Federal Civil Procedure - *Alyeska Pipeline Service Co. v. Wilderness Society* - The Private Attorney General Theory Is No Longer Available to Shift the Cost of Attorneys' Fees from the Victorious Litigant to the Losing Party

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FEDERAL CIVIL PROCEDURE—Alyeska Pipeline Service Co. v. Wilderness Society—The Private Attorney General Theory Is No Longer Available to Shift the Cost of Attorneys' Fees from the Victorious Litigant to the Losing Party.

INTRODUCTION

The American rule of litigation requires that each party be responsible for the fees of his attorney, win or lose. However, both the legislature and the judiciary have recognized exceptions to the rule, to allow parties to recover their attorneys' fees from their opponent.

In *Alyeska Pipeline Service Co. v. Wilderness Society*, the Supreme Court ruled that the "private attorney general" theory, a recent judicially created exception to the American rule, was no longer a viable theory upon which to base an award of attorneys' fees.

BACKGROUND OF THE DECISION

On March 26, 1970, respondents, three non-profit environmental organizations, filed a complaint against the Secretary of the Interior and a motion for a preliminary injunction to prevent the issuance of certain permits required for the construction of the trans-Alaska pipeline. The district court granted the injunction. The court based its decision on two grounds: the application of *Alyeska* exceeded the limitations that Congress had established in section 28 of the Mineral Leasing Act of 1920 on the amount of public lands that could be diverted to pipeline use and that the environmental and other safeguards set forth in the National Environmental Policy Act of 1969 (NEPA), had not been applied to the project.

2. Viz. the Wilderness Society, the Environmental Defense Fund, Inc., and the Friends of the Earth.
5. *Alyeska Pipeline Service Company* was owned by a consortium consisting of Exxon Pipeline Company, Mobil Pipeline Company, ARCO Pipeline Company, Phillips Petroleum Company, Union Oil Company of California, Sohio Pipeline Company, and Amerada-Hess Corporation. This entity submitted the application for the permits.
In September of 1971, the State of Alaska and petitioner Alyeska were allowed to intervene. On March 20, 1972, the Interior Department released to the public a six-volume Environmental Impact Statement and a three-volume Economic and Security Analysis. After the period of time set aside for public comment, the Secretary announced that Alyeska would be granted the permits it requested for the trans-Alaska pipeline.

Proceedings in the district court were then reinstated. Both the Mineral Leasing Act and NEPA issues were briefed and argued. The district court vacated the preliminary injunction, ruled in favor of defendants on all issues, and dismissed the complaint.

On appeal, the Court of Appeals for the District of Columbia Circuit reversed, relying solely on the Mineral Leasing Act. The court declined to decide the merits of respondents' NEPA contentions because those issues would involve unnecessary delay to the decision. The Supreme Court denied certiorari. But, shortly thereafter, Congress amended the Mineral Leasing Act to allow the Secretary to grant permits to Alyeska and also amended NEPA, making further action by Alyeska unnecessary.

Before these amendments were passed, respondents filed a bill of costs with the court of appeals. The petition prayed for an award of expenses and compensation for 4,455 hours of attorney time involving both the court proceedings and the submission of comments regarding the impact statement to the Department of Interior. The District of Columbia Circuit granted the petition for an award of attorneys' fees, holding that plaintiffs qualified under the private attorney general exception. In a five-to-two decision, the Supreme

8. Alyeska had argued that their interests could not be represented adequately by existing parties. The responsibilities and duties of the Secretary of the Interior, it was noted by Alyeska, did not include or concern the proprietary and financial interests of Alyeska or its subcontractors or agents. See Brief for Petitioner at 16, Alyeska Pipeline Service Company v. Wilderness Society, 421 U.S. 240 (1975).


10. Id.

11. Id.


16. Wilderness Society v. Morton, 495 F.2d 1026 (D.C. Cir. 1974). The court stated: Acting as private attorneys general, not only have they ensured the proper functioning of our system of government, but they have advanced and protected in a very concrete manner substantial public interests. An award of fees would not have
Court reversed the court of appeals. The Court rejected the private attorney general theory as an unwarranted judicial incursion on the American rule, which forbids the award of attorneys fees to the prevailing party.

In referring to the nonaward rule, the Court stated:

[T]he rule followed in our courts with respect to attorneys' fees has survived. It is deeply rooted in our history and in congressional policy; and it is not for us to invade the legislature's province by redistributing litigation costs in the manner suggested by respondents and followed by the Courts of Appeals. 17

THE AMERICAN RULE AND ITS EXCEPTIONS

Unlike the practice of most other nations, 18 American litigation requires that each party be responsible for the fees of his own attorney, win or lose. It is not altogether clear how or why the American rule was adopted. Early courts in the colonial United States routinely awarded all costs, including attorneys' fees, to the successful litigant. 19 American courts subsequently abandoned this practice of including attorneys' fees as costs. One explanation given is that during colonial times lawyers were considered unnecessary and generally held in suspicion. Thus, the courts did not wish to encourage their use by awarding them costs. 20 The adoption of the American rule has also been attributed to the individualism of the colonials who believed that each person should bear whatever financial burdens were involved in the litigation. 21

Regardless of the original rationale underlying the American rule, early courts recognized and consistently upheld the rule. 22 For ex-

unjustly discouraged appellee Alyeska from defending its case in court. And denying fees might well have deterred appellants from undertaking the heavy burden of this litigation.

Id. at 1036.
22. The District of Columbia Circuit noted:
The chief rationale behind the American rule is the notion that parties might be unjustly discouraged from instituting or defending actions to vindicate their rights if the penalty for losing in court included the fees of their opponent's counsel.
Wilderness Society v. Morton, 495 F.2d 1026, 1031 (D.C. Cir. 1974).
"... the time, expense, and difficulties of proof inherent in litigating the question of what
ample, in *Oelrichs v. Spain*, the Court held that the lack of a measurable attorneys' fees standard justified the rule. In *Stewart v. Sonneborn*, the Court ruled that attorneys' fees were not recoverable because they were not proximately caused by the actions of the defendant; also, it was not foreseeable that a party would employ a lawyer when he was criminally prosecuted. The Supreme Court has continued to follow the traditional rule that attorneys' fees are not ordinarily recoverable in the absence of a statute or enforceable contract providing therefore.

Despite the acceptance of the nonaward rule in the United States, there are instances in litigation where the prevailing party can recover attorneys' fees from his opponent. Congress has made statutory allowances for the recovery of attorneys' fees in a variety of circumstances. Under some statutes, the award is mandatory, while others confer discretionary power upon the courts to shift fees to the successful plaintiff. Besides statutory exceptions, federal courts, exercising their inherent equitable power, have fashioned certain exceptions to the nonaward rule. Courts have held that the interests of justice at times require an award of attorneys' fees to certain litigants. Consequently, three exceptions to the American rule developed.

A finding of bad faith or oppressive tactics by one party is sufficient to prompt a court to award fees to his opponent. This "obdur-

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A "bad faith" exception has been utilized to punish the party who has engaged in groundless, oppressive, or vexatious conduct and to reimburse his opponent for unnecessary litigation expenses. Recently, the bad faith exception has been expanded in school desegregation cases, where defendant school districts were found to have precipitated unnecessary litigation.

A second exception to the American rule is the "common benefit" doctrine. Initially, the exception was applicable where, as a result of litigation, a party created a fund or protected an identifiable number of beneficiaries. When a party created or protected a fund in which others had a beneficial interest, equity required that such a person should be reimbursed for his reasonable expenses, including attorneys' fees, from the fund itself or by some other equitable arrangement. In terms of policy, this exception to the American rule essentially encompasses notions of restitution for the plaintiff and the avoidance of unjust enrichment for the class members.

From a narrow group of cases in which a common fund was protected or created for the benefit of an identifiable group, the "common fund" principle was expanded and applied to cases where litigation did not actually result in or protect a fund, but produced a comparable effect by establishing a precedent for others. Recently, the Supreme Court in Mills v. Electric Auto-Lite Co. held that attorneys' fees can be awarded if plaintiff confers a "substantial benefit," which need not be of a pecuniary nature, to members of an identifiable class.

The fact that this suit has not yet produced, and may never produce, a monetary recovery from which the fees could be paid does not preclude an award based on this rationale. Although the earliest cases recognizing a right to reimbursement involved litigation that had produced or preserved a "common fund" for the benefit of a group, nothing in these cases indicates that the suit must actually bring money into the court as a prerequisite to the court's power to order reimbursement of expenses.

The substantial benefit or common benefit approach of Mills was

34. 6 J. MOORE, FEDERAL PRACTICE ¶ 54.77(2), at 54-1705 (2d ed. 1974).
37. Id. at 392.
reaffirmed in *Hall v. Cole.* In that case, a union member sued to regain membership under section 102 of the Labor-Management Reporting and Disclosure Act. He was expelled from the union for deliberate and malicious vilification of union management. The Court reasoned:

> When a union member is disciplined for the exercise of any of the rights protected by Title I, the rights of all the members of the union are threatened. And, by vindicating his own right, the successful litigant dispels the "chill" cast upon the rights of others.

The Court rejected the argument that the absence of a specific fee-shifting provision in section 102 indicated congressional intent to prevent fee-shifting. This determination was made despite the fact that other sections of the Act, sections 201 (c) and 501 (b) had authorized the recovery of counsel fees. However, notwithstanding its recent expansion, this theory is still limited by requirements of:

- (1) conferring a benefit upon the members of an ascertainable class; and
- (2) being a case in which an award of fees will serve to spread the costs of litigation among its beneficiaries.

Therefore, in the *Alyeska* context, the imposition of attorneys' fees upon corporations like petitioner's would not serve to further the strict designs of the doctrine.

**PRIVATE ATTORNEY GENERAL EXCEPTION**

Prior to *Alyeska,* federal courts applied another significant exception to the American rule—the private attorney general exception. Basically, this recent exception provides for allowance of attorneys' fees to a private litigant who ensures the effectuation of a strong congressional policy. The development of the private attorney general theory has been traced to four factors:

- (1) that fee shifting under federal regulatory statutes provided a successful example of the use of congressionally authorized awards as an incentive for private enforcement of public policy;
- (2) that the central role of litigation in the civil rights movement led to congressional enact-

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41. For further discussion, see text accompanying note 39 supra.
42. *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970). *See also Dawson,* *Lawyers and Involuntary Clients in Public Interest Litigation,* 88 HARV. L. REV. 849, 897 (1975). It should be noted that the term "class" as used in this context is not synonymous with "class action."
44. See notes 27 and 28 supra.
ment of attorney fee provisions in the various civil rights acts of the 1960's; \(^5\) (3) the liberalization and expansion of standing; \(^6\) (4) the liberalization of rules governing class actions. \(^7\) Thus, where the bad faith and common benefit exceptions were inapplicable, federal courts considered the private attorney general exception.

The need for private enforcement of federal laws designed to protect broad public interests is an essential precept of the private attorney general theory. It has been argued that restricted funding, heavily centralized bureaucratic organization, and direct conflicts of interest within the various administrative agencies and the United States Attorney General’s office have left a void in law enforcement that requires filling by private litigants. \(^8\) However, few private attorneys can afford to take on an important public issue if there is no possibility of recompense. First, public interest litigation suits generally involve complex and often novel issues of fact and law which require substantial preparation and expense. \(^9\) Secondly, the suits frequently seek injunctive rather than monetary relief and are brought on behalf of clients who lack financial resources. \(^0\) In short, the protection of important federal rights depends on the efforts of skilled attorneys who need encouragement to undertake such difficult and time-consuming litigation. \(^1\)

An essential element in the award of fees based on the private attorney general exception is the strength of the congressional policy being enforced by the successful plaintiff. Though courts have regularly determined the motives of Congress, there are difficulties involved when a court attempts to justify fee-shifting upon the relative strength of a public policy. Determinations of a congressional policy’s strength or weakness are arguably not issues ideally suited for the courts. No reasonably objective standards can be

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\(^5\) E.g., 42 U.S.C. § 2000a-3(b) (1970); 42 U.S.C. § 3612(c).


\(^0\) Id.

\(^1\) See Hoitt v. Vitek, 495 F.2d 219 (1st Cir. 1974); accord, Souza v. Travisano, 512 F.2d 1137 (1st Cir. 1975).
formulated to differentiate statutes on the basis of the relative strengths of their respective policy goals.\textsuperscript{52}

Additional problems arise when courts attempt to weigh the need for private enforcement of a statute. Judgments would have to be made concerning the effectiveness of the various agencies entrusted with the enforcement of the statute. However, these decisions would often be based upon factors existing outside the scope of the case. Also, if public enforcement is adequate, a losing defendant should not be taxed exclusively.\textsuperscript{53}

The private attorney general exception to the American rule gained considerable momentum in the lower federal courts after the Supreme Court decision in \textit{Newman v. Piggie Park Enterprises}.\textsuperscript{54} In \textit{Newman}, the petitioners, in a class action, enjoined racial discrimination at respondents' South Carolina restaurants. The Court granted attorneys' fees under the discretionary fees section of Title II of the Civil Rights Act of 1964, section 204(a).\textsuperscript{55} It reversed the Fourth Circuit Court of Appeals' instruction to the district court to award counsel fees only if the trial court found bad faith. The Supreme Court explained the reasoning involved:

If successful plaintiffs were routinely forced to bear their own attorneys' fees, few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the federal courts. Congress therefore enacted the provision for counsel fees—not simply to penalize litigants who deliberately advance arguments they know to be untenable but, more broadly, to encourage individuals injured by racial discrimination to seek judicial relief under Title II.\textsuperscript{56}

\textit{Newman} was viewed as important by those who favored liberalization of the nonaward rule\textsuperscript{57} for two reasons. First, it indicated a turnabout from the Court's approach a year earlier in \textit{Fleischmann}

\textsuperscript{52} See Comment, \textit{Court Awarded Attorney Fees and Equal Access to the Courts}, 122 U. Pa. L. Rev. 636, 671 (1974). However, it can be argued that since courts frequently decide cases based upon their interpretation of legislative intent, the relative strength or weakness of a congressional policy is measurable by merely carrying the legislative intent analysis one step further, i.e., weighing the strength of the congressional intent.

\textsuperscript{53} Id. In other words, if the agency entrusted with enforcement of the statute is lax in enforcing it, a defendant who would not have had to pay the government's attorneys' fees should not be burdened with the successful private plaintiff's fee award.

\textsuperscript{54} 390 U.S. 400 (1968).

\textsuperscript{55} 42 U.S.C. § 2000a-3(b) (1970).


Distilling Corp. v. Maier Brewing Corp. In Fleischmann, plaintiff's action for trademark infringement under section 35 of the Lanham Act was held insufficient to justify fee-shifting.

The recognized exceptions to the general rule were not, however, developed in the context of statutory causes of action for which the legislature had prescribed intricate remedies. Trademark actions under the Lanham Act do occur in such a setting.

Secondly, the language employed by the Court in Newman seemed to evidence a more liberal stance toward fee-shifting. The Court interpreted a discretionary provision for attorneys' fees as a "virtual command always to award fees to a successful plaintiff." The attitude of the Court toward the judiciary's power to award attorneys' fees shifted. Instead of considering the award simply as a way to punish the losing party for misconduct, fee-shifting was seen as "an effective way of encouraging 'private attorneys general' to bring lawsuits that advance the public interest."

This novel approach to the award of attorneys' fees was also reflected in Mills v. Electric Auto-Lite Co. Although Mills involved the application of the common benefit theory rather than the private attorney general exception as in Newman, both decisions emphasized the need to provide the individual with private law enforcement power. Markedly absent from both decisions were any implications that judicially-created exceptions were out of place in a statutory cause of action. Also missing was the broad language that these exceptions to the fee rule were to be narrowly construed.

It should be noted, however, that both Newman and Mills involved rather limited fact situations. Mills was a shareholder suit brought under section 14(a) of the Securities Exchange Act. The Court in Mills did not specifically overrule Fleischmann Distilling Corp. v. Maier Brewing Corp., but distinguished it on the parti-

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Footnotes:
58. 386 U.S. 714 (1967).
60. Fleischmann Distilling Corp. v. Maier Brewing Corp., 386 U.S. 714, 719 (1967).
62. Id. at 320.
65. Id.
cular statute involved in *Fleischmann*. The Lanham Act provides all the remedies available to a plaintiff who proves his valid trademark has been infringed. Similarly, *Newman* spoke only to the specific fee granting discretion provided by Title II of the 1964 Civil Rights Act.

**APPLICATION OF THE PRIVATE ATTORNEY GENERAL EXCEPTION**

As previously discussed, the *Newman* and *Mills* decisions prompted the lower federal courts to utilize the private attorney general concept to award fees to a successful plaintiff in a number of cases. Although the techniques and the exact rationales employed in the application of the private attorney general exception differed in the federal courts, the fact remains that the courts considered the exception viable and particularly useful.

In *Lee v. Southern Home Sites Corp.*, an action brought under 42 U.S.C. § 1982 alleging racial discrimination in selling lots, the Fifth Circuit reasoned that awarding attorneys' fees was an appropriate means for the federal courts to employ in effectuating the congressional policy of the Civil Rights Acts. The court relied on *Mills, Newman*, and certain federal statutes which allowed the award of fees and embodied legislative policies closely analogous to those supporting section 1982, which had no comparable provision for attorneys' fees. Private suits were viewed as a valid and necessary means of enforcing certain congressional policies and the award of fees was therefore justified as a means of encouraging such enforcement.


Admittedly, *Newman* involved a suit brought under a civil rights

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69. 42 U.S.C. § 2000a-3(b) (1970). Moreover, the Court has always been extremely sensitive to the policies underlying civil rights legislation.
70. See text accompanying notes 63 through 65 supra.
71. 444 F.2d 143 (5th Cir. 1971).

All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.
73. 444 F.2d 143 (5th Cir. 1971).
74. 467 F.2d 836 (5th Cir. 1972).
75. 42 U.S.C. § 1981 (1970) provides:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give
statute which makes specific allowance for attorneys' fees. But in
Lee v. Southern Home Cities Corp., this Court extended the
Newman doctrine to section 1982 suits. There is no relevant dis-
tinction between a section 1982 suit and a section 1981 suit such
as this one.76

Brandenburger v. Thompson,77 an action brought under 42 U.S.C.
§ 1983,78 successfully challenged Hawaii's one-year duration resi-
dency requirement for welfare benefits. Plaintiffs were awarded at-
torneys' fees because the court decided they had satisfied the re-
quirements of the private attorney general theory. As defined by the
court, an award should be made to a litigant who furthers the inter-
ests of a significant class of persons by effectuating a strong congres-
sional policy.79 In this case, plaintiffs benefited two significant
classes, potential welfare recipients and interstate travelers, by
vindicating the federally protected right of travel free from the for-
feiture of welfare benefits. Since section 1983 expresses a strong
policy of vindicating federal constitutional rights against infringe-
ment by state officials, the plaintiffs furthered congressional policy
by challenging the Hawaii statute.

In another civil rights case, Fowler v. Schwarzwalder,80 the Eighth
Circuit instructed the district court on remand:

[In fashioning an effective remedy for the rights declared by
Congress one hundred years ago, courts should look not only to
policy of the enacting Congress, but also to the policy embodied
in closely related legislation.81

Consequently, the district court, in considering the violation of sec-
tion 1981, was instructed to give weight to the teachings in Mills and
Newman and the actions of Congress in enacting those sections of

76. Cooper v. Allen, 467 F.2d 836, 841 (5th Cir. 1972).
77. 494 F.2d 885 (9th Cir. 1974).

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.
79. Brandenburger v. Thompson, 494 F.2d 885, 888 (9th Cir. 1974).
80. 498 F.2d 143 (8th Cir. 1974).
81. Id. at 145.
the 1964 and 1968 Civil Rights Acts aimed at similarly defined social problems.

Prison inmates were awarded attorneys' fees under the private attorney general rationale in *Souza v. Travisano.*\(^82\) In that case, inmates successfully challenged, under section 1983, a prison regulation limiting their access to attorneys and law students. The First Circuit grounded its ruling upon an earlier decision, *Hoitt v. Vitek,*\(^83\) involving a similar section 1983 action by prisoners. There the court stated:

> [The Public, as well as all present and future prisoners, benefits when the constitutionality of the treatment of prisoners is assured . . . the bar ought to be encouraged to give them legal aid and advice in order to secure their rights.]

In *La Raza Unida v. Volpe,*\(^85\) the court noted: " . . . the average attorney or litigant must hesitate, if not shudder, at the thought of 'taking on' an entity such as the California Department of Highways, with no prospect of financial compensation for the efforts and expenses rendered."\(^86\) The court allowed attorneys' fees, basing the award upon the strength of the congressional policy, the number of people benefited by the litigants' efforts, and the necessity and financial burden of private enforcement.

In addition to a strict private attorney general approach, federal courts have authorized fee awards based upon a combination of the main exceptions.\(^87\) Courts have also granted the award using these judicial exceptions in the alternative. In *Cornist v. Richland Parish School Board,*\(^88\) a section 1983 civil rights action by black teachers, the court employed both the bad faith and the private attorney general exceptions in allowing fee-shifting. Likewise, in *Fairley v. Patterson,*\(^89\) a reapportionment case, the obdurate behavior and the private attorney general theories supported an award to the private plaintiffs.

The *Mills* common benefit approach was merged with the *Newman* private attorney general exception to form the rationale for

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82. 512 F.2d 1137 (1st Cir. 1975).
83. 495 F.2d 219 (1st Cir. 1974).
84. Id. at 220.
85. 57 F.R.D. 94 (N.D. Cal. 1972) (an environmental protection and housing assistance case).
86. Id. at 101.
87. I.e., the bad faith, common benefit, and private attorney general exceptions.
88. 495 F.2d 189 (5th Cir. 1974).
89. 493 F.2d 598 (5th Cir. 1974).
fee shifting in *Sims v. Amos* and *NAACP v. Allen*. In *Sims*, where plaintiffs sued to secure reapportionment of the state legislature, the district court held that plaintiffs were entitled to a fee award since they had benefited their class and effectuated a strong congressional policy. That court applied identical reasoning in *NAACP v. Allen*, a section 1983 civil rights case involving state employment discrimination. This particular line of reasoning has been criticized because dual concepts of statutory vindication and class-wide benefit appear to be redundant, since in most cases the act of vindicating congressional policy will ipso facto confer a benefit upon plaintiff’s class.

In several cases, the trial court has failed to specify which exception to the nonaward rule was employed. In *Taylor v. Perini*, a section 1983 prisoners’ rights case, the Sixth Circuit was uncertain about which theory the district court had based its award upon. Nevertheless, the court of appeals, recognizing the private attorney general theory, decided that fee-shifting was proper because there existed no particular substantial award of damages and the award served to prevent the unjust discouragement of parties in bringing suit to vindicate important rights.

The district court in *Donahue v. Staunton*, a section 1983 free speech case, failed to specify the grounds upon which it allowed fee-shifting to plaintiffs. However, the Seventh Circuit held that the rationale for the award appeared on the face of the record.

The benefit to the general public, *i.e.*, of encouraging free and robust public discussion, is substantial in this case and should not depend for its protection upon the financial status of the individual who is deprived of his constitutional rights.

In sum, the federal courts, drawing from the strong language of the Supreme Court in *Newman v. Piggie Park Enterprises* and *Mills*

93. 503 F.2d 899 (6th Cir. 1974). The Sixth Circuit remanded to the district court for a finding of its reason for granting attorneys’ fees.
94. Id. at 905.
95. 471 F.2d 475 (7th Cir. 1972), cert. denied, 410 U.S. 955 (1973).
96. Id. at 483.
v. Electric Auto-Lite Co., have not been hesitant in utilizing the private attorney general exception. In cases where the traditional and relatively limited exceptions to the American rule were inapplicable, federal courts, pursuant to their equitable jurisdiction, have awarded attorneys' fees under the broader rationale of the private attorney general exception.

THE SUPREME COURT DECISION

In Alyeska, the Supreme Court strongly emphasizes the constraints of section 1923 upon the concept of fee-shifting. Section 1923 of 28 U.S.C. is the present version of the fee bill of 1853. The Court viewed the fee bill as a barrier to further encroachment upon the American rule of litigation:

Since the approach taken by Congress to this issue has been to carve out specific exceptions to a general rule that federal courts cannot award attorneys' fees beyond the limits of 28 U.S.C. 1923, those courts are not free to fashion drastic new rules with respect to the allowance of attorneys' fees to the prevailing party in federal


(a) Attorney's and proctor's docket fees in courts of the United States may be taxed as costs as follows:

$20 on trial or -final hearing (including a default judgment whether entered by the court or by the clerk) in civil, criminal, or admiralty cases, except that in cases of admiralty and maritime jurisdiction where the libellant recovers less than $50 the proctor's docket fee shall be $10;

$20 in admiralty appeals involving not over $1,000;

$50 in admiralty appeals involving not over $5,000;

$100 in admiralty appeals involving more than $5,000;

$5 on discontinuance of a civil action;

$5 on motion for judgment and other proceedings on recognizances;

$2.50 for each deposition admitted in evidence.

(b) The docket fees of United States attorneys shall be paid to the clerk of the court and by him paid into the Treasury.

(c) In admiralty appeals the court may allow as costs for printing the briefs of the successful party not more than:

$25 where the amount involved is not over $1,000;

$50 where the amount involved is not over $5,000;

$75 where the amount involved is over $5,000.

100. It should be noted that Petitioner failed to argue 28 U.S.C. § 1923 in its brief.
litigation or to pick and choose among plaintiffs and the statutes under which they sue and to award fees in some cases but not in others, depending upon the court's assessment of the importance of the public policies involved in particular cases. Nor should the federal courts purport to adopt on their own initiative a rule awarding attorneys' fees based on the private attorney general approach when such judicial rule will operate only against private parties and not against the Government.\textsuperscript{102}

Mr. Justice White, speaking for the Court, conceded that Congress has chosen to rely upon private enforcement of certain statutes to implement public policy. Thus, courts have allowed counsel fees so as to encourage this type of litigation. However, he cautioned:

\begin{quote}
[C]ongressional utilization of the private attorney general concept can in no sense be construed as a grant of authority to the Judiciary to jettison the traditional rule against nonstatutory allowances to the prevailing party and to award attorneys' fees whenever the courts deem the public policy furthered by a particular statute important enough to warrant the award.\textsuperscript{103}
\end{quote}

The Supreme Court's interpretation of the docket fees statute as a barrier to judicially created exceptions appears to be inconsistent with the federal courts' traditional equitable powers of control over the costs of litigation. As the Supreme Court reasoned in \textit{Sprague v. Ticonic National Bank},\textsuperscript{104} in considering the power of the federal courts to award fees:

\begin{quote}
Allowance of such costs in appropriate situations is part of the historic equity jurisdiction of the federal courts. ... Plainly the foundation for the historic practice of granting reimbursement for the costs of litigation other than the conventional [statutory] taxable costs is part of the original authority of the chancellor to do equity in a particular situation.\textsuperscript{105}
\end{quote}

In bad faith and common fund exception cases, federal courts have always acknowledged the viability of the American rule, but have also stressed their own inherent equitable powers to award attorneys' fees when the interests of justice so require. A broad reading of \textit{Alyeska} could lead federal courts to conclude that they should restrict the exercise of their equitable powers to award attorneys' fees, and should strictly adhere to the American rule and the

\textsuperscript{102}. \textit{Alyeska Pipeline Service Co. v. Wilderness Society}, 421 U.S. 240, 269 (1975).

\textsuperscript{103}. \textit{Id. at 263}.

\textsuperscript{104}. 307 U.S. 161 (1939).

\textsuperscript{105}. \textit{Id. at 164-66}.
traditional exceptions thereto, unless the legislature otherwise directs.

Mr. Justice White urged that courts are inherently incapable of determining when public policy should require an award of attorneys' fees for private enforcement of a statute. In addition to the foregoing, the Court noted that the government's immunity against a fee award could work an injustice against private litigants.\textsuperscript{106}

In his dissent, Mr. Justice Marshall strongly criticized the majority approach interpreting the docket fee statute as an impediment to the federal courts' historic equity powers. He argued, through an analysis of recent fee-shifting cases, that the courts as well as the legislature may create and in fact have created exceptions to the general rule.

In sum, the Court's primary contention—that Congress enjoys hegemony over fee-shifting because of the docketing fee statute and the occasional express provisions for attorneys' fees—will not withstand even the most casual reading of the precedents. The Court's recognition of the several judge-made exceptions to the American rule demonstrates the inadequacy of its analysis. Whatever the Court's view of the wisdom of fee-shifting in "public benefit" cases in general, I think that it is a serious misstep for it to abdicate equitable authority in this area in the name of statutory construction.\textsuperscript{107}

Mr. Justice Marshall also noted that there is no basis in precedent or policy for a restriction of the courts' equitable powers when the court finds that a fee award is necessary. He stressed that the majority's conceptual difficulties with the private attorney general exception were somewhat exaggerated:

The Court's concern with the difficulty of applying meaningful standards in awarding attorneys' fees to successful "public benefit" litigants is a legitimate one, but in my view it overstates the novelty of the "private attorney general" theory. The guidelines developed in closely analogous statutory and nonstatutory attorneys' fee cases could readily be applied in cases such as the one at bar.\textsuperscript{108}

\textsuperscript{106} Mr. Justice Marshall argued that 28 U.S.C. § 2412 may not preclude a fee award against the United States in all cases. He stated:

Section 2412 states that the ordinary recoverable costs shall not include attorneys' fees; it may be read not to bar fee awards, over and above ordinary taxable costs, when equity demands. In any event, there are plainly circumstances under which § 2412 would not bar attorney fee awards against the United States.

421 U.S. 240 at 287 n.9.

\textsuperscript{107} 421 U.S. 240 at 282 (1975).

\textsuperscript{108} Id. at 273-74.
Why did the *Alyeska* Court so thoroughly reject the private attorney general rationale for fee-shifting? The Court could have ruled that this case was not proper for the application of the exception because the statute involved, the Mineral Leasing Act, did not articulate a strong congressional policy.\footnote{Brief for Petitioner at 26, *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975).}

The Court’s decision reflects a negative reaction to lower federal court application of the private attorney general exception in section 1983 actions.\footnote{For complete text of 42 U.S.C. § 1983 see note 78 supra.} Since section 1983 is not merely limited to injunctive relief or declaratory judgments for remedies, there is arguably less necessity for recompense of a successful plaintiff’s attorneys’ fees. Moreover, section 1983 actions are not confined to a specific congressional statutory scheme, but encompass a broad spectrum of constitutional rights. The Supreme Court suggested that a continuation of fee-shifting in section 1983 actions may well result in an unwarranted abrogation of the American rule of litigation:

\[\ldots\] it would appear that a wide-range of statutes would arguably satisfy the criterion of public importance and justify an award of attorneys’ fees to the private litigant. And, if any statutory policy is deemed so important that its enforcement must be encouraged by awards of attorneys’ fees, how could a court deny attorneys’ fees to private litigants in § 1983 actions seeking to vindicate constitutional rights?\footnote{421 U.S. 240 at 264.}

**CONCLUSION**

*Alyeska* could substantially limit the accessibility of the courts to private individual plaintiffs and private groups formed to protect a particular public interest. Conservation, environmental, consumer, civil liberties and civil rights organizations may have to seek means other than fee-shifting to help finance their litigation.\footnote{Of course, public interest litigants cannot assume that they will always be successful, let alone, receive an award of attorneys’ fees.} Also, it is argued that certain non-profit public interest organizations possess sufficient resources to enable them to finance litigation of their public issue or issues.\footnote{Brief for Petitioner at 43-45. *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975).} Nevertheless, there is bound to be a certain limiting effect upon an organization’s future litigation plans because of the demise of the private attorney general exception. Much of the litigation brought by public interest groups is lengthy and
complex. Moreover, injunctive relief rather than monetary damages is generally sought against corporations or governmental units. Therefore, any decision curtailing the court's power to award attorneys' fees will certainly have an adverse affect on these organizations.

Public interest plaintiffs may attempt to expand the common benefit exception to compensate for the loss of the private attorney general exception. However, this approach is limited. 114

In actions similar to Alyeska, the restitution-based rationale of the common benefit exception would preclude a fee award. The court must have jurisdiction over some source which allows it to assess the ultimate beneficiaries for plaintiff's costs. But so long as the court has within its jurisdiction the means of distributing the costs of litigation, the common benefit theory is adequate. The private attorney general theory becomes necessary only when the court cannot match the costs with the benefits which are created or protected by judicial action.

Absent a shift in the Court's thinking public interest groups may be forced to shift their emphasis to the legislature. Consequently, congressional amendments providing a mandatory award of attorneys' fees for particular statutes, or a general fee-shifting provision, appears to be the most appropriate solution. If there is any message by the Court to these public interest organizations, it is that they should seek from Congress, and not the courts, the power to act as private attorneys general.

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114. See note 42 supra and accompanying text.