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INTRODUCTION A BRIEF GLANCE AT ATTORNEYS' FEES AFTER ALYESKA

Hon. James L. Oakes*

When the Supreme Court decided *Alyeska Pipeline Service Co. v. Wilderness Society* ¹ reaffirming the American Rule that a prevailing party is generally not entitled to attorneys fees,² it merely altered the parameters of litigation over attorneys fees; it did not end the controversy. This symposium addresses many of the issues that remain. This introduction is intended to provide a background to, and delineate some of, those issues without preempting the authors of the commentaries that follow.

The Court in *Alyeska* was disturbed by a growing tendency of the lower federal courts to permit an award of attorneys fees to parties vindicating the "public interest" by acting as "private attorneys general."³ The "private attorney general" concept had found perhaps its most expansionist expression in *La Raza Unida v. Volpe* ⁴ In that case the district court, after enjoining a highway construction project for failure to comply with statutory housing relocation requirements, awarded attorneys fees against the California Highway and Public Works Departments as well as against the Chief Highway Engineer in his individual and representative capacity. The decision may have envisaged:

[A]n era of the law's developing its own internal self-sustaining institution meeting the social demand for law actively to subserve the public interest in environmental protection—creating in three steps (1) a public right, (2) persons (or objects) with

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¹ U.S. Circuit Judge, United States Court of Appeals for the Second Circuit.
³ See 421 U.S. at 270 n.46 (citations omitted).
standing to assert that right, and (3) providing the means for
paying the lawyers and technical experts who do the work to as­
sert the right. Thus evolves democracy in this wondrous law­
oriented society of ours. 5

Alyeska has effectively ended the visionary fanciful, or rather
frightening—depending on the viewer's perspective—scheme of
things foreshadowed by La Raza Unida. But it has left open four
doors 6 for the award of attorneys' fees.

First, Congress may authorize the award of attorneys' fees by
statute. 7 Many statutes authorizing these awards predate Alyeska. 8
New statutes have been adopted, 9 perhaps the most important of
which is the Civil Rights Attorneys' Fees Awards Act of 1976. 10
Since Alyeska, at least four major questions have been litigated un­
der these statutes: (1) Whether they permit the award of fees in
connection with litigation commenced prior to statutory enactment;
(2) whether, when statutes provide for awards to the prevailing
party in the trial court's discretion, presumptive rules should dif­
ferentiate between prevailing plaintiffs and defendants; (3) whether
attorneys' fees are an element of costs or of damages. If they are an
element of damages, then postjudgment interest is allowable; (4)
whether the statutes permit fees to legal organizations, such as le­
gal aid societies and some "public interest" law firms, that are par­
tially funded by the government.

Following the Supreme Court's interpretation of the Emer­
gency School Aid Act of 1972, 11 subsequently applied in respect to

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5. Oakes, Environmental Litigation: Current Developments and Suggestions

6. What I call the "fourth door" allows the award of attorneys' fees in federal
diversity cases where the applicable state law permits it. But this exception is often
redundant with the Alyeska conclusion, since most states themselves follow the restric­
tive American Rule. 421 U.S. at 259 n.31. As such, and as otherwise of little
moment, this door is not discussed in this introduction.


8. See 421 U.S. at 260 n.33; Oakes, Awarding Attorneys Fees After Alyeska, in
   2 CURRENT PROBLEMS IN FEDERAL CIVIL PRACTICE 598 (1976).

9. See Solovy & Barnard, Attorneys Fees in Commercial and Civil Rights Ac­
tions, in 2 CURRENT PROBLEMS IN FEDERAL CIVIL PRACTICE 760 (1979) (list
including newer statutes); NATIONAL LAW JOURNAL, Oct. 2, 1978, at 8.

   Response to the Civil Rights Attorney Fees Act, 22 ST. LOUIS U.L.J. 243 (1978);
   Malson, In Response to Alyeska—The Civil Rights Attorney Fees Awards Act of
   1976, 21 ST. LOUIS U.L.J. 430 (1977); Note, The Civil Rights Attorney Fee Awards
   Act of 1976, 52 ST. JOHN S L. REV 562 (1978); Comment, Civil Rights Attorney

the Civil Rights Attorney's Fees Awards Act of 1976, most lower federal courts have allowed the award of fees in cases commenced prior to the statutory enactment.

The Supreme Court has answered the question whether different standards should govern the award of attorneys' fees to a prevailing party plaintiff or a prevailing party defendant, by endorsing a presumptive award to plaintiffs. The Court, however, requires more specific findings for an award to defendants. Thus, in Newman v. Piggle Wiggly Enterprises, the Court held that, under the prevailing party language of Title II of the Civil Rights Act of 1964, a prevailing plaintiff should ordinarily recover an attorney's fee unless special circumstances would render [that] award unjust. The prevailing plaintiff standard was followed in Northcross v. Board of Education, an educational civil rights case, and in Albemarle Paper Co. v. Moody a title VII case. In Christiansburg Garment Co. v. Equal Employment Opportunity Commission, however, the Court applied a different test to a defendant prevailing under title VII. Rejecting both the prevailing plaintiff standard and the suggestion that a defendant should recover only when the action was brought in bad faith, the Court held that fees may be awarded upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith. Presumably a similar standard would apply to other comparable statutes.

The third question, whether fees are costs or damages, has

15. Id. at 402.
19. Id. at 421.
been answered differently by the U.S. Courts of Appeals for the Fifth and Ninth Circuit. The fourth question, whether a state-funded plaintiff's attorney is entitled to fees, has received varying answers from different courts, with most favoring the award.

Recent cases have held that even where a nonconstitutional claim is involved, attorneys fees may be awarded from state defendants despite the eleventh amendment, at least when Congress is exercising its fourteenth amendment section 5 powers. But several important issues remain unresolved, including the use of pendent jurisdiction to bring nonconstitutional claims within the purview of a congressional act, the standards pertaining to the exercise of the court's discretion thereunder; the applicability of an act to government officials and the United States itself, whether as losing or prevailing parties; and compensation for legal services rendered in administrative proceedings, all of which are discussed in depth within the pages of this symposium.


21. See, e.g., Gagne Maher, 594 F.2d 336, 345 (2d Cir. 1979), cert. granted, 48 U.S.L.W 3047 (Oct. 1, 1979) (No. 78-1888) (attorneys fees reduced to reflect public funding); Mid-Hudson Legal Servs., Inc. v. G & U Inc., 578 F.2d 34 (2d Cir. 1978); Perez Rodriguez Bou, 575 F.2d 21, 24 (1st Cir. 1978).


A second door to the award of attorneys fees left open by Alyeska is the old equitable common fund or "common benefit" doctrine. Alyeska leaves unclear how wide this opening is. The text of Mr. Justice White's opinion reads "benefit" as broadly as the language of Trustees v. Greenough permits, referring to a "power of equity to permit the trustee of a fund or property or a party preserving or recovering a fund for the benefit of others, to recover his costs, including attorneys fees, from the fund or property or directly from the other parties enjoying the benefit." A later footnote, however, narrows the construction to classes of beneficiaries which are small in number and easily identifiable, and where the benefits could be traced with some accuracy so that the costs could be shifted to those truly benefiting.

While we may only speculate, the Court's recent decision to review Van Gernert v. Boeing Co. may reflect a desire to clarify the scope of the "common benefit" doctrine. In Van Gernert, a successful class action suit on behalf of nonconverting debenture holders, the court of appeals allowed the attorneys an award based on the total fund recovered even though not all the members of the class had filed claims for recovery. The dissent argued that non-

26. See generally Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1969) (awarding interim attorneys fees to minority stockholders who, suing to set aside their corporation merger, established violation of § 14(a) of Securities Exchange Act of 1934 and Rule 14a-9 thereunder pertaining to proxy disclosures. 15 U.S.C. § 78n (1976)); Sprague Taconic Nat'l Bank, 307 U.S. 161 (1939) (Frankfurter, J.) (trust beneficiary establishing own right to lien on trust fund sale may obtain attorneys fees out of proceeds; case is often cited for dicta, based upon the broad power of equity as applied through stare decisis, where the "fund is for all practical purposes created for the benefit of others. Id. at 167); Central R.R. & Banking Co. v. Pettus, 113 U.S. 116 (1885) (lawyer may recover attorneys fees not only from his clients but also from other parties benefiting from his efforts to establish lien on property); Trustees v. Greenough, 105 U.S. 527 (1882) (party bringing suit to rescue trust fund and restore it to its proper purposes may recover fees from the fund as means of enforcing contribution to his attorneys fees from his cobeneficiaries of the fund); Smolowe v. Delendo Corp., 136 F.2d 231, 241 (2d Cir.), cert. denied, 320 U.S. 751 (1943) (attorneys fees recoverable under unjust enrichment theory in action under § 16(b) of 1934 Act, although no express provision provides such, and express provisions do exist under §§ 9(e) and 18(a) of the Act. 15 U.S.C. §§ 78i(e), 78r(a) (1976)); Dawson I, supra note 2; Dawson II, supra note 2.

27. 105 U.S. 527 (1882).

28. 421 U.S. at 257 (footnote omitted).

29. Id. at 264 n.39.

30. 590 F.2d 433 (2d Cir. 1978) (en banc), cert. granted, 99 S. Ct. 2158 (1979) (No. 78-1327) (Van Gernert IV).

claiming members were not clients of the attorneys for the named class, if they were even parties to the suit,\footnote{590 F.2d at 442, 443 (Van Graafeiland, J., dissenting). \textit{But see} 590 F.2d at 440 n.15 (Kaufman, C.J.) ("the class \textit{is} the attorney client for all practical purposes") (emphasis in original) (citing Note, \textit{Developments in the Law: Class Actions}, \textit{89 Harv. L. Rev} 1318, 1592-97 (1976)). The majority specifically stated that it did not express any view as to the appropriate ultimate disposition of the unclaimed remainder of the fund. \textit{Id.} at 440 n.17. The dissent was completely silent on this issue. \textit{But see} Van Gemert v. Boeing Co., 553 F.2d 812 (2d Cir. 1977) (Van Gemert II).} and that the award was, therefore, a "lawyer's windfall."\footnote{590 F.2d at 443. The dissent also argued that since the common fund" doctrine was created to prevent unjust enrichment, there can be no recovery since no benefit is conferred without claim and knowing acceptance of the benefit. \textit{Id.} at 444.} Given the concern expressed by some judges over possible abuse of class actions by lawyers,\footnote{E.g., \textit{Van Gemert v. Boeing Co.}, 573 F.2d 733, 735-36 (2d Cir. 1978) (\textit{Van Gemert III}).} one may not safely predict the outcome of \textit{Van Gemert}.\footnote{Irrespective of that outcome, the author stands by his differentiation between attorneys fees and disbursements, as set forth in the dissent to the panel opinion in \textit{Van Gemert III}. \textit{Van Gemert v. Boeing Co.}, 573 F.2d 733, 738 (1978).}

Regardless of how \textit{Van Gemert} is decided, serious problems remain in determining the amount of fees to be awarded, and to whom the award extends, in "common benefit" cases, which is a subject covered in this symposium. Some of the decided cases delineate the problems, including when negotiations for attorneys fees should be conducted,\footnote{Prandini \textit{v. National Tea Co.}, 557 F.2d 1015 (3d Cir 1977) (after main class action is settled, to avoid possible conflict of interests).} the factors to be used in determining the amount of the fees,\footnote{City of Detroit \textit{v. Grinnell Corp.}, 560 F.2d 1093 (2d Cir. 1977) (numerous factors determining whether basic hourly fee should be increased or decreased); \textit{Johnson v. Georgia Highway Express, Inc.}, 488 F.2d 714 (5th Cir. 1974) (twelve factors for same purpose). \textit{See also ABA Code of Professional Responsibility, Disciplinary Rule 2-107}. A sophisticated discussion of the cases dealing with the criteria for the award of attorneys fees appears in Solovy \& Barnard, supra note 9, at 774.} and whether discovery of defense counsel's hours is appropriate as a basis for comparison with plaintiff's time.\footnote{\textit{See} Rabb, \textit{Attorney Fees in Civil Rights Actions}, \textit{in 2 Current Problems in Federal Civil Practice} 865 (1979) (list of cases).}

The third door to recovery of attorneys fees left open in \textit{Alyeska}—for vexatious, bad faith, wanton, or oppressive action by the losing party\footnote{E.g., F.D. Rich Co. v. United States \textit{ex rel. International Lumber Co.}, 417 U.S. 116, 129 (1974); Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 421 U.S. at 258-59.}—not only has a longstanding history of Supreme Court approval,\footnote{E.g., F.D. Rich Co. v. United States \textit{ex rel. International Lumber Co.}, 417 U.S. 116, 129 (1974); Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S.} but enjoys fairly frequent usage. Since \textit{Alyeska},
this exception to the American rule has been used to award attorneys fees in a class action suit against a hospital and local mayor refusing to permit abortions,\textsuperscript{41} in a prisoners rights suit,\textsuperscript{42} in a housing discrimination case,\textsuperscript{43} in a teacher’s discharge suit,\textsuperscript{44} and most recently in a title VII case.\textsuperscript{45} Of course, if a suit is only insubstantial but not in bad faith, fees will not be awarded under this rule.\textsuperscript{46} One district court, in a novel case, has assessed a $50,000 award against an unsuccessful plaintiff’s lawyer and his law firm for a suit that the court found baseless.\textsuperscript{47} The question remains whether the vexatious or bad faith conduct must occur in the handling of the litigation itself, as some courts hold,\textsuperscript{48} or may include an opponent’s conduct which necessitates the litigation, as held by others.\textsuperscript{49} The author tends to support the first of these two theories in the belief that oppressive conduct leading to the litigation can

\textsuperscript{41} Doe v. Poelker, 515 F.2d 541, 546-48 (8th Cir. 1975), \textit{rev’d on other grounds}, 432 U.S. 519 (1977) (per curiam). See also Cornst v. Richland Parish School Bd., 517 F.2d 1032, 1033 (5th Cir. 1975) (per curiam) (case involving racially discriminatory firings remanded for possible award of fees based on bad faith).

\textsuperscript{42} Miller Carson, 401 F Supp. 835, 845-57 (M.D. Fla. 1975).


\textsuperscript{44} Morris v. Board of Educ., 401 F Supp. 188, 215 (D. Del. 1975).


\textsuperscript{46} Wimberly Mission Broadcasting Co., 523 F.2d 1260, 1262 (10th Cir. 1975) (no attorneys fees for unsuccessful individual private action by veteran for re-employment following military discharge); United States Ford Motor Co., 522 F.2d 962, 967 (6th Cir. 1975) (no attorneys fees for defending against employer who sought injunction that was ruled insubstantial and with little merit, though not frivolous); Hallmark Clinic v. North Carolina Dep’t of Human Resources, 519 F.2d 1315, 1317 (4th Cir. 1975) (no attorneys fees against Human Resources Department as part of executive department; none against individuals because no bad faith when attempting to implement new statutes responsive to new constitutional doctrine); Hander v. San Jacinto Junior College, 519 F.2d 273, 280-81 (5th Cir. 1975) (no attorneys fees for wrongfully discharged public junior college teacher in violation of fourteenth amendment since violation does not fall within the four \textit{Alyeska} exceptions); Lipscomb v. Wise, 399 F Supp. 782, 799 (N.D. Tex. 1975), \textit{rev’d on other grounds}, 551 F.2d 1043 (5th Cir. 1977), \textit{rev’d on other grounds}, 437 U.S. 535 (1978) (no attorneys fees for successful constitutional challenge of city at large method of electing city council members since there was no bad faith); Walther & Cie U.S. Fidelity & Guar. Co., 397 F Supp. 937, 946 (M.D. Pa. 1975) (no attorneys fees since defendant’s failure to consummate settlement agreement in timely manner did not amount to bad faith).

\textsuperscript{47} Nemeroff Abelson, 469 F Supp. 630 (S.D.N.Y. 1979) (appeal pending).


ordinarily be compensated for through the doctrine of punitive damages. Although logic may permit the award of attorneys fees, even as authorized by statute, it may nevertheless, be outweighed in a given case in which the punitive damages have been substantial. 50

These three Alyeska exceptions by themselves suggest that the editors of the Western New England Law Review have chosen an increasingly important topic for this symposium, and one of growing interest to lawyers and clients alike. The skyrocketing cost of litigation alone makes the topic alive. Statutory proposals such as The Equal Access to Justice Act, 51 which would provide citizens and small businesses reimbursement in prevailing litigation with the government, make the topic even more significant for the future. After twenty years of practice and ten years of observation from the bench, I am well aware that the allocation and amount of attorneys fees and costs have tremendous impact not only on the bringing and settling of litigation but also on achieving real justice. I am honored to have been chosen to write this survey of the problem, a problem for which Alyeska set some parameters but did not resolve.

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50. See Zarcone Perry 581 F.2d 1039 (2d Cir. 1978), cert. denied, 439 U.S. 1072 (1979) (attorneys fees were disallowed in part because the punitive damages award had been sufficient).