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The Impact of Immunity on Fee Awards Under the Civil Rights Attorney's Fees Awards Act of 1976

INTRODUCTION

The Civil Rights Attorney's Fees Awards Act of 1976 provides that a court in its discretion may award reasonable attorney's fees to the prevailing party in an action brought under specified civil rights statutes. The purpose of this legislation is to encourage victims of discrimination to seek recourse in the judicial system without fear of incurring litigation expenses beyond their means. The federal courts have liberally interpreted and applied the attorney's fees statute in order to give effect to the remedial purposes of the civil rights acts. While attorney's fees are generally awarded to civil rights plaintiffs, one significant barrier remains to the recovery of these fees. When the party sued is a state official, a fee award may be barred by the application of one of the common law immunity doctrines. In *Supreme Court of Virginia v. Consumers Union*, the United States Supreme Court held that an award of attorney's fees may not be premised on acts for which defendant state officials enjoy immunity.

The purpose of this note is to explore the impact of the common law immunities on awards of attorney's fees under the 1976 Civil Rights Attorney's Fees Awards Act. The note will provide background information on the statute and its interpretation by the courts. The impact of the common law immunities on awards under this statute will be discussed. This discussion will focus on the recent decision of *Supreme Court of Virginia v. Consumers Union*. This note will illustrate how the decision frustrates congressional intent expressed in the 1976 Civil Rights Attorney's Fees Awards Act.

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2. See notes 57-59 infra and accompanying text.
3. See notes 61-76 infra and accompanying text.
4. See notes 36-38 infra and accompanying text.
5. See notes 78-89 infra and accompanying text.
BACKGROUND

The American Rule

While many foreign jurisdictions routinely award attorney's fees to the prevailing party in civil litigation, the American rule requires that each litigant pay his own attorney's fees in the absence of statutory or contractual provisions to the contrary. Legal commentators have repeatedly criticized the wisdom and logic of the American rule, but the United States Supreme Court reaffirmed its validity in 1975 in *Alyeska Pipeline Service Co. v. Wilderness Society.*

The American rule has not, however, totally barred the award of attorney's fees. Exceptions to the general rule have been recognized by the federal courts in the exercise of their inherent equitable powers. These exceptions are the bad faith, common fund/common benefit, and private attorney general exceptions.

Bad Faith Exception

The bad faith exception to the American rule permits a court to assess attorney's fees against any party who brings an action or raises a defense in "bad faith, vexatiously, wantonly or for oppressive reasons." The purpose of this exception is to deter abuse of,
and insure compliance with, the judicial process.\textsuperscript{14} The bad faith exception has been used to punish a defendant’s “obdurate obstinancy”\textsuperscript{18} in evading a clear legal duty. For example, when local school boards refused to cooperate in the enforcement of school desegregation orders, the courts frequently assessed such awards.\textsuperscript{16}

Common Fund/Benefit Exception

The common fund exception\textsuperscript{17} is based on the policy of preventing unjust enrichment.\textsuperscript{18} When a successful litigant recovers damages or creates a monetary fund in which an ascertainable group of individuals have an interest, the court may spread the costs of the litigation among those individuals who benefit from the action.\textsuperscript{19} “To allow the others to obtain full benefit from the plaintiff’s efforts without contributing equally to the litigation expenses would be to enrich the others unjustly at the plaintiff’s expense.”\textsuperscript{20} The common fund exception is distinguishable from the bad faith exception in that the common fund exception does not shift the costs

\begin{footnotes}
\item[14.] The deterrent purpose of the bad faith award was clearly recognized by the Supreme Court in Hall v. Cole, 412 U.S. 1, 5 (1973) where it stated that “the underlying rationale of ‘fee shifting’ is punitive.” \textit{Id.} at 5.
\item[16.] \textit{See} Bradley v. School Board, 345 F.2d 310 (4th Cir.), \textit{vacated} 382 U.S. 102 (1965); Bell v. School Board, 321 F.2d 494 (4th Cir. 1963). In \textit{Bell}, the Fourth Circuit reversed the district court’s denial of attorney’s fees as a result of the school board’s: long continued pattern of evasion and obstruction which included not only the defendants’ unyielding refusal to take any initiative, thus casting a heavy burden on the children and their parents, but their interposing a variety of administrative obstacles to thwart the valid wishes of the plaintiffs for a desegregated education. \textit{Id.} at 500.
\item[17.] For an excellent discussion of the common fund/common benefit exception, \textit{see} Berger, \textit{Court Awarded Attorney’s Fees: What is ‘Reasonable’?}, 126 U. Pa. L. Rev. 281, 295-300 (1977) [hereinafter cited as Berger].
\item[18.] Hall v. Cole, 412 U.S. 1, 6 (1973).
\item[19.] \textit{See, e.g.}, Hall v. Cole, 412 U.S. 1, 5-6 (1973); Mills v. Electronic Auto-lite Co., 396 U.S. 375, 393-94 (1970); Sprague v. Ticonic Nat’l Bank, 307 U.S. 161, 166-67 (1939). The traditional rule with respect to the common fund doctrine was that the costs of litigation could only be spread where the action giving rise to the costs resulted in money damages or the creation of a monetary fund. 6 \textit{Moore’s Federal Practice} ¶ 54.77[2] (2d ed. 1976). This traditional rule was announced in Trustees v. Greenough, 105 U.S. 527 (1882), where a plaintiff bondholder sued the trustees of a land fund alleging waste by the defendant trustees. As a result of the action, the trust assets were brought under the control of the court, and the bondholders were paid previously unrealized dividends. The Supreme Court held the plaintiff was entitled to reimbursement of his costs out of the fund created by the dividends. \textit{Id.} at 537.
\item[20.] Hall v. Cole, 412 U.S. 1, 6 (1973).
\end{footnotes}
of the litigation to the opposing party, but instead distributes the 
costs among all individuals who benefit from the action.

The common benefit exception, an offshoot of the traditional 
common fund doctrine, enlarges the circumstances under which an 
award of attorney's fees is appropriate. Based upon the same un-
just enrichment rationale, the common benefit exception does not 
require the creation of a monetary fund as a condition precedent 
to an award of fees. The plaintiff's actions need only benefit a 
group of others in the same manner as the plaintiff himself was 
benefitted.

The common benefit exception was applied by the Supreme 
Court in 1970 when the Court addressed the question of whether a 
demand for pecuniary relief was necessary to the recovery of attor-
ey's fees. In Mills v. Electric Auto-lite Co., the plaintiffs 
brought a shareholders' derivative suit under section 14(a) of the 
Securities Exchange Act of 1934. Seeking to dissolve a corporate 
 merger, they alleged that the merger resulted from the use of mis-
leading proxy statements. The Court found that the stockholders 
as a group had been injured by the misleading proxy statements, 
and that the plaintiffs had brought suit and incurred legal ex-
penses for the benefit of the corporation and all other stockhold-
ers. The Court reasoned that failure of a suit to produce a mone-
tary recovery should not preclude an award based on the common 
benefit rationale. The Court then held that the plaintiffs' attor-
ey's fees could be charged to the defendant corporation since it 
was the primary beneficiary of the law suit.

Private Attorney General Exception

The trend towards compensating plaintiffs who act to protect 
the interests of others reached full bloom with the development of 
the private attorney general exception. Prior to the late 1960's,

21. Berger, supra note 17, at 300. The common benefit exception was first utilized in 
Sprague v. Ticonic Nat'l Bank, 307 U.S. 161 (1939). In that case, the plaintiff sued the 
defendant bank and attached a lien on the proceeds of bonds which had been pledged as 
security for trust deposits. In so doing, the plaintiff established a lien for fourteen other 
similarly situated bank customers. While plaintiff did not create a fund out of which attor-
ey's fees would be collected, the Supreme Court upheld an award of attorney's fees based 
upon the benefit plaintiff conferred on the fourteen other depositors.
23. Id.
26. Id.
federal courts rarely awarded attorney’s fees in public interest litigation.27 While civil rights plaintiffs who obtained injunctive relief benefitted large groups, successful injunctive actions generated no damage awards out of which attorney’s fees could be paid.28 Civil rights plaintiffs were required to obtain free legal services or pay for their own counsel. In practical effect, civil rights were often raised to the level of unobtainable luxuries.29

The plight of the civil rights plaintiff was remedied by the private attorney general exception.30 This exception developed from judicial interpretation of the attorney’s fees provisions of the 1964 Civil Rights Act.31 The Act provides for awards of attorney’s fees upon proof of discrimination in employment32 and in public accommodations.33

*Newman v. Piggie Park*34 was the seminal case which gave rise to the development of the private attorney general exception. In *Newman*, the plaintiffs instituted an action under the public accommodations section of the 1964 Civil Rights Act to enjoin racial discrimination in six restaurants operated by the defendant in South Carolina. The plaintiffs sought attorney’s fees under Title II, which provides that the prevailing party is entitled, at the court’s discretion, to a reasonable attorney’s fee.35 The Fourth Circuit approved an award of fees, but interpreted the attorney’s fee provision of Title II narrowly as the functional equivalent of the existing equitable exceptions. The Supreme Court not only affirmed the award of fees, but also adopted a broader approach toward the award of attorney’s fees. The Court ruled that a prevailing plaintiff “should ordinarily recover an attorney’s fee unless special circumstances would render such an award unjust.”36 This broader rule was developed in recognition of the civil rights plain-

28. Id.
29. Id. at 442.
30. See notes 36-62 infra and accompanying text.
34. 390 U.S. 400 (1968).
tiff's unique role as a "private attorney general." The Court reasoned that the importance of private enforcement, acknowledged by Congress when the statute was passed, should influence the exercise of judicial discretion in awarding fees. A number of lower federal courts relied on the Newman decision to permit an award of attorney's fees even in the absence of congressional authorization. The Newman decision, read in conjunction with the common benefit exception, seemed to permit such an interpretation. From 1968 to 1975, the private attorney general theory was used to award attorney's fees in a wide range of

37. "When a plaintiff brings an action under that Title, he cannot recover damages. If he obtains an injunction, he does so not for himself alone but also as a 'private attorney general,' vindicating a policy that Congress considered of the highest priority." Id. 38. Id. at 401. 39. There was an express statutory provision for the award of attorney's fees in Newman. See note 35 supra and accompanying text. For cases awarding fees in the absence of express statutory authority, see Comment, The Civil Rights Attorney's Fees Award Act of 1976, 52 St. John's L. Rev. 562, 570 n. 49 (1979). 40. See notes 21-26 supra and accompanying text. In Mills v. Electric Auto-lite, 396 U.S. 375 (1978), the Court concluded that fees would be allowed in cases where a plaintiff successfully maintains a suit "that benefits a group of others in the same manner as himself." 396 U.S. at 392. 41. A case illustrating this interpretation is Sims v. Amos, 340 F. Supp. 691 (N.D. Ala. 1972). In an earlier decision, the District Court for the Middle District of Alabama declared the Alabama legislature to be malapportioned. 336 F. Supp. 924 (M.D. Ala. 1972). As a consequence, the plaintiffs were underrepresented and thereby denied the constitutional right to equal suffrage. Upon successful resolution of the suit, the plaintiffs petitioned the court for an award of attorney's fees. The Sims court held that, despite a lack of express statutory authority, plaintiffs were entitled to an award of attorney's fees. The Sims court held that, despite a lack of express statutory authority, plaintiffs were entitled to an award of attorney's fees. 340 F. Supp. 691, 695. The defendants (Alabama state legislators, the Secretary of State, Attorney General, and Governor of Alabama) argued that the facts did not justify the court's exercise of its equity powers to award fees. The plaintiffs countered with several arguments. First, they demonstrated that "[t]he history of the . . . litigation [was] replete with instances of the Legislature's neglect of, and even total disregard for, its constitutional obligation to reapportion." Id. at 693-94. In addition to the Legislature's failure to act, the court stated that the submission of unacceptable reapportionment plans by other defendants would also be characterized as acts of bad faith. Id. at 694. In addition to its finding of bad faith, the court stated that such a finding is not a "prerequisite to the taxing of attorney's fees." Id. at 694. Applying the private attorney general exception, the court stated: "If, pursuant to this action, plaintiffs have benefitted their class and have effectuated a strong Congressional policy, they are entitled to attorney's fees regardless of defendants' good or bad faith." Id. The court noted that the principles enunciated in Newman v. Piggie Park, 390 U.S. 400 (1968), applied to the Sims case. The court held that the absence of express statutory authority for an award of fees in § 1983 actions was of no consequence to an award of fees pursuant to Newman principles and the private attorney general exception. Sims v. Amos, 340 F. Supp. 691, 695 (M.D. Ala. 1972). 42. See generally Comment, Interim Awards of Attorney's Fees Under the Civil Rights Act of 1976, 21 Ariz. L. Rev. 893, 900 n. 94 (1979) [hereinafter cited as Interim Awards].
In 1975, the Supreme Court abruptly halted the expansion of the private attorney general exception by limiting its application to those actions where fee awards were specifically authorized by Congress. In *Alyeska Service Pipeline Co. v. Wilderness Society*, environmentalist groups brought an action seeking declaratory and injunctive relief to prevent the issuance of permits required for the construction of the trans-Alaska oil pipeline. Congress subsequently enacted legislation which facilitated the issuance of permits, thereby terminating the litigation on the merits. The District of Columbia Court of Appeals approved an award of attorney's fees because the plaintiffs had acted to vindicate important statutory rights of all citizens. On appeal by defendant Alyeska, the Supreme Court reversed. In reaching its decision, the Court reviewed the origin and development of the American rule and the traditional equitable exceptions. The Court noted that Congress had provided for attorney fee awards in specific statutes, and concluded that where Congress failed to make explicit provision for fee shifting, Congress did not intend for fees to be awarded. Since there was no statutory authorization explicitly providing for an award of fees in *Alyeska*, and because the plaintiffs did not otherwise qualify for an award of fees under the traditional equitable exceptions, the Court held that an award of fees was impermissible. The Court in *Alyeska* thus...

43. Derfner, supra note 27, at 433-44 n. 9-26. The Newman/private attorney general rationale was utilized by the lower federal courts to award fees in suits involving the Reconstruction era civil rights statutes, school desegregation, jury discrimination, teacher dismissal, first amendment violations, unreasonable searches, discrimination in, or irrational application of, state or federal services or benefits, redistricting, prisoners' rights, union democracy and fair representation, police harassment, consumer and environmental problems.


45. *Id.* at 244-45.

46. *Id.* at 247-61. See text accompanying notes 13-38 supra.


49. *Id.* at 244-45. The lower court decision, the District of Columbia Court of Appeals held the bad faith exception inapplicable since the action taken by the federal and state parties and Alyeska "was manifestly reasonable and assumed in good faith . . ." *Id.*, citing to *Wilderness Society v. Morton*, 485 F.2d 1026, 1029 (D.C. Cir. 1974). The court of appeals also refused to apply the common benefit exception because the application of the doctrine to the facts of the case would "stretch it totally outside its basic rationale. . . ." *Id.*

50. *Id.* at 245.

51. *Id.* at 246.

52. *Id.* at 260.

53. *Id.* at 271.
sounded the death knell for the judicial expansion of the private attorney general rule.

Congress responded promptly to the *Alyeska* decision by amending several pieces of legislation to include provisions for attorney’s fees, and by explicitly providing for attorney’s fees in new public interest statutes. This trend culminated in the civil rights field with the passage in 1976 of the Civil Rights Attorney’s Fees Awards Act.

**CIVIL RIGHTS ATTORNEY’S FEES AWARDS ACT OF 1976**

**Congressional Purpose**

The Civil Rights Attorney’s Fees Award Act [hereinafter referred to as section 1988] was the first piece of legislation enacted to deal exclusively with attorney’s fees. The intent of Congress in enacting this legislation was “to remedy anomalous gaps in our civil rights laws created by the United States Supreme Court’s recent decision in *Alyeska* . . . and to achieve consistency in our civil rights law.” Congress, clearly cognizant of the importance of private enforcement of the civil rights statutes, acted to eliminate financial impediments to the vindication of civil rights.

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54. Derfner, supra note 27, at 446 n. 32, 33. See statutes listed therein.
56. Section 1988 provides, in pertinent part:
In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, . . . 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, a reasonable attorney’s fee as part of the cost.
57. Derfner, supra note 27, at 447.
58. S. REP. No. 94-1011, 94TH CONG. 2d Sess. 1 (1976), reprinted in [1976] U.S. CODE CONG. & AD. NEWS 5908, 5909. See also the remarks of Senator Mathias, Republican member of the Senate Judiciary Committee:
The need for this bill arises from a recent Supreme Court decision which has erected a formidable financial barrier against those seeking access to Federal courts and has consequently dealt a serious blow to the effective enforcement of our civil rights laws. . . . I believe that S. 2278 [the subject legislation] constitutes a much needed response to *Alyeska* and is necessary to guarantee the proper enforcement of our civil rights laws which Congress has so earnestly labored for in the past.
122 CONG. REC. S. 16251 (1976).
Fee awards have proved an essential remedy if private citizens are to have a meaningful opportunity to vindicate the important Congressional policies which
Attorney’s Fee Awards

1980

Statutory Interpretation

Congress expressly intended that the liberal standards used in awarding fees under the Civil Rights Act of 1964 also apply in the interpretation of section 1988.60 A “prevailing party”61 was defined to include one who has vindicated rights without necessarily obtaining formal relief.62 Thus, in accord with Congressional design, it was judicially recognized that a party need only show the necessity of bringing the action and success with respect to the central issue of the litigation.63 Such success could be achieved by a consent order, by an out-of-court settlement, or by a defendant’s voluntary compliance with the plaintiff’s demands.64 Formal relief by a court order is not, therefore, a prerequisite for an award of fees under section 1988.

Since section 1988 provides for reasonable fee awards65 to “pre-

these laws contain. . . . If private citizens are to be able to assert their civil rights, . . . citizens must have the opportunity to recover what it costs them to vindicate these rights in court.


64. Interim Awards, supra note 42, at 908 n. 169-172.

65. For guidance in determining what constitutes a reasonable fee under § 1988, Congress directed the courts to consider the twelve factors established in Johnson v. Georgia Highway Express Inc., 488 F.2d 714 (5th Cir. 1974). See 122 Cong. Rec. H. 12160 (daily ed., Oct. 1, 1976). In Johnson, the Fifth Circuit set forth twelve factors based upon fee arrangement guidelines in Disciplinary Rule 2-106(B) of the American Bar Association’s Code of Professional Responsibility:

1) the time and labor required;
2) the novelty and difficulty of the questions;
3) the skill requisite to perform the legal service properly;
4) the preclusion of other employment by the attorney due to acceptance of the case;
5) the customary fee;
6) whether the fee is fixed or contingent;
7) time limitations imposed by the client or the circumstances;
8) the amount involved and the results obtained;
9) the experience, reputation, and ability of the attorneys;
10) the “undesirability” of the case;
11) the nature and length of the professional relationship with the client; and
12) awards in similar cases.

Johnson v. Georgia Highway Express Co., 488 F.2d 714, 717-19 (5th Cir. 1974).

Commentators have been critical of the inconsistent application of these standards in the
vailing parties,” a prevailing defendant may be eligible for an award of attorney’s fees. Congress was concerned, however, that the mere possibility of having fee awards assessed against civil rights plaintiffs might have a “chilling effect” on the filing of such suits. To avoid this result, Congress recommended that the dual standard developed by the courts for fee awards under the 1964 Civil Rights Act be applied to section 1988 as well. Under this standard, a prevailing plaintiff should ordinarily recover attorney’s fees unless special circumstances would render such an award unjust. A prevailing defendant, however, must meet a much stricter standard. Since prevailing defendants do “not appear before the court cloaked in a mantle of public interest,” an award to a prevailing defendant may be made only where the action is “vexatious and frivolous, or if the plaintiff instituted it solely to harass the defendant.” Congress expressed confidence that the dual standard would not discourage civil rights plaintiffs from bringing suit, and that it would prevent frivolous suits and abuse of the courts.

Under section 1988 awards are made at the court’s “discretion.” The exercise of that discretion, however, is very limited. The legislative history indicates that, for purposes of awards under section 1988, Congress adopted the approach of the Supreme Court

lower courts’ determinations of what constitutes a reasonable fee. See generally Berger, supra note 17; Note, Court-Awarded “Reasonable” Fees: Forcing a Segregated Public Interest Bar?, 7 FORDHAM URBAN L.J. 399 (1979). The legislative history further states that fee awards under the Civil Rights statutes are to be “governed by the same standards which prevail in other types of equally complex Federal litigation, such as antitrust cases and [are] not to be reduced because the rights involved may be non-pecuniary in nature.” S. REP. No. 94-1011, 94th Cong., 2d Sess. 3 (1976) reprinted in [1976] U.S. CODE CONG. & AD. NEWS 5908, 5912. One comparative study of fees, however, indicates that the mean hourly rate awarded by courts under the fee provisions of the antitrust statutes was $181, while the mean hourly rate awarded in Title VII cases was $40. Berger, supra note 17, at 310. This study indicates that the courts are not heeding the mandate of Congress with respect to fee assessments.

67. Id.
70. United States Steel Corp. v. United States, 519 F.2d 359, 364 (3d Cir. 1975).
72. Id.
in *Newman v. Piggie Park*. The *Newman* court held the prevailing plaintiff should ordinarily recover attorney's fees. In adopting this broad standard of entitlement, Congress sought to encourage individuals injured by racial discrimination to seek judicial relief. There are circumstances, however, where despite this broad standard of entitlement, plaintiffs may be totally barred from the recovery of attorney's fees. These situations arise where the defendant in the action is a state official protected by common law immunity.

**COMMON LAW IMMUNITIES**

The common law has developed immunities to protect a variety of public officials in the exercise of their official duties. Two different types of immunity are recognized at common law, absolute and qualified immunity. If an absolute immunity has been recognized for a particular public office, then one who asserts the immunity need only show that he was acting in that official capacity. To establish a qualified immunity, one must show not only that he was acting in an official capacity for which an immunity has been recognized, but also that he was acting in good faith. The availability of a qualified immunity varies, depending upon the responsibilities of the individual official and the degree of discretion he exercises in his actions.

75.1. *Id.* at 402.
76. S. REP. No. 94-1011, 94th Cong., 2d Sess. 3 (1976) reprinted in [1976] U.S. CODE CONG. & AD. NEWS 5908, 5910. Section 1988 especially encourages civil rights plaintiffs who seek only injunctive relief. Since these individuals have no hope of collecting monetary damages out of which fees can be deducted, § 1988 represents a means by which their legal fees can be paid, thereby allowing them to vindicate the rights of many without being held solely responsible for the costs of such litigation.
81. "The higher the post, the broader the range of responsibilities and duties, and the wider the scope of discretion." *Id.* at 247. The Supreme Court in *Scheuer* stated the test
State legislators, state court judges, prosecutors, police officers, school board members, and various state executive officers have all been granted some degree of immunity from damages in civil actions by private citizens. The type of immunity a state official is granted depends upon whether the state official was acting in a legislative, judicial, or enforcement capacity at the time the alleged illegal act occurred.

Various policy reasons support grants of immunity to public officials. Generally a grant of immunity from damages eliminates "the danger that the threat of . . . liability would deter [an official's] willingness to execute his office with the decisiveness and the judgment required by the public good." Additionally, courts have considered it unjust to submit an official to liability for acts that he is under a legal obligation to execute.

The issue of immunity is of particular concern to the civil rights plaintiff suing under section 1983 to enjoin discriminatory conduct and/or seek damages from individuals acting under color of state law. A finding of immunity directly affects the determination of whether attorney's fees will be awarded. This issue was confronted by the United States Supreme Court in *Supreme Court of Virginia v. Consumers Union*.

which determines whether an official may be found qualifiedly immune: "It is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good-faith belief, that affords a basis for qualified immunity. . . ." *Id.* at 247-48. If the facts as developed evidence reasonable grounds for the official's action plus a good faith belief, he will be held immune from damages. If, however, the actions he took are found to be unreasonable under the circumstances, or there is a finding of bad faith, the official will be treated like a defendant in any other damages suit.

88. *Id.* at 240.
89. *Id.*
90. 42 U.S.C. § 1983 (1976) provides in pertinent part:

   Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

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SUPREME COURT OF VIRGINIA
v.
CONSUMERS UNION

In 1974, the Consumers Union attempted to gather information from practicing attorneys for the publication of a legal services directory for Arlington County, Virginia.92 Attorneys refused to cooperate with the Consumers Union for fear of violating the Virginia Code of Professional Responsibility’s (Bar Code) strict prohibition against attorney advertising.93 The Bar Code’s attorney advertising provision (DR 2-102(A)(6)) was patterned after a similar provision in the ABA’s Code of Professional Responsibility.94

In early 1975, the Consumers Union and the Virginia Citizens Consumer Council brought an action pursuant to 42 U.S.C. § 1983 against the Virginia Supreme Court, the Virginia State Bar (State Bar), the American Bar Association (ABA), and, in both their individual and official capacities, the Chief Justice of the Virginia Supreme Court, the president of the State Bar, and the chairman of the State Bar’s Legal Ethics Committee. The plaintiffs claimed that defendants, in the promulgation and enforcement of the Bar Code, violated their First and Fourteenth Amendment rights to gather and publish factual information concerning attorneys prac-

92. The information requested by the Consumers Union concerned each attorney’s education, legal activities, areas of specialization, office location, fee and billing practices, business and professional affiliations, and client relations. Id. at 1971.
93. The particular provision prohibiting attorney advertising was Disciplinary Rule 2-102(A), which provided in pertinent part:

A lawyer or law firm shall not use professional cards, professional announcement cards, office signs, letterheads, telephone directory listings, law lists, legal directory listings, or similar professional notices or devices, except that the following may be used if they are in dignified form: . . . (6) A listing in a reputable law list or legal directory giving brief biographical and other informative data. . . . The published data may include only the following: name, including name of law firm and names of professional associates; addresses and telephone numbers; one or more fields of law in which the lawyer or law firm concentrates; a statement that practice is limited to one or more fields of law; a statement that the lawyer or law firm specializes in a particular field of law or law practice . . . ; date and place of birth; date and place of admission to the bar of state and federal courts; schools attended, with dates of graduation, degrees, and other scholastic distinctions; public or quasi-public offices; military service; posts of honor; legal authorships; legal teaching positions; memberships, offices, committee assignments, and section memberships in bar associations; memberships and offices in legal fraternities and legal societies; technical and professional associations and societies; foreign language ability; names and addresses of references, and, with their consent, names of clients regularly represented.

Id. at 1971 n.5.
94. ABA CODE OF PROFESSIONAL RESPONSIBILITY (1976).
ticing in Arlington County. The plaintiffs sought declaratory and injunctive relief. A three-judge district court held that DR 2-102(A)(6) violated the plaintiffs’ constitutional rights. Defendants were permanently enjoined from enforcing DR 2-102(A)(6). Both plaintiffs and defendants appealed this decision to the United States Supreme Court. While the appeals were pending, the Supreme Court decided Bates v. State Bar of Arizona. In Bates, the Court held unconstitutional the enforcement of a prohibition on attorney advertising of fees for routine legal services. Because of Bates, Consumers Union was vacated and remanded for reconsideration. On remand, the district court held DR 2-102(A)(6) unconstitutional and permanently enjoined the defendants from enforcing it.

At this stage, plaintiffs moved for an award of costs and for attorney’s fees under section 1988. The district court decided that the individual defendants were immune in their individual capacities from liability for attorney’s fees, but the court granted the request for fees as against the Virginia Supreme Court and the individual judicial defendants in their official capacities. After denial of petition for rehearing, the Virginia Supreme Court and the

95. The case was twice continued at the defendants’ behest to permit both the ABA and the State Bar to consider amendments relaxing the advertising prohibitions. On February 17, 1976, the ABA amended the Code of Professional Responsibility to permit an attorney to release for publication the type of information the plaintiff Consumers Union had sought for its directory. The State Bar recommended that the Virginia Supreme Court adopt the ABA amendments, but it refused to do so. The case then went to trial before a three-judge district court on the constitutionality of the existing section, DR 2-102(A)(6) of the Bar Code. Supreme Court of Virginia v. Consumers Union, 100 S. Ct. 1967, 1971 (1980).


97. Id. The Code’s ban on advertising fees beyond the initial consultation fee was excepted from the court’s injunction.

98. Plaintiffs challenged the district court’s refusal to enjoin the enforcement of the Code’s provision prohibiting advertising of fees beyond the initial consultation fee. The defendants argued that DR 2-102(A)(6) should be upheld. Supreme Court of Virginia v. Consumers Union, 100 S. Ct. 1967, 1972 (1980).


100. Id.


102. Consumers Union of the United States v. American Bar Ass’n, 470 F. Supp. 1055, 1059-61 (E.D. Va. 1979). The district court denied the request for fees against the State Bar and its officers in their official capacities, stating that it would be unjust to hold them liable since they recommended and attempted to persuade the Virginia Supreme Court to amend DR 2-102(A)(6) to conform with the ABA amendments. For an analysis of the case at the district court level, see Consumers Union of the United States, Inc. v. American Bar Association: Judicial Liability for Attorney’s Fees Awards, U. TOLEDO L. REV. 164 (1979).
Chief Justice appealed the fees award decision to the United States Supreme Court.

The issue the Supreme Court faced was whether the Virginia Supreme Court and its Chief Justice were officially immune from suit, and whether section 1988 provided for an award of attorney’s fees notwithstanding the finding of an immunity. The Court first considered various doctrines of common law immunity and whether the actions taken by the defendants in this case were cloaked with a veil of immunity. To determine what, if any, immunity applied to the Virginia Supreme Court and the Chief Justice, the Court scrutinized the official act which gave rise to the constitutional violation. The Virginia Supreme Court enacted the State Bar Code pursuant to inherent and statutory powers to discipline and regulate attorneys. The United States Supreme Court concluded that this act of promulgating the State Bar Code was an act of rulemaking. Therefore, the Court applied legislative immunity to the acts performed by the judicial body. The factor which determined the type of immunity to be applied was not the title of the official, but the capacity in which he was acting at the time of the alleged constitutional violation.

Once it was determined that legislative immunity was the appropriate standard, the Court discussed the scope of that immunity.

104. Id. at 1974.
105. The Virginia Supreme Court, citing Button v. Day, 204 Va. 547, 552-55 (1963), claimed inherent authority to regulate and discipline attorneys. The Virginia court cited statutory authority for this claim as well. Va. Code § 54-48 (1950) provides that the Supreme Court of Virginia may “promulgate and amend rules and regulations ... prescribing a code of ethics governing the professional conduct of attorneys at law.” Since this section contains no standards governing how the Virginia court is to regulate attorneys, the Virginia Supreme Court concluded that the legislature had vested in the court the legislature’s entire legislative and regulatory power over the legal profession. Supreme Court of Virginia v. Consumers Union, 100 S. Ct. 1967, 1967 (1980).
106. Id. at 1974. For the correct characterization of the Virginia Supreme Court’s action in the promulgation of the State Bar Code, the Supreme Court cited to a dissent in the district court opinion:

Disciplinary rules are rules of general application and are statutory in character. They act not on parties litigant but on all who practice law in Virginia. They do not arise out of a controversy which must be adjudicated but instead out of a need to regulate conduct for the protection of citizens. It is evident that in enacting disciplinary rules, the Supreme Court of Virginia is constituted a legislature.

107. See, e.g., Butz v. Economou, 438 U.S. 478 (1978) (judicial immunity applied to employees of the Executive Department based upon their function as administrative judges).
The case that established the extent of immunity enjoyed by state legislators acting within the sphere of legitimate legislative activity was Tenney v. Brandhove. In Tenney, a private citizen brought a section 1983 action against several state legislators. The Court examined the common law origin of legislative immunity. With respect to the section 1983 claim, the Court found that Congress did not intend to abrogate the common law immunities at the time it enacted section 1983. Thus, the Tenney Court held that state legislators were entitled to absolute immunity from damages, the same degree of immunity enjoyed by legislators at common law.

Although Tenney involved an action for damages, whereas the plaintiffs in Consumers Union requested declaratory and injunctive relief, the Court nevertheless determined that the holding of Tenney was equally applicable to suits for declaratory or injunctive relief. The Court reached this conclusion by a two-step analysis. First, the Court pointed out that federal legislators are immune from suits for injunctive relief. Second, the Court noted that federal legislative immunity, based on the speech and debate clause, strongly parallels the common law immunities enjoyed by state legislators. Based upon this similarity and the reasoning in Tenney, the Court concluded that state legislators' absolute immunity would apply to suits for injunctive relief as well as suits for damages.

After determining that a finding of absolute legislative immunity would bar a suit for injunctive relief against the Virginia Supreme Court, the Court considered other functions the defendants per-
formed with respect to the unconstitutional provision in the Bar Code.\textsuperscript{118} The Court noted that a public official or an official body may act in more than one capacity. With respect to the Bar Code, the defendants not only promulgated the disciplinary rules, but also possessed power to hear appeals from decisions in disciplinary cases.\textsuperscript{119} Thus, the defendant court also performed judicial functions.\textsuperscript{120}

The Court examined the scope of common law judicial immunity which cloaked judges with absolute immunity from damages for acts performed in their official capacities.\textsuperscript{121} The Court considered whether judicial immunity should be applied to suits for injunctive relief, but declined to resolve this issue.\textsuperscript{122}

In addition to its legislative and judicial functions, the Virginia Supreme Court was also authorized to act in an enforcement capacity. The justices were empowered to act as prosecutors pursuant to section 54-74 of the State Bar Code which allowed them, upon observation of unprofessional conduct, to institute appropriate disciplinary hearings against the offending attorney.\textsuperscript{123} Although prosecutors have been held absolutely immune from damage suits for abuse of prosecution,\textsuperscript{124} they are not immune from injunctive relief.\textsuperscript{125} The Court noted that if enforcement officials were not subject to suits for injunctive relief, aggrieved plaintiffs would have to endure the threat of official action and/or wait until actual enforcement proceedings were instituted before they could assert their constitutional rights. The Court concluded that immunity did not shield the Virginia Supreme Court or its Chief Justice

\textsuperscript{118} Id. at 1976.

\textsuperscript{119} Id. at 1970 n. 4.


\textsuperscript{122} Supreme Court of Virginia v. Consumers Union, 100 S. Ct. 1967, 1976 (1980). The Court did note, however, that several circuits have held that judicial officers are not immune from injunctive relief. Id. at 1976 n. 13.

\textsuperscript{123} Va. Code § 54-74 (1976).


\textsuperscript{125} Prosecutors are "natural targets for § 1983 injunctive suits since they are the state officers who are threatening to enforce and who are enforcing the law." Supreme Court of Virginia v. Consumers Union, 100 S. Ct. 1967, 1977 (1980).
from suits to enjoin their enforcement of unconstitutional provi-
sions of the State Bar Code. In summary, then, the Virginia Su-
preme Court was held immune from injunctive and declaratory re-
lief in its legislative capacity, but not in its enforcement capacity.

Upon reaching this conclusion, the Court considered the impact
of a finding of immunity on attorney's fees awards under section
1988. In reviewing the legislative history, the Court found direct
support for an award of attorney's fees in cases where defendant
public officials, although immune from damages, are subject to in-
junctive relief. The Court, however, found "no similar indication
in the legislative history . . . to suggest that Congress intended to
permit an award of attorney's fees to be premised on acts for
which defendants would enjoy absolute legislative immunity [from
both damages and injunctive relief]." The Court therefore con-
cluded that the district court had abused its discretion by award-
ing attorney's fees based upon acts performed by the Virginia
Supreme Court in its legislative capacity.

126. Id. at 1977.
129. Id. Another possible impediment to the recovery of attorney's fees when suing a
state official which was mentioned in Consumers Union but summarily dismissed is the
Eleventh Amendment. The Eleventh Amendment has been interpreted to bar suits by pri-
ivate individuals against the state or its agents when the suit may result in liability for dam-
Eleventh Amendment does not prevent injunctive actions against the state where the relief
awarded is prospective only. Ex parte Young, 209 U.S. 123 (1908).

Attorney's fees awarded in a suit against state officials would require payment of funds
from the state treasury. The Supreme Court held in Hutto v. Finney that an award of attor-
ey's fees in a suit against state officials, although requiring payment from the state trea-
sury, was not prohibited by the Eleventh Amendment. 437 U.S. 678 (1978). The Hutto
Court determined that Congress, consistent with the enabling clause of the Fourteenth
Amendment, intended to override the Eleventh Amendment immunity of the states in order
to permit an assessment of attorney's fees payable from the state treasury. Hutto v. Finney,
437 U.S. 651, 693-94 (1978). The Court based this conclusion on express legislative history:
"[I]t is intended that attorney's fees like other items of cost, will be collected either directly
from the official, in his official capacity, from the funds of his agency . . . or from the State
Cong., 2d Sess. 5 (1976)). The Court in Hutto held that since Congress, in enacting § 1988,
intended to override the Eleventh Amendment immunity of the states, awards of attorney's
fees in suits against state officials payable from the state treasury were constitutionally per-
Congress was aware, when enacting section 1988, of the limitations which might arise as a result of the absolute immunity from damages enjoyed by some public officials. It specifically noted, however, that attorney's fees should be awarded where the plaintiff's remedy is limited to injunctive relief:

[I]n some cases immunity doctrines and special defenses, available only to public officials, preclude or severely limit the damage remedy. Consequently awarding counsel fees to prevailing plaintiffs in such litigation suits for injunctive relief is particularly important and necessary if Federal civil and constitutional rights are to be adequately protected. To be sure, in a large number of cases . . . only injunctive relief is sought, and prevailing plaintiffs should ordinarily recover their counsel fees.\textsuperscript{130}

This Congressional intent with regard to section 1988 was frustrated when the Consumers Union Court expanded the immunity enjoyed by state legislators to include absolute immunity from injunctive relief.\textsuperscript{131} The decision completely forecloses any measure of relief for constitutional and civil rights violations perpetrated by state legislators.

Perhaps this expansion of immunity would not seem so serious if it were limited exclusively to state legislators. It is clear from this decision, however, that the Court, in determining what type of immunity is applicable, will look to the function a state official was performing at the time of the alleged illegal act.\textsuperscript{132} The official's title itself is not controlling. The court determines the capacity in which an official is functioning, thereby also determining the degree of immunity the official enjoys. While in most cases this functional analysis works very well, it may, when combined with section 1988, frustrate the very purpose for which the Act was intended.

Section 1988 was enacted to encourage private citizens whose civil and constitutional rights have been violated to seek redress for their injuries in the judicial forum. Where these plaintiffs "prevail" the court will award them attorneys fees, thus eliminating the

\textsuperscript{131} See notes 114-117 supra and accompanying text.
\textsuperscript{132} See notes 104-107 supra and accompanying text.
When state officials are sued, however, one of the common law immunities may come into play. In determining the appropriate standard of immunity, the court may, pursuant to the functional analysis, cast a public official in a variety of roles depending upon the specific capacity in which he was operating at the time the alleged unlawful action occurred. Because this system of classifying public officials for immunity purposes is so imprecise, it leads to a great deal of uncertainty. Since it is difficult to predict the exact function in which a court may cast a public official, it will be impossible to determine with certainty whether or not attorney's fees will be awarded. Attorneys may be reluctant to take cases where compensation for their services is uncertain; plaintiffs may hesitate to bring suit where they may ultimately be assessed fees and costs. Since the application of the immunity doctrines to awards of attorney's fees may give rise to so much uncertainty, the purpose of section 1988, to encourage private enforcement of the civil rights statutes, may be substantially undermined.

CONCLUSION

The Consumers Union case demonstrates that, in determining the appropriate standard of immunity, the courts may cast a public official in a variety of different roles depending upon the specific capacity in which he was operating at the time the alleged unlawful action occurred. It is critical for civil rights plaintiffs and their attorneys to carefully scrutinize the act of the official giving rise to the civil rights violation. They must determine, as best they can, the capacity in which a potential defendant may have been operating, and as such, whether the official would be immune to suits for damages or injunctive relief or both.

The 1976 Attorney's Fees Awards Act was enacted to encourage private citizens to bring meritorious law suits to vindicate the civil and constitutional rights of the public at large. Attorney's fees may not be awarded, however, where the underlying act giving rise to the civil rights violation is an official function to which immunity attaches. Uncertainty as to when and under what circumstances a court will find an immunity from both damages and injunctive re-

133. See notes 58-59 supra and accompanying text.
134. See note 77 supra and accompanying text.
135. See note 104-126 supra and accompanying text.
lief may result in an unwillingness on the part of attorneys to bring actions against state officials. Unlawful acts of public officials may then go unchallenged, thereby defeating completely the purpose of the Civil Rights Attorney’s Fees Awards Act.

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