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AWARDING ATTORNEY'S FEES TO ENVIRONMENTAL PLAINTIFFS UNDER A PRIVATE ATTORNEY GENERAL THEORY

Scott J. Jordan*

I. INTRODUCTION

A private attorney general is a private individual who steps forward to defend the public interest when the government does not. Governmental attorneys general and other governmental agencies cannot, or will not, always enforce all of the laws because they have limited resources and are influenced by political considerations. The result is that “most of the responsibility for enforcement [of statutes] has to rest upon private citizens, who must go to court to prove a violation of the law.”

Congress and the courts have decided that private attorneys general must be allowed to participate in various types of legal proceedings. Courts have broadened standing to allow private attorneys general to bring suits. Many governmental agencies allow private attorneys general into agency proceedings. Further, Congress has recognized the importance of private enforcement of statutes by providing for private causes of action in a wide variety of laws.

*Topics Editor, 1986-1987, BOSTON COLLEGE ENVIRONMENTAL AFFAIRS LAW REVIEW.

2 U.S. v. Richardson, 418 U.S. 166, 193 (1974) (Stewart, J., concurring) (“To be sure standing barriers have been substantially lowered in the last three decades”). See also United States v. SCRAP, 412 U.S. 669 (1973) (Extreme leniency in finding standing: organization granted standing in Interstate Commerce Commission rate-setting proceeding because increased rates would discourage recycling which would cause environmental degradation of natural areas including areas used by plaintiff’s members for recreation).
3 For example, the Federal Energy Regulatory Commission allows public interest plaintiffs to intervene in agency proceedings under 18 C.F.R. § 385.214(b)(2)(iii) and § 385.906(c)(2)(ii)(1986).
But merely granting private attorneys general a right to enforce the laws is not sufficient. They must also have the resources to exercise the right. Litigation is extremely expensive and public interest plaintiffs will not always be able to finance their suits. One source of resources is attorney's fee awards granted by courts. Fee awards provide the resources to private attorneys general in two ways. First, awards provide the public interest plaintiff with the opportunity to recover attorneys fees if he wins. Without this opportunity, the private plaintiff may decide that the burdens of litigation outweigh the benefits to him. The plaintiff may decide not to spend thousands of dollars to enforce the law because, even if he is totally successful, the victory is not worth that much money to him personally. Second, fee awards from past cases can fund future public interest litigation by the successful plaintiff. In many cases, an individual who wishes to act to protect the public interest cannot because the individual lacks the resources to pay for litigation. Attorney fee awards can provide the funding for public interest law firms that will use their resources to protect public rights.  

Congress and the courts recognize the importance of fee awards. The legislative histories of statutory fee provisions express the importance of fee awards in ensuring the fulfillment of statutory policy. The Supreme Court, in Hall v. Cole, recognized that refusing to award fees can be “tantamount to repealing the [statute] itself by frustrating its basic purpose.”

Granting fee awards to private attorneys general is also fair to the private citizens who volunteer to champion public rights. Since society has chosen to leave much of the enforcement of its laws in the hands of private parties, the courts should ensure that private attorneys general are not bearing the full burden of protecting the public interest. “No one expects a policeman, or an officeholder, to pay for the privilege of enforcing the law. It should be no different for a private citizen . . . .”

These arguments are especially pertinent to environmental plaintiffs. Since environmental plaintiffs protect the environment in which

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9 See supra note 1 at 33,313.
we all live, their efforts benefit us all. For example, when an environmental lawsuit stops a factory from polluting the air, all people who breathe that air are benefited. Even if an environmental plaintiff is motivated solely by self-interest, the benefits of the suit are enjoyed by others.10 Attorney's fee awards are especially important in environmental cases, because the remedy is often injunctive relief rather than money damages. The plaintiff does not win funds which could cover the costs of litigation, and the plaintiff must bear the entire financial burden of the suit. Thus, it is crucial that the judicial system make resources available to private attorneys general who bring suit to enforce environmental laws.

In the late 1960's and early 1970's, federal courts recognized the importance of awarding attorney's fees to public interest plaintiffs and developed a "private attorney general" exception to the general rule that courts do not shift the attorney's fees of one party onto another.11 This exception allowed courts to award attorney's fees to plaintiffs who brought suits to enforce statutes and, in so doing, served the public interest. In 1975, in *Alyeska Pipeline v. Wilderness Society,*12 the United States Supreme Court held that federal courts could not award attorney's fees under the private attorney general exception unless there was a statute that specifically granted the discretion to do so. The *Alyeska* decision ended what some commentators had seen as a promising tool with which public interest groups could finance their litigation.13

This Comment will discuss why the private attorney general exception should be reinstated as a basis for fee awards in the federal courts. Section II of this Comment will discuss the general American rule of not awarding fees and the exceptions to it that federal courts have developed. Section III will look at the development of the private attorney general exception and compare it to other equitable exceptions. Section IV will discuss the *Alyeska* opinion and the Court's reasons for holding that granting attorney's fees to private attorneys general is beyond the discretion of courts. Section V will critique the *Alyeska* opinion as contrary to the traditional view of federal courts' power to award fees and, more generally, to exercise

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10 This is not to say that the environmental plaintiff does not have some personal interest in the benefit he seeks. Obviously he does since he took the initiative to bring the suit. Further, a plaintiff must have some special interest to have standing.
11 See infra notes 42-53 and accompanying text.
discretion in applying statutes. Further, Section V will argue that the Alyeska opinion is internally inconsistent. Finally, Section VI will discuss why courts should use their discretion to revive the private attorney general exception.

Although eleven years have passed since the Alyeska opinion was handed down, the private attorney general exception is not a dead issue. Shortly after Alyeska, California state courts adopted the private attorney general exception. Since then, California courts have strongly upheld it. Further, President Reagan has emphasized recently that the federal government should encourage private citizens to perform functions that have been handled by the government. Encouragement of private attorneys general by allowing fee awards is in line with this trend. Finally, since 1975, many court decisions have come down that are contrary to the reasoning that the Alyeska court followed in striking down the private attorney general exception.

II. AWARDING ATTORNEY'S FEES: THE GENERAL RULE AND ITS EQUITABLE EXCEPTIONS

A. The American Rule and the English Rule

Justice is not free. Any individual who wants justice must pay the price of seeking it. The price is the cost of attorney's fees and litigation expenses that must be borne by any party who prosecutes or defends a suit. There is nothing inherently wrong with this. Our adversarial legal system imposes costs on society; it is fair that some of the costs are borne by the parties that benefit by using the judicial system to settle their disputes. It follows that each party should pay his own attorney's fees. This is the rationale of the "American rule:" that under normal circumstances, each party is liable for his own attorney's fees.

The American rule is not followed in all countries. In England, for example, courts customarily award fees to the prevailing party. This

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15 See infra discussion of California's treatment of the private attorney general exception at text accompanying notes 132-138.
16 See infra notes 130-131 and accompanying text.
“English rule” has a statutory basis that dates back to 1275. The English rule regards attorney’s fees as a recoverable element of damages similar to medical expenses, automobile repair bills, and pain and suffering. The underlying rationale is the opposite of that of the American rule: the costs of justice should be borne by the losing party because that party imposed the costs onto the other party by forcing the dispute to be resolved in court. Thus, in an auto accident, the negligent defendant caused damage to the plaintiff’s person by injuring him, his car by wrecking it, and his bank account by forcing him to pay an attorney to win compensation in the courts. This rule is applied consistently in that a defendant may recover fees from a plaintiff who prosecutes a losing suit. The plaintiff is liable for the defendant’s fees because the plaintiff has wrongfully forced the defendant to bear those costs. The court simply requires the losing party to compensate the winning party for its attorney’s fees.

One major defect of the English rule is that it provides a disincentive to litigate disputes. The threat of liability for fees might be used as a weapon by both plaintiffs and defendants to prevent a dispute from being heard in the courts. For example, a plaintiff might be dissuaded from bringing a valid suit because he cannot afford to pay the defendant’s attorney’s fees if he loses. One might argue that this result is beneficial in that it tempers the litigious nature of parties. This beneficial effect, however, is outweighed by the fact that the English rule denies access to the judicial system to parties who cannot risk the burden of liability for their opponent’s fees. This is an additional reason why the American rule is preferred.

B. Exceptions to the American Rule

The American legal system has developed certain exceptions to the general rule of no fees. First, many statutes allow attorney’s fees to be awarded to parties who prosecute cases under the statute’s substantive provisions. Second, courts have used their “inherent

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19 See King & Plater, supra note 13 at 31-2; Goodhart, Costs, 38 YALE L. REV. 849, 851-4 (1929).
20 King & Plater, supra note 13 at 32; Goodhart, supra note 19 at 853.
equitable power”23 to fashion exceptions to the no fees rule. This Comment is primarily concerned with the equitable exceptions.

The court’s equitable power to develop exceptions to the no fees rule is based on the maxim that equitable remedies are proper when legal remedies are not sufficient to do justice.24 Even when a plaintiff’s cause of action is granted by law, such as by statute, courts obtain concurrent equitable jurisdiction where the available legal remedies are inadequate.25 Thus, courts have developed exceptions to the no fees rule when justice has demanded it. These equitable exceptions have drawn from the rationales of both the American rule and the English rule.

1. Bad Faith Exception

The bad faith exception allows fees to be awarded when a party has acted in bad faith in the litigation. In Fireman’s Fund Insurance Company v. Santoro,26 an insurance company forced a claimant to prove the negligence of the insured at “a six-day trial in which it strongly contested its insured’s negligence” even though it knew all along that its insured was negligent.27 The court held that the insurance company was liable for the fees of the plaintiff because it had litigated in bad faith. The bad faith exception might be seen as resting on the rationale of the English rule: that a party should be liable for the attorney’s fees that he has caused the other party to bear. This serves to deter parties from bringing frivolous suits.

One circuit court has expanded the bad faith exception to allow an award of fees where the defendant showed bad faith in his primary conduct, that is, the conduct that instigated the lawsuit. In Rolax v. Atlantic Coastline Railroad Co.,28 a union was assessed the legal fees of a black member who had challenged a labor contract that
deprived the plaintiff and other black workers of seniority. The court stated that fees were justified because "plaintiffs of small means [had] been subjected to discriminatory and oppressive conduct by [the defendant] which was required, as bargaining agent, to protect their interests." The *Rolax* court went on to defend the bad faith exception with arguments that are applicable to the private attorney general theory. The court stated:

The vindication of [the plaintiffs'] rights necessarily involves greater expense in the employment of counsel to [litigate the suit] than the amount involved to the individual plaintiffs would justify their paying. In such situation [sic], we think that the allowance of counsel fees in a reasonable amount as a part of the recoverable costs of the case is a matter resting in the sound discretion of the trial judge.\(^{30}\)

This kind of reasoning eventually was used by the courts to support the private attorney general exception.

Courts developed the bad faith exception as an exercise of their power to regulate the parties' conduct in lawsuits and, more generally, their equitable power to prevent injustice. Further, use of the bad faith exception has made courts more willing to accept broader exceptions to the no fees rule.\(^{31}\) Court decisions such as *Rolax*\(^{32}\) show this growing willingness to develop more "socially-conscious" exceptions such as the common benefit exception.\(^{33}\)

2. Common Benefit Exception

The second exception to the general no fees rule is the common benefit exception. Under this exception a court will award fees to a plaintiff who has prosecuted a suit that provides a benefit to a specific group of people.\(^{34}\)

\(^{29}\) *Id.* at 481. See also, Schlein v. Smith, 160 F.2d 22 (D.C. Cir. 1947). But see Shimman v. International Union of Operating Eng'rs. Local 18, 744 F.2d 1226, 1231 (6th Cir. 1984).

\(^{30}\) 186 F.2d at 481.

\(^{31}\) *King* & *Plater*, *supra* note 13 at 41.

\(^{32}\) 186 F.2d 473.

\(^{33}\) *King* & *Plater*, *supra* note 13 at 43.

\(^{34}\) For the purpose of this Comment, the common fund exception will be considered part of the common benefit exception. The common fund exception was developed in the late 1800's and allows an award of fees to a plaintiff who protects or creates a pool of assets for the benefit of a specific class of individuals. Sprague v. Ticonic National Bank, 307 U.S. 161 (1939); Trustees v. Greenough, 105 U.S. 527 (1881). Considering the common fund exception and the common benefit exception as one exception is proper because, conceptually, a "fund" is one example of a "benefit" that a plaintiff might provide to the group.
The common benefit exception was developed in the late 1960's and early 1970's in Mills v. Electric Auto-lite and Hall v Cole. The rationale of the common benefit theory is that of the American rule: those who enjoy the benefits of litigation should bear the burden of it. Toward that end, courts will only apply the common benefit exception when the defendant is an entity that "represents" the benefited class. Thus, while the fees are paid by the defendant, the effect is to shift the fees from the plaintiff onto the benefited class. For example, in Mills, the plaintiff was a shareholder who prosecuted a suit against the corporation to vindicate the rights of all shareholders. In holding the corporation liable for the plaintiff's fees, the court stated that, in shareholder derivative suits, courts will allow the expenses of the suit to be spread among the shareholders by granting an award against the corporation. Similarly, in Hall, a union was held liable for fees of one union member who sued the union to protect the rights of all union members. As in Mills, the award against the union treasury served to shift the burden onto the benefited class.

The common benefit exception is a large step beyond the bad faith exception. The bad faith exception serves to punish a party who acts wrongfully. The common benefit exception serves to reward a party for doing something good. Courts applying the common benefit exception recognize that plaintiffs will sometimes act to protect interests broader than their own and, in such circumstances, plaintiffs should not bear the entire burden of litigation.

The common benefit exception has some severe limitations. As discussed above, it can only be applied when the plaintiff has acted to benefit a specific class that is "represented" by the defendant. It does not apply when the plaintiff protects the public interest in general, unless the public interest happens to coincide with the class interest. This limitation in the common benefit exception could lead to situations where a plaintiff is not entitled to fees because his efforts have benefited too many others. Where a fee award will not have the effect of shifting the fee on to the benefited class, the plaintiff is forced to bear the full burden. This anomaly led courts to develop the private attorney general exception.

37 396 U.S. at 394-5.
38 412 U.S. at 8-9.
39 See King & Plater, supra note 13 at 48.
III. PRIVATE ATTORNEY GENERAL EXCEPTION

The private attorney general exception allows fees to be granted to plaintiffs who act to protect the interests of the public. The exception is based on the belief that governmental attorneys general cannot bring all of the suits necessary to protect the public interest. The equitable basis of the private attorney general exception is a hybrid between the bases of the common benefit and bad faith exceptions. It resembles the common benefit exception in that the underlying policy is to shift the fees from the plaintiff since he has acted to benefit interests broader than his own. It is like the bad faith theory because it shifts the burden of litigation onto the defendant whose conduct has caused the plaintiff to incur the costs of litigation.

The private attorney general exception also has a basis in economic reality. Private interests tend to be protected vigorously because such interests often are concentrated in a few parties who regard the outcome as very important. The result is that these parties have a strong incentive to litigate. Conversely, broad public interests affect a diffuse group of parties, few of whom have more than a small stake in the outcome. This leads to a free rider effect: those with only a small stake will tend to leave the burden to others. They calculate that their benefits are too small to justify action and that their support will not make a difference in the outcome. The result is that public interest litigation will be underfunded relative to the actual value that it has to society. Fee awards under the private attorney general exception serve to correct this imbalance by funding plaintiffs who protect interests broader than their own.

The private attorney general exception was first applied by the Supreme Court in Newman v. Piggie Park Enterprises, Inc. The Piggie Park Court stated that few plaintiffs would be able to come to federal court to protect the public interest if they were required to bear the burden of their attorney's fees. For this reason, the Court held that a fee award was proper in order to encourage individuals to seek relief in the courts. The Supreme Court reaffirmed

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41 See, e.g., Serrano, 20 Cal. 3d at 46-7, 569 P.2d at 1313 (court's statement of plaintiff's argument).
42 390 U.S. 400 (1968).
43 Id. at 402.
44 Id.
the *Piggie Park* decision in 1973 in *Northcross v. Board of Education of Memphis City Schools.* 45

The fee awards in *Piggie Park* and *Northcross*, however, were based on statutes that expressly granted the discretion to award fees to courts. 46 The use of the private attorney general theory as an equitable exception began in 1971 in *Lee v. Southern Home Sites Corp.* 47 In *Lee*, a plaintiff was awarded fees in a civil rights action even though the statute involved 48 did not expressly authorize an award of fees. The court held that a fee award was “part of the effective remedy a court should fashion to carry out the congressional policy embodied in” the statute. 49

As in *Piggie Park* and *Northcross*, the court in *Lee* reasoned that a fee award to the plaintiff was appropriate because the plaintiff had furthered the congressional policies that were stated in the statute. 50 The court held that fees are appropriate in these situations to “ensure that individual litigants are willing to act as ‘Private Attorneys General.’” 51

Following *Lee*, many of the circuit courts accepted the private attorney general theory as an equitable exception to the American rule. In addition to the Fifth Circuit in *Lee*, the First, Sixth, Seventh, Eighth, and Ninth Circuits expressly accepted the private attorney general exception. 52 Only the Fourth Circuit expressly rejected the private attorney general exception. 53 Thus, by 1975, six of the seven circuits to decide this issue had held that awarding fees to private attorneys general was within the court's discretion.

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46 The *Piggie Park* award was decided under the Civil Rights Act of 1964, 42 U.S.C. 2000a-3(b). 390 U.S. at 401. The *Northcross* award was decided under the Emergency School Aid Act of 1972, 20 U.S.C. § 1617. 412 U.S. at 427. It is important to note that these statutes did not specifically allow awards based on the private attorney general exception. They only contained a general grant of discretion to award fees. The Supreme Court developed the private attorney general exception as an exercise of the discretion granted under the statutes.
47 444 F.2d 143 (5th Cir. 1971).
49 444 F.2d at 144. See infra notes 88-90 and accompanying text.
50 444 F.2d at 145.
51 Id. at 148.
52 First Circuit: Hoitt v. Vitek, 495 F.2d 219 (1st Cir. 1974), Knight v. Auciello, 453 F.2d 852 (1st Cir. 1972); Sixth Circuit: Taylor v. Perini, 503 F.2d 899 (6th Cir. 1974); Seventh Circuit: Morales v. Haines, 486 F.2d 880 (7th Cir. 1973), Donahue v. Staunton, 471 F.2d 475 (7th Cir. 1972); Eighth Circuit: Fowler v. Schwarzwald, 498 F.2d 149 (8th Cir. 1974); Ninth Circuit: Brandenburger v. Thompson, 494 F.2d 885 (9th Cir. 1974).
IV. ALYESKA PIPELINE V. WILDERNESS SOCIETY

The growth of the equitable private attorney general exception did not continue. In fact, the equitable private attorney general exception was killed off in one fell swoop. In *Alyeska Pipeline v. Wilderness Society*, the United States Supreme Court held that the federal courts cannot award fees under the equitable private attorney general exception. In *Alyeska*, several environmental organizations sought a fee award after bringing a successful suit to halt the Alaskan oil pipeline on the grounds that it violated the Mineral Lands Leasing Act and the National Environmental Policy Act. Neither statute contained an express provision allowing attorney's fee awards. The D.C. Circuit Court awarded fees to the plaintiffs under the private attorney general exception. The circuit court held that the plaintiffs had benefited the public interest by preventing the oil pipeline construction from violating federal law. The plaintiffs had furthered the policies of NEPA by forcing the Department of the Interior to draft an Environmental Impact Statement, and had enforced the policies of the Mineral Leasing Act by requiring the agency to follow the width limitations in that act.

The Supreme Court overturned the circuit court's decision in *Alyeska*. It ruled that the circuit court had no discretion to award fees on a private attorney general theory since the statutes involved did not expressly allow fee awards. The Court reasoned that, since Congress has traditionally enacted attorney's fees provisions in statutes, any statute that did not contain an express provision should be interpreted as prohibiting courts from awarding fees in suits brought under that statute. Thus, federal courts are not free to fashion "new" equitable exceptions to the general no fees rule. This clear-cut denial of the private attorney general theory as an exception to the American rule continues to be the law in federal courts.

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58 495 F.2d 1026 (D.C. Cir. 1974).
59 Id. at 1034.
60 Id. at 1032-33.
62 Id. at 269.
63 Id.
64 Id.
65 See, e.g., Aetna Cas. & Sur. Co. v. Liebowitz, 730 F.2d 905 (2d Cir. 1984); Pacific Legal
It is crucial to remember that the *Alyeska* court did not simply exercise its discretion and decide not to allow fee awards to private attorneys general. The Court found that it had *no discretion to exercise* and could not even consider whether private attorney general fee awards were proper.

V. CRITICISM OF ALYESKA

There are three difficulties with the reasoning of the *Alyeska* decision. First, it goes against the traditional views of courts' power to award fees. Second, it is a radical departure from the traditional relationship between courts' equitable power and statutes. Third, the logic of the *Alyeska* opinion is internally inconsistent.

A. Alyeska as Contrary to Traditional Equitable Power to Award Fees

The power of courts to award attorney's fees is based on traditional equitable doctrine. The United States Supreme Court, in *Sprague v. Ticonic National Bank*, stated that "[p]lainly the foundation for the historic practice of granting reimbursement for the costs of litigation . . . is part of the original authority of the chancellor to do equity in a particular situation." The Court has consistently echoed this doctrine in subsequent cases. In fact, in the *Alyeska* opinion itself, the Court states that the bad faith and common benefit exceptions are "unquestionably assertions of the inherent power in the courts to allow attorney's fees in particular situations, unless forbidden by Congress . . . ." Since *Alyeska*, federal courts have continued to hold that awarding fees is part of the courts' inherent equitable power.
The holding in *Alyeska*, however, does not follow this long held doctrine. The *Alyeska* Court found that it did not have the discretion to award fees on an equitable basis. The *Alyeska* Court disregards the maxim that courts should use their equitable power to create equitable remedies when legal remedies are inadequate. The *Alyeska* holding turns this maxim on its head by finding that the lack of a statutory remedy shows congressional intent to limit the court’s equitable power. This logic is inconsistent with the court’s duty to use equitable remedies to fill the gaps left by law.

Further, it is inconsistent for the *Alyeska* Court to find that the court-created common benefit and bad faith exceptions are valid and, at the same time, hold that the Court does not have the power to accept the private attorney general exception. This inconsistency exists because the Court did not merely balance the equities and exercise its discretion to decline to accept the private attorney general theory. The Court held that it could not accept the private attorney general exception because it did not have the discretion to accept it. But if the Court does not have the equitable discretion to accept the private attorney general exception, it is hard to see how the Court could have the discretion to develop the bad faith and common benefit exceptions. Since the Court has exercised equitable discretion in creating these other equitable exceptions, it should also find that it has the discretion to award fees under the private attorney general exception.

### B. *Alyeska* as Contrary to the traditional Relationship Between Statutes and Equitable Discretion

A second criticism of the *Alyeska* holding is that it is contrary to long held notions of how statutes restrict the equitable discretion of courts. The *Alyeska* opinion states that since Congress had included provisions for awarding fees in certain statutes, courts are prohibited from awarding fees under a private attorney general theory under other statutes. Courts, however, have traditionally held that statutes cannot limit equitable discretion by implication. In *Porter v. Warner Holding Co.*, the Supreme Court said that

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74 *Alyeska*, 421 U.S. at 271.
76 *Id.* at 263.
77 See, id. at 277-78 (Marshall, J., dissenting).
78 Id. at 281-82 (Marshall, J., dissenting).
79 328 U.S. 395 (1946) (Statute allowing court to issue injunctions and compliance orders does not prevent court from ordering restitution).
"unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied." This doctrine was applied to the awarding of fees in Mills v. Electric Auto-lite Co. The Electric Auto-lite Court stated that express fee provisions "should not be read as denying to the courts the power to award counsel fees" where there is no express provision. This argument was also accepted by the Court in Hall v. Cole.

Since Alyeska, the Supreme Court held that statutes will not restrict equitable discretion by implication in Weinberger v. Romero-Barcelo. A comparison of Alyeska and Romero-Barcelo is illustrative of the departure that the Alyeska Court made from traditional reasoning.

In Romero-Barcelo, the Governor of Puerto Rico and others sued to prevent the Navy from holding bombing practice in an area off Puerto Rico. The Navy was operating without the permit required by the Federal Water Pollution Control Act. The Court held, as an exercise of its equitable discretion, that the bombing could continue without a permit even though the permit was expressly required in the statute. The Court reasoned that their equitable power remained because there was no express language that removed their discretion nor was it a necessary inference.

The Romero-Barcelo decision shows the extreme to which courts will go to retain their equitable discretion when acting under stat-
utes. The Court could have held that its discretion was limited by the statute to the extent that the Court must prevent statutory violations from continuing. It did not. Instead, the Court took the stance that its discretion is not limited by any implication, not even the strong, even necessary, implication that a statute really means what it says.

The *Alyeska* decision stands in stark contrast to this line of reasoning. The Court did not base the withdrawal of its discretion on any specific language in a specific statute. Instead, it used a two-step structural analysis of statutes in general. First, the Court reasoned that because Congress put express fee provisions in some statutes, Congress implicitly intended that fees would not be awarded in cases brought under statutes without fee provisions. Second, it concluded that this implicit denial of fees at law served to restrict the Court’s discretion to award fees in equity.

By making this two-step analysis, the *Alyeska* Court acted contrary to the traditional doctrine that courts will be hesitant to find statutory limits on equitable discretion. The *Romero-Barcelo* Court retained its discretion even to the point that the discretion allowed it to permit violations of a statute. The *Alyeska* Court found there was no judicial discretion to award fees when the statute being applied did not discuss attorney’s fees at all. The *Alyeska* decision is clearly a major aberration from the doctrine that courts will hesitate to interpret statutes as limiting equitable discretion. In fact, the *Alyeska* Court goes out of its way to read an implied limitation into the statutes. Furthermore, the decision did not demonstrate a new direction in law that courts have followed since *Alyeska*. It was a one time departure that the Court has contradicted in *Romero-Barcelo*.

It might have been more appropriate if the *Alyeska* Court had drawn the opposite implication: that by allowing fee awards in some statutes, Congress intended courts to have the discretion to grant fees in others as well. This implication was drawn by the Fifth Circuit Court of Appeals in *Lee v. Southern Homes*. In *Lee*, the court stated that in determining whether fees are appropriate under a civil rights statute that contains no express fee provision, “courts...
must give weight to the actions of Congress in enacting [statutes] aimed at very similarly defined social problems.\textsuperscript{89} The Lee court reasoned that since recent civil rights laws provide for fee awards, it was proper to award fees in the other civil rights statutes.\textsuperscript{90} In Alyeska, the Supreme Court could have used this reasoning to imply a remedy of attorney's fee awards in an environmental statute without a fee award provision\textsuperscript{91} because many other environmental statutes contain fee award provisions.\textsuperscript{92}

Congress has since approved of just such an analogy in its Senate Report for the Civil Rights Attorney’s Fees Act of 1976.\textsuperscript{93} In that report, the Senate Committee stated:

Before May 12, 1975, when the Supreme Court handed down its decision in [Alyeska], many lower Federal courts throughout the Nation had drawn the \textit{obvious analogy} between the Reconstruction Civil Rights Acts and these modern civil rights acts, and, following Congressional recognition in the newer statutes of the “private Attorney General” concept, were exercising their traditional equity powers to award attorneys’ fees under early civil rights laws as well.\textsuperscript{94} [footnote omitted][emphasis added]

This language shows that a court could adopt the Lee analogy without thwarting the will of Congress. In fact, such an analogy would follow the reasoning of Congress.

\textbf{C. Inconsistency within Alyeska}

A third flaw in the Alyeska decision is that it is marred by arguments that are internally inconsistent. The Alyeska Court accepts the common benefit exception as an established exception\textsuperscript{95} and, then, rejects the private attorney general theory because it is “new.”\textsuperscript{96} As discussed above, the common benefit exception was

\textsuperscript{89} Id. at 146.
\textsuperscript{90} Id.
\textsuperscript{91} In Alyeska, the statutes involved were the Mineral Leasing Act of 1920, 30 U.S.C. § 185 (1982), and the National Environmental Policy Act of 1969, 42 U.S.C. § 4321 et. seq. (1982).
\textsuperscript{94} Id.
\textsuperscript{95} 421 U.S. at 257-60.
\textsuperscript{96} Id. at 269.
developed in the late 1960's and early 1970's.\textsuperscript{97} One federal circuit court has stated that the common benefit exception was "established" in 1973.\textsuperscript{98}

The equitable private attorney general exception had developed at almost the same time. The \textit{Alyeska} opinion itself cites cases using the private attorney general theory dated as early as \textit{Lee v. Southern Homes}\textsuperscript{99} in 1971.\textsuperscript{100} Thus, there is no basis for the \textit{Alyeska} Court to call the private attorney general exception "new" and the common benefit theory "traditional."

It might be argued that the common benefit exception is not new since it is an expansion of the common fund theory.\textsuperscript{101} This argument is not persuasive, however, because awarding fees to a plaintiff out of a common fund is quite different from charging fees to a defendant directly. While the logic of the common benefit exception supports the common fund exception, the logic of the common fund exception does not necessarily support the common benefit exception. The common fund case exception states that when a plaintiff creates a cash pool or protects property for the benefit of others, part of that "fund" should pay for the plaintiff's fees. The common benefit exception is based on a much broader rationale: when a plaintiff provides a benefit to a class of persons, the burden of obtaining that benefit should be shared by those benefited.\textsuperscript{102}

The importance of this difference can probably best be appreciated when one remembers that the common fund theory originated in 1881 in \textit{Trustees v. Greenough}\textsuperscript{103} and, yet, the common benefit exception was not developed until 90 years later. Clearly, the Supreme Court did not see the step from common fund to common benefit as a small one.

VI. Why Courts Should Adopt The Private Attorney General Exception

Based on traditional notions of equity, courts have the power to award fees under a private attorney general theory. Further, courts should award fees to private attorneys general for two reasons. First, allowing fee awards to private attorneys general is one way

\textsuperscript{97} See \textit{supra} notes 34-39 and accompanying text.

\textsuperscript{98} Christopher v. Safeway Stores, Inc., 644 F.2d 467, 472 (5th Cir. 1981) (Common benefit exception was established in \textit{Hall v. Cole}, 412 U.S. 1 (1973)).

\textsuperscript{99} 444 F.2d 143 (5th Cir. 1971).

\textsuperscript{100} 421 U.S. at 270 n.46.

\textsuperscript{101} See, e.g., Bradley v. School Bd. of Richmond, 472 F.2d 318, 329 (1972).

\textsuperscript{102} See \textit{supra} notes 34-38 and accompanying text.

\textsuperscript{103} 105 U.S. 527 (1881).
for courts to fulfill their duty to enforce the law. Second, courts have a duty to use equitable remedies when legal remedies are inadequate.

A. Awarding Attorney’s Fees is One Way for Courts to Ensure That the Law is Enforced

Courts have a duty to enforce the law. One method by which courts can ensure that the law is enforced is to make fee awards available to private plaintiffs who step forward to enforce the law. As noted above, private attorneys general must have the resources to litigate. Without the resources to pay the costs of litigation, the right to come to court to enforce the law is a hollow shell. The availability of fee awards provides the resources to private attorneys general by giving them the opportunity to recover their fees if they win. Also, attorney’s fee awards are a source of funds for successful plaintiffs to finance future public interest law suits.

Furthermore, fee awards can provide the added incentive for a private citizen who would otherwise decide that his personal benefits did not justify the great expense of prosecuting a suit. By reducing the burden on public interest plaintiffs, courts can lessen the disincentives that a private individual faces when he acts to protect interests broader than his own self-interest. In doing so, courts would encourage public interest plaintiffs to file suits to enforce laws that might not be enforced otherwise.

Finally, the availability of fee awards may serve to discourage violations of the law. Since fee awards would tend to increase the ability of citizens to bring environmental enforcement suits, violators may work harder to remain in compliance with environmental restrictions. Without fee awards, violators may conclude that their actions will rarely be challenged. For the same reasons, the threat of citizen’s suits and fee awards against the government might stimulate government enforcement.


One might argue that courts should only decide the cases that are brought to them and not encourage litigation. This argument fails, however, because it does not recognize that attorney’s fee awards only “encourage” lawsuits by removing barriers that discourage parties from coming to court. The availability of fee awards do not convince litigants to pull lawsuits from thin air simply so they can win attorney’s fees. Fee awards merely ensure that parties with legitimate grievances can afford to litigate those grievances.

105 See supra notes 4-5 and accompanying text.

106 See supra note 5 and accompanying text.

107 This argument is suggested in ANDERSON, MANDECKER & TARLOCK, ENVIRONMENTAL PROTECTION 152 (1984).
Both Congress and the courts have stated that fee awards to private attorneys general are crucial to full enforcement of the law.108 After the Alyeska decision, Congress passed the Attorney's Fees Awards Act,109 which granted fees to public interest plaintiffs in civil rights suits. In the Senate report for this law,110 the Senate Committee stated that the denial of fee awards to private attorneys general created "anomalous gaps" in the civil rights laws.111 This shows that Congress believed that the availability of attorney's fees was important to fulfill the public policies expressed in the statutes.

Congress has also signaled the propriety of fee awards to private attorneys general by including fee award provisions in many statutes. Many of the fee provisions use the word "appropriate" as the standard for courts to follow. For example, the fee provision of the Clean Air Act112 states: "[i]n any judicial proceeding under this section, the court may award costs of litigation (including reasonable attorney and expert witness fees) whenever it determines that such award is appropriate."113 Similar language is found in many other environmental statutes.114 Courts could reasonably look to statutes that state that awarding fees to private attorneys general is appropriate in law and decide that awarding fees under statutes without fee award provisions is appropriate in equity. This reasoning has been accepted by courts in the past115 and is consistent with past statements by Congress.116

Furthermore, the use of the word "appropriate" should not be taken as a mere statutory shorthand for fee awards to private attorneys general. Congress used the word "appropriate" in the various statutes to show its feeling that private attorney general fee awards are proper and important.117 Congress could have chosen to state plainly that fee awards to private attorneys general would be allowed. Instead, Congress told courts to award fees when it was "appropriate" and that fees were "appropriate" when the plaintiff acts as a private attorney general. With this congressional definition,

108 See supra notes 6-8 and accompanying text.
111 Id.
114 See supra note 92.
115 See supra notes 88-92 and accompanying text.
116 See supra notes 93-94 and accompanying text.
117 See supra note 6 and accompanying text.
courts acting in equity have a basis for awarding fees to private attorneys general.

Courts have a duty to enforce all laws. As the *Alyeska* court itself argued, courts should not "pick and choose" which laws deserve more or less protection.118 This duty extends to laws that do not contain fee award provisions. When courts choose not to allow fee awards to those private plaintiffs who litigate to enforce a law, they fail to use a mechanism that Congress has stated is necessary for the enforcement of laws. In the extreme, by choosing to not award fees, the court is acting to "repeal[ ] the [statute] itself by frustrating its basic purpose."119

**B. Courts Should Apply Equitable Remedies When Legal Remedies are Inadequate**

A courts' duty to enforce all laws does not lapse simply because a remedy in law is not present. Courts have equitable powers and should fashion equitable remedies when the available legal remedies are insufficient to do justice.120

The inadequacy of the remedy in an environmental statute without a fee provision, such as NEPA,121 is demonstrated by comparing it to the antitrust laws, which have fee provisions.122 When a plaintiff sues under the antitrust laws, he is often protecting his own economic interest as well as the public interest. A typical case involves a competitor suing to prevent certain trade practices that have hurt the plaintiff's business.123 In this situation, the plaintiff has a strong economic incentive to litigate even without the availability of fee awards. Despite this clear economic incentive for plaintiffs to enforce the antitrust laws, Congress felt that fee awards were important to provide an adequate remedy for antitrust violations.124

In environmental cases, this economic incentive is not present. Environmental plaintiffs will rarely gain any economic benefits from their litigation as antitrust plaintiffs will. Often the outcome of

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118 421 U.S. at 269.
119 Hall v. Cole, 412 U.S. at 13 (citing Cole v. Hall, 462 F.2d 777, 780-81 (1972)).
120 See supra notes 24-25 and accompanying text.
environmental suit is an injunction without any money damages. If
fee awards are necessary to provide an adequate remedy in antitrust
suits where strong economic incentives to litigate exist, it is difficult
to see how courts can find that adequate legal remedies exist without
fee awards in environmental cases where few, if any, economic in­
centives to litigate exist. Since the legal remedies for violation of
environmental laws are often inadequate in the absence of an award
of attorney’s fees, courts should use their equitable powers to award
attorney’s fees.

A similar comparison can be made between environmental statutes
and the civil rights laws. The Alyeska decision ended the availability
of attorney’s fee awards for civil rights plaintiffs as well as environ­
mental plaintiffs. Since Alyeska, however, Congress has filled this
“anomalous gap[ ]”125 in the civil rights laws by passing the Attor­
ney’s Fees Awards Act.126 This statute created a basis in law for
awarding attorney’s fees to civil rights plaintiffs.

Civil rights plaintiffs, like antitrust plaintiffs, often can expect to
gain benefits that flow to them directly. When a civil rights plaintiff
claims discrimination in employment, for example, he is litigating to
win a personal benefit. He is seeking a job for himself. Of course,
this litigation has the important indirect effect of preventing discrim­
ination throughout society. Thus, fees are proper to encourage plain­
tiffs to enforce the civil rights laws. Nonetheless, the societal ben­
efits of civil rights suits are indirect because a suit brought by one
plaintiff does not end discrimination against all others.

Environmental suits, however, have a direct benefit to society. A
plaintiff who protects the environment for himself protects it for
everyone. Furthermore, environmental plaintiffs do not get spe­
cific personal benefits as civil rights plaintiffs do. The environmental
plaintiff’s benefits are identical to all those who breathe the same
air, drink the same water, and enjoy the same forests. As above, it
is hard to see how attorney’s fees are not crucial to the enforcement
of environmental laws when they are crucial to the enforcement of
civil rights laws.

The logic behind the attorney’s fees provisions in the civil rights
and antitrust statutes indicates that fee provisions are necessary for
full enforcement of the environmental statutes. Since Congress has
not provided for awards of attorney’s fees in all environmental stat-

NEWS 5908, 5911.
utes, courts should award fees to private attorneys general as an exercise of their duty to develop equitable remedies when legal remedies are inadequate.

C. Since Alyeska

Several developments since Alyeska have made a federal private attorney general exception appropriate. First, the federal courts have made it clear in recent decisions that the reasoning in Alyeska is faulty. As discussed above,\textsuperscript{127} the Romero-Barcelo decision is an outright rejection by the Supreme Court of the Alyeska holding that judicial equitable discretion will be removed by implication. Both Alyeska and Romero-Barcelo cannot be good law. Logically, the Alyeska decision should be overruled because it is an aberration from decades of jurisprudence.

Further, federal courts have continued to act inconsistently by granting fee awards under the equitable bad faith and common benefit exceptions\textsuperscript{128} while denying their ability to award fees under the private attorney general exception.\textsuperscript{129} Courts either have the power to create equitable exceptions or they do not. It is incredible that the law would be that courts have such power sometimes. Nonetheless, that is the law since Alyeska. To be consistent, the courts must either recognize the private attorney general exception or strike down the bad faith and common benefit exceptions.

The second development since Alyeska is the Reagan Administration’s doctrine of privatization. Currently, the Reagan Administration is privatizing many government functions purportedly to let free market forces act to increase their efficiency.\textsuperscript{130} For example, the Reagan administration is encouraging private individuals and corporations to run such things as courts, fire departments, and prisons.\textsuperscript{131} The purpose is to replace government decision-making with private individuals acting under market incentives. Fee awards for successful plaintiffs follow this same logic. Plaintiffs will avoid bringing questionable suits because losing plaintiffs will not recover fees. Fee awards will encourage only sound lawsuits. Over time, those public interest firms that bring winning suits will survive and grow. Firms that bring losing suits will not win attorney’s fees and will

\textsuperscript{127} See supra notes 83-87 and accompanying text.

\textsuperscript{128} See supra note 73.

\textsuperscript{129} See supra note 65.

\textsuperscript{130} Koepp, PUBLIC SERVICE, PRIVATE PARTIES, Time, Feb. 10, 1986 at 64-66.

\textsuperscript{131} Id. at 64-65.
either grow more responsible or fade away for lack of funds. Thus, those firms that are providing the most benefits to society by bringing meritorious suits will be rewarded and supported. Those firms that are cluttering courts with nuisance suits will not.

Finally, since *Alyeska*, California has developed as an example of how a court system can incorporate the private attorney general exception.\(^\text{132}\) Two years after the *Alyeska* decision, in *Serrano v. Priest*,\(^\text{133}\) the Supreme Court of California held that an award of fees to the plaintiff was proper under the private attorney general theory. This decision was made despite the fact that there was no applicable statute that provided for a fee award for the plaintiff and despite section 1021 of the California Code of Civil Procedure which limited fee awards to situations provided for in statute or in agreements between the parties.\(^\text{134}\) The court based its allowance of fees under the private attorney general theory on its inherent equitable power to create exceptions to the general rule of section 1021.\(^\text{135}\)

In *Serrano*, the court noted three factors which should be considered in granting fees under a private attorney general exception:

1. the strength or societal importance of the public policy vindicated by the litigation,
2. the necessity for private enforcement and the magnitude of the resultant burden on the plaintiff,
3. the number of people standing to benefit from the decision.\(^\text{136}\)

1. Most states have yet to address this issue. A Minnesota court has, in dicta, stated that the private attorney general exception is one of the "established" exceptions, along with the bad faith and common benefit exceptions. Senior Citizens Coalition v. Minnesota Public Utilities Comm'n, 355 N.W.2d 295, 302 n.10 (Minn. 1984).

Some states have followed *Alyeska* and have expressly denied the private attorney general exception. These include Alabama; Shelby County v. Smith, 372 So.2d 1062, 1097 ( Ala. 1979); Illinois; Hamer v. Kirk, 64 Ill. 2d 434, 441 (1976); Massachusetts; Bournewood Hosp. v. Massachusetts Comm'n. Against Discrimination, 371 Mass. 303, 311, 358 N.E.2d 235, 240 (1978); Rhode Island; Providence Journal Co. v. Mason, 116 R.I. 614, 625-6 (1976); and South Dakota, Van Emmerik v. Montana-Dakota Utilities Co., 332 N.W.2d 279, 284 (S.D. 1983).

While state courts are not bound by U.S. Supreme Court decisions, state courts are often persuaded by U.S. Supreme Court opinions. To a large extent, the number of state courts that followed *Alyeska* is indicative of this persuasiveness.


3. Section 1021 of the California Code of Civil Procedure states, in part: "Except as attorney's fees are specifically provided for by statute, the measure and mode of compensation of attorneys . . . is left to the agreement, express or implied, of the parties . . . ." Cal. Civ. Proc. Code § 1021 (West 1980).

4. 20 Cal. 3d at 34, 569 P.2d at 1306.

5. Id. at 45, 569 P.2d at 1314.

The court left out a fourth factor that Justice Marshall suggested in his dissent in *Alyeska*: the extent to which shifting the fees to the defendant would serve to place them on the class benefited. *Alyeska*, 421 U.S. at 285. The *Serrano* court properly noted that this fourth factor...
Since the *Serrano* decision, California has enacted a statute that codifies the court decisions allowing fees to be awarded to private attorneys general.\(^{137}\) The experience in California shows that it is possible to develop the private attorney general exception so that it encourages private parties to bring meritorious suits without creating an incentive to bring nuisance suits and without undermining the no fees rule.\(^{138}\)

VII. CONCLUSION

Allowing fee awards under a private attorney general exception will provide benefits beyond financial support for public interest plaintiffs and greater enforcement of the laws. Fee awards to private attorneys general will broaden participation in our governmental system. Making fee awards available to public interest plaintiffs is right for the same reason that poll taxes are wrong: a democracy cannot function properly when participation is based on wealth. The availability of fee awards allows more citizens to have access to the courts.

The no fees rule fit a time when the typical lawsuit pitted one private economic interest against another private economic interest. This model still fits the majority of cases, but today there is a


Upon motion, a court may award attorney's fees to a successful party against one or more opposing parties in any action which has resulted in the enforcement of an important right affecting the public interest if: (a) a significant benefit, whether pecuniary or nonpecuniary, has been conferred on the general public or a large class of persons, (b) the necessity and financial burden of private enforcement are such as to make the award appropriate, and (c) such fees should not in the interest of justice be paid out of the recovery if any . . . .

One might argue that this statute indicates that the private attorney general exception in California is a legislative exception to the no fees rule, not a court created exception. The Supreme Court of California, however, has stated otherwise. In Woodland Hills v. Los Angeles, 23 Cal. 3d 917, 593 P.2d 200 (1979), the court stated that "the legislature adopted section 1021.5 as a codification of the 'Private Attorney General' attorney fee doctrine that had been developed in numerous prior judicial decisions." *Id.* at 933, 593 P.2d at 208. The court has affirmed this view in several opinions since *Woodland Hills*. See, e.g., Gray v. Don Miller & Associates, Inc., 35 Cal. 3d 498, 505, 674 P.2d 253, 257 (1984) (private attorney general exception was "created by courts pursuant to their inherent equitable powers . . ."). Statutory authorization has followed Press v. Lucky Stores, 34 Cal. 3d 311, 317, 667 P.2d 704, 707 (1983) ("[Section] 1021.5 is a codification of the Private Attorney General doctrine adopted by this court in [Serrano]").

growing number of suits in which private individuals are fighting for causes that are not based on economic interest. The general no fees rule should be retained for most cases so as not to discourage parties with private economic interests from bringing their disputes to court. At the same time, the private attorney general exception should be adopted for a similar reason, so that public interest plaintiffs are not discouraged from coming to court to enforce the law.

139 See supra text accompanying note 21.