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ATTORNEYS' FEES AGAINST GOVERNMENT DEFENDANTS ECONOMICS REQUIRES A NEW PROPOSAL

Mary C. Dunlap*

A few years ago, as Snoopy lay smiling on the roof of his doghouse, Charlie Brown stood nearby and declared: "When a person takes on an institution, the institution has a definite tendency to win. Current law on the awarding of attorneys fees against government defendants¹ should be examined and understood in the context of Charlie Brown's pithy observation. This is necessary because federal and state governments are a shaping force in all litigation. From court systems to the law itself, governmentally financed judicial, legislative, and administrative voices are omnipresent.

This ubiquitous presence gives government the upper hand in civil litigation, especially if procedure controls substance. Government, not private individuals or entities, decides who may sue whom and who may sue the government.² It is government which designates the form and scope of its own liability.³ It is government which determines the rules of litigation.⁴ These rules differentiate between government and non-government defendants with respect to service of process,⁵ due dates for responsive pleading,⁶

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1. The emphasis of this article is upon federal civil law pertaining to attorneys fees awards.

2. It is disputable whether the legislature or judicial branch has the greater power in determining rights of action. *See Cannon v. University of Chicago*, 99 S. Ct. 1946 (1979), *Cort v. Ash*, 422 U.S. 66 (1975). Overall, these two branches of government together decide when and whether government is subject to suit.

3. Illustrative of this power are the exceptions to the Federal Tort Claims Act, 28 U.S.C. § 2680 (1976). *See Laird v. Nelms*, 406 U.S. 797 (1972) (Federal Tort Claims Act exempts government from action for property damage allegedly covered by military plane sonic boom); *Dalehite v. United States*, 346 U.S. 15 (1953) (Federal Tort Claims Act did not render the federal government responsible for an explosion of its ammonium nitrate fertilizer).

4. The Federal Rules of Civil Procedure constitute the governmental rule of litigation.

5. FED. R. CIV. P. 4(d)(4).

6. *Id.* 12(a).

and availability of default judgment;⁷ and where the differences are not explicit, they are customary.⁸

Yet, government is not a homogeneous structure with a singular purpose, scope, or form. Governmental entities include federal, state, and municipal governing bodies, each having numerous subdivisions. Philosophical differences as to attorneys fees have been manifested by a continuing ideological four way tug of war between the Supreme Court, the lower courts, Congress, and the states. The latest demonstration of this tug of war is exemplified in the United States Supreme Court's decision in *Hutto v. Finney*.⁹ In *Hutto* the Court held that Congress may decide when attorneys fees are to be awarded against state and local governments. The court found that the eleventh amendment¹⁰ did not bar the award of attorneys fees to a prevailing party against a state official to the extent that such an award was grounded upon the Civil Rights Attorney's Fees Awards Act of 1976.¹¹ The action was against state officials based on cruel and unusual punishment for their failure to cure conditions in a prison.¹²

While *Hutto* may indicate a state-federal constitutional struggle, the implementation of the attorneys fees concept originally caused a tug of war between the Supreme Court on one side and Congress and lower federal courts on the other. Until the Supreme Court's 1975 decision in *Alaska Pipeline Service Co v Wilderness Society*,¹³ judicial discretion had been exercised frequently by lower courts in the awarding of attorneys fees against both public and private defendants. Awards were given to prevailing parties

7. *Id.* 55(e).

8. In the author's experience, lateness and delay on the part of government litigants are more often abided by judges than lateness and delay on the part of non-governmental litigants, especially in matters such as responsive pleadings, motions to intervene and briefs.

9. 437 U.S. 678 (1978) (Burger, C.J., Rehnquist, White, & Powell, JJ, dissenting).

10. "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State. U.S. CONST. amend. XI.

11. 42 U.S.C. § 1988 (1976).

12. The action in *Hutto* was brought pursuant to § 1983 for failure of state prison officials to cure conditions amounting to cruel and unusual punishment. See 437 U.S. at 681, 693. The Attorney General of Arkansas unsuccessfully argued that the awarding of attorneys fees against state officials was not authorized by the Civil Rights Attorneys Fees Awards Act of 1976 and was prohibited by the eleventh amendment, *Id.* at 693.

13. 421 U.S. 240 (1975).

who litigated cases "in the public interest" as private attorneys general."¹⁴ *Alyeska* limited the discretionary authority of the lower courts to award these fees.¹⁵ In direct response to the Supreme Court's position, Congress passed the Civil Rights Attorney's Fees Awards Act.¹⁶ While still in its infancy the Act's primary message

14. See *Newman Piggie Park Enterprises*, 390 U.S. 400 (1968) (awarding fees under the public accommodations section of the 1964 Civil Rights Act displays congressional policy in favor of private litigation as the major means of securing statutory compliance); *Lea Cone Mills Corp.*, 438 F.2d 86 (1971) (applied *Newman* rationale to title VII cases despite the fact that the attorney was hired as an organizational attorney who did not look to the plaintiff for the fee); *Lee Southern Home Sites Corp.*, 444 F.2d 143 (5th Cir. 1971) (further policy of encouraging private litigation to enforce statute by permitting recovery of attorney fees when black plaintiff is deprived of civil rights when barred from the sale of land); *La Raza Unida v. Volpe*, 57 F.R.D. 94 (N.D. Cal. 1972) (successful action resulted in effectuation of strong public policy of environmental protection for many, the individuals bringing suit would be awarded fees from the state treasury).

15. 421 U.S. at 269.

[Because] the approach taken by Congress to this issue [of attorneys fees] has been to carve out specific exceptions to 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 courts assessment of the importance of the public policies involved in particular cases.

Id.

16. 42 U.S.C. § 1988 (1976). This act provides in part:

[I]n any action or proceeding to enforce provision of Sections 1981, 1982, 1983, 1985, and 1987 of this title, title IX of Public Law 92-318, or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging violation of the United States Internal Revenue Code, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, reasonable attorney fee as part of the costs.

Id.

The substantive areas covered above include suits involving: racial discrimination in contracts and employment under § 1981. *Runyon v. McCrary*, 427 U.S. 160 (1976); *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976); *Johnson Railway Express Agency, Inc.*, 421 U.S. 454 (1975); *Scott v. University of Del.*, 601 F.2d 76 (3d Cir. 1979); *Alexander Aero Lodge No. 735, Int'l Ass of Machinists and Aerospace Workers*, 565 F.2d 1364 (6th Cir. 1977), housing and property transactions under § 1982: *Jones Mayer*, 392 U.S. 409 (1968); *Dillon AFBIC Dev Corp.*, 597 F.2d 556 (5th Cir. 1979); *Taylor v. Fletcher Properties, Inc.*, 592 F.2d 244 (5th Cir. 1979); *Resident Advisory Bd. Rizzo*, 564 F.2d 126 (3d Cir. 1977); *Meyers Pennypack Woods Home Ownership Ass'n*, 559 F.2d 894 (3d Cir. 1977), suits by sub-federal governments under §§ 1983, 1985 (1), (2) & 1966: *Hall v. Pennsylvania State Police*, 570 F.2d 86 (3d Cir. 1978); *Wiley v. Memphis Police Dep't*, 548 F.2d 1247 (6th Cir. 1977); *Kimbrough O'Neil*, 523 F.2d 1057 (7th Cir. 1975); *Vasquez City of Reno*, 461 F. Supp. 1098 (D. Nev. 1978), by private conspirators under § 1985 (3): see *Griffin Breckenridge*, 403 U.S. 88 (1971); *McLellan Mississippi Power &*

appears to be that a significant part of the "private attorney general" basis for fee awards, overturned by *Alyeska*, has been reconstructed. *Alyeska* allows fees to be awarded under the common fund, substantial benefit, and "bad faith theories,"¹⁷ the Act

Light Co., 545 F.2d 919 (5th Cir. 1977); McNally v. Pulitzer Publishing Co., 532 F.2d 69 (8th Cir. 1976); Cohen v. Illinois Inst. of Technology, 524 F.2d 818 (7th Cir. 1975); Croy v. Skinner, 410 F. Supp. 117 (N.D. Ga. 1976); Reichardt v. Payne, 396 F. Supp. 1010 (N.D. Cal. 1975); Hohensee v. Dailey, 383 F. Supp. 6 (M.D. Pa. 1974), federally assisted programs under § 2000d; Hills v. Gautreaux, 425 U.S. 284 (1976); Lau v. Nichols, 414 U.S. 563 (1974); Coates v. Illinois State Bd. of Educ., 559 F.2d 445 (7th Cir. 1977); Joy v. Daniels, 479 F.2d 1236 (4th Cir. 1973); Shannon v. HUD, 436 F.2d 809 (3d Cir. 1970); Bossier Parish School Bd. v. Lemon, 370 F.2d 847 (5th Cir. 1967); Otero v. Mesa County Valley School Dist., 470 F. Supp. 326 (D. Colo. 1979); School Dist. of Saginaw v. HEW, 431 F. Supp. 147 (E.D. Mich. 1977), sex discrimination suits against sub-federal governments under § 1983: see Monell v. Department of Social Services, 436 U.S. 658 (1978); Marshall v. Kirkland, 602 F.2d 1282 (8th Cir. 1979); Sinicropi v. Nassau County, 601 F.2d 60 (2d Cir. 1979); Allen v. Lovejoy, 553 F.2d 522 (6th Cir. 1977); Braden v. University of Pittsburgh, 552 F.2d 948 (3d Cir. 1977); Vorcheimer v. School Dist., 532 F.2d 880 (3d Cir. 1976), by conspirators to deprive persons of civil rights on account of sex under §§ 1983 & 1985(3): Life Ins. Co. of North America v. Reichart, 591 F.2d 499 (9th Cir. 1979); Cohen v. Illinois Inst. of Technology, 581 F.2d 658 (7th Cir. 1979); Girard v. 94th St. & Fifth Ave. Corp., 530 F.2d 66 (2d Cir. 1976); Cohen v. Illinois Inst. of Technology, 524 F.2d 818 (7th Cir. 1975); Weise v. Syracuse Univ., 522 F.2d 397 (2d Cir. 1975); Vasquez v. City of Reno, 461 F. Supp. 1098 (D. Nev. 1978); Harris v. Pennsylvania, 419 F. Supp. 10 (M.D. Pa. 1976), federally assisted educational programs under 20 U.S.C. §§ 1681-86 (1976): see Cannon v. University of Chicago, 99 S. Ct. 1946 (1979); Junior College Dist. v. Califano, 597 F.2d 119 (8th Cir. 1979); Islesboro School Comm. v. Califano, 593 F.2d 424 (1st Cir. 1979); University of Toledo v. HEW, 464 F. Supp. 693 (N.D. Ohio 1979); Plascik v. Cleveland Museum of Art, 426 F. Supp. 779 (N.D. Ohio 1976); Cape v. Tennessee Second School Athletic Ass'n, 424 F. Supp. 732 (E.D. Tenn. 1976), suits based upon sub-federal or conspiratorial violations of constitutional or civil rights, under §§ 1983 & 1985: see Murphy v. Mount Carmel High School, 543 F.2d 1189 (7th Cir. 1976); Mulligan v. Schlachter, 389 F.2d 231 (6th Cir. 1968); Moran v. Bench, 353 F.2d 193 (1st Cir. 1965); Sixth Camden Corp. v. Township of Eversham, 420 F. Supp. 709 (D. N.J. 1976); Harris v. Ward, 418 F. Supp. 660 (S.D.N.Y. 1976); Croy v. Skinner, 410 F. Supp. 117 (N.D. Colo. 1976); cf. Great Am. Fed. Sav. & Loan Ass'n v. Novotny, 99 S. Ct. 2345 (1979) (the court held that violation of title VII could not be asserted through § 1985(c) action); and, tax cases where non-United States defendants prevail under the Internal Revenue Code: *But cf.*, Southeast Legal Defense Group v. Adams, 436 F. Supp. 891 (D. Or. 1977) (Civil Rights Attorneys Fees Awards Act of 1976 does not authorize attorneys fees against federal defendant but does against state defendant); Aparacor, Inc. v. United States, 571 F.2d 552 (Ct. Cl. 1978) (Civil Rights Attorney Fees Awards Act of 1976 does not authorize attorney fees for taxpayer initiated refund suit).

17 421 U.S. 257-59. The Supreme Court defined each of the theories upon which attorneys fees could be awarded, absent an authorizing statute. Under the common fund theory the equitable powers of the courts allow for an attorney to receive proportionate share of plaintiffs recovered or preserved common fund. *Id.* at 257. The attorneys fees is to be paid out of the fund. *Id.* The equity power of the court is also applied under the common benefit theory where the losing party which

provides a broader foundation for attorneys fees awards against certain government defendants in specific cases.¹⁸

Alyeska also left open the award of attorneys fees based on explicit statutory authorization.¹⁹ The present body of federal statutory law on attorneys fees, however resembles an unfinished patchwork quilt.²⁰ Statutes permitting awards of attorneys fees appear serendipitously²¹ While it is safer and easier to prevail on the question of attorneys fees by using a statute rather than by relying upon the "bad faith, common fund, or substantial benefit theories,"²² it is not always easy to find the statutes. Once the statute is found, however the battle is not won. Plaintiffs must prevail prior to any fee award. Prevailing against the government

was compelled to pay attorneys fees was the beneficiary of the litigation. *See* *Mills Electric Auto-Lite Co.*, 396 U.S. 375 (1970) (corporate defendant in stockholders derivative suit had to pay the attorneys fees of the plaintiff shareholders under the theory that the corporation benefited from the litigation). The court may also award attorneys fees against a party which proceeds in bad faith, or for vexatious, wanton or oppressive reasons. 421 U.S. at 259.

For an exhaustive discussion of these theories and the cases applying them see *Salisbury Equitable Bases for Attorneys Fees*, 1 COURT AWARDED FEES IN "PUBLIC INTEREST LITIGATION 157-78 (H. Newburg, Chrmn. 1978).

18. The applicability of § 1988 to cases where federal officials, agencies or entities are defendants is the subject of current, unresolved litigation. *Compare* *Shannon v. HUD*, 433 F. Supp. 249 (E.D. Pa. 1977), *aff'd*, 577 F.2d 854 (3d Cir. 1978), *cert. denied*, 439 U.S. 1002 (1979) (the court of appeals held that the Civil Rights Attorneys Fees Awards Act of 1976 did not permit an award of counsel fees against the United States in suit brought under title VII of the Act because there was no clear statutory authority to permit the award) *with* *NAACP v. Bell*, 448 F. Supp. 1164 (D. D.C. 1978) (suit under the Civil Rights Act of 1964 against the Justice Department challenging non-dual prosecution policy in which the plaintiff was awarded attorneys fees even after the department changed its policy making the case moot).

19. 421 U.S. at 270-71.

20. This patchwork has prompted one commentator to observe: "[M]embers of Congress frequently offer attorney fee amendments, without much fanfare, to bills as they move through the legislative process. Thus one must look very carefully, especially through voluminous legislation, to find counsel fee provision that may be applicable to your case. Wolf, *Federal Legislative Outlook For New Opportunities For Fee Awards*, 2 COURT AWARDED FEES IN "PUBLIC INTEREST LITIGATION 412-13 (H. Newburg, Chrmn. 1978).

21. Among the federal statutes affording attorneys fees awards in civil rights litigation that have not been mentioned are: The Freedom of Information and Privacy Acts, 5 U.S.C. § 552(a)(4)(E), (g)(2)(B), (3)(B)(1976); The Fair Labor Standards Act, 29 U.S.C. § 216(b) (1976) encompassing the Equal Pay Act of 1963, *Id.* § 206(d) and the Age Discrimination in Employment Act, *Id.* § 621, The Voting Rights Act Extension of 1975, 42 U.S.C. § 19731. (e) (1976); The Emergency School Aid Act of 1972, 20 U.S.C. § 1617 (1976); The Civil Rights Act of 1964, 42 U.S.C. §§ 2000a-3(b), 2000e-5(k) (1976). *See* *Cohen, Award of Attorneys Fees Against the United States: The Sovereign Is Still Somewhat Immune*, 2 W. NEW ENG. L. REV. 177 (1979).

22. *See* note 17 *supra*.

entails distinct economic²³ as well as legal considerations.

This author knows of no case in which government, great or small, old or new has been compelled to go into court without counsel or to forego litigation because of inadequate economic resources. Government has the massive, expandable litigation resources which allow it to appear in court whenever necessary. To the private litigant, government is an economically formidable, if not invincible, opponent. Furthermore, in cases where government is a defendant, the disparity of economic resources is reinforced by the fact that the government attorneys are compensated, win, lose, or draw.

In comparison, the private litigant's attorney often works on the contingency of a negotiated or court-ordered fee award. This arrangement is often necessitated by the client's inability to afford counsel. Therefore, non-governmental attorneys are confronted with the impracticability of years of protracted litigation and escalated costs, usually with no interim compensation.²⁴ Thus, the awarding of attorneys' fees theoretically enabling attorneys to accept essential constitutional and civil rights claims, may be an illusory political promise when such a system is predicated upon a substantial initial capital expenditure.

To prevail is an absolute prerequisite to receipt of the fee

23. Nongovernment funds for public interest law are shrinking. COUNCIL FOR PUBLIC INTEREST LAW, *BALANCING THE SCALES OF JUSTICE: FINANCING PUBLIC INTEREST LAW IN AMERICA* (1976).

In the prototypical realm of title VII, employment discrimination for example, one recent foundation report describes the economic phenomenon:

Title VII cases are becoming ever more difficult to litigate because of the cost of discovery and the need for expensive experts. The discovery process affords determined opponent numerous opportunities to escalate the cost of the proceedings even more. Provided defendants are willing to spend money to combat Title VII claims and there is every indication of an increased willingness on their part to do so, they can launch an all out paper war, expanding the scope of discovery through their own demands for information, while resisting plaintiffs' requests. Plaintiffs are forced to further expenditures of time and money if they want to move the action along. While the enormous cost of discovery is not unique to Title VII actions—the pervasiveness of the problem has prompted cries for reform—the harm is particularly acute when, as in Title VII actions, there is an enormous disparity between the financial resources of the parties.

M. BERGER, *LITIGATION ON BEHALF OF WOMAN: AN ASSESSMENT* 54-56 (1979) (footnotes omitted) (emphasis added).

24. *But see* Bradley v. Richmond School Bd., 416 U.S. 696, 723 (1974); Chandler v. Roudebush, 14 Empl. Prac. Dec. ¶7589, at 4904 (C.D. Cal. 1977). An interim award, however, is of no use where the prevailing party must provide one hundred percent collateral for bond in order to receive the fee. *See* Smith v. Union Oil Co., 18 Fair Empl. Prac. Cas. 1183 (N.D. Cal. 1978).

award in civil cases. This prerequisite may seem stunningly logical on its surface, in that the declared purpose of these statutes is to encourage the representation of persons having meritorious claims. The prevailing party standard, however should be reexamined more closely in light of other broader purposes of litigation against government.²⁵ It should also be reexamined in light of the reality that government defendants are free to make litigation prohibitively expensive regardless of the merits.

Consideration should be given to a new approach to the awarding of attorneys fees. As a congressionally controlled experiment, legislation should be enacted that would require payment of attorneys fees awards against government defendants in all cases presently covered by the attorneys fee statutes, whether or not the plaintiff prevails. Obviously the courts would prohibit awards in all actions which were "frivolous, unreasonable or without foundation"²⁶ or which were conducted in "bad faith."²⁷ This proposition would not modify the current criteria used by the courts to prohibit the award of attorneys fees.

The chief hypothesis of the proposed experiment is that most plaintiffs, excluding multinational corporations, challenging the government are in a position of economic disadvantage. Thus, there is a strategic premium for government defendants to protract litigation, escalate costs and conduct wasteful paper wars in order to overwhelm the plaintiffs. If this method of legal advocacy by war of attrition is used in meritorious cases, it will undermine the essential principle of statutes such as the Civil Rights Attorney s Fees Awards Act of 1976.

25. Consideration should be given, for example, to public information and education, government accountability, political organizing and first amendment exercises by oppressed groups.

26. See *Christianburg Garment Co. v. EEOC*, 434 U.S. 412, 421 (1978) (district court may award attorney fees to prevailing title VII defendant upon finding that the plaintiff' case was frivolous, unreasonable or without foundation, even though suit was not brought with subjective bad faith).

27. See *Hall v. Cole*, 412 U.S. 1, 15 (1973) (prevailing respondent awarded attorneys fees under § 102 of Labor Management Reporting Disclosure Act, in suit to regain membership in union after dismissal for alleged deliberate and malicious vilification of union management). The Court stated that while the presence of bad faith is essential to fee shifting, bad faith alone is not dispositive under national policy accepting the common benefit doctrine. 412 U.S. at 15. *Flashmann Distilling Corp.*

Maier Brewing Co., 386 U.S. 714, 719 (1967) (Lanham Act does not allow for recovery of attorneys fees even when there was deliberate infringement of trademark rights, however, fees are appropriate in certain circumstances such as civil contempt action based upon wilful disobedience); *Vaugh v. Atkinson*, 369 U.S. 527 (1962) (plaintiff received maintenance award and attorneys fees in lieu of damages when respondents callous attitude resulted in ineffective medical treatment).

A second hypothesis also can be posited. If there is an award of attorneys fees whether or not the plaintiff wins, government defendants will be discouraged from wasting public tax monies and governmental resources which result from protracted litigation. Thus, adoption of the proposal will encourage expedient resolution based chiefly on the merits, and not on relative economic endurance.

Like any radical legislative experiment, the proposed program carries certain risks. There is the possibility that legal professional opportunism will be encouraged, resulting in a proliferation of poorly handled, publicly financed lawsuits under the experimental law. There is also the interrelated possibility that courts will resist the awarding of fees by expanding the prohibitory "frivolous, unreasonable," without foundation," and "bad faith standards. If this expansion occurs, it will prevent awards to many deserving plaintiffs.

The extent of expenditure of public monies to pay such fee awards, and the likelihood of abusive actions on the part of some attorneys, are exceedingly difficult to predict. Nevertheless, to the extent that present attorneys fees awards statutes signify major congressional determinations about public interest" priorities,²⁸ the proposed experiment would be guided by a recognition that it would be unlikely to worsen the present gap between theory and practice, which is presently perpetuated by litigation resource disparities between government and others.

The proposal merits consideration and implementation because the distance is too great between the principle that certain litigation deserves public financing and the reality that some of that litigation against government defendants is plainly economically infeasible. Too often, public interest law concerns are displaced because of the political and economic primacy of the government as a law-maker law enforcer, law interpreter and civil defendant. The proposal, to authorize awards to plaintiffs for litigation of particular types of cases whether or not they prevail, is aimed at reducing the inequity of litigation resources that presently diminishes the practical, real-life worth and effectiveness of public interest attorneys fees awards law

28. The proposed legislative experiment assumes lack of comprehensiveness of current federal statutory attorneys fees awards provisions encompassing substantive public interest" law priorities. There are significant priorities, such as consumer and environmental protection issues that are not currently addressed by the patchwork quilt of statutes.