,<sup>55</sup> a case arising out of the Eighth Circuit, the plaintiff brought suit seeking declaratory and injunctive relief against the local hospitals' practice of refusing to perform abortions. The court, after first noting that the *Alyeska Pipeline* opinion had established that the private attorney general exception applied only where specifically provided for by congressional enactment, nevertheless was convinced that an award of attorneys' fees was proper under the bad faith exception. The court took notice of the fact that the defendants, and particularly the mayor of the city, refused to permit abortions for over a year despite the clear pronouncements of the United States Supreme Court in *Roe v. Wade*<sup>56</sup> and *Doe v. Bolton*<sup>57</sup> to the contrary.

Judge Charles R. Richey,<sup>58</sup> writing on the prospects for employing the bad faith exception after the *Alyeska Pipeline* decision, commented:

[G]iven the tone of the decision in *Alyeska*, the court will be on guard to prevent the exceptions from swallowing the rule; in fact, this concern may even result in a narrowing of the exceptions, which to this date have been rather loosely articulated. Furthermore, where

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52. 6 F. Supp. 568 (E.D. N.Y. 1934).

53. *Id.* at 568.

54. *Id.*

55. 515 F.2d 541, 548 (8th Cir. 1975).

56. 410 U.S. 113 (1973).

57. 410 U.S. 179 (1973).

58. Much of what Judge Richey has written and observed on the *Alyeska Pipeline v. Wilderness Society* case was derived from his firsthand knowledge of the litigation. The Honorable Charles R. Richey is currently a Judge of the United States District Court for the District of Columbia, and he enjoyed the unique position of having had the original suit brought before this court.

it appears even to a small degree that the suit was brought or defended in the belief that a position was at least arguable, courts will not be receptive to an application for attorneys' fees. And, finally, courts may also be reluctant to invoke this exception since, to a certain extent, it reflects upon losing counsel.<sup>59</sup>

In the area of public interest environmental litigation, the bad faith exception may be a difficult tool with which to obtain attorneys' fees. The subjective problems inherent in the proof of bad faith conduct may have a limiting effect on the use of the doctrine as a viable means for fee recovery. Indeed, this double-edged exception may have the ultimate effect of operating as a sort of regulating mechanism by which to cause the prospective litigant to weigh the merits of his action.

### *The Award of Attorneys' Fees for Disobedience of a Court Order Exception*

A second, and potentially more fruitful, exception to the American Rule involves the situation where a party has willfully disobeyed an order of the court. In *Toledo Scales Co. v. Computing Sale Co.*,<sup>60</sup> the Court held that it was "in the discretion of the court whose dignity has been offended and whose process has been obstructed" to decide the degree of punishment for contempt in a proceeding involving a party guilty of obstructing the entry of a court decree. In that instance, it was held not to be an abuse of discretion to "impose, as a penalty, compensation for the expenses incurred by the successful party to the decree in defending its rights. . . ."<sup>61</sup>

In a similar factual setting, wherein the prevailing party to a bankruptcy proceeding was forced to initiate civil contempt proceedings in order to preserve and protect his adjudicated right, the court held him to be entitled to a decree "which may include, in the discretion of the court, an award of reasonable attorneys' fees." A major consideration in determining whether attorneys' fees should be awarded was viewed to be the "willfulness inherent in the contemptuous act."<sup>62</sup>

Of particular importance to the public interest environmental attorney, however, is the relative success that the "disobedience of a

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59. Richey, *Attorneys' Fees: A Two-Pronged Problem*, 11 Trial 59, 62-65 (Nov./Dec. 1975).

60. 261 U.S. 399 (1923).

61. *Id.* at 328.

62. *In re Federal Facilities Realty Trust*, 227 F.2d 657, 658 (7 Cir. 1955).

court order" exception has enjoyed in the area of environmental litigation. Situations to which the doctrine manifestly lends itself include those where a recalcitrant administrative agency or a polluting industry have shown a repeated willingness to disobey clear legal mandates emanating either from within or outside the subject court proceedings.<sup>63</sup>

In the case of private corporate defendants, often the guilty polluting party will be similarly guilty of a corporate policy of obstructing or delaying agency efforts to enforce environmental controls. Thus, in the case of *Reynolds Metals Co. v. Lampert*,<sup>64</sup> evidence was introduced at trial which showed that over a period of years the defendant corporation had knowingly discharged fluorides from its aluminum plant despite the fact that control devices were available. The court had no difficulty in affirming an award of punitive damages based on the unusually candid admission of the plant manager that, "It is cheaper to pay claims than it is to control fluorides."<sup>65</sup>

There are, however, certain potential pitfalls to the employment of this "obdurate behavior" exception against a recalcitrant corporate or administrative defendant. These problem areas are particularly foreseeable in the practical, procedural and tactical considerations surrounding the use of the exception. In *Reynolds*, for example, proof of willful disobedience was made infinitely easier by the polluting plant manager's admission of corporate policy for the record. In most cases, the plaintiff's burden of proving willful disobedience or obdurate behavior will be considerably more difficult.<sup>66</sup>

Furthermore, in the case of the administrative defendant, the plaintiff's burden is made even more complicated by the broad range of generally acceptable administrative exercises of discretion and the presumption of the correctness of administrative action.<sup>67</sup>

Despite these potential shortcomings, however, the doctrine poses an interesting alternative avenue for the environmental litigant who seeks to recover attorneys' fees. Although the court in *Alyeska v. Wilderness Society* refrained from employing the rationale, it nevertheless took pains to emphasize that the decision went solely to the issue of the private attorney general theory for fee awards. The Supreme Court noted that their decision in no way affected the

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63. King & Plater *supra* note 1, at 58.

64. 324 F.2d 465 (9th Cir. 1963).

65. *Id.* at 466.

66. King & Plater *supra* note 1, at 58.

67. *Id.* at 59.

"inherent power in the courts to allow attorneys' fees in particular situations."<sup>6 8</sup>

### *The "Equitable Fund" Exception*

The equitable fund exception to the American Rule has, over time, developed into a two-pronged avenue by which attorneys' fees may be obtained. In the first area, that of the establishment of a common fund, the exception has been left virtually unchanged by the language of the Supreme Court in *Alyeska*.<sup>6 9</sup> In the second area, however, that of the creation of a substantial benefit, the Court has made severe inroads into the concept as a viable means for obtaining fees in environmental litigation.

The common fund theory has generally achieved wide judicial acceptance as an exception to the American Rule because the fee awards, at least ostensibly, do not come out of the losing party's pocket. Rather, the award may be described as "monies that are due to others who are benefiting from the action of the plaintiff . . . and who must pay for their benefit." The monies, however, are not taken directly from the benefited class members individually. To do so would be wholly impracticable. Instead, the fee award is taken from the common fund itself and, as a consequence, *in personam* jurisdiction is not necessary.<sup>7 0</sup>

The common fund exception was first enunciated by the United States Supreme Court in *Trustees v. Greenough*.<sup>7 1</sup> In that action, a bondholder acting on behalf of himself and other bondholders enjoying an equal interest in a common fund, successfully rescued that fund from waste arising out of the misconduct of the trustee. The Court held:

[W]here one of many parties having a common interest in a trust fund, at his own expense takes proper proceedings to save it from destruction and to restore it to the purposes of the trust, he is entitled to reimbursement, either out of the fund itself, or by proportional contribution from those who accept the benefit of his efforts<sup>7 2</sup>

That rule has been uniformly adhered to by the United States Supreme Court on numerous occasions.<sup>7 3</sup>

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68. 421 U.S. 240, 259 (1975).

69. See generally *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 259-260 (1975).

70. Richey *supra* note 59, at 65. See also *National Council of Community Health Centers v. Weinberger*, *infra* note 76.

71. 105 U.S. 527 (1881).

72. *Id.* at 532-33.

73. See *Central Railroad & Banking Co. v. Pettus*, 113 U.S. 116 (1885); *Harrison v.*

In a similar factual setting, an individual bank depositor, although not professing to sue as a member of a class, was awarded her costs because her success would have a *stare decisis* effect entitling the other fourteen bank depositors similarly situated to recover out of the specific assets of the same defendant. The Court in *Sprague v. Ticonic National Bank*,<sup>74</sup> wrote:

Whether one professes to sue representatively or formally makes a fund available for others may, of course, be a relevant circumstance in making the fund liable for his costs in producing it. But when such a fund is for all practical purposes created for the benefit of others, the formalities of the litigation—the absence of an avowed class suit or the creation of a fund, as it were, through *stare decisis* rather than through a decree—hardly touch the power of equity in doing justice as between a party and the beneficiaries of his litigation.<sup>75</sup>

Thus, in the eyes of the Court, it was of little consequence that the action was pursued by an individual and not by a member of a class. So long as an easily ascertainable class was the recipient of the benefits of the plaintiff's litigation, the Court held that the expenses could be paid out of the common fund, despite the fact that the proceeds of the fund had not been paid directly into the court.

In the more recent case, *National Council of Community Health Centers, Inc. v. Weinberger*,<sup>76</sup> the court awarded attorneys' fees from an unexpended fund held by H.E.W. Representing one hundred thirty-eight community health centers, the plaintiffs succeeded in setting aside an impoundment order withholding some 52 million dollars which Congress had appropriated for the fiscal year. Although the court first noted that, absent specific statutory language to the contrary, attorneys' fees may not be awarded against the Government,<sup>77</sup> or against officers of the Government relating to their specific duties,<sup>78</sup> it nevertheless held:

The law is settled that where a fund has been created in litigation with the Government, and the Government stands as it does here in the position of a stakeholder required to pay over that fund to

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Perea, 168 U.S. 311, 325-326 (1897); United States Equitable Trust Co., 283 U.S. 783 (1931); *Sprague v. Ticonic National Bank*, 307 U.S. 161 (1939); *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970); *Hall v. Cole*, 412 U.S. 1 (1973).

74. 307 U.S. 161 (1939).

75. *Id.* at 166-167.

76. 387 F. Supp. 991 (D.D.C. 1974).

77. 28 U.S.C. § 2412; *United States v. Chemical Foundation*, 272 U.S. 1, 20 (1926); *United States v. Worley*, 281 U.S. 339 (1930); *Pyramid Lake Paiute Tribe v. Morton*, 499 F.2d 1095 (D.C. Cir. 1974) *cert. denied*, 95 S.Ct. 1351 (1975).

78. See 6 J. Moore, *Federal Practice* (2d ed. 1971), para. 54.75 (4).



qualified beneficiaries, the court may award a portion of it to the attorney for the beneficiaries as "costs between solicitor and client."<sup>79</sup>

Parenthetically, however, it should be noted that the court refused to accept plaintiff's counsel's contingency fee request. The court noted, "the amount released was determined by Congress, not by the litigation. The only contingency was whether or not the plaintiff class would win or lose . . . his work [plaintiff's counsel] contributed in no way to the amount of the award but only to the fact of the award itself."<sup>80</sup>

The equitable fund exception, although still a viable avenue for recovering attorneys' fees after *Alyeska*, is nevertheless of limited value in environmental litigation. Unlike commercial litigation, public interest environmental litigation is not likely to produce any monetary common fund from which a fee award could be drawn. Prior to *Alyeska*, however, the courts were willing to award attorneys' fees to litigants who asserted the public interest and who had performed a substantial benefit to a large class of beneficiaries.

In *Mills v. Electric Auto-Lite Co.*<sup>81</sup> the Supreme Court first enunciated the substantial benefit variation to the equitable fund exception.<sup>82</sup> The substantial benefit doctrine arose out of an action involving a minority shareholder's derivative suit challenging the methods and manner in which the stockholder's votes were being solicited. The allegedly misleading proxy statement was made by the management of the recently merged corporation in violation of section 14 (a) of the Securities Exchange Act of 1934.<sup>83</sup> In dealing with the issue of the award of interim attorneys' fees, the Court was initially confronted with its own language some three years earlier denying a fee award in a similar situation.

In *Fleischmann Distilling Corp. v. Maier Brewing Co.*,<sup>84</sup> the Supreme Court declined to award attorneys' fees in an action arising out of the infringement of a trademark under the Lanham Act.<sup>85</sup> The Court concluded that, "Congress intended § 35 of the Lanham Act to mark the boundaries of the power to award monetary relief in cases arising under the Act. A judicially created compensatory

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79. 387 F. Supp. 991, 994 (1974).

80. *Id.* at 995.

81. 396 U.S. 375 (1970).

82. The "substantial benefit" test was first announced in the earlier decision of *Bosch v. Meeker Cooperative Power and Light Ass'n.*, 257 Minn. 362, 101 N.W.2d 423 (1960).

83. 15 U.S.C. § 78n(a) (1970).

84. 386 U.S. 714 (1967).

85. 15 U.S.C. § 1117 (1970).

remedy in addition to the express statutory remedies is inappropriate."<sup>86</sup>

The *Mills* Court, noting that its earlier decision was based on the fact that "Congress had meticulously detailed the remedies available,"<sup>87</sup> looked to the statutory language of the Securities Exchange Act. In contrast to the Lanham Act, the Court concluded "we cannot fairly infer from the Securities Exchange Act of 1934 a purpose to circumscribe the Court's power to grant appropriate remedies."<sup>88</sup> Noting that the development of the common fund exception had contemplated the prevention of unjust enrichment by beneficiaries at the expense of the plaintiff, the Court took pains to emphasize that equity did not distinguish between monetary and non-monetary benefit. The *Mills* Court acknowledged that litigation could provide a substantial benefit on a class whether or not the benefit was pecuniary in nature.<sup>89</sup> Thus, the Court was able to hold that a private stockholder action involved in vindicating the statutory policy of Congress justified an award of attorneys' fees to be paid from the larger class of shareholders who benefited by the plaintiff's action.<sup>90</sup>

The doctrine announced by the Supreme Court in *Mills* and later affirmed in *Hall v. Cole*,<sup>91</sup> actually was a hybrid in that it contained elements of the private attorney general rationale, as well as those found in the "substantial benefit" concept. Indeed, the effects of both doctrines are quite similar. Yet, while the two exceptions are fundamentally the same in their net result of shifting the fee burden, their respective rationales are quite different. While the substantial benefit rule taxes the class who benefits from the initiation of the action, the private attorney general theory taxes the defendant because the plaintiff has vindicated a strong public policy and similarly performed a public service.<sup>92</sup> The advantage of the private attorney general theory of fee recovery to the prospective environmental litigant over the substantial benefit approach, which requires some finding as to the class benefited by the plaintiff's environ-

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86. 386 U.S. 714, 721 (1967).

87. 396 U.S. 375, 391 (1970).

88. *Id.* at 391.

89. *Id.* at 392. The United States Supreme Court noted, "The fact that this suit has not yet produced, and may never produce, a monetary recovery from which the fees could be paid does not preclude an award based on this rationale."

90. *Id.* at 396.

91. 412 U.S. 1 (1973), has been followed in other, more recent labor cases. See e.g. *Yablonski v. United Mine Workers*, 466 F.2d 424 (D.C. Cir. 1972), cert. denied, 412 U.S. 918 (1973).

92. Note, *Awarding Attorney and Expert Witness Fees in Environmental Litigation*, 58 Cornell L. Rev. 1222, 1238 (1973).

mental action, is that the private attorney general theory allows for direct recovery. It was just this reasoning that contributed to the increased use of the private attorney general rationale in fee shifting awards arising out of public interest environmental litigation.

#### DEVELOPMENT OF THE PRIVATE ATTORNEY GENERAL EXCEPTION

The "private attorney general" exception first appeared as a vehicle for fee shifting in the area of civil rights and, in *Newman v. Piggie Park Enterprises*,<sup>93</sup> the exception was given the status of black letter law by the United States Supreme Court.

*Newman v. Piggie Park Enterprises* involved a successful suit to enjoin racial discrimination at a series of drive-in restaurants. Rejecting a narrow lower court interpretation, the Supreme Court held that the plaintiffs were entitled to an award of "reasonable" counsel fees at the Court's "discretion."<sup>94</sup>

In so holding, the Supreme Court looked to the legislative history of the Civil Rights Act of 1964. The Court noted that suits initiated under Title II of the Act were "private in form only."<sup>95</sup> Since a plaintiff bringing an action under Title II could not recover damages but only injunctive relief, he was not acting for himself but rather "vindicated a policy that Congress considered of the highest priority."<sup>96</sup> The Court reasoned that Congress had enacted the provision for counsel fees "to encourage individuals injured by racial discrimination to seek judicial relief under Title II."<sup>97</sup>

The private vindication of Congressional policies of the highest priority received recognition in other civil rights actions involving statutes that were silent as to the award of counsel fees. In *Lee v. Southern Home Sites Corp.*,<sup>98</sup> the issue before the Fifth Circuit was whether a defendant who refused to sell lots to Negroes on the same terms as he sold lots to whites was liable to the plaintiff for counsel fees, when 42 U.S.C. 1982 was silent on the issue. The court, recognizing the importance of the rights being asserted,<sup>99</sup> was able to conclude:

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93. 390 U.S. 400 (1968).

94. "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 attorneys' fee as a part of the costs, and the United States shall be liable for the costs the same as a private person." 42 U.S.C. § 2000a-3(b).

95. 390 U.S. 400, 401 (1968).

96. *Id.* at 402.

97. *Id.*

98. 444 F.2d 143 (1971).

99. *Id.* at 147. The court evaluated the factors relied on in *Piggie Park Enterprises* and concluded, "the policy against discrimination in the sale or rental of property is equally strong."

Section 1982 is not a statute providing detailed remedies, and thus the policy of effectuating congressional purpose does not militate against an award of attorney's fees. Additionally, here as in *Mills* there is a strong congressional policy behind the rights declared in 1982. Awarding attorney's fees to successful plaintiffs would facilitate the enforcement of that policy through private litigation.<sup>100</sup>

In the more recent case of *Fowler v. Schwarzwald*,<sup>101</sup> plaintiffs successfully sought injunctive relief against the racially discriminatory practices of testing and hiring applicants for a municipal fire department under Sections 1981 and 1983.<sup>102</sup> The court, after taking judicial notice of the trend toward expanding attorneys' fee awards in civil rights litigation emanating from both the Supreme Court and the lower federal courts,<sup>103</sup> concluded that such a suit "clearly furthers the will of congress that such discrimination should be eliminated." The court further noted that Congress had already contemplated attorney fee awards in certain employment discrimination provisions found contained under Title VII of the Civil Rights Act of 1964.<sup>104</sup> Thus, a fee award was deemed to be an "effective device in furthering its [Congress'] policy that there be no racial discrimination in employment."<sup>105</sup>

The private attorney general rationale employed by both the Supreme Court and the lower federal courts in awarding attorneys' fees in civil rights litigation soon found its way into the area of public interest environmental litigation. Thus, in 1972, the first application of the private attorney general exception to the American Rule in environmental litigation appeared in *La Raza Unida v. Volpe*.<sup>106</sup>

The suit involved a class action seeking to enjoin the construction of a California highway project<sup>107</sup> on the grounds that the defendants failed to meet federal environmental and housing assistance standards.<sup>108</sup>

#### In awarding attorneys' fees under the private attorney general

100. *Id.* at 145.

101. 498 F.2d 143 (1974).

102. 42 U.S.C. § 1981, § 1983 (1964).

103. 498 F.2d 143, 145 (1974).

104. See Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* (1964).

105. 498 F.2d 143, 146 (1974).

106. 57 F.R.D. 94 (N.D. Cal. 1972).

107. 337 F. Supp. 221 (N.D. Cal. 1971).

108. Defendants, California Department of Highways, Department of Public Works and the Chief Highway Engineer for the State of California, were all named for their failure to comply with § 4(f) of the Department of Transportation Act of 1966 dealing with housing displacement and relocation. Although these statutes are silent as to the award of attorneys' fees, the court nevertheless held that the plaintiffs were entitled to a reasonable award. 57 F.R.D. 94, 101 (N.D. Cal. 1972).

exception, the *La Raza* court cited three criteria which guided its decision. They included: (a) "the effectuation of strong Congressional Policies";<sup>109</sup> (b) "the number of people who have benefited from plaintiffs' efforts";<sup>110</sup> and (c) "the necessity and financial burden of private enforcement."<sup>111</sup> Concluding that the plaintiffs had successfully met these three criteria, the court exercised its "equitable powers" to award attorney and witness fees. The court noted that the fee award would come from the state treasury but it was nevertheless able to conclude that the fee award matched "to the extent that the Court's jurisdiction over the matter makes possible, the costs and the benefits of litigation."<sup>112</sup>

In *Natural Resources Defense Council, Inc. v. Environmental Protection Agency*,<sup>113</sup> decided one year later, the First Circuit was asked to exact attorneys' fees from an agency of the Federal Government. The petitioners had successfully obtained orders requiring the Environmental Protection Agency to comply with certain of its obligations under the Clean Air Amendments of 1970.<sup>114</sup>

The court took judicial notice of the statutory goals of the Clean Air Amendments and the fact that the petitioners were forced to activate "the traditional adversary machinery for bringing issues before the court"<sup>115</sup> in order to facilitate this stated policy goal. The court reasoned, "the potential award of attorneys' fees was a logical complement to the right to bring citizen suits."<sup>116</sup> In holding that an award of attorneys' fees was justified, the court chose not to pass on the question of sovereign immunity and the recovery of fees from the Government. The court noted with approval that the wording of the Clean Air Amendments contained statutory provisions authorizing the award of fees.<sup>117</sup> Looking to the public service that the petitioners performed, the court observed:

As a result [of the initiation of the Plaintiffs' action] policies of the EPA have been corrected and others, upheld, have been removed from the arena of dispute. Presumptively the public has benefitted—not only in Rhode Island and Massachusetts but nationally, as neither air pollution nor the movement of citizenry respect state boundaries, and some of the legal principles at issue have national as

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109. *Id.* at 99.

110. *Id.*

111. *Id.* at 100.

112. *Id.* at 101.

113. 484 F.2d 1331 (1st Cir. 1973).

114. Clean Air Amendments of 1970, 42 U.S.C. §§ 1857c-5 *et seq.* (1970).

115. 484 F.2d 1331, 1334 (1st Cir. 1973).

116. *Id.* at 1337.

117. *Id.* at 1335.

well as regional import. Petitioners have thus helped to enforce, refine and clarify the law. They can be said to have assisted the EPA in achieving its statutory goals.<sup>118</sup>

Thus, the court was able to hold that "to allocate petitioners' reasonable costs and attorneys' fees is to spread them ultimately among the taxpaying public, which receives the benefit of this litigation."<sup>119</sup>

As we have seen from our analysis of *La Raza* and *National Resources Defense Council*, the federal courts were willing to award attorneys' fees, under the private attorney general exception, against state agencies and officials and against agencies of the Federal Government. In *Wilderness Society v. Morton*,<sup>120</sup> the District of Columbia Circuit Court of Appeals was asked to extend the fee shifting exception still further to include awards of attorneys' fees as against private individuals.

In *Wilderness Society v. Morton*, plaintiff's suit to recover attorneys' fees was based on claims brought under the Mineral Leasing Act and under the National Environmental Policy Act.<sup>121</sup> The Court of Appeals, *per* Judge Skelly Wright, adopted the private attorney general exception to the traditional rule against fee shifting and held the defendant, Alyeska Pipeline Service Company, liable for one half the reasonable value of the services rendered to the plaintiff by counsel.<sup>122</sup> Noting that 28 U.S.C. § 2412 operated as a bar to the imposition of an attorneys' fee award on the federal defendants, the court held that the plaintiff, Wilderness Society, was to assume the other half of the total cost of the litigation. In view of the size and expense of the award represented by even one half of the total cost of the litigation, Alyeska Pipeline Service Company appealed the decision of the Circuit Court of Appeals.<sup>123</sup> The United States Supreme Court granted certiorari<sup>124</sup> in order that the issue of whether such an award of attorneys' fees was appropriate could be resolved.

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118. *Id.* at 1334.

119. *Id.*

120. 495 F.2d 1026 (D.C. Cir. 1974).

121. See *supra* at note 9. Plaintiffs' suit for declaratory and injunctive relief brought under the Mineral Leasing Act, § 28 as amended, 30 U.S.C. § 185 (1971) was brought on the ground that the statutory pipeline right-of-way width provision had been violated. A second cause of action, alleging insufficiency in the preparation of the environmental impact statement required under the National Environmental Policy Act of 1969, §§ 2 *et seq.*, 42 U.S.C. §§ 4321 *et seq.* (1973) was subsequently mooted by the Congressional passage of the Trans-Alaska Pipeline Authorization Act, 203 (c,d), 43 U.S.C.A. § 1652 (c,d) (1976).

122. 495 F.2d 1026, 1028 (D.C. Cir. 1974).

123. Defendant, Alyeska Pipeline Service Company's liability for one half of the Wilderness Society's bill of costs included one half liability for the total of 4,455 hours of attorneys' time spent on the litigation. See 421 U.S. 240, 245 at note 13 (1975).

124. *Cert. granted*, 419 U.S. 823 (1974).

In *Alyeska Pipeline Service Co. v. Wilderness Society*, the Court chose to defer to Congress for statutory authority to award attorneys' fees against a private individual. The Court noted that to hold otherwise would "make major inroads on a policy matter that Congress has reserved for itself."<sup>125</sup> The Supreme Court, after an extensive examination of the development of the American Rule and the rationale underlying the traditional policy against fee shifting, concluded:

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 or to pick and choose among plaintiffs and the statutes under which they sue and to award fees in some cases but not in others, depending upon the court's assessment of the importance of the public policies involved in particular cases. Nor should the federal courts purport to adopt on their own initiative a rule awarding attorneys' fees based on the private attorney general approach when such judicial rule will operate only against private parties and not against the Government.<sup>126</sup>

In view of the unmistakably clear pronouncement of the United States Supreme Court, it appears that, at least in the area of public interest litigation against a private individual or concern, the American Rule is going to be with us for some time. However, as Judge Richey observed, "there are avenues for obtaining attorneys' fees: by exception to the Rule and by statute." He also cautions, however, that "counsel will have to be imaginative and innovative."<sup>127</sup> Let us then examine some of the avenues for the recovery of attorneys' fees that remain available after *Alyeska*.

#### ALTERNATIVES FOR THE RECOVERY OF ATTORNEY'S FEES AFTER *ALEYSKA* v. *WILDERNESS SOCIETY*

As we have noted from the preceeding discussion of the equitable powers of the court to award attorney and expert witness fees, there appears to be little help to be obtained from the courts in recovering fees in public interest environmental litigation. However, in addition to the court's equitable powers to award fees, in limited circumstances, Congress has provided a variety of statutory fee provisions

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125. 421 U.S. 240, 269 (1975).

126. *Id.*

127. Richey, *supra* note 59, at 66.

involving a multitude of areas, including the environment. In these instances, the fee awards may be made either at the discretion of the court<sup>128</sup> or mandated by the language of the statute.<sup>129</sup>

The *Alyeska Pipeline* decision may be read as an invitation for Congress to act on the issue of fee awards. Indeed, in this area Congress has already begun to respond.

On January 26, 1976, Senator James L. Buckley (C-R-N.Y.) introduced S. 2871, The Equal Access to Courts Act of 1976, for the stated purpose of "ending the injustice of requiring successful parties in such actions [actions between private parties and the government] to bear their legal expenses without reimbursement." The scope of the bill contemplates the reimbursement of legal fees to a prevailing party in both criminal and civil actions involving private parties and the Federal Government, as well as in both civil and criminal actions initiated by the Federal Government and by administrative agencies. The bill, which seeks to amend the existing bar to the recovery of attorneys' fees contained in 28 U.S.C. § 2412,<sup>130</sup> like its predecessor S. 2530, has been referred to the Senate Judiciary Committee.<sup>131</sup>

It should be noted, however, that this statutory provision is designed to compensate the prevailing party only in litigation involving private parties and the Federal Government. With few exceptions, the American Rule against fee shifting remains the law of the land with reference to actions between private parties.<sup>132</sup>

Some states, however, have fee award provisions which are not found at the Federal level. A wise attorney would do well to examine his state fee recovery statutes. In diversity actions, this precaution may be quite helpful in framing causes of action so as to capitalize on the fee award provisions.

In Alaska, for an example, except where otherwise provided by

128. An example of a statute containing a discretionary fee award provision may be found in the Securities Act of 1933 and the Securities Exchange Act of 1934. *See also supra* note 83.

129. An example of a mandatory fee award provision may be seen in Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5K (1974). *See also* 95 S.Ct. 1624.

130. Earlier, on October 20, 1975, Senator Buckley introduced S. 2530, The Equal Access to Courts Act of 1975. The Bill provided for reimbursement of legal fees to prevailing parties in civil litigation involving the government and private parties. The Equal Access to Courts Act of 1976, S. 2871, extends S. 2530 to include both criminal and civil actions initiated by the federal government and by administrative agencies.

131. At present there are nine bills pending in the Congress addressing themselves to the problem of reimbursement of attorneys' fees and costs in suits between the Federal government and companies or individuals.

132. It should be noted, however, that the "American Rule" does not stand as a bar against the award of punitive damages in environmental tort actions involving private parties. *See Reynolds Metals Co., vs. Lampert, supra* at note 64.



statute "the supreme court shall determine what costs, if any, including attorneys' fees, shall be allowed the prevailing party in any case."<sup>133</sup> In addition, the Alaska Code of Civil Procedure provides that "unless the court, in its discretion otherwise directs," a fixed schedule of attorneys' fees will be followed for the party recovering a money judgment.<sup>134</sup> This Alaskan fixed schedule for the recovery of fees is a rarity within the United States but it appears to be one alternative method by which to eliminate the ancillary proceedings which occur under the English system solely for the purpose of adjudicating a proper attorneys' fee award.<sup>135</sup>

The future of the American Rule after *Alyeska Pipeline Service Co. v. Wilderness Society* will be shaped by the Congress, state legislatures and perhaps even federal and state administrative agencies through their rulemaking powers. The lesson to be learned from the Supreme Court, at least for the moment, is that the federal courts are no longer at liberty to award attorneys' fees at their discretion. Therefore, the public interest environmental litigant would do well to research the available existing avenues for obtaining his attorneys' fees. The Supreme Court has issued its pronouncement on the matter of fee shifting. It now remains to be seen how the Congress and the legislatures of the states will respond.

FREDRICK W. LEDBETTER

133. Alas. Stat. Sec. 09.60.010 (1973). Costs allowed prevailing party.

Except as otherwise provided by statute, the supreme court shall determine by rule or order what costs, if any, including attorney fees, shall be allowed the prevailing party in any case.

134. Alas. R. Civ. P. 82(a) Allowance to Prevailing Party as Costs.

(1) Unless the court, in its discretion, otherwise directs, the following schedule of attorney's fees will be adhered to in fixing such fees for the party recovering any money judgment therein, as part of the costs of the action allowed by law:

#### ATTORNEY'S FEES IN AVERAGE CASES

	Contested	Without Trial	Non-Contested
First \$ 2,000	25%	20%	15%
Next \$ 3,000	20%	15%	12.5%
Next \$ 5,000	15%	12.5%	10%
Over \$10,000	10%	7.5%	5%

Should no recovery be had, attorney's fees for the prevailing party may be fixed by the court as a part of the costs of the action, in its discretion, in a reasonable amount.

(2) In actions where the money judgment is not an accurate criteria for determining the fee to be allowed to the prevailing side, the court shall award a fee commensurate with the amount and value of legal services rendered.

(3) The allowance of attorney's fees by the court in conformance with the foregoing schedule is not to be construed as fixing the fees between attorney and client.

135. See *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 717 (1967). See also text *supra* at note 26.