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Civil Rights - No Private Attorney General Exception to the American Rule in New Mexico: New Mexico Right to Choose/ National Abortion Rights Action League v. Johnson

Allison Crist

CIVIL RIGHTS—No Private Attorney General Exception to the American Rule in New Mexico: *New Mexico Right to Choose/National Abortion Rights Action League v. Johnson*

I. INTRODUCTION

In *New Mexico Right to Choose/National Abortion Rights Action League v. William Johnson* (*Johnson II*),[1] the New Mexico Supreme Court refused to adopt the private attorney general doctrine, which allows a party who prevailed on a state constitutional rights claim to recover attorney's fees.[2] The court held that adoption of the private attorney general doctrine would not be consistent with New Mexico's strict adherence to the American rule and its policies.[3]

Part II of this Note begins with a factual description of the *Johnson* case. Part III discusses the historical background of the American rule and the private attorney general doctrine in American courts. Finally, part IV analyzes the *Johnson* court's reasoning and explores the implications of this decision on the future of litigation regarding state constitutional rights in New Mexico.

II. STATEMENT OF THE CASE

The plaintiffs in this case prevailed in the district court when they challenged a Human Services Department regulation restricting the use of Medicaid funds to pay for abortions. The district court decision was appealed and was affirmed by the New Mexico Supreme Court in a groundbreaking application of New Mexico's Equal Rights Amendment in *New Mexico Right to Choose/NARAL v. Johnson* (*Johnson I*).[4] The New Mexico Supreme Court held that the Department's regulation violated New Mexico's Equal Rights Amendment "because it result[ed] in a program that does not apply the same standard of medical necessity to both men and women, and there is no compelling justification for treating men and women differently with respect to their medical needs in this instance."[5]

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1. 127 N.M. 654, 986 P.2d 450 (1999).
2. *Id.* at 662, 986 P.2d at 458.
3. *Id.*
4. 126 N.M. 788, 791, 975 P.2d 841, 844 (1998), *cert. denied*, Klecan v. New Mexico Right to Choose/NARAL, 526 U.S. 1020 (1999). The regulation prohibited the use of state funds to pay for abortions for Medicaid-eligible women except when necessary to (1) save the life of the mother, (2) to end an ectopic pregnancy, or (3) when the pregnancy resulted from rape or incest. The district court permanently enjoined the Secretary of Human Services from enforcing this rule. Under the district court's order, the Human Services Department "must allow the use of state funds to pay for abortions for Medicaid-eligible women when they are medically necessary." *Id.* at 791, 975 P.2d at 844. The Secretary of Human Services appealed the district court's decision and the court of appeals certified the appeal to the New Mexico Supreme Court because the issue presented a significant question of law under the New Mexico Constitution. *Id.* at 791, 975 P.2d at 844.
5. 126 N.M. at 791, 975 P.2d at 844. The New Mexico Supreme Court upheld the district court's decision based on the Equal Rights Amendment of the New Mexico State Constitution. *Id.* at 798, 975 P.2d at 851 (citing N.M. CONST. art. II, § 18 "No person shall be deprived of life, liberty or property without due process of law; nor shall any person be denied equal protection of the laws. Equality of rights under law shall not be denied on account of the sex of any person."). *See also* Linda M. Vanzi, *Freedom at Home: State Constitutions and Medicaid Funding for Abortions*, 26 N.M. L. REV. 433, 452-53 (1996) (discussing how states and the federal government have dealt with Medicaid funding of abortions).

After succeeding on the merits in the district court, the plaintiffs moved for an award of attorney's fees under both the private attorney general doctrine and the bad faith exceptions to the American rule.[6] The trial court denied the motion and its denial was challenged on cross-appeal, which was stayed by the supreme court pending resolution of the merits.[7] After entry of its opinion in *Johnson I*, the New Mexico Supreme Court accepted briefs from the parties and ruled on the issue of attorney's fees. That ruling, *Johnson II*, is the subject of this Note.[8]

In *Johnson II*, the plaintiffs argued only that the New Mexico Supreme Court should adopt the private attorney general doctrine exception to the American rule, which would allow private plaintiffs' attorneys to recover fees in cases where, as a result of their efforts, state constitutional rights are protected to the benefit of a large number of people.[9] This was the first consideration of the private attorney general doctrine in New Mexico. The New Mexico Supreme Court ruled against the plaintiffs and refused to adopt the private attorney general doctrine for New Mexico.[10]

III. BACKGROUND

A. *The American Rule*

The history of the American rule regarding attorney's fees is infused with arguments underlying the theory of American democracy. The American rule, where the losing party in litigation is not liable for the winner's fees, was introduced in the earliest days of the founding of the United States in opposition to the English rule, where the losing party pays the winner's fees.[11] It is believed that the American rule reflects the "spirit of individualism in frontier societies" by encouraging open access to courts and not deterring wronged parties from filing suit because of the risk of having to pay opposing parties' attorney's fees if unsuccessful.[12] Recent court decisions have justified continued adherence to the American rule for three main reasons.[13] First, courts explain that since litigation is risky, a party should not be penalized for participating in a lawsuit.[14] Second, courts fear that the poor would be disproportionately affected by fee shifting because they have more to lose if forced to pay their opponents' legal fees.[15] Finally, some courts have determined that court

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6. *See* discussion of the private attorney general doctrine and bad faith exceptions *infra* parts III.B.2 and 3.

7. 126 N.M. at 793, 975 P.2d at 846.

8. 127 N.M 654, 986 P.2d at 450.

9. 127 N.M. at 657, 986 P.2d at 453.

10. 127 N.M. at 663, 986 P.2d at 459.

11. *See* Dan B. Dobbs, LAW OF REMEDIES § 3.10(1), at 387-89 (2d ed. 1993). *See also* Arcambel v. Wiseman, 3 U.S. (3 Dall.) 306 (1796) (showing that the American rule was well established early in America's history). *Cf.* Edward F. Sherman, *From "Loser Pays" to Modified Offer of Judgment Rules: Reconciling Incentives to Settle with Access to Justice*, 76 TEX. L. REV. 1863, 1871-72 (1998) (critiquing courts' continued adherence to the American rule and suggesting adoption of a modified English rule to ameliorate the English rule's effects on indigent litigants and the access to the courts issue).

12. Sherman, *supra* note 11, at 1863-64.

13. *See* Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 718 (1967) (explaining American courts' continued reliance on the American rule).

14. *Id.* at 718.

15. *Id.*

costs required in order to determine appropriate fee awards burden judicial processes, since the courts must review evidence regarding time spent on cases and reasonable fee calculations.[16] The American rule, therefore, is rooted in public policies that are important to America's legal history.[17]

B. Exceptions to the American Rule

Despite this strong attachment to the American rule, a prevailing party can obtain fee awards in American courts if allowed by legislation (statutory exceptions) or equitable court doctrines. Fee shifting statutes exist at both the federal and state levels, usually apply only to prevailing plaintiffs, and have been enacted primarily to provide an incentive for people to protect a statutory or constitutional right.[18] Courts also use equitable doctrines to award attorney's fees to punish bad faith behavior or when litigation protects a common fund, and some courts award attorney's fees when a party litigates to protect public interests or constitutional rights.

1. Statutory Exceptions

At the federal level, fee-shifting provisions have been included in many diverse statutes such as the Freedom of Information Act[19] and the Fair Labor Standards Act.[20] The primary federal fee shifting statute is the Civil Rights Attorney's Fees Awards Act.[21] Passed in 1976, section 1988 awards fees for successful suits under the civil rights statutes, primarily under section 1983, against the state or a person acting under the authority of state law.[22] In passing section 1988, Congress recognized the importance of attorney fee awards in encouraging access to the courts for federal civil rights litigation.[23] In cases combining section 1983 and state law claims, the approved federal practice is to award attorney's fees pursuant to section 1988, as long as plaintiff's section 1983 claims are substantial.[24] While some state courts follow the generous federal practice of awarding fees even when the plaintiff

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16. *Id.*

17. Sherman, *supra* note 11, at 1863-64. Supporters of the English rule argue that it discourages the bringing of frivolous lawsuits and that the disparate impact of the English rule is lessened with free legal aid and tax laws that reduce the burden on the losing party. *Id.* at 1871-72. Similarly, if a litigant is poor, and in effect "judgment proof," the risk of having to pay another party's attorney's fees may not be a deterrent to bringing the suit. *Id.* at 1872. Nevertheless, the "access to the courts" policy is so embedded in the American rule that it is almost always considered by courts when they are faced with arguments for adopting American rule exceptions.

18. Sherman, *supra* note 11, at 1866.

19. 5 U.S.C. § 552(a)(4)(E) (1994).

20. 29 U.S.C. § 216(b) (1998).

21. 42 U.S.C. § 1988 (1994). *See* discussion *infra* part III.B.3.

22. The relevant portion of 42 U.S.C. § 1988(b), provides: "In any action or proceeding to enforce a provision of sections 1981, 1981(a), 1982, 1983, 1985 and 1986 of this title...the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

23. The purpose of 42 U.S.C. § 1988 is "to promote compliance with civil rights legislation by enabling citizens to bring civil rights claims and by encouraging attorneys to accept such cases." Section 1988 has been applied broadly: *See* Maine v. Thiboutot, 448 U.S. 1, 11 (1980) (holding that the fee provision is part of the section 1983 remedy whether the action is brought in federal or state court.); Williams v. Hanover Housing Authority, 113 F.3d 1294, 1299 (1st Cir. 1997) (holding that prevailing parties were entitled to attorney's fees under section 1988 even though the grounds on which they won rested on state rather than federal grounds).

24. *See* Jennifer Friesen, STATE CONSTITUTIONAL LAW: LITIGATING INDIVIDUAL RIGHTS, CLAIMS, AND DEFENSES ¶ 10.01, at 10-3 (2d ed. 1995).

has succeeded on state law grounds, other state courts reject the section 1988 claim for fees if the federal claim was left unadjudicated or was rejected.[25]

A plaintiff in state court without federal claims may still recover attorney's fees through state fee shifting provisions or statutes. For example, New Mexico provides for attorney's fees in its Human Rights Act and in statutes governing unfair trade practices and insurance bad faith claims.[26] Massachusetts and Connecticut also have fee-shifting provisions in their civil rights acts allowing claims for narrowly defined classes of litigants, and Oregon has an independent fee shifting statute that provides fees for narrowly defined constitutional claims.[27] California has a broad independent fee shifting statute that makes fees available in any case "result[ing] in the enforcement of an important right affecting the public interest."[28] Some state statutes also allow prevailing defendants to recover attorney's fees, however these instances are usually limited to frivolous or bad faith claims.[29] By enacting fee-shifting provisions to encourage litigation, state legislators have been able to choose which statutory rights and policies warrant greater protection. In cases without statute-based claims, litigants must turn to the court's equitable common law powers for fee awards.

2. General Equitable Common Law Exceptions

All states recognize equitable doctrines giving courts authority to adopt exceptions to the American rule and award fees absent a statutory provision.[30] One of these doctrines is the bad faith exception, where either party to a lawsuit can recover attorney's fees when the other party acts "in bad faith, vexatiously, wantonly, or for oppressive reasons" in the course of the litigation.[31] Awarding attorney's fees under this exception serves to punish and deter bad faith behavior, and therefore keeps the courts open to those who bring suits against parties who may

25. *Id.* For example, in Chapman v. Luna, 102 N.M. 768, 770, 701 P.2d 367, 369 (1985) plaintiffs were not entitled to attorney's fees under section 1988 when they did not specifically plead a federal equal protection or section 1983 claim and prevailed on state constitutional grounds.

26. N.M. Stat. Ann. § 28-1-13(D) (1978) (Human Rights Act); N.M. STAT. ANN. § 57-12-10(c) (1978) (Unfair Trade Practices); N.M. STAT. ANN. § 59A-16-30 (1978) (Insurance Bad Faith). The New Mexico Human Rights Act is much more limited than the federal Civil Rights Statutes because it only applies to discriminatory practices by persons, employers, and other entities on the basis of "race, age, religion, color, national origin, ancestry, sex, physical or mental handicap or serious medical condition." N.M. STAT. ANN. § 28-1-7 (1978). It does not apply to causes of action arising under the New Mexico Constitution, such as equal protection or due process claims, and thus is not a substitute for the full protection of civil rights provided for by the federal Civil Rights Statutes.

27. CONN. GEN. STAT. ANN. § 46a-58 (West 1995) (attorney's fees allowed in action for injury to person or property that arises out of a deprivation of rights secured by the Connecticut Constitution on account of membership in named protected classes); Massachusetts Civil Rights Act, MASS. GEN. LAWS ANN. ch. 12, § 11(I) (West 1996) (allowing fees for plaintiffs in cases where state constitutional rights have been violated by threats, intimidation, or coercion); OR. REV. STAT. § 20.107 (1988) (providing for prevailing party attorney's fees in cases involving discrimination under state statute, regulation, or state constitutional provision).

28. Cal. Civ. Pro. Code § 1021.5 (1980). *See* private attorney general doctrine discussed *infra* part III.C.3.

29. Friesen, *supra* note 24, ¶ 10.02, at 10-6.

30. Friesen, *supra* note 24, ¶ 10.03, at 10-6 to 10-9.

31. Hall v. Cole, 412 U.S. 1, 5 (1973) (explaining the use of the bad faith doctrine in federal courts). *See also* State v. Baca, 120 N.M. 1, 6, 9, 896 P.2d 1148, 1153, 1156 (1995) (explaining New Mexico's long-time recognition of the bad faith exception to the American rule).

be inclined to that sort of behavior.[32] The United States Supreme Court has adopted the bad faith doctrine for federal courts in order to vindicate judicial authority without the more drastic sanctions of contempt of court and to make the prevailing party whole for expenses caused by the opponent's bad faith actions.[33]

Most states also allow attorney's fees under the common fund, substantial benefit, and private attorney general doctrines. The common fund doctrine was recognized in the United States as early as 1881 and has been adopted by almost every state.[34] It allows attorney's fees to be awarded from a common fund when a party with established rights to the fund litigates in order to preserve the fund. Some examples include class actions for money damages and suits protecting trust funds, corporations, and estates. This doctrine explicitly encourages access to the courts to protect the interests of parties who may not otherwise be able to protect their portion of the common fund. It has a restitutionary purpose since the people who share in the fund would be unjustly enriched if they received benefits without paying fees.[35]

An extension of the common fund doctrine is the substantial benefit doctrine, where attorney's fees are recoverable from persons who share in a non-monetary benefit.[36] Since these benefits are intangible, the fee award is generally applied to the defendant, who then passes on the costs to the benefited group indirectly through membership fees or reduced dividends for shareholders.[37]

3. The Private Attorney General Exception

Another equitable attorney fee doctrine is the private attorney general doctrine, where plaintiffs recover attorney's fees when their litigation protects important societal interests. The private attorney general exception to the American rule is different from the substantial benefit doctrine in that a party acting as a private attorney general protects public interests or constitutional rights for society in general, while the substantial benefit doctrine establishes or protects rights of a limited group. Like the substantial benefit doctrine, the payment of fees under the private attorney general doctrine is imposed on the defendant, generally the state or

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32. Sherman, *supra* note 11, at 1866.

33. Chambers v. Nasco, Inc., 501 U.S. 32, 46 (1991) (explaining that the federal courts allow recovery of attorney's fees where a party has perpetrated a fraud on the court or has interfered with the litigation).

34. Trustees v. Greenough, 105 U.S. (15 Otto) 527, 532-33 (1881) (adopting the common fund doctrine); Johnny Parker, *The Common Fund Doctrine: Coming of Age in the Law of Insurance Subrogation*, 31 IND. L. REV. 313, 337 (1998) (noting that all states except New Hampshire and Wyoming have adopted the doctrine).

35. Dobbs, *supra* note 11, § 3.10(2), at 395. Beneficiaries are not required to accept the benefit, and therefore the common fund rule does not violate the restitution rule that "one person may not foist a benefit upon another and then demand payment, because to do so would interfere with the recipient's rights of choice and self-determination." *Id.*

36. *Id.* § 3.10(2), at 396. *See, e.g.*, Hall v. Cole, 412 U.S. at 8-9 (explaining that a union member who successfully sued to retain his membership in the union after being expelled for comments made against the leadership established free speech rights for union members generally and therefore the membership should share in paying fees).

37. Dobbs, *supra* note 11, § 3.10(2), at 396-97. While the substantial benefit doctrine might seem to apply in constitutional litigation like *Johnson II* where a group shares in a non-monetary benefit, that claim was not made in *Johnson II*, and the doctrine was subsequently rejected by the New Mexico Supreme Court in American Civil Liberties Union of New Mexico v. City of Albuquerque, 128 N.M. 315, 325, 992 P.2d 866 (1999) (refusing to adopt the substantial benefit doctrine where plaintiffs prevailed on state constitutional and statutory grounds on a challenge of the city's juvenile curfew ordinance and safe teen operation program).

a large public entity, who then passes on the cost of the attorney fee award to the benefited people through taxes or increased fees.[38] Despite the similarities between the private attorney general and other equitable exceptions to the American rule, the private attorney general exception is unique in its relationship to public policy issues and state constitutional rights. Courts confronted with the question of adopting the private attorney general exception have struggled with the question of whether to foster the judicial value of encouraging state constitutional and public interest litigation, or to defer to the special legislative responsibility to decide under what circumstances, if any, public funds should be used to fund litigation against the state. The exception has received disparate treatment in the states that have considered it and of those states most have rejected it, some have adopted it on state constitutional grounds, and one state has adopted it for cases protecting public interests in general.[39]

Led by a key United States Supreme Court decision, most courts considering the private attorney general exception have been unwilling to use their equitable powers to adopt it. In 1975, the United States Supreme Court in *Alyeska Pipeline Service Co. v. Wilderness Society* rejected the private attorney general doctrine in the federal courts.[40] In this case, the plaintiffs prevailed in a suit to bar construction of the trans-Alaska oil pipeline and were awarded attorney's fees under the private attorney general exception, which at that time was widely recognized by federal district courts.[41] On appeal, the Supreme Court reasoned that since Congress allows attorney's fees under certain circumstances and has set out these exceptions to the American rule in statutes, federal courts may not create new exceptions based on public policy without legislative guidance.[42] The Court feared that allowing the judiciary to make such awards would leave them free to

> fashion drastic new rules with respect to the allowance of attorneys' fees to the prevailing party...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 on the courts' assessment of the importance of the public policies involved in particular cases.[43]

Thus, the Court decided that it was best that Congress determine which public interests deserve the award of attorney's fees in order to further the protection of those interests.[44]

In response, Congress enacted the Civil Rights Attorney's Fees Awards Act to ensure that prevailing plaintiffs would be able to recover attorney's fees in civil

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38. Dobbs, *supra* note 11, § 3.10(2), at 398. Without the ability to pass on the fees, the unjust enrichment to the public would not be properly remedied—it would only be paid by the defendant who would then have no claim against the public. Therefore, the private attorney general and the substantial benefit doctrines have generally not been applied to individual defendants. *Id.* at 396-401. *But see* discussion of Arizona's treatment of the private attorney general doctrine *infra* this section.

39. *See* Appendix *infra*.

40. 421 U.S. 240, 269-71 (1975).

41. *Id.* at 241.

42. *Id.* at 269.

43. *Id.* at 269.

44. *Id.* at 269.

rights cases.[45] Following the Supreme Court's reasoning in *Alyeska*, several states have explicitly refused to adopt the private attorney general exception.[46] For example, the opinion of the Connecticut Supreme Court in *Doe v. Heintz*, where the facts mirror *Johnson II*, illustrates how state courts have accepted the *Alyeska* holding.[47] In an earlier judgment in that case, a regulation restricting state funding of abortions for indigent women was declared invalid under the Connecticut Constitution.[48] The state supreme court then rejected plaintiff's plea for a fee award, holding that allowing attorney's fees when a private litigant has "at substantial cost to himself succeeded in enforcing a significant social policy that may benefit others" was a legislative prerogative.[49]

In contrast, California rejected the *Alyeska* reasoning and adopted the private attorney general exception. In *Serrano v. Priest*,[50] the California Supreme Court awarded attorney's fees to plaintiffs who established the unconstitutionality of the public school financing system. *Alyeska* had just been decided.[51] The *Serrano* court explained that the *Alyeska* holding that the exception should not be adopted in the absence of legislative guidance was "foremost in [its] mind."[52] The *Serrano* court found that the private attorney general exception, adopted through the court's equitable powers and without statutory authorization, was appropriate.[53] The court

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45. Friesen, *supra* note 24, ¶ 10.01, at 10-3.

46. *See, e.g.*, Doe v. Heintz, 526 A.2d 1318, 1323 (Conn. 1987) (denying the doctrine when a class of indigent women and physicians prevailed in challenging the constitutionality of regulations restricting the funding of abortions under the state's Medicaid program); Hamer v. Kirk, 356 N.E.2d 524, 528 (Ill. 1976) (relying on *Alyeska* in rejecting the doctrine where taxpayers successfully sued for statutory violations in order to equalize the level of assessment for each township) (affirmed in Fischer v. Brombolich, 616 N.E.2d 743, 745 (Ill. App. Ct. 1993) (stating it was up to the legislature to decide what suits deserve fee shifting)); Moore v. City of Pacific, 534 S.W.2d 486, 504-05 (Mo. Ct. App. 1976) (declining to adopt the doctrine for plaintiff who challenged a redistricting ordinance violating constitutional "one man-one vote" principles); Jones v. Muir, 515 A.2d 855, 862 (Pa. 1986) (rejecting doctrine where plaintiffs challenged the failure by the State of Pennsylvania to implement collection of charges for a fund to provide citizens with medical treatment and rehabilitative services from car related injuries, stating it was up to the legislature to award fees); Blue Sky Advocates v. State, 727 P.2d 644, 649 (Wash. 1986) (refusing to adopt the exception when a non-profit sued the state's Attorney General for malpractice, stating it was up to the legislature to fashion an exception to the American rule).

47. 526 A.2d 1318 (Conn. 1987).

48. Doe v. Maher, 515 A.2d 134 (Conn. Super. Ct. 1984).

49. 526 A.2d at 1323.

50. 569 P.2d 1303, 1313-15 (Cal. 1977). Other decisions adopting the private attorney general doctrine include: Hickel v. Southeast Conference, 868 P.2d 919, 923 (Alaska 1994) (awarding fees to plaintiffs challenging a redistricting plan on constitutional grounds); Hellar v. Cenarrusa, 682 P.2d 524, 531 (Idaho 1984) (awarding fees where plaintiffs challenged legislature's reapportionment scheme on state constitutional grounds, plaintiff's counsel was a sole practitioner who undertook extensive expenses and demands to prosecute, and the state Attorney General had been asked to defend the reapportionment scheme); Town of St. John v. State Bd. of Tax Comm'rs, 730 N.E.2d 240, 256 (Ind. Tax Ct. 2000) (adopting the private attorney general doctrine where taxpayers prevailed in a suit challenging the constitutionality of the state's assessment of real property); Montanans for the Responsible Use of the Sch.Trust v. State ex rel. Bd. of Land Comm'rs, 989 P.2d 800, 811-12 (Mont. 1999) (adopting the exception where plaintiffs challenged the constitutionality of fourteen statutes concerning Montana's school trust lands, despite a state statute limiting an award of attorney's fees against the state to situations where the court finds the state claim or defense frivolous or pursued in bad faith (MONT. CODE ANN. § 25-10-711 (1979)); Stewart v. Utah Public Serv. Comm'n, 885 P.2d 759, 783 n.19 (Utah 1994) (adopting the exception where rate payers challenged the constitutionality of UTAH CODE ANN. § 54-4-4.1(2) (1990) for its delegation of legislative powers to a private party, the court limited the application of the private attorney general doctrine to extraordinary circumstances).

51. 421 U.S. 240.

52. 569 P.2d at 1313.

53. *Id.* at 1315.

agreed with the plaintiffs that citizens in great numbers and across a broad spectrum frequently have interests in common, but that these interests do not usually "involve the fortunes of a single individual to the extent necessary to encourage their private vindication in the courts."[54] Furthermore, the court agreed that although there are offices and institutions (such as the office of the attorney general) "whose function it is to represent the general public in such matters and to ensure proper enforcement, for various reasons the burden of enforcement is not always adequately carried by those offices and institutions, rendering some sort of private action imperative."[55] The court set out three factors to be considered in making its decision: (1) the strength of societal importance of the public policy vindicated by the litigation; (2) the necessity for private enforcement; and (3) the extent of the resultant burden on the plaintiff, and the number of people standing to benefit from the decision.[56] The court explained that since the public policy at issue in the first factor was grounded in the state constitution, and that the benefits were to be enjoyed by a large number of the state's citizens, the trial court was justified in applying the private attorney general doctrine and legislative approval was not necessary.[57]

After the *Serrano* decision, the California legislature enacted a private attorney general statute to provide attorney's fees in public interest litigation.[58] This statute goes beyond the court's adoption of the exception based on state constitutional grounds and allows the private attorney general doctrine in cases protecting public interests in general. Under this statute, California has awarded attorney's fees in cases similar to *Johnson II*.[59]

The opposite approaches taken by the United States Supreme Court and California regarding the private attorney general exception present the essential dilemma for state courts considering the issue. The interplay between the judiciary and the legislature is a key consideration in addressing this doctrine, with the federal courts bowing to legislative authority and California courts taking a leading role in adopting the exception. It might appear that adoption of the exception could be

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54. *Id.*
55. *Id.*
56. *Id.* at 1314.
57. *Id.* at 1315.
58. Cal. Civ. Pro. Code § 1021.5 (West 1980). Section 1021.5 reads,

> Upon motion, a court may award attorneys' fees to a successful party against one or more opposing parties in any action which has resulted in the enforcement of an important right affecting the public interest if: (a) a significant benefit, whether pecuniary or nonpecuniary, has been conferred on the general public or a large class of persons, (b) the necessity and financial burden of private enforcement, or of enforcement by one public entity against another public entity, are such as to make the award appropriate, and (c) such fees should not in the interest of justice be paid out of the recovery, if any. With respect to actions involving public entities, this section applies to allowances against, but not in favor of, public entities, and no claim shall be required to be filed therefor, unless one or more successful parties and one or more opposing parties are public entities, in which case no claim shall be required to be filed therefor under Part 3 (commencing with Section 900) of Division 3.6 of Title 1 of the Government Code. Attorneys' fees awarded to a public entity pursuant to this section shall not be increased or decreased by a multiplier based upon extrinsic circumstances, as discussed in *Serrano v. Priest*, 20 Cal.3d 25, 49.

59. *See* Comm. to Defend Reproductive Rights v. Myers, 625 P.2d 779, 799 (Cal. 1981); Comm. to Defend Reproductive Rights v. Rank, 198 Cal. Rptr. 630, 633 (1984).

consistently limited to state constitutional claims, like *Serrano*, and rejected when the underlying relief is based on statutory or public interest grounds, as in *Alyeska*; however, state courts refusing to adopt the exception have done so even when the underlying claims were based on the state constitution.[60] In contrast, Arizona courts went even further than the California court in *Serrano* and adopted the private attorney general exception for public interest claims in general.[61] Arizona has limited the doctrine by not applying it where litigants seek only to recover money for themselves or when they establish rights for citizens only through an attempt to vindicate their individual rights without trying to benefit anyone else.[62] Still, the doctrine has been applied broadly in Arizona and allows fees for various public interest suits, even against private defendants.[63] Thus, state courts have not consistently followed the federal example of deferring to the legislature when asked to adopt the exception, nor have they precisely followed California's example of adopting the exception without legislative guidance only when the claims are based on state constitutional grounds. The state of the law in this area is therefore unsettled and presents no clear road map for state courts to follow.

IV. RATIONALE AND ANALYSIS

In the *Johnson II* decision, the New Mexico Supreme Court joined the majority of states by declining to adopt the private attorney general exception to the American rule.[64] The court found that New Mexico strictly adheres to the American rule and thus it would be inappropriate for the court to abandon this rule or its policies.[65] Furthermore, the court explained that it feared that adopting the doctrine would erode the policies of the American rule upon which New Mexico courts have relied since their earliest days.[66] The court appeared to reject the doctrine out of hand, relying on arguments that do not withstand careful analysis. Buried within the

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60. *See supra*, note 46 and *Doe v. Heintz* discussed *supra* this section.

61. Arnold v. Arizona Dep't of Health Services, 775 P.2d 521, 536-37 (Ariz. 1989) (adopting the exception where plaintiffs sued on behalf of chronically mentally ill patients and prevailed in obtaining mental health services for them, reasoning that since the American rule had been eroded by statutes and other judicial exceptions, the adoption of the doctrine was not contrary to precedent).

62. *See* Kerr v. Waddell, 899 P.2d 162, 184 (Ariz. Ct. App. 1994) (denying appellants' request for fees under the private attorney general doctrine because appellants sought only to recover money for themselves, not to advance the public interest); Chavarria v. State Farm Mut. Auto. Ins. Co., 798 P.2d 1343, 1346-47 (Ariz. Ct. App. 1990) (denying attorney's fees under the private attorney general doctrine where plaintiff pressed her claim against insurer for bad-faith denial of medical payments in order to recover a large award of damages for herself, not to benefit the general public); Corley v. Arizona Bd. of Pardons and Paroles, 775 P.2d 539, 541 (Ariz. Ct. App. 1989) (denying attorney's fees under the doctrine when parolee established procedural rights for absolute discharge from parole because he was attempting to vindicate only his own right of due process and the issue of absolute discharge from parole is not of general societal importance).

63. *See* Yslava v. Hughes Aircraft Co., 845 F.Supp. 705, 711 (D. Ariz. 1993) (allowing attorney's fees against aircraft company under the private attorney general doctrine for prevailing on state law claims for past and future medical monitoring because the medical monitoring program would potentially benefit a large number of people); Arizona Ctr. for Law in Public Interest v. Hassell, 837 P.2d 158, 173 (Ariz. Ct. App. 1991) (assessing attorney's fees under the private attorney general doctrine against both state and private defendants where plaintiffs successfully challenged the validity of legislation relinquishing state's interest in riverbed lands and landowners who claimed interests in the lands intervened as additional defendants).

64. *See* Appendix *infra*.

65. 127 N.M. 654, 658-59, 986 P.2d 450, 454-55.

66. *Id.* at 455-59.

opinion, however, is recognition of the dilemma of determining proper legislative and judicial roles illustrated in the opposite approaches taken by the United States Supreme Court and California. It is that dilemma that presents a more reasoned justification for the court's result.

A. Stare Decisis

The *Johnson II* court began its discussion of the private attorney general doctrine with a look at New Mexico's adherence to the American rule.[67] The court stated that New Mexico has "strictly adhered to [the American] rule since [its] territorial days," and if the court were to adopt the private attorney general doctrine it would be departing from established precedent.[68] The court reasoned that it must rely on the doctrine of stare decisis in determining whether to adopt the private attorney general exception to the American rule.[69] Stare decisis is the judicial principle of relying on previous precedent, and any departure from it requires special justification.[70] In determining whether to depart from precedent, the court stated that it evaluates the following factors: whether the precedent is so unworkable as to be intolerable, whether parties justifiably relied on the precedent so that reversing it would create an undue hardship, whether principles of law have developed to such an extent to leave the old rule a "remnant of abandoned doctrine," and whether the facts have changed in the interval from the time the old rule was adopted so that the old rule can no longer be justified.[71] The court explained that the precedent it was being asked to depart from was a line of cases setting out the policies underlying the American rule.[72] The two American rule policies upon which New Mexico courts rely on in attorney's fees decisions are (1) protection of equal access to the courts and (2) preservation of judicial resources.[73] Since these policies are still important today, and because most state constitutional jurisprudence in New Mexico concerns either criminal matters, where attorney's fees are not at issue, or civil rights cases, where state statutes authorize attorney's fees, the court stated that the American rule is not so "unworkable as to be intolerable."[74] Thus, the court held that it would not abandon the precedent underlying the American rule or its policies.[75]

The court's stare decisis analysis of the American rule is flawed because the court is not relying on a previously decided case. "Stare decisis" means "to stand by things decided" and is the "doctrine of precedent, under which it is necessary for a court to follow earlier judicial decisions when the same points arise again in

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67. *Id.* at 663, 986 P.2d at 458. The standard of review in this case was de novo. Reviews of attorney fee awards are generally for an abuse of discretion, but the district court rejected the private attorney general doctrine as a matter of law, which required a review of the application of the law to the facts de novo. *Id.* at 656-57, 986 P.2d at 452-53.

68. *Id.* at 657, 986 P.2d at 453.

69. *Id.*

70. *Id.*

71. *Id.* at 657-58, 986 P.2d at 453-54.

72. *Id.* at 657, 986 P.2d at 453.

73. *Id.* at 658, 986 P.2d at 454.

74. *Id.* at 659, 986 P.2d at 455. *See* N.M. STAT. ANN. § 28-1-13(D) (1978). New Mexico's Human Rights Act states, "In any action or proceeding under this section if the complainant prevails, the court in its discretion may allow actual damages and reasonable attorney's fees, and the state shall be liable the same as a private person."

75. 127 N.M. at 663, 986 P.2d at 459.

litigation."[76] Stare decisis is employed when a court is faced with whether it should overrule an established precedent because of special and convincing justifications. The United States Supreme Court, for example, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[77] considered whether the holding in *Roe v. Wade*[78] should be reaffirmed or overturned and explained that the rule of stare decisis is necessary to establish continuity under the Constitution, but that a prior judicial ruling should be overturned if it "should come to be seen so clearly as error that its enforcement was for that very reason doomed."[79] The Court proceeded to set out factors to consider when faced with the proposition of overturning a previous case—the same factors the *Johnson II* court explained it had considered in deciding whether to depart from the American rule.[80] New Mexico courts have adopted the *Casey* factors for courts to consider in a stare decisis analysis and explicitly recognize that stare decisis involves analysis of a prior judicial decision.[81] The New Mexico Court of Appeals has explained that under stare decisis, courts will "apply the rules of law previously announced by courts of the same jurisdiction to cases involving similar facts," and thus when a previous case only announces general principles addressing a certain issue, it will not be considered precedent for those principles.[82]

A stare decisis analysis applies with respect to prior decisions and does not make sense without a prior decision that the court is considering overruling. Prior to *Johnson II*, the private attorney general exception had never been addressed by New Mexico courts. Nevertheless, the *Johnson II* court applied the doctrine of stare decisis to its consideration of upholding New Mexico's adherence to the American rule and its policies.[83] Since the court was not basing its stare decisis analysis on a previous case with similar facts, its analysis clouds the basis for this decision. Adopting an exception to a rule does not overrule a case, and therefore when a court accepts or rejects an exception to a rule it should look at policy issues, not at stare decisis factors. Thus, the court's misplaced stare decisis reasoning results in a holding that is incorrectly justified by giving American rule policies the same status as a prior holding and in effect giving the policies more weight than they deserve.

B. American Rule Policies

The *Johnson II* court next discussed whether it could adopt the private attorney general exception without departing from the American rule's policies of ensuring

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76. BLACK'S LAW DICTIONARY 1414 (7th ed. 1999).

77. 505 U.S. 833 (1992).

78. 410 U.S. 113, 164-66 (1973).

79. 505 U.S. at 854 (holding that doctrine of stare decisis requires reaffirmance of *Roe v. Wade*'s essential holding recognizing a woman's right to choose to have an abortion).

80. *Id.* at 854.

81. City of Las Vegas v. Oman, 110 N.M. 425, 433-34, 796 P.2d 1121, 1129-30 (Ct. App. 1990) (holding in part that previous decision announced only general principles and did not resolve all potential issues presented by plaintiffs on basis of stare decisis, so district court was not precluded from receiving evidence). *See also* Hicks v. State, 88 N.M. 588, 591, 544 P.2d 1153, 1156 (1975) (holding that stare decisis principles should only apply to cases considering prior decisions).

82. 110 N.M. at 433-34, 796 P.2d at 1129-30.

83. 127 N.M. at 657-59, 986 P.2d at 453-55.

equal access to the courts and not burdening judicial resources.[84] The court described how currently recognized exceptions to the American rule in New Mexico have not eroded the rule's policies.[85] First, New Mexico's bad faith exception allows fee awards against parties whose conduct occurs before the court or is in direct defiance of the court's authority.[86] The court explained that this exception is consistent with the policies of the American rule because it makes the courts more efficient and does not discourage the losing litigant from fairly prosecuting or defending a claim.[87] Second, the court found that New Mexico's common fund attorney fee awards are not truly fee shifting because they are deducted from the fund that was protected and thus do not violate the principles of the American rule.[88] Third, the court found that attorney's fees awarded in wrongful injunction cases are part of the damages and thus do not constitute a fee shifting exception.[89] Finally, the court reasoned that allowing fees in divorce, child custody, and fiduciary duty cases where statutes give courts the power to adjudicate these matters is consistent with the American rule because it promotes equal access to the courts by protecting vulnerable parties and does not burden judicial resources because courts can "draw guidance from a number of cases that have analyzed and applied these exceptions over time."[90]

1. Equal Access to the Courts

The *Johnson II* court found that unlike these recognized exceptions, the private attorney general doctrine is not consistent with the American rule's policies and therefore the court will not adopt it.[91] The court reasoned that the exception would prevent equal access to the courts because "it lacks sufficient guidelines to prevent courts from treating similarly situated parties differently and could easily result in decisions that favor a particular class of private litigants while unduly discouraging the government from mounting a good faith defense."[92]

The court failed to recognize, however, that the private attorney general doctrine is not only consistent with the policy of encouraging access to the courts, it was adopted for that specific purpose. The doctrine was developed to encourage suits that would protect constitutional rights beyond those protected under federal law. Its purpose is "to provide an incentive for representing litigants who assert publicly favored claims."[93] In adopting the private attorney general exception, one court

84. 127 N.M. at 662-63, 986 P.2d at 458-59.

85. *Id.* at 659-62, 986 P.2d at 455-57. *See* Turpin v. Smedinghoff, 117 N.M. 598, 601, 874 P.2d 1262, 1265 (1994) (holding that attorney's fees would not be awarded under the bad faith or common fund theories where defendant sued to dissolve partnership, stating: "This Court has been reluctant to extend awards of attorney's fees except in limited circumstances.").

86. State v. Baca 120 N.M. 1, 6-7, 896 P.2d 1148, 1153-54 (explaining New Mexico's long-time recognition of the bad faith exception to the American rule).

87. *Johnson II*, 127 N.M. at 659, 986 P.2d at 455.

88. *Id.* at 660, 986 P.2d at 456. *See also* Las Vegas Ry. & Power Co. v. Trust Co., 17 N.M. 286, 291, 126 P. 1005, 1010 (1912) (recognizing common fund exception), *error dismissed*, 238 U.S. 645 (1914).

89. *Id.* at 660-61, 986 P.2d at 456.

90. *Id.* at 661, 986 P.2d at 457.

91. *Id.* at 662, 986 P.2d at 458.

92. *Id.* at 663, 986 P.2d at 459.

93. DeWills Interiors, Inc. v. Dines, 678 P.2d 80, 86 (Idaho Ct. App. 1984).

noted that their decision, "if anything,...promotes meritorious litigation by those who otherwise may not be able to afford to enforce their constitutional rights."[94] Furthermore, since the private attorney general exception is almost always applied against government entities, its adoption does not discourage good-faith litigation on the part of poor plaintiffs.

2. Protecting Public Funds

Underlying the *Johnson II* court's argument that the exception may discourage meritorious defenses is, perhaps, a concern for protecting the public treasury. *City of Riverside v. Rivera* highlights the concern that costs could be prohibitive in constitutional cases involving an expanded right to fees.[95] In that case, the United States Supreme Court upheld a district court decision granting fees under section 1988 that were seven times the amount of compensatory and punitive damages awarded.[96] The court reasoned that "[b]ecause damages awards do not reflect fully the public benefit advanced by civil rights litigation, Congress did not intend for fees in civil rights cases, unlike most private law cases, to depend on obtaining substantial monetary relief."[97] Since courts under section 1988 can award fees that may far exceed the damages award in a case, it is certainly possible for defendants to be discouraged from mounting proper defenses. Thus, the private attorney general exception could arguably place too large a weapon in the hands of plaintiffs, forcing defendants to settle.

Courts adopting the exception have, however, dealt with this argument in two ways. Some courts have explained that the state will not necessarily be discouraged from mounting meritorious defenses since the litigation is intended to bring the state agency back on track with constitutional regulations and, after complying with the substantive ruling, the state agency "likely can justifiably oppose constitutional attacks."[98] Other courts, adopting the exception on state constitutional grounds, have explained that since the public policies at issue were grounded in the state constitution and the interests furthered were constitutional in nature, the importance of protecting state constitutional rights overrides concern for the effect on defendants of potentially large fee awards.[99]

3. Preserving Judicial Resources

The *Johnson II* court found that the private attorney general exception would not preserve judicial resources because it would force courts to "engage in a fact-specific reexamination of the merits of a case to determine the significance and scope of the rights that have been protected."[100] This argument lacks merit because courts are already required to award attorney's fees in cases falling under the many

94. Town of St. John, 730 N.E.2d 240, 246 (Ind. Tax 2000).

95. 477 U.S. 561, 574, 576-78 (1986) (rejecting the proposition that fee awards under section 1988 should necessarily be proportionate to the amount of damages a civil rights plaintiff actually recovers).

96. *Id.* at 565-67.

97. *Id.* at 575.

98. *See* Town of St. John, 730 N.E.2d at 265.

99. *See* Serrano v. Priest, 569 P.2d 1303, 1314 (Cal. 1977).

100. 127 N.M. at 663, 986 P.2d at 459.

statutory and common law exceptions to the American rule. There are well-established criteria for the courts to evaluate and calculate those awards and adopting the private attorney general doctrine would not require new procedures.[101] Furthermore, not only do courts have experience calculating attorney's fees, "determining fees is part of the Court's basic function."[102]

C. *The Court/Legislature Dilemma*

While the foregoing rationales for the *Johnson II* court's rejection of the private attorney general exception seem to lack merit when subjected to closer scrutiny, buried within the opinion are two rationales that are perhaps more compelling. The court expresses a dual concern (1) that the private attorney general doctrine requires the court to "look beyond the proceedings before it to determine which rights are of more societal importance than others, which classes of litigants have protected such rights, and which classes of people have benefited from such protection;"[103] and (2) that the court must be particularly sensitive to "the necessity to protect public revenues unless their diversion is specifically authorized by statute."[104] Thus, out of deference to legislative policy judgments concerning the relative importance of various rights, and out of concern for judicially imposed influence on the public treasury, the court opted for the federal legislative-deference model of *Alyeska*,[105] rather than the California judicial leadership model of *Serrano*.[106]

New Mexico might have adopted the private attorney general exception only for cases based on state constitutional grounds, as the *Serrano* court did, in order to avoid having courts decide which rights are more important than others since all constitutional rights would be given the same importance. Such a ruling, however, might open too broadly the door to the public treasury. Under such a rule, public funds would be available for parties with state constitutional claims who could adequately afford the cost of litigation against the state, as well as to those individuals, like the plaintiffs in the *Johnson* case, who do not have such resources. It is perhaps, this kind of concern for the judicial invasion of the public treasury—without legislative authorization—that drove the conclusion in *Johnson II*.

V. IMPLICATIONS

There is a certain irony in the New Mexico Supreme Court's rejection of the private attorney general exception to the American rule. Throughout the country, state courts have been asked to assume a primary role in securing civil rights in the post-Warren Court era where the United States Supreme Court has interpreted

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101. *See, e.g.*, Kennedy v. Dexter Consol. Sch., 129 N.M. 436, 447, 10 P.3d 115, 126 (2000) (explaining how New Mexico uses the lodestar method to calculate attorney's fees under section 1988 and stating what records are necessary for the party seeking a fee award to provide).

102. Town of St. John, 730 N.E.2d at 265.

103. 127 N.M. at 662, 986 P.2d at 458.

104. *Id.* (quoting Torrance County Mental Health Program, Inc. v. New Mexico Health and Env't Dep't, 113 N.M. 593, 600, 830 P.2d 145, 152 (1992)).

105. 421 U.S. 240 (1975).

106. 569 P.2d 1303 (Cal. 1977).

individual rights secured by the federal Constitution in a more narrow fashion.[107] While over-reliance on the federal doctrines that grew out of the Warren era have left state constitutional law underdeveloped in many states, New Mexico has been in the lead in the development of its state constitutional rights jurisprudence—giving broader protection to rights under its state constitution than is afforded under the federal Constitution.[108] Indeed, in a recent Symposium examining Western state constitutions in the New Mexico Law Review in 1998,[109] some of the contributing authors focused on the recent New Mexico Supreme Court decisions using the "New Mexico Constitution as a tool for safeguarding individual rights."[110] It is ironic that, during the very era when the New Mexico court is expanding the availability of judicially enforceable rights under its state constitution, it fails to facilitate and encourage the bringing of such cases through the adoption of the private attorney general theory of attorney's fees.

Furthermore, the holding in *Johnson II* demonstrates the dilemma faced by litigants who may have similar federal and state constitutional claims and would, for tactical reasons, prefer to remain in state court and remain free from federal court review. Because section 1988 provides a chance to recover attorney's fees for federal constitutional claims, litigants may be tempted to pursue their federal claims at the expense of their state claims. Such claims brought in state court, however, are often subject to removal to federal court,[111] and in any event would be subject to certiorari review in the United States Supreme Court, whereas state constitutional claims are neither subject to removal nor Supreme Court review.[112] Thus, such litigants are faced with the dilemma of pursuing a possibly more satisfactory result in state court, under the state constitution, but at the considerable cost of foregoing the right to attorney's fees, which would be available if the litigant sought similar constitutional relief under the federal Constitution.

VI. CONCLUSION

The New Mexico Supreme Court in *Johnson II* refused to adopt the private attorney general exception to the American rule. In so doing, the court struggled with the difficult task of defining the proper dividing line between legislative and judicial authority over the expansion of the right to attorney's fees. In deciding to reject the private attorney general exception, however, the court may have inhibited

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107. Friesen, *supra* note 24, ¶ 1.01, at 1-3.

108. *See* Shirley S. Abrahamson, *Reincarnation of State Courts*, 36 SW. L. J. 951, 957 (1981) ("As the federal constitutional guarantees grew during the Warren Court years, the protection of individual rights under the state constitutions almost came to a halt.").

109. *See* G. Alan Tarr and Robert F. Williams, *Foreword: Western State Constitutions in the American Constitutional Tradition*, 28 N.M. L. REV. 191 (Spring 1998); Jennifer Cutcliffe Juste, *Constitutional Law—The Effect of State Constitutional Interpretation on New Mexico's Civil and Criminal Procedure—State v. Gomez*, 28 N.M. L. REV. 355, 377 (1998).

110. Juste, *supra* note 109, at 377.

111. *See* 28 U.S.C. § 1441(a) (1994) (noting that "Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.").

112. *See* Michigan v. Long, 463 U.S. 1031, 1040-41 (1983) (explaining that the Supreme Court does not have jurisdiction when state courts decide cases based on adequate and independent state grounds).

the growth of New Mexico's state constitutional jurisprudence, at the very time it has been signaling its willingness to expand state constitutional rights beyond those conferred by the federal Constitution.

ALLISON CRIST

APPENDIX

STATUS OF THE PRIVATE ATTORNEY GENERAL DOCTRINE IN THE UNITED STATES

States:	Yes	No	By Statute	By Judicial Decision	Scope: State Constitution	Public Interest
Alabama		X		Shelby County Commission v. Smith, 372 So.2d 1092 (Ala. 1979) (Rejected in case asking state to increase state deputy salaries)		
Alaska	X			Hickel v. Southeast Conference, 868 P.2d 919 (Alaska 1994)	X	
Arizona	X			Arnold v. Arizona Dep't of Health Services, 775 P.2d 251 (Ariz. 1989)		X
Arkansas		X				
California	X		Cal. Civ. Pro. Code § 1021.5 (1990)	Serrano v. Priest, 569 P.2d 1303 (Cal. 1977)		X (originally state constitution: statute broadened it)

Appendix (continued)

States:	Yes	No	By Statute	By Judicial Decision	Scope: State Constitution	Public Interest
Colorado		X				
Connecticut		X		Doe v. Heintz, 526 A.2d 1318 (Conn. 1987) (Rejected in case based on the state constitution)		
Delaware		X				
Florida		X				
Georgia		X				
Hawaii		X				
Idaho	X			Hellar v. Cenarrusa, 682 P.2d 524 (Idaho 1984)	X	
Illinois		X		Hamer v. Kirk, 356 N.E.2d 524 (Ill. 1976) (Rejected in case challenging statutory violations)		
Indiana	X			Town of St. John v. State Bd. of Tax Comm'rs, 730 N.E.2d 240 (Ind. Tax Ct. 2000)	X	
Iowa		X				
Kansas		X				
Kentucky		X				

Appendix (continued)

States:	Yes	No	By Statute	By Judicial Decision	Scope: State Constitution	Public Interest
Louisiana		X				
Maine		X				
Maryland		X				
Massachusetts		X				
Michigan		X				
Minnesota		X				
Mississippi		X				
Missouri		X		Moore v. City of Pacific, 534 S.W.2d 486 (Mo. Ct. App. 1976)(Rejected in case based on the state constitution)		
Montana	X			Montanans for the Responsible Use ...v. State, 989 P.2d 800 (Mont. 1999)	X	
Nebraska		X				
Nevada		X				
New Hampshire		X				
New Jersey		X				
New Mexico		X		New Mexico Right to Choose v. Johnson, 127 N.M. 654, 986 P.2d 450 (N.M. 1990) (Rejected in case based on the state constitution)		

Appendix (continued)

States:	Yes	No	By Statute	By Judicial Decision	Scope: State Constitution	Public Interest
New York		X				
North Carolina		X				
North Dakota		X				
Ohio		X				
Oklahoma		X				
Oregon	X			Doctrine indirectly recognized in Derras v. Myers, 535 P.2d 541 (Or. 1975)	X (allowed fee recovery, but did not explicitly adopt the doctrine)	
Pennsylvania		X		Jones v. Muir, 515 A.2d 855 (Pa. 1986) (Rejected in a public interest case)		
Rhode Island		X				
South Carolina		X				
South Dakota		X				
Tennessee		X				

Appendix (continued)

States:	Yes	No	By Statute	By Judicial Decision	Scope: State Constitution	Public Interest
Texas		X				
Utah	X			Stewart v. Utah Pub. Serv. Comm'n, 885 P.2d 759 (Utah 1994)	X (and limited to "extraordinary circumstances")	
Vermont		X				
Virginia		X				
Washington		X		Blue Sky Advocates v. State, 727 P.2d 644 (Wash. 1986) (Rejected in a public interest case)		
West Virginia		X				
Wisconsin		X				
Wyoming		X				