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COMMENT

COURT AWARDED ATTORNEYS' FEES IN MASSACHUSETTS

I. INTRODUCTION

This comment examines Massachusetts' state and federal court exceptions to the American rule disallowing attorneys' fees. Massachusetts follows the American rule with respect to court awarded attorneys' fees.[1] Under the rule, neither a plaintiff nor a defendant has an inherent right to receive attorneys' fees from the losing party in a court dispute.[2] The American rule is a departure from the English tradition of allowing counsel fees to a successful litigant.[3]

The American departure from the English rule can be traced to the colonists' view of attorneys. The honorable distinction associated with the legal profession was always matched in popular lore by the lawyer's reputation for sharpness and greedy manipulation of technicality to oppress the weak and ignorant.[4] The colonists saw the English system as favoring the wealthy over the poor and unduly burdening the losing party.[5] This view of the English system

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1. *See, e.g.*, Lincoln St. Realty Co. v. Green, 1978 Mass. Adv. Sh. 670, 373 N.E.2d 1172 (1978).

2. S. SPEISER, ATTORNEYS' FEES § 12:3, at 463-64 (1973). Of the fifty states, only Alaska does not follow the American rule. *See* ALASKA STAT. § 09.60.010 (1973). For more information on the American rule, see Goodhart, *Costs*, 38 YALE L.J. 849 (1929); Note, *Attorneys' Fees, Where Shall the Ultimate Burden Lie?*, 20 VAND. L. REV. 1216 (1967).

3. *See* S. SPEISER, *supra* note 2, § 12:7 at 479. In England, the Statute of Gloucester, 6 Edw. 1, c. 1, (1275), provided for costs including counsel fees to successful plaintiffs in litigation. Goodhart, *supra* note 2, at 853. Since 1607, English courts have been empowered to award counsel fees to defendants as well as plaintiffs. *Id.* at 853. Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 247 (1976).

It is customary in England to have separate hearings after claims are litigated before special taxing masters in order to determine the appropriateness and size of counsel fee awards. To prevent lengthy hearings, fees allowable are usually provided for even down to the amount to be recovered for specific services. S. SPEISER, *supra* note 2, § 12:7, at 479.

4. J. HURST, THE GROWTH OF AMERICAN LAW 251 (1950).

5. S. SPEISER, *supra* note 2, § 12:3, at 467. For another explanation of the American departure from the English rule see Note, *supra* note 2, at 1218 (fees provided for by statute, but statutes not updated to keep pace with the changes in the American monetary system).

of counsel fee allowances as nonegalitarian caused the early Americans to reject it.

Supporters of the English rule contend, however, that the allowance of counsel fees stimulates arbitration and settlement.[6] Litigants are deterred from entering litigation with a spurious claim because they fear that they will have to bear the burden of their opponent's attorneys' fees in addition to their own. Further, supporters contend that allowing attorneys' fees encourages juries to determine damages more accurately. When the fees are not available, the juries may, as a practical matter, find it impossible to exclude attorneys' fees from their minds in fixing compensation. Therefore, juries may inflate damage awards in order to provide complete compensation to an injured party.[7]

Supporters of the American rule marshall convincing arguments on behalf of their position that neither party has an inherent right to be awarded attorneys' fees. They point out that where there is a risk of losing a case and being held liable for an opponent's attorneys' fees, individuals may well be deterred from asserting a right.[8] It is a well recognized premise of the American judicial system that all individuals with legitimate claims should have their day in court.[9]

While the English rule may give fuller compensation, it may also discourage the poor, in particular, from pursuing their claims. Supporters of the American rule fear that the additional cost of counsel fees to be borne in case of failure is a burden which the impoverished litigant cannot shoulder.[10] The American rule may also preclude indigent clients from litigating legitimate suits. Indigent clients with meritorious claims may remain uncompensated in the absence of counsel fee allowances simply because few attorneys will be willing to represent a client who cannot pay a fee or provide any guarantee that the fee will be paid.[11] There are negative aspects to both the English and American rules but a solution to the problem emerges from an analysis of the American rule and its exceptions.[12]

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6. 15 U. CIN. L. REV. 313, 315 (1941).
7. *Id.*
8. Note, *supra* note 2, at 1231.
9. *See, e.g.*, Boddie v. Connecticut, 401 U.S. 371, 375 (1971).
10. Note, *supra* note 2, at 1224.
11. S. SPEISER, *supra* note 2, § 12:8, at 481.
12. 15 U. CIN. L. REV. 313, 315 (1941).

II. *ALYESKA*—EQUITABLE EXCEPTIONS TO THE AMERICAN RULE IN FEDERAL COURTS

Federal courts have traditionally used three grounds to sustain attorneys' fees awards in the absence of statutory authorization. Two grounds for equitable fee awards, the common fund and bad faith doctrines, are still viable. The third, the private attorney general rule, has been rejected by the United States Supreme Court in *Alyeska Pipeline Service Co. v. Wilderness Society*.[13]

In *Alyeska*, the Wilderness Society, the Environmental Defense Fund and Friends of the Earth initiated litigation to prevent the Secretary of the Interior from issuing permits for construction of the trans-Alaska oil pipeline. The court of appeals approved an award of attorneys' fees to the groups based on the theory that they were performing the services of private attorneys general.[14] The groups had acted on behalf of the public to vindicate important statutory rights of all citizens in seeing that the government acted properly in issuing the pipeline permits. Attorneys' fees were appropriate to ensure that the great cost of litigation, particularly against well-financed defendants such as Alyeska, would not deter private parties from enforcing the laws protecting the environment. The Supreme Court, however, reversed the lower court's decision. Justice White, writing for the majority, stated that reallocating the expenses of litigation was a matter more appropriate for the legislature to decide than for the judiciary.[15] The Court ruled, however, that the decision did not affect the other traditional grounds of equitable counsel fees recovery, that is, bad faith and common fund.[16]

The bad faith exception preserved in the *Alyeska* decision is one of the most widely used grounds for recovering counsel fees in the absence of statutory authorization. The federal courts have the power to award counsel fees to a successful party when the opponent has acted in bad faith, vexatiously, wantonly or for oppressive reasons.[17] *Vaughan v. Atkinson*[18] exemplifies the use of this nonstatutory ground for authorization of fees. In *Vaughan*, a seaman

13. 421 U.S. 240 (1975).
14. *Id.*
15. *Id.* at 247.
16. *Id.* at 257-58.
17. *See generally* Hall v. Cole, 412 U.S. 1, 5 (1973) (discussion of bad faith, but fees awarded under the common benefit theory).
18. 369 U.S. 527 (1962).

with tuberculosis sued the owners of a ship where he was employed for not providing him with food and lodging during his illness. The shipowners failed to admit or deny or even investigate the validity of the claim. The United States Supreme Court found that the shipowners' callous attitude in failing to investigate was willful and persistent.[19] Their inattentiveness to the claim forced the seaman to hire a lawyer and go to court in order to get what was plainly owed him. The Supreme Court awarded the seaman his counsel fees as part of the damages caused by the shipowners' bad faith.[20]

The standard of behavior necessary for a finding of "bad faith" is not a stringent one. Courts have been willing to find "bad faith" merely on the basis of a need for judicial assistance in securing a clearly defined and established right.[21] Consequently, in many cases in which fees have been sought on the basis of the private attorney general doctrine, the plaintiffs have pleaded the existence of "bad faith" as an alternative ground of recovery.[22] The awards based solely on bad faith, unlike those based on the private attorney general doctrine, are of limited help in encouraging an attorney to undertake a case for a client who cannot otherwise afford to bring the action. Such awards hinge on the other party's behavior and cannot be predicted prior to trial.[23]

The *Alyeska* Court's decision also left intact attorneys' fees allowances under the common fund doctrine. Under this theory, one who creates or protects a fund is entitled to recover attorneys' fees out of the fund. In this manner, the expense is shared by all who have benefitted through the creation or preservation of the fund.[24] Any existing fund, or any fund created by the litigation, may be used to pay the attorneys' fees. Examples of such funds are trust funds, escrow accounts, funds in corporate and other treasuries, and funds in the hands of a receiver.[25] The courts have expanded

19. *Id.* at 530-31.

20. *Id.* at 531.

21. Fairley v. Patterson, 493 F.2d 598, 606 (5th Cir. 1974); *The Supreme Court, 1974 Term,* 89 HARV. L. REV. 170, 182 (1975); Note, *Court Awarded Attorneys' Fees and Equal Access to the Court,* 122 U. PA. L. REV. 630, 660 n.4 (1974); Note, *Awarding Attorneys' Fees to the "Private Attorney General": Judicial Green Light to Private Litigation in Public Interest,* 24 HASTINGS L.J. 733, 737 (1973).

22. *See, e.g.,* Lee v. Southern Home Sites Corp., 444 F.2d 143 (5th Cir. 1971); Sims v. Amos, 340 F. Supp. 691, 694 (M.D. Ala.), *aff'd,* 409 U.S. 942 (1972).

23. Comment, *Court-Awarded Reasonable Fees: Forcing a Segregated Public Interest Bar?,* 7 FORDHAM URB. L. J. 399, 403 (1979).

24. *See generally* Trustees v. Greenough, 105 U.S. 527 (1882).

25. S. SPEISER, *supra* note 2, §§ 11:13-20, at 416-34.

the theory to the situation in which a common benefit has been found but no fund exists.[26] Those who receive the "common benefit" are required to share in the burden of counsel fees. In *Alyeska*, common fund and common benefit were lumped together under the heading "substantial benefit."[27] The *Alyeska* requirements for "substantial benefit" fee awards are that the class of beneficiaries be small and identifiable. Furthermore, the costs must be borne directly by those who benefit.

The third equitable exception discussed in the *Alyeska* decision is the private attorney general doctrine. This doctrine first appeared in *Newman v. Piggie Park Enterprises, Inc.*[28] *Newman* involved a successful injunction against racial discrimination at six restaurants. The injunction was granted under Title II of the Civil Rights Act of 1964.[29] The Supreme Court held that although title II suits are brought by private citizens, the outcome serves the public. Consequently, the plaintiff has, in effect, served as a "private attorney general." This doctrine was used extensively in civil rights cases prior to *Alyeska*[30] and the passage of the Civil Rigths Attorney's Fees Awards Act of 1976.[31] It was often used, in addition, in a wide range of public interest litigation.[32] The *Alyeska* Court, however, struck the private attorney general doctrine in federal question cases. Consequently, litigants seeking attorneys' fees must now rely on the remaining equitable doctrines or statutes authorizing the allowance of fees.[33]

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26. *Id.* § 11:21, at 434. *See also*, Mills v. Electric Auto-Lite Co., 396 U.S. 375, 392-93 (1970).

27. 421 U.S. at 264 n.39.

28. 390 U.S. 400 (1968). *See also* Lee v. Southern Home Sites Corp., 444 F.2d 143 (5th Cir. 1971) (litigants willing to act as private attorneys general to effectuate the purpose of a public statute should be allowed attorneys' fees).

29. 390 U.S. at 402.

30. 42 U.S.C. § 1988 (1976).

31. *See* Souza v. Travisono, 512 F.2d 1137 (1st Cir. 1975); Brandenburger v. Thompson, 494 F.2d 885 (9th Cir. 1974); Lee v. Southern Home Sites Corp., 444 F.2d 143 (5th Cir. 1971); NAACP v. Allen, 340 F. Supp. 703 (M.D. Ala. 1972).

32. *See* Wilderness Soc'y v. Morton, 495 F.2d 1026 (D.C. Cir. 1974), *rev'd sub nom.* Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240 (1975); Calnetics Corp. v. Volkswagon of America, Inc., 353 F. Supp. 1219 (C.D. Cal. 1973) (manufacturer of automobile air conditioners acted as a private attorney general in prosecuting a violation of the Clayton Act); La Raza Unida v. Volpe, 57 F.R.D. 94 (N.D. Cal. 1972) (private citizens acting as private attorneys general in enjoining state highway construction project where strong public policies of environmental protection and housing assistance were at issue).

33. Cohen, *Awards of Attorneys' Fees Against the United States: The Sovereign Is Still Somewhat Immune*, 2 W. NEW ENG. L. REV. 177 (1979). In addition to the statutory fee awards, there are a number of federal rules of court providing for

The Court advanced several rationales for its conclusion that counsel fees should not be awarded under the private attorney general doctrine. The first argument relies upon the Court Costs Statute of 1853.[34] In the majority opinion, Justice White indicated that the statute was intended to limit recovery of costs to specified sums.[35] Justice White explained that Congress had standardized the costs allowable in federal litigation to avoid unfairly saddling the losing litigant with exorbitant fees for the victor's attorney. The manageability and fairness of awards in the absence of legislative guidance also concerned the Court. Furthermore, the Court noted that since the federal government has statutory immunity, the parties would not be able to collect attorneys' fees against the government. It also questioned the equity of allowing fees against private parties and not against the federal government since private attorney general actions are often brought to enforce federal government obligations.[36]

Justices Brennan and Marshall saw no basis in precedent for holding that courts cannot award counsel fees unless the fee claim fits squarely under a sanctioned judicial exception to the American rule.[37] Under Justice Marshall's view, fees should be awarded where the interests of justice require recovery.[38] Justice Marshall

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fee awards. *See, e.g.*, Toledo Scale Co. v. Computing Scale Co., 261 U.S. 399 (1923), Grunberg v. Louison, 343 Mass. 729, 180 N.E.2d 802 (1962) (allowance of counsel fees in a contempt proceeding); FED. R. CIV. P. 41(a)(2) (courts may impose such conditions as seen fit); S. SPEISER, *supra* note 2, § 12:47, at 524 (discretion of the courts), § 13:3, at 621-23 (vexatious litigation), § 13:6, at 627-28 (admiralty cases), § 14:37, at 60-61 (civil contempt).

34. 28 U.S.C. §§ 1920, 1923 (1976).

35. 421 U.S. at 251-53. Sections 1920 and 1923 enumerate recoverable costs. Section 1920 includes clerk and marshall fees, court reporters, printing and copying, and witnesses. Section 1923 provides for docket fees and costs of briefs.

36. *Id.* at 265-68. *See also* 28 U.S.C. §§ 2412, 2413 (1976) (preclusion of attorneys' fees as costs against the United States); Cohen, *supra* note 33, at 179-81 (federal common law exceptions discussed in relation to statutory fee allowances and sovereign immunity); Dunlap, *Attorneys' Fees Against Government Defendants: Economics Requires a New Proposal*, 2 W. NEW ENG. L. REV. 311 (1979). For fee awards against state governments, see Fitzpatrick v. Bitzer, 427 U.S. 445 (1976) (eleventh amendment does not bar backpay and attorneys' fees awards since the amendment and state sovereignty are limited by the enforcement provisions of § 5 of the fourteenth amendment). Section 5 grants Congress the authority to enforce its provisions by appropriate legislation in a manner which would otherwise be constitutionally impermissible. *Id.*

The award in *Fitzpatrick* was pursuant to statute. The situation differs when the court seeks to award fees on its own authority. The constitutional arguments in that situation are not so readily overcome.

37. 421 U.S. at 273.

38. *Id.* at 272.

attacked the majority's arguments premised on the Court Costs Statute of 1853 and judicial manageability. The Supreme Court, according to Justice Marshall, has not used the Court Costs Statute as a general bar to judicial fee shifting in the past. He said that judicial manageability should not dissuade the Court from considering these cases since there are analogous statutory and nonstatutory fee cases which enunciate guidelines which can be applied.

Justice Marshall contended that while the majority recognizes the continued vitality of the bad faith and common benefit exceptions, it ignores the theory underlying them. He said that rejection of the private attorney general concept contradicted the wide construction given to the common benefit exception in recent Supreme Court cases.[39] Justice Marshall's opinion has received close attention.

One commentator, for instance, indicates how little difference actually exists between recent common benefit cases and the private attorney general concept and suggests that two different labels describe substantially the same theory.[40] This proposition brings into question the *Alyeska* majority's distinction between the two. Some courts, for instance, find a common benefit when a cause of action is brought to vindicate a statute on behalf of the public.[41] In *Mills v. Electric Auto-Lite Co.*,[42] a common benefit was found when plaintiffs brought a successful suit to set aside a corporate merger accomplished through the use of a misleading proxy statement. The plaintiffs established the violation of the securities laws for the benefit of the corporation and its shareholders. The Supreme Court indicated the benefit conferred was the availability of "an important means of enforcement of the proxy statute."[43] Allowance of attorneys' fees to enforce the statute resembles the notion that the plaintiffs are acting as private attorneys general to enforce the public interest.

Some courts, on the other hand, carefully distinguish the common benefit and private attorney general theories. In *District of Columbia v. Green*,[44] the attorneys representing taxpayers who prevented the collection of illegally imposed taxes sought attorneys'

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39. *Id.* at 275.

40. *The Supreme Court, 1974 Term*, 89 HARV. L. REV. 170, 176 (1975).

41. Hall v. Cole, 412 U.S. 1 (1973) (suit under the Labor Management-Relations and Disclosure Act of 1959); Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1970) (suit under the Securities Act of 1934).

42. 396 U.S. 375 (1970).

43. *Id.* at 396.

44. 381 A.2d 578 (D.C. 1977).

fees from the District of Columbia treasury. The court did not allow attorneys' fees under the common benefit theory because the benefitting class was not sufficiently definable.[45] The court refused to rule that all District citizens benefitted from the vindication of constitutional principles and were members of the injured class.[46] The court found such a ruling merges the common benefit exception with the private attorney doctrine rejected by the Supreme Court in *Alyeska*.[47]

The result of the *Alyeska* decision was a drastic reduction in the available grounds for equitable attorneys' fees awards in public interest cases. This reduction prompted the passage of the Civil Rights Attorney's Fees Awards Act of 1976.[48] The Act authorizes attorneys' fees in the area of civil rights.[49] The purpose of the Act is to remedy the "anomalous gaps" in the civil rights laws created by *Alyeska*, by providing federal courts the discretion to award attorneys' fees to prevailing parties in suits brought to enforce the Civil Rights Acts passed since 1866.[50] The problem, of course, is that the Act's protection is limited to the area of civil rights. Environmentalists and other public interest groups which relied on the equitable ground for collection of counsel fees are not protected under the Act unless they can fit under the narrow requirements of the substantial benefit or bad faith rationales or obtain congressional authorization. Statutory authorization is, however, insufficient in many cases. Public interest suits may be brought under a statute which does not provide for attorneys' fees. Another problem is the lack of uniformity in statutory provisions. There is often authorization for attorneys' fees under one statute but not another in the same general area of law.[51] For example, in environ-

45. *Id.* at 582 n.9.

46. *Id.*

47. *Id. See also* Skehan v. Trustees of Bloomsburg State College, 538 F.2d 53, 56 (3d Cir. 1976) (rejection of common benefit exception in which the general public derived benefit from requiring public institutions to act in accordance with the demands of due process).

48. Civil Rights Attorney's Fees' Awards Act of 1976, 42 U.S.C. § 1988.

49. Section 1988 provides for attorneys' fees in action brought to enforce § 1981 (equal rights under the law), § 1982 (property rights of citizens), § 1983 (civil action for deprivation of rights), § 1985 (conspiracy to interfere with civil rights), the Educational Amendments to Title IX, Pub. L. No. 92-318, 86 Stat. 235 (1972), the United States Internal Revenue Code, and Title VII of the Civil Rights Act of 1964 (employment discrimination).

50. S. REP. NO. 1011, 94th Cong., 2d Sess. 1 (1976), *reprinted in* [1976] 5 U.S. CODE CONG. & AD. NEWS 5908.

51. *See* Derfner, *The True "American Rule": Drafting Fee Legislation in the Public Interest*, 2 W. NEW ENG. L. REV. 251 (1979).

mental law there are provisions for fees under the Clean Air Act,[52] but there are not provisions under the Insecticide, Fungicide and Rodenticide Act.[53] It is also common for a statute to authorize fee awards under one subsection and not under another of the same statute. In order for Congress to respond adequately to the problems created by *Alyeska*, each specific area of the law would have to be examined to determine whether authorization of attorneys' fees should be provided.[54]

This hit or miss method for allowing attorneys' fees could discourage public interest suits. Fee awards are an extremely important element in public interest litigation. Public interest cases often involve complex issues of law and fact which require a great deal of preparation and expense. At the same time, the suits frequently seek injunctive rather than monetary relief and involve clients without adequate funds for the lengthy litigation.[55] It is possible that the private bar could aid greatly in matters of public interest if attorneys' fees were more freely allowed by the courts.[56] The private bar cannot accept many public interest cases when a fee award does not exist or is insufficient to defray expenses or pay the attorney's customary salary.[57]

III. STATE RESPONSE TO FEDERAL REJECTION OF THE PRIVATE ATTORNEY GENERAL DOCTRINE

The state courts must follow the federal courts and reject the private attorney general theory when hearing a federal cause of action.[58] The states may, however, make their own decision with regard to the doctrine in actions brought under state law. Thus, it is

52. 42 U.S.C. § 1857h-2(d)(1976).

53. 7 U.S.C. § 136*l*(d)(1976).

54. Derfner, *supra* note 51, at 260-61.

55. Nussbaum, *Attorney's Fees in Public Interest Litigation*, 48 N.Y.U. L. REV. 301 (1973).

56. Comment, *supra* note 23 at 421. *See also* E. Cahn, *Power to the People or the Profession—The Public in Public Interest Law*, 79 YALE L.J. 1005 (1970). For more information on the importance of attorneys' fees in specialized areas of the law see Brown, *Calculation of Attorneys' Fees: Franchise and Antitrust Relief*, 2 W. NEW ENG. L. REV. 297 (1979).

57. Comment, *supra* note 23 at 411. For more information on the reasonableness of attorneys' fees allowances, see *Id.* at 420 (attorneys' fees do not reflect fair marketplace value of counsel services or take into account office overhead, or the length and exclusive nature of a given case).

58. *See* Ward v. Love County, 253 U.S. 17 (1920); U.S. CONST. art. VI (the supremacy clause). *But cf.* Erie R.R. v. Tompkins, 304 U.S. 64 (1938). For information on the *Erie* substance-procedure distinction in fee awards see Note, *supra* note 2, at 1218.

not necessary that the state courts follow the federal courts and sound the death knell of the private attorney general. The state courts in Massachusetts and California, for example, have adopted opposite viewpoints on this issue.

California has chosen to retain the private attorney general doctrine despite the United States Supreme Court's position in *Alyeska*. In *Serrano v. Priest*,[59] the Supreme Court of California ruled in a 5-3 decision that a counsel fee award was appropriate where state constitutional rights were being vindicated. Judgment was reserved on the issue of whether a statutory right's vindication would suffice for the award. The fees in *Serrano* were allowed to two public interest law firms who represented plaintiffs in a successful challenge to the California public school financing system under the equal protection clause of the California Constitution. The California court discussed the *Alyeska* decision and found that the Supreme Court recognized that the fashioning of state equitable exceptions was a matter left solely to the discretion of the state courts.[60] The California court was fully aware of the criticism that through awarding fees under equitable doctrines a judiciary violates the separation of powers by usurping what some consider solely a legislative function. The court, however, exercised its discretion and retained the doctrine. The court proposed basic factors to be considered in awarding fees under the theory to control usage of the doctrine. These factors included the societal importance of the public policy, the necessity for private enforcement, the magnitude of the burden on the plaintiff, and the number of potential beneficiaries.[61]

Justice Richardson, dissenting in *Serrano*,[62] found the *Alyeska* rationale more persuasive than the majority position in *Serrano*. Justice Richardson's concern was the California court's refusal to rule on the viability of the private attorney general doctrine while the *Alyeska* case was pending before the United States Supreme Court. The Supreme Court ultimately rejected the private attorney general doctrine, yet the California majority ignored the Supreme Court's reasoning and retained the rule.[63] Like the Court in *Alyeska*, Justice Richardson was concerned with the problem of

59. 20 Cal. 3d 25, 569 P.2d 1303 (1977).

60. *Id.* at 43, 569 P.2d at 1312-13 (citing Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 259 n. 31. (1976)).

61. *Id.* at 45, 569 P.2d at 1314.

62. *Id.* at 49, 569 P.2d at 1317.

63. *Id.* at 51, 569 P.2d at 1318.

court involvement in policymaking and judicial manageability.[64] Justice Richardson noted that there is a wide spectrum of rights accorded to citizens under the California Constitution.[65] The constitution protects such fundamental rights as life and liberty and also such accepted freedoms as the right to fish in public waters. The wide disparity in the importance of these rights makes it difficult for the courts to decide which rights can be vindicated by granting fee awards.[66]

Justice Clark, also dissenting in *Serrano*,[67] criticizes the majority's decision from a separation of powers viewpoint. Justice Clark indicated that California judges up to this point have entertained neither the dream nor the power to endorse social programs, nor to appropriate money to fund those causes deemed deserving.[68] He does not want the judiciary to be forced to decide which causes are worthy enough to be supported by the award of counsel fees. He views such policymaking as strictly a legislative matter, not one to be usurped by court endorsement of one policy over another.[69] The California Legislature is apparently less concerned with judicial enforcement of social policy than is Justice Clark. Since *Serrano*, the legislature has enacted a loose codification of the private attorney general doctrine.[70] The statute leaves

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64. *Id.*
65. *Id.* at 52, 569 P.2d at 1319.
66. *Id.*
67. *Id.*
68. *Id.* at 54, 569 P. 2d at 1320.
69. *Id.*
70. CAL. CIV. PROC. CODE § 1021.5 (West Cum. Supp. 1978):

> Upon motion, a court may award attorneys' fees to a successful party against whom 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 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.

The California Appeals Court held that § 1021.5 was a legislative declaration of attorneys' fees policy combining elements of the substantial benefit (common fund/common benefit) and private attorney general theories. Woodland Hills Residents Ass'n v. City Council, 75 Cal. App. 3d 1, 141 Cal. Rptr. 857, 863 (1977), *vacated*, 23 Cal. 3d 917, 154 Cal. Rptr. 503 (1979) (distinguishing substantial benefit and private attorney general). *But cf.* 381 A.2d at 586-87 (refusing to allow fees for fear of merging the common benefit exception with the private attorney approach rejected by the *Alyeska* court). *See also* Note, *Implementation of California's Adoption of the Private Attorney General Theory and the Impact of Cal. Civ. Pro. Code sec. 1021.5: Serrano v. Priest*, 1 WHITTIER L. REV. 259, 275 (1979) (suggestion § 1021.5 intended as limitation on the courts' ability to award attorneys' fees).

the courts with a great deal of discretion in determining when to award counsel fees.

Massachusetts, in contrast to California, follows the federal courts in rejecting the private attorney general doctrine. In *Bournewood Hospital, Inc. v. Massachusetts Commission Against Discrimination*,[71] an employment discrimination case, the Massachusetts Supreme Judicial Court recognized that it was not bound to follow *Alyeska* in its state court proceedings. The court, however, found the reasoning and result of *Alyeska* correct and concurred that the private attorney general doctrine should be rejected.[72] Massachusetts state courts are obliged to follow the federal law when hearing a federal cause of action.[73] The state courts have the choice, however, when applying state law, of whatever direction they deem best in awarding fees under the theory. Their decision, in turn, determines the law to be applied in diversity cases in federal courts. The Supreme Court recognized in *Alyeska* that state law should be followed in actions grounded on diversity when it does not run counter to federal statute or rule of court and when it reflects a substantial policy of the state.[74] Thus, a federal court applying California law in a diversity case should follow the state law and allow fees under the private attorney general doctrine. The federal courts, however, hearing a Massachusetts cause of action should follow *Bournewood* and reject the allowance of counsel fees under the doctrine.[75] A problem arises when a state has not ruled

71. 371 Mass. 303, 358 N.E.2d 235 (1976). The following cases have endorsed the *Bournewood* rationale. Massachusetts Elec. v. Massachusetts Comm'n Against Discrimination, 1979 Mass. Adv. Sh. 1189, 375 N.E.2d 1192 (1978); Fuss v. Fuss, 372 Mass. 64, 368 N.E.2d 271 (1977); Broadhurst v. Director of Div. of Employment, 1978 Mass. Adv. Sh. 2448, 369 N.E.2d 1018 (1977); Lincoln St. Realty Co. v. Green, 1978 Mass. Adv. Sh. 670, 373 N.E.2d 1172 (1978).

72. Bournewood Hosp., Inc. v. Massachusetts Comm'n Against Discrimination, 371 Mass. 303, 358 N.E. 2d 235, 240 (1976).

73. *See* notes 58 *supra*.

74. 421 U.S. at 259. *See also* Erie R.R. v. Tompkins, 304 U.S. 64 (1938).

75. Prior to *Alyeska*, the First Circuit had fully recognized the private attorney general doctrine. *See* Souza v. Travasino, 512 F.2d 1137 (1st Cir. 1975) (inmates who successfully challenged prison regulation limiting access of attorneys and law students properly awarded attorneys' fees); Hoitt v. Vitek, 495 F.2d 219 (1st Cir. 1974) (prison inmates brought civil rights action against prison officials, attorneys' fees were appropriate when awarded to encourage important public policy enforcement through private attorneys general); Knight v. Auciello, 453 F.2d 852 (1st Cir. 1972) (plaintiffs prevailed in their suit alleging unlawful racial discrimination in defendants refusing to lease an apartment, attorneys' fees were appropriate as plaintiffs were seeking to vindicate a public right where damages were little compared to the cost of vindicating the right). For an introduction to federal court application of state law in the area of attorneys' fees see Note, *supra* note 2, at 1217.

on the doctrine's viability. The federal court must in that instance determine what law should be appropriately applied.[76]

IV. BAD FAITH AND COMMON FUND IN STATE AND FEDERAL COURTS IN MASSACHUSETTS

The *Alyeska* decision preserved the "bad faith" exception to the general rule of no counsel fee awards.[77] One commentator suggested that the exception is presently broader than the common understanding of bad faith.[78] The original reasoning behind the exception was primarily punitive, and the award was appropriate only when the defendant was guilty of improper conduct. Courts have expanded the exception, primarily in civil rights cases,[79] to include the situation in which judicial assistance is required to preserve an established right.[80]

The courts in Massachusetts, however, have statutory authority to award counsel fees as costs in cases in which there are insubstantial, frivolous or bad faith claims or defenses.[81] The statute permits the court to make a finding of bad faith against any party to the proceedings.[82] The statute does not provide for specific amounts, but instead allows the court to award reasonable counsel

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76. The complicated choice of law issues faced by federal courts are beyond the scope of this comment.

77. 421 U.S. at 258-59.

78. Note, *Attorneys' Fees*, 29 VAND. L. REV. 685, 722 (1976).

79. *Id. See also* Bell v. School Bd., 321 F.2d 494 (4th Cir. 1963).

80. 42 U.S.C. § 1988 (1976).

81. MASS. GEN. LAWS ANN. ch. 231, § 6F (West 1976).

> § 6F. Costs, expenses and interest for insubstantial, frivolous or bad faith claims or defenses
>
> Upon motion of any party in a civil action in which a finding, verdict, decision, award, order or judgment has been made by a judge or justice or by a jury, auditor, master or other finder of fact, the court may determine after a hearing, as a separate and distinct finding, that all or substantially all of the claims, defenses, setoffs or counterclaims, whether of a factual, legal or mixed nature, made by any party who was represented by counsel during most or all of the proceeding, were wholly insubstantial, frivolous and not advanced in good faith. The court shall include in such finding the specific facts and reasons on which the finding is based.
>
> If such a finding is made with respect to a party's claims, the court shall award to each party against whom such claims were asserted an amount representing the reasonable counsel fees and other costs and expenses incurred in defending against such claims. If the party against whom such claims were asserted was not represented by counsel, the court shall award to such party an amount representing his reasonable costs, expenses and effort in defending against such claims . . . .

Id.

82. *Id.*

fees and other costs and expenses incurred in defending against the frivolous and fraudulent claims.[83]

The common fund or common benefit theory has achieved wide recognition in both state and federal courts in Massachusetts.[84] This acceptance is consistent with the position of the United States Supreme Court.[85] One of the earliest decisions allowing fees out of a fund in Massachusetts was *Davis v. Bay State League*.[86] In *Davis*, a large number of certificate holders benefitted from a suit brought for fraud and mismanagement against the officers of a corporation. The court held that the plaintiff's attorney was entitled to counsel fees out of the common fund created and in the hands of the receiver. The allowance of fees often occurs in cases brought to vindicate corporate stockholders' rights as in the *Davis* decision.[87] A readily identifiable fund is usually created in the shareholders' rights cases. When an actual fund does not exist, courts have relied on the common benefit of persons interested in the preservation of the same property to award fees.[88]

The First Circuit application of the common fund doctrine in *Kargman v. Sullivan*[89] illustrates the value of the doctrine to plaintiffs seeking recovery of actual expenses, including counsel fees and other costs. In the case, the Kargmans, owners of subsidized housing, sued Boston rent control officials asserting city rent control levels conflicted with the higher rent rates allowed by the Department of Housing and Urban Development.[90] A preliminary injunction was granted, but all excess rents were required to be put into an escrow account. After the Kargmans lost the lengthy legal battle, the court allowed attorneys' fees to be paid out of the escrow fund to the attorney who intervened on behalf of several tenants in

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83. *Id.*

84. Kargman v. Sullivan, 552 F.2d 2, *vacated*, 582 F.2d 131 (1st Cir. 1978).

85. *See, e.g.*, Hall v. Cole, 412 U.S. 1 (1973); Sprague v. Ticonic Bank, 307 U.S. 161 (1939); Harrison v. Perea, 168 U.S. 311 (1897); Hobbs v. McLean, 117 U.S. 567 (1886); Central R.R. & B. v. Pettus, 113 U.S. 116 (1885); Trustees v. Greenough, 105 U.S. 527 (1882).

86. 158 Mass. 434, 33 N.E. 591 (1893).

87. *See* Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1970); Angoff v. Goldfine, 270 F.2d 185 (1st Cir. 1959); 158 Mass. at 434, 33 N.E. at 591.

88. Clark v. Sawyer, 151 Mass. 64, 23 N.E. 726 (1890); Cobb v. Rice, 130 Mass. 235 (1881); Commonwealth v. Mechanics Mut. Fire Ins. Co., 122 Mass. 421 (1887); Bowditch v. Soltyk, 99 Mass. 136 (1868).

89. 582 F.2d 131 (1st Cir. 1978).

90. *Id.* at 132.

Kargman housing.[91] Although the tenant-plaintiffs were not class representatives, their interests were identical to those of other tenants and their attorneys' efforts were primarily responsible for the tenants' triumph. Without the intervenors' efforts, no fund would have been created and no one would have benefitted. Thus, it was equitable for all tenants profiting from the litigation to share the cost of bringing the suit.

Certain limitations are traditionally imposed upon the common fund or common benefit doctrine.[92] It should be exercised only in exceptional cases which require unusual methods to bring about substantial justice. In addition, the attorney seeking the award bears the burden of showing the fee claim comes squarely under the equitable principle.[93]

V. Other Exceptions to the American Rule in Massachusetts

Massachusetts allows counsel fees when provided for by statute, rule of court, or a valid contract or stipulation.[94] In addition, Massachusetts recognizes the common fund doctrine discussed above and provides statutory authorization for fee awards in cases of bad faith. Beyond these, there are a few limited and exceptional circumstances when counsel fees may be awarded by the court.

One unusual exception occurs when the defendant is free from fault and the plaintiff's injury stemmed solely from a third party's bad conduct.[95] If a defendant is held responsible at law in spite of his freedom from fault, then the fault-free defendant may sue the third party for attorneys' fees in a separate action. A practical application of this doctrine is seen in *Consolidated Hand-Method Lasting Machine Co. v. Bradley*.[96] Plaintiff in the suit seeking attorneys' fees had been successfully sued for damages for the death of

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91. *Id.*

92. Sprague v. Ticonic Bank, 307 U.S. 161 (1939); Weed v. Central R.R., 100 F. 162 (5th Cir. 1900); Keyworth v. Israelson, 240 Md. 289, 214 A.2d 168 (1965); S. SPEISER, *supra* note 2, § 11:9, at 410-11.

93. 20 AM. JUR. 2d *Costs* § 86 (1965) (limits announced by courts); Fischer v. Superior Oil Co., 390 P.2d 521 (Okla. 1964) (care and caution required in applying common fund doctrine).

94. Fuss v. Fuss, 372 Mass. 64, 368 N.E.2d 274 (1977).

95. *Id.*

96. 171 Mass. 127, 50 N.E. 464 (1898). *See also* Ford v. Flaherty, 364 Mass. 382, 305 N.E.2d 112 (1973); Buhl v. Viera, 328 Mass. 201, 102 N.E.2d 774 (1952). *But cf.* Hollywood Barbecue Co. v. Morse, 314 Mass. 368, 50 N.E.2d 55 (1943) (attorneys' fees allowed although defendant was not totally free from fault).

one of its employees. The present defendants, however, were actually responsible for the death. Curiously, the court held that the case fell within the rule that a master held responsible for a servant's acts, without misfeasance on his part, may recover not only the amount of the judgment against him but his reasonable expenses, including counsel fees. The rule does not apply where one is defending his own wrong or his own contract, although another may be responsible to him.

The third party bad conduct rule has specific requirements for its application. The plaintiff in the second action must establish involvement in a legal dispute because of the defendant's breach of conduct or defendant's tortious act. The attorneys' fees sought must have been incurred in litigation with a third party, not in the suit with the defendant from whom recovery is sought. The fees must, in addition, be the natural and necessary consequence of the defendant's bad conduct since remote or uncertain consequences do not afford a basis for recovery.[97]

Another exception to the general rule occurs in tort actions for malicious prosecution.[98] A malicious prosecution is one begun with malice and without probable cause with the intention of injuring the defendant and terminating in favor of the person prosecuted.[99] In *Wheeler v. Hanson*,[100] attorneys' fees were awarded in a malicious prosecution suit after an embezzlement charge. The plaintiff's expense in procuring sureties on his bail bond and in employing counsel were elements of the damages to which he was entitled. In early cases there was a broad based recovery premised on the wrongful conduct of a defendant. The plaintiff was allowed to recover reasonable attorney's fees as an element of damages when the wrong was of such a character that proper protection of plaintiff's rights required employment of counsel.[101] The courts expressed fear that awards requiring only the existence of a wrong without actual malicious prosecution ranges so far afield as to run the risk of destroying the general rule through exception.[102]

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97. S. SPEISER, *supra* note 2, § 13:4, at 623.

98. *See generally* Stiles v. Municipal Council, 233 Mass. 174, 123 N.E. 615 (1919) (tort action against council member for damages suffered by wrongful removal of city collector, reasonable attorneys' fees were an element of damages); Wheeler v. Hanson, 161 Mass. 370, 37 N.E. 382 (1894).

99. Wheeler v. Hanson, 161 Mass. 370, 374, 37 N.E. 382, 384 (1894).

100. *Id.*

101. *See* Malloy v. Carroll, 287 Mass. 376, 385, 191 N.E. 661, 665 (1934) (plaintiffs wrongly excluded from labor union, suit brought in equity against officers and members).

102. Chartrand v. Riley, 354 Mass. 242, 237 N.E.2d 10 (1968).

Chartrand v. Riley[103] restricts the application of the malicious prosecution rule. The court in *Chartrand* denied counsel fees to an improperly discharged registry of motor vehicles employee who sought to recover fees incurred in a mandamus proceeding to compel reinstatement. The court found that the allowance of fees where a "wrong" exists but no malicious prosecution has taken place provides too broad a ground for recovery.[104] The rule could be extended to include any case in which the plaintiff has to seek a remedy in the courts. Such broad application would totally circumvent the American rule of no attorneys' fees awards. The limitations on counsel fees in these cases may seem harsh. Nevertheless, many actions based on the defendant's wrongful conduct may receive statutory help in Massachusetts. The statute providing for the award of expenses, including counsel fees, for insubstantial, frivolous, and bad faith claims or defenses could provide counsel fees for wronged parties in many cases.[105]

VI. CONCLUSION

Massachusetts courts generally will not allow the award of attorneys' fees in the absence of statutory authorization. There are certain limited exceptions to the rule. These include counsel fee allowances when authorized by court rule, when the court finds a valid contract or stipulation between the parties, and when a third party's bad conduct or a tort action for malicious prosecution is involved. The most successfully utilized equitable exception is the establishment of a common fund or common benefit. It has been particularly useful in the vindication of shareholders' rights.

Federal courts in Massachusetts, in addition to these exceptions, may apply federal equity jurisdiction in cases involving federal law. The federal bad faith exception, which is statutory in Massachusetts, is allowed as well as the common fund or common benefit doctrine. The private attorney general doctrine is disallowed under both federal and Massachusetts equitable principles.

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103. *Id.* For additional cases denying attorneys' fees as damages where a "wrong" exists see Saunders v. Austin W. Fishing Corp., 352 Mass. 169, 224 N.E.2d 215 (1967) (suit in equity by judgment creditor to reach and apply the proceeds of a marine policy of liability insurance in satisfaction of the judgment); Manganaro v. DeSanctis, 351 Mass. 107, 217 N.E.2d 760 (1966) (partners who brought a bill in equity for an accounting of the partnership against a third party not entitled to attorneys' fees); Goldberg v. Curhan, 332 Mass. 310, 124 N.E. 2d 926 (1955) (plaintiff prevailed in suit to enjoin false representations made by business competitor, plaintiff not entitled to attorneys' fees incurred).

104. Chartrand v. Riley, 354 Mass. 242, 243, 237 N.E.2d 10, 11 (1968).

105. MASS. GEN. LAWS ANN. ch. 231, § 6F (West 1976).

The *Alyeska* decision dealt a devastating blow to public interest litigation by disallowing counsel fees under the private attorney general doctrine. Congressional enactment of the Attorney's Fees Awards Act of 1976 aids those vindicating civil rights, but other public interest groups have suffered. There are few groups sufficiently funded to bear the cost of lengthy litigation against a well-financed defendant. It is doubtful the private bar will take up the cause of these groups without adequate economic rewards. Although the current legislative counsel fee awards aid in some cases, there are still many areas which do not receive statutory help. Allowance of attorneys' fees for suits brought in the public interest would be one method of assuring equal enforcement of all policies of value to all citizens. The negative reaction to court as opposed to legislative endorsement of selected policies evinces too little confidence in our judiciary. Judges are involved everyday in the balancing of delicate and important interests. Enforcement of the public interest requires the flexibility of court awarded attorneys' fees.

Roberta Baker Jones