NOTES

PREVAILING DEFENDANT FEE AWARDS IN CIVIL RIGHTS LITIGATION: A GROWING THREAT TO PRIVATE ENFORCEMENT

If a case is to be considered frivolous based on the length of the chancellor's foot . . . the results are going to be unfortunate.[1]

INTRODUCTION

Who should bear the burden of attorney's fees is a question of extreme importance to civil rights litigants in federal courts. Formerly, civil rights plaintiffs could pursue private enforcement of their claims only insofar as their wealth permitted.[2] Contrary to practices in virtually every other Western nation,[3] the prevailing party in American federal litigation is, absent statutory authorization or enforceable contract,[4] not ordinarily entitled to recover attorney's fees from the losing party.[5] Attorney's fees are currently available, however, to

1. Prochaska v. Marcoux, 632 F.2d 848, 855 (10th Cir. 1980) (Doyle, J., concurring in part, dissenting in part), *cert. denied,* 101 S.Ct. 2316 (1981).

2. Seattle School Dist. No. 1 v. Washington, 633 F.2d 1338 (9th Cir. 1980); Pickett v. Milam, 579 F.2d 1118 (8th Cir. 1978). "[I]n general, legal services are available to individuals in direct proportion to their ability and willingness to pay for them." R. ARONSON, ATTORNEY-CLIENT FEE ARRANGEMENTS: REGULATION AND REVIEW 120 (1980). *See also* Derfner, *One Giant Step: The Civil Rights Attorney's Fees Awards Act of 1976,* 21 ST. LOUIS U.L.J. 441, 442 (1977); Comment, *Attorney's Fees in Damage Actions Under the Civil Rights Attorney's Fees Awards Act of 1976,* 47 U. CHI. L. REV. 332, 340 (1980).

3. *See* Ehrenzweig, *Reimbursement of Counsel Fees and the Great Society,* 54 CALIF. L. REV. 792 (1966); McLaren, *Barristers' Fees,* 126 NEW L.J. 1180 (1976); Williams, *Fee Shifting and Public Interest Litigation,* 64 A.B.A.J. 859 (1978); Note, *Attorney Fees: Exceptions to the American Rule,* 25 DRAKE L. REV. 717 (1976). *See generally* ABA INT'L & COMP. LAW SECTION PROCEEDINGS—REPORT OF THE COMMITTEE ON COMP. PROC. & PRAC. 119-42 (1962) [hereinafter referred to as COMPARATIVE PROCEDURE].

4. Insertion of a contractual attorney's fee indemnity clause does not guarantee recovery of fees. Courts will not enforce such provisions if they are contrary to public policy or unduly indefinite. *See* United States v. Carter, 217 U.S. 286 (1910); Missouri Pac. R.R. v. Winburn Tile Mfg. Co., 461 F.2d 984 (8th Cir. 1972); Artvale, Inc. v. Rugby Fabrics Corp., 232 F. Supp. 814 (S.D.N.Y. 1964). *See generally* McLaughlin, *The Recovery of Attorney's Fees: A New Method of Financing Legal Services,* 40 FORDHAM L. REV. 761, 770 (1972); Note, *supra* note 3, at 725-26.

5. Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 415 (1978); Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 247 (1975); Hall v. Cole, 412 U.S. 1, 4 (1973); Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 717 (1967). *See also* Runyon v. McCrary,

prevailing litigants under the Civil Rights Attorney's Fees Awards Act of 1976[6] (Awards Act) and its principal counterparts in Titles II[7] and VII[8] of the Civil Rights Act of 1964. Together, these comprehensive provisions and other limited enactments provide the statutory foundation for fee shifting in virtually all private civil rights litigation.[9]

Congress included fee-shifting provisions in the legislative scheme to encourage private enforcement by reducing the economic barrier to relief for those most likely to confront violations of civil rights—minority groups and the economically disadvantaged.[10] Congress realized, though, that eliminating these economic barriers increased the danger of frivolous complaints and therefore saw the need to balance its private enforcement objective against the perceived threat of spurious liti-

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427 U.S. 160 (1976); Hauenstein v. Lynham, 100 U.S. 483 (1880); Stewart v. Sonnenborn, 98 U.S. 187 (1879); Oelrichs v. Spain, 82 U.S. (15 Wall.) 211 (1872); Day v. Woodworth, 54 U.S. (13 How.) 363 (1852); Arcambel v. Wiseman, 3 U.S. (3 Dall.) 306 (1796).

6. 42 U.S.C. § 1988 (1976).

7. Civil Rights Act of 1964, § 204(b), 42 U.S.C. § 2000a-3(b) (1976).

8. Civil Rights Act of 1964, § 706(k), 42 U.S.C. § 2000e-5(k) (1976).

9. Other civil rights acts that permit fee awards include, *e.g.,* Emergency School Aid Act of 1972, § 718, 20 U.S.C. § 1617 (1976) (repealed 1978); Voting Rights Act Amendments of 1975, § 402, 42 U.S.C. § 1973*l*(e) (1976); Fair Housing Act of 1968, § 812(c), 42 U.S.C. § 3612(c) (1976).

10. Public interest groups have long sought to establish civil rights-public interest litigation as an exception to the American rule on the basis of the special needs of the disadvantaged. *See generally* COUNCIL FOR PUBLIC INTEREST LAW, BALANCING THE SCALES OF JUSTICE: FINANCING PUBLIC INTEREST LAW IN AMERICA (1976); *The Awarding of Attorneys Fees in Federal Courts: Hearings Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice,* 95th Cong., 1st & 2d Sess. 5 (1977-1978) (statement of Lenore Otrowsky) [hereinafter referred to as *Hearings: Fees in Federal Courts*]; Nussbaum, *Attorney's Fees in Public Interest Litigation,* 48 N.Y.U. L. REV. 301 (1973); Silver, *The Imminent Failure of Legal Services for the Poor: Why and How to Limit the Caseload,* 46 J. URB. L. 217 (1969); Note, *Allowance of Attorney Fees in Civil Rights Actions,* 7 COLUM. J.L. & SOC. PROB. 381 (1971); 11 RUT.-CAM. L.J. 145 (1979). Courts and commentators have noted that the problem of financing civil rights litigation is not limited to economically destitute members of society. One court has commented:

> The doors to federal courthouses must remain open to all who have justiciable federal causes of action. They must remain open not only to the rich and the poor, but also to multitudes in between who do not qualify for publicly supported legal aid, and who can afford the ever increasing costs of legal services only by great personal sacrifices.

Isaacs v. Temple Univ., 467 F. Supp. 67, 70 (E.D. Pa. 1979). Professor Nussbaum further states:

> [I]t is unhealthy in a democratic society for so few members of the legal profession to be the only ones involved in litigating important public issues. For decades the profession has devoted its best talents to serving wealthy individuals and large corporations, while generally ignoring the needs of the average citizen. Such behavior in the long run can only lead to suspicion on the part of the public.

Nussbaum, *supra,* at 308-09. *See also* R. ARONSON, *supra* note 2, at 128-30; Comment, *Court Awarded Attorney's Fees and Equal Access to the Courts,* 122 U. PA. L. REV. 636, 656 (1974).

gation.[11] Finding the proper balance, however, proved difficult.[12] Financial inducements to encourage individual enforcement of civil rights laws enhance free access[13] to judicial relief and promote compliance with the law.[14] Nevertheless, fee shifting threatens a corresponding increase in the frequency of baseless court action.

Congress attempted to devise a method of shifting fees that would encourage meritorious complaints while sufficiently deterring the instigation or continuation of frivolous lawsuits. The civil rights fee-shifting statutes employ a dual standard to govern judicial discretion in awarding fees.[15] Prevailing plaintiffs serve as "private attorneys gen-

11. Congress expressed concern that fee-shifting provisions would encourage barratry—proliferation of frivolous suits initiated to generate statutory fees—during its consideration of the Awards Act. 122 CONG. REC. 31,474 (1976). Critics of the provision argued that § 1988 would provide "bonanzas to the legal profession" and a "relief fund for lawyers." *Id.* at 33,314 (remarks of Sen. Kennedy). *See generally* Dawson, *Lawyers and Involuntary Clients in Public Interest Litigation,* 88 HARV. L. REV. 849 (1975).

The debates leading to the enactment of the Title VII fee-shifting provision (§ 706(k), 42 U.S.C. § 2000(e)-5(k) (1976)) are "inconclusive." *See* United States Steel Corp. v. United States, 519 F.2d 359, 362 (3d Cir. 1975); Van Hoomissen v. Xerox Corp., 503 F.2d 1131, 1133 (9th Cir. 1974). Nevertheless, Senator Humphrey remarked: "Section 706(1) (sic) provides for the award of attorney's fees to the prevailing party. . . . This should make it easier for a plaintiff of limited means to bring a meritorious suit." 110 CONG. REC. 12,724 (1964). Senator Humphrey's statement, the only substantive remark concerning the fee-shifting provision, illustrates the undoubted intent of Congress to facilitate private enforcement of the Act. It also expresses the congressional concern that litigants accomplish private enforcement with *meritorious suits. See* Heinsz, *Attorney's Fees for Prevailing Title VII Defendants: Toward a Workable Standard,* 8 U. TOL. L. REV. 259, 262 (1977).

12. "As the law of Title VII fee awards developed, the tension between these objectives—encouraging private enforcement versus avoiding encouragement of (and even discouraging) baseless litigation—became increasingly obvious." Heinsz, *supra* note 11, at 262.

13. Promotion of free access is a double-edged sword. On the one hand, a system of fee indemnification will increase the number of suits filed. *See* R. POSNER, ECONOMIC ANALYSIS OF LAW 294 (2d ed. 1977). On the other hand, the increase is offset somewhat by litigation of fee disputes diverting substantial court time from substantive issues. *See Hearings: Fees in Federal Courts, supra* note 10, at 24 (statement of Paul Nejelski). The amount of time attorneys devote to fee entitlement reflects this phenomenon. *See, e.g.,* Foster v. Boise-Cascade, Inc., 420 F. Supp. 674 (S.D. Tex. 1976) (33% of total case hours); Parker v. Matthews, 411 F. Supp. 1059 (D.D.C. 1976) (21% of total case hours).

14. Fee awards function financially and symbolically. Fee shifting concomitantly reduces the high cost of legal services and taxes violators of the law for the cost of enforcement. Private practitioners and public interest groups are more able to undertake lengthy and complicated trials to enforce public rights. *See* Derfner, *supra* note 2, at 445; Note, *Awards of Attorney's Fees to Legal Aid Offices,* 87 HARV. L. REV. 411 (1973). "In 1975, the NAACP Legal Defense and Education Fund was reported to have obtained approximately $550,000 of its annual $3 million litigation budget from court-awarded fees." R. ARONSON, *supra* note 2, at 128-29.

15. *See* note 93 *infra* and accompanying text.

eral" because vindication of their civil rights benefits the entire community. Therefore, plaintiffs recover attorney's fees almost automatically.[16] Prevailing defendants, by contrast, recover fees only in suits that are frivolous, unreasonable, or without foundation.[17]

While prevailing defendant awards under the civil rights fee provisions are designed to curb frivolous litigation, Congress regarded this goal as secondary to the encouragement of private enforcement of the civil rights laws.[18] Recent federal decisions indicate that some courts, in their zeal to discourage groundless claims, regularly impose fees on good faith litigants who simply lose on the merits of their cases.[19] This practice is flatly contrary to Congress' legislative goals.

As the number of cases improperly awarding fees to prevailing defendants increases, the overriding private enforcement objective suffers. Litigants cannot accurately assess whether their claims are sufficiently well founded to avoid imposition of their opponents' fees. Inconsistent fee awards deter potential litigants. This sort of "chilling effect" portends serious consequences for developing areas of the law. Parties will abandon novel legal theories for fear of incurring additional expenses.[20]

To alleviate the problems presented by inconsistent prevailing de-

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16. *See* notes 95-96 *infra* and accompanying text.

17. *See* notes 100 & 102 *infra* and accompanying text.

18. The Senate Judiciary Report accompanying S. 2278 (the Awards Act) emphasizes the primacy of the private enforcement objective under the civil rights statutes:

> The purpose and effect of S. 2278 are simple—it is designed to allow courts to provide the familiar remedy of reasonable counsel fees to prevailing parties in suits to enforce the civil rights acts which Congress has passed since 1866. . . . All of these civil rights laws depend heavily upon private enforcement, and fee awards have proved an essential remedy if private citizens are to have a meaningful opportunity to vindicate the important Congressional policies which these laws contain.

S. REP. No. 1011, 94th Cong., 2d Sess. 2, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 5908, 5909-10.

> This bill creates no startling new remedy. . . . It does not change the statutory provisions regarding the protection of civil rights except as it provides the fee awards which are necessary if citizens are to be able to effectively secure compliance with these existing statutes. . . . Enforcement of the law depends on governmental action and, in some cases, on private action through the courts. If the cost of private enforcement actions becomes too great, there will be no private enforcement. If our civil rights laws are not to become mere hollow pronouncements which the average citizen cannot enforce, we must maintain the traditionally effective remedy of fee shifting in these cases.

Id. at 6, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 5908, 5913. *See also* Heinsz, *supra* note 11, at 266-67 (examination of private enforcement objective in Title VII).

19. *See* notes 137 & 148-49 *infra* and accompanying text.

20. *Hearings: Fees in Federal Courts, supra* note 10, at 22 (statement of Paul Nejelski); Risinger, *Honesty in Pleading and Its Enforcement: Some "Striking" Problems with Federal Rule of Civil*

fendant fee awards, a legislative modification of the prevailing defendant standard is required. This Note surveys the common-law background of fee awards, examines current statutory provisions, and analyzes the unacceptable uncertainty that exists in the defendant fee award context. Alternative approaches to discourage frivolous suits are then considered and utilized to develop a legislative reform proposal. The proposal tailors current civil rights fee award provisions to accommodate more precisely the competing values of encouraging private enforcement and deterring baseless lawsuits.

I. THE COMMON-LAW BACKGROUND

A. *The American Rule and Its Judicially-Created Exceptions*

At the time of the American Revolution English courts awarded counsel fees to prevailing parties in all types of cases at all levels of litigation.[21] Between 1799 and 1853 the federal courts in the United

Procedure II, 61 MINN. L. REV. 1, 57 (1976). Legal innovation suffers when novel claims are discouraged:

> Today's frivolity may be tomorrow's law, and the law often grows by an organic process in which a concept is conceived, then derided as absurd (and clearly not the law), then accepted as theoretically tenable (though not the law), then accepted as the law . . . . How might the law have developed if, prior to 1954, an attorney might have been sanctioned for asserting, contrary to settled Supreme Court case law, that separate but equal was not equal?

Risinger, *supra*, at 57.

21. The "English rule," permitting recovery of costs by the prevailing party in a civil proceeding, was not a common-law right but rather the result of legislation allowing a defendant subjected to malicious prosecution summarily to recover costs, including attorney's fees. Statute of Marlbridge, 52 Hen. III, c. 1 (1269). As early as 1278, English courts awarded barrister honorariums (fees) to successful plaintiffs. Statute of Gloucester, 6 Edw. I, c. 1 (1278). Since 1607, prevailing defendants have received attorney's fees as well. Statute of Westminster, 4 Jac. 1, c. 3 (1606). *See generally* Stallo v. Wagner, 245 F. 636 (2d Cir. 1917); Kolka v. Jones, 6 N.D. 461, 71 N.W. 558 (1897).

The current practice in England requires a hearing before special "taxing masters" after trial of the substantive claims to determine the appropriateness and amount of an award. Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 717 (1967). *See generally* C. MCCORMICK, LAW OF DAMAGES 234-36 (1935); Goodhart, *Costs*, 38 YALE L.J. 849, 851-54 (1929); Note, *Attorney's Fees and the Federal Bad Faith Exception*, 29 HASTINGS L.J. 319, 320 (1977). The master normally determines the amount by reference to fixed fee schedules that provide a standard sum for each particular service (*e.g.*, the drafting of a letter, or the filing of a brief) performed by the lawyer. The fixed fee schedules that provide for reimbursement directly to the client, however, are not necessarily sufficient to cover attorney's fees that the client incurs. For a collection of articles on continental practices, see COMPARATIVE PROCEDURE, *supra* note 3, at 119-42.

The fundamental principle of the English method of cost distribution is that to recompense fully a prevailing party for losses occasioned by a wrongdoer's acts, the measure of the loss must include the client's loss of fees paid to his attorney. *See* Falcon, *Award of Attorneys' Fees in Civil*

States followed the "English rule" and permitted the awarding of attorney's fees to the extent permissible under state law.[22] In 1853 Congress enacted a statute[23] to standardize the costs allowable in federal courts that detailed the amounts recoverable from a losing party.[24] Congress substantially reenacted this provision in 1948, making allowance for insignificant costs such as docket fees.[25] Courts have consistently denied fee shifting beyond the statutory provisions initiated in the mid-

Rights and Constitutional Litigation, 33 MD. L. REV. 379, 381 n.4 (1973); Note, *supra*, at 321. Other proponents of the English practice observe that the number of people, particularly the poor, served by the legal profession increases if a strong incentive exists for an attorney to accept meritorious cases without regard to a client's ability to pay. *See* Ehrenzweig, *supra* note 3, at 798; Kuenzel, *The Attorney's Fee: Why Not A Cost of Litigation?,* 49 IOWA L. REV. 75, 84 (1963). *See generally* Greenberger, *The Cost of Justice: An American Problem, An English Solution,* 9 VILL. L. REV. 400 (1964); McLaughlin, *supra* note 4; Posner, *An Economic Approach to Legal Procedure and Judicial Administration,* 2 J. LEGAL STUDIES 399 (1973); Stoebuck, *Counsel Fees Included in Costs: A Logical Development,* 38 U. COLO. L. REV. 202 (1966); Tunney, *Financing the Cost of Enforcing Legal Rights,* 122 U. PA. L. REV. 632 (1974). Some authorities argue that the threat of losing and therefore being burdened with attorneys' fees has inhibited parties from seeking relief in the commonwealth courts. *See* Mause, *Winner Takes All: A Re-examination of the Indemnity System,* 55 IOWA L. REV. 26 (1969); Williams, *supra* note 3.

22. The Federal Judiciary Act of Sept. 24, 1789, 1 Stat. 78, §§ 9, 11, 12, 20-23, 35; Act of Sept. 29, 1789, 1 Stat. 93, § 2. Commentators disagree regarding the practices in early colonial courts. *Compare* C. WARREN, A HISTORY OF THE AMERICAN BAR 4 (1913) (distrust of and disrespect towards lawyers by colonial citizenry thwarted the adoption of awarding fees as costs) *and* Goodhart, *supra* note 21, at 873 (same) *with* C. MCCORMICK, *supra* note 21, at 235 (most colonial courts adopted the English practice as evidenced by widespread use of statutory maximums) *and* Note, *Use of Taxable Costs to Regulate the Conduct of Litigants,* 53 COLUM. L. REV. 78, 80 n.17 (1953) (same). Professor Ehrenzweig suggests that English practices were gradually replaced only as statutory maximums became unrealistically low and lost their viability as compensatory mechanisms. Ehrenzweig, *supra* note 3, at 799.

23. Act of Feb. 26, 1853, ch. 80, 10 Stat. 161. A growing diversity in state court practices and complaints of exorbitant fees by defeated litigants precipitated the legislation. *See* CONG. GLOBE APP., 32d Cong., 2d Sess. 207 (1853) (remarks of Sen. Bradbury), *reprinted in* Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 251 n.24 (1975). The ultimate reason for the departure from English practices has been termed "a combination of historical accidents." Falcon, *supra* note 21, at 381 n.5. For a complete summary of the statutory authorization for fee shifting in this period, see *Alyeska*, 421 U.S. at 247-50; S. LAW, THE JURISDICTION AND POWERS OF THE UNITED STATES COURTS 255-82 (1852).

24. S. LAW, *supra* note 23, at 252-53.

25. 28 U.S.C. §§ 1920, 1923 (1976); S. LAW, *supra* note 23, at 255. "Costs" generally do not include attorney's fees. Recoverable costs are listed in § 1920, the successor to the 1853 Act: (1) clerk and marshal fees; (2) court reporter and transcript fees; (3) printing and witness fees; (4) fees for exemplification and copies of documents necessary for the case; (5) docket fees under § 1923; and (6) court-appointed expert witness and interpreter compensation. 28 U.S.C. § 1920 (1976). Attorney's fees are costs only in rare circumstances. 28 U.S.C. § 1927 (Supp. IV 1980). *See* notes 179-82 *infra* and accompanying text.

nineteenth century as repugnant to the intent of Congress.[26] Thus, the general "American rule," that attorney's fees are not recoverable without statutory authorization, emerged.

Scholars commonly forward several arguments to justify the American rule.[27] The most persuasive argument is that the fee award acts primarily as a penalty that courts should not impose upon a litigant for merely exercising the right to prosecute or defend a lawsuit.[28] Proponents of the rule maintain that the losing party is not always a wrongdoer; the outcome of a lawsuit is not necessarily an indicator of right or wrong.[29] Additionally, courts and commentators have often argued

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26. Until Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240 (1975), the Supreme Court acknowledged in many cases that courts, in the exercise of inherent equitable powers to do justice, could tax counsel fees as costs. For instance, the Court held in 1939:

> Allowance of [attorney's fees] 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 taxable costs is part of the original authority of the chancellor to do equity in a particular situation.

Sprague v. Ticonic Nat'l Bank, 307 U.S. 161, 164-66 (1939). More recently, the Court opined:

> Although the traditional American rule ordinarily disfavors the allowance of attorneys' fees in the absence of statutory or contractual authorization, federal courts, in the exercise of their equitable powers, may award attorneys' fees when the interests of justice so require. . . . [F]ederal courts do not hesitate to exercise this inherent equitable power whenever "overriding considerations indicate the need for such a recovery."

Hall v. Cole, 412 U.S. 1, 4-5 (1973) (quoting Mills v. Electric Auto-Lite Co., 396 U.S. 375, 391-92 (1970)) (footnotes omitted). *See generally* Derfner, *supra* note 2, at 445-46 n.31; Derfner, *The True "American Rule": Drafting Fee Legislation in the Public Interest,* 2 W. NEW ENG. L. REV. 251, 253 n.8 (1979). *Cf.* Roadway Express, Inc. v. Piper, 447 U.S. 752 (1980) (recognizing courts' inherent equitable power to impose fees on an attorney conducting litigation in bad faith).

27. *See generally* D. DOBBS, REMEDIES 200-04 (1973); 1 S. SPEISER, ATTORNEY'S FEES 467 (1973); Note, *Promoting the Vindication of Civil Rights Through the Attorney's Fees Awards Act,* 80 COLUM. L. REV. 346, 347-48 (1980). *See also* Note, *supra* note 3; Note, *supra* note 21; Comment, *supra* note 2; Note, *The Civil Rights Attorneys' Fees Awards Act of 1976,* 34 WASH. & LEE L. REV. 205 (1977).

28. Newman v. Piggie Park Enterprises, 377 F.2d 433, 437 (4th Cir. 1967), *aff'd and modified,* 390 U.S. 400 (1968). *See also* Falcon, *supra* note 21, at 384-85; Note, *supra* note 21, at 321. As Professor Falcon recognizes, this argument depends on whether an unconditional right to litigate exists.

29. Falcon, *supra* note 21, at 385.

> The scheme urged [the loser to pay all costs] is based on the wholly unwarranted assumption that the losing party in litigation is always, or even ordinarily, in the wrong. Its sole justification must be that an adverse verdict by a jury or an unfavorable decision of the court carries with it the necessary conclusion that the defeated party was morally culpable in bringing action, or in resisting suit, as the case may be. Nothing could be further from the actual facts of life. . . . An enlightened Judge must realize that, in spite of his most conscientious and painstaking efforts, he is, in a given case, as likely as not to do injustice when he seeks to do justice.

Sattherwaite, *Increasing Costs to be Paid by Losing Party,* 46 N.J.L.J. 133 (1923).

that the American rule does not discourage private vindication of rights by poor or moderate income litigants.[30] A private party, it is asserted, hesitates to sue if payment of the opposition's attorney's fees might be a penalty for failure in court.[31] The public interest bar strongly adheres to this view.[32] Courts have also expressed concern regarding attorney-client conflict of interest[33] and court congestion resulting from litigation to recover fees from prior suits.[34] Regardless of the relative merits of the arguments for and against the American rule, however, it remains a firmly entrenched principle.[35]

Apart from the early statutory provisions, courts using traditional equity powers derived several exceptions to the American rule. Federal courts recognized the bad faith and common fund-substantial benefit theories, as well as the now defunct private attorney general rationale.[36]

30. Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 718 (1967) (indigents); Farmer v. Arabian Am. Oil Co., 379 U.S. 227, 237 (1964) (Goldberg, J., concurring) (moderate income litigants). *See* Falcon, *supra* note 21, at 384.

31. Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 718 (1967). Professor Dobbs explains: "The honestly suing plaintiff or the honestly defending defendant will be forced to pay court costs and his own attorneys' fees if he loses. To superadd the burden of unknown amounts of fees for his opponent may discourage his legitimate use of the courts as resolvers of controversies." D. DOBBS, *supra* note 27, at 201. *See also* Sands, *Attorney's Fees as Recoverable Costs,* 63 A.B.A.J. 510, 513 (1977); Note, *Attorney's Fees—Recovery by Prevailing Defendants in Title VII Actions,* 13 WAKE FOREST L. REV. 627, 629 (1977).

This argument has been carried forward an additional step to conclude that the English rule is undemocratic. Shifting the total cost of litigation to the loser has a greater impact on the poor. 386 U.S. at 718. *See also* Note, *Promoting the Vindication of Civil Rights Through the Attorney's Fee Awards Act, supra* note 27, at 347.

32. *Hearings: Fees in Federal Courts, supra* note 10, at 5 (statement of Lenore Otrowsky); *id.* at 59 (statement of Susan Goss).

33. The Supreme Court suggested this possibility in F.D. Rich Co. v. Industrial Lumber Co., 417 U.S. 116, 129 (1974).

34. Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 718 (1967). *See* note 13 *supra.*

35. Sprague v. Ticonic Nat'l Bank, 307 U.S. 161, 167 (1939). The cases indicate that fee awards will be granted "only in exceptional cases and for dominating reasons of justice." *Id. See also* note 5 *supra* and accompanying text.

36. The private attorney general theory is alive and well in many states. *See, e.g.,* Anchorage v. McCabe, 568 P.2d 986 (Alaska 1977); Bergen County Sewer Auth. v. Borough of Bergenfield, 142 N.J. Super. 438, 361 A.2d 621 (1976) (dictum); Nassau Trust Co. v. Belfield, 89 Misc. 2d 282, 391 N.Y.S.2d 311 (Civ. Ct. 1977); Devas v. Myers, 272 Or. 47, 535 P.2d 541 (1975).

The California legislature enacted a bill to award fees to private attorneys general if the suit confers a significant public benefit, the burden of private enforcement necessitates an award, and the interests of justice mandate that attorneys' fees not reduce the recovery, if any. CAL. CIV. PROC. CODE § 1021.5 (Deering Supp. 1981). The bill illustrates the California legislature's approval of the private attorney general concept. Moreover, the California Supreme Court endorsed

The Supreme Court very early held that the 1853 Act was consistent with historic equity powers.[37]

1. *Bad Faith*[38]

The Judiciary Act of 1789[39] bestowed upon American equity courts all the powers of the English chancery courts at the time that the United States Constitution was adopted.[40] When the Federal Rules of Civil Procedure abolished the distinction between law and equity in the federal system in 1938,[41] courts expanded the equitable exceptions to the no fee rule beyond equity proceedings alone.[42] Courts maintained the power to punish parties who conducted all or part of an action in bad faith,[43] that is, in a vexatious or wanton manner or for oppressive reasons.[44]

The bad faith concept encompasses both prior conduct that induces

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the bill's theory a few days after its passage in Serrano v. Priest, 20 Cal. 3d 25, 569 P.2d 1303, 141 Cal. Rptr. 315 (1977).

37. Universal Oil Prod. Co. v. Root Refining Co., 328 U.S. 575, 580-81 (1946) (bad faith); Toledo Scale Co. v. Computing Scale Co., 261 U.S. 399, 426-28 (1923) (willful disobedience of a court order allows court to levy attorney's fees as part of the fine occurred); Trustees v. Greenough, 105 U.S. 527, 535-36 (1882) (common-fund exception sanctioned).

38. This exception is also referred to in the cases as "obdurate obstinacy," "wanton or oppressive action," or "fraudulent, groundless or vexatious conduct." *See generally* Annot., 8 L. Ed. 2d 894, 912-13 (1962) (collecting cases).

39. Act of Sept. 24, 1789, ch. 20, 1 Stat. 73.

40. *See* Fontain v. Ravenal, 58 U.S. (17 How.) 369, 384 (1855). *See generally* Note, *supra* note 3, at 726; Note, *supra* note 21, at 324.

41. FED. R. CIV. P. 2.

42. *Compare* Guardian Trust Co. v. Kansas City S. Ry., 28 F.2d 233 (8th Cir. 1928) (fraud), *rev'd on other grounds,* 281 U.S. 1 (1930) *with* Rolax v. Atlantic Coast Line R.R., 186 F.2d 473 (4th Cir. 1951) (employment discrimination).

43. A court in its discretion could award fees to a bad faith litigant's opponent only to the extent that the bad faith created additional costs. *See, e.g.,* Nemeroff v. Abelson, 469 F. Supp. 630, 640-41 (S.D.N.Y. 1979), *aff'd in part and rev'd in part,* 620 F.2d 339 (2d Cir. 1980); Signal Delivery Serv., Inc. v. Truck Drivers Local 107, 68 F.R.D. 318, 322 (E.D. Pa. 1975). If, however, the bad faith pervades the entire action the court could charge all of the opponent's fees against the guilty party. *See, e.g.,* Haycraft v. Hollenbach, 606 F.2d 128, 133 (6th Cir. 1979); Bell v. School Bd., 321 F.2d 494, 500 (4th Cir. 1963).

44. Hall v. Cole, 412 U.S. 1, 5 (1973). The Court left no doubt that the primary purpose of the bad faith exception award is to *punish* frivolous or ill-motivated behavior and discourage abuse of judicial process. The Court stated: "In this class of cases, the underlying rationale of 'fee-shifting' is, of course, punitive, and the essential element triggering the award of fees is therefore the existence of 'bad faith' on the part of the unsuccessful litigant." *Id. Accord,* Roadway Express, Inc. v. Piper, 447 U.S. 752, 763-64 (1980); National Resources Defense Council v. EPA, 484 F.2d 1331, 1333 (1st Cir. 1973). *See* Haycraft v. Hollenbach, 606 F.2d 128, 133 (6th Cir. 1979).

unnecessary litigation[45] and conduct occurring during the course of a trial.[46] Thus, the exception is now applicable whenever a party, obstinately refusing to recognize another person's obvious legal rights, forces the other party to sue for enforcement of those rights.[47] Courts award fees for bad faith when a plaintiff pursues a groundless suit,[48] a defendant maintains a patently baseless defense,[49] or a party displays a generally vexatious course of conduct throughout the litigation.[50]

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45. An oft-cited admiralty case, Vaughan v. Atkinson, 369 U.S. 527 (1962), illustrates the sort of bad faith that induces pointless litigation and warrants fee shifting. The Supreme Court included attorney's fees in the general damages awarded because of defendant's callous attitude in refusing to investigate, admit, or deny the plaintiff's claim. *Id.* at 530-31. "As a result of that recalcitrance, libellant was forced to hire a lawyer and go to court to get what was plainly owed him under laws that are centuries old." *Id.* at 531. To the same effect is Haycraft v. Hollenbach, 606 F.2d 128 (6th Cir. 1979). In *Haycraft*, an intervenor's entrance into a school desegregation case forced relitigation of issues already resolved by prior mandate of the court. *Id.* at 133. Intervenor's attempt to enter an alternative desegregation plan that the court had previously rejected as facially insufficient amounted to obstinacy in resisting plaintiffs' "realization of their clearly defined legal rights." *Id.*

46. Roadway Express, Inc. v. Piper, 447 U.S. 752, 766 (1980); Hall v. Cole, 412 U.S. 1, 15 (1973).

47. *See generally* Note, *supra* note 3, at 727; Note, *supra* note 21, at 325; note 45 *supra* and accompanying text.

48. *See, e.g.,* Gazan v. Vadsco Sales Corp., 6 F. Supp. 568 (E.D.N.Y. 1934). In *Gazan*, the court concluded that a stockholder action for injunctive relief lacked any legal or factual basis and was brought for vexatious or oppressive reasons. *Id. Accord,* Guardian Trust Co. v. Kansas City S. Ry., 28 F.2d 233 (8th Cir. 1928), *rev'd on other grounds,* 281 U.S. 1 (1930).

To invoke the bad faith exception courts must isolate some sort of culpable conduct or ill will. A court cannot impose a fee award under the exception on the basis of "negligence, frivolity, or improvidence." Cornwall v. Robinson, 645 F.2d 685, 687 (10th Cir. 1981).

49. *See, e.g.,* Gates v. Collier, 70 F.R.D. 341 (N.D. Miss. 1976). State prison officers, defending a class action on behalf of inmates alleging violation of constitutional rights, unreasonably denied any violation in the face of evidence of their clear liability. When the futility of their position became apparent, after considerable time had elapsed, the officials agreed to a stipulated record. Plaintiffs' attorney had incurred additional expenses because of defendants' unreasonable adherence to a groundless defense and vexatious extenuation of the litigation. *Id.* at 345-46.

50. *See, e.g.,* Baas v. Elliot, 71 F.R.D. 693, 694 (E.D.N.Y. 1976); Red School House, Inc. v. OEO, 386 F. Supp. 1177, 1186-87 (D. Minn. 1974).

In *Baas*, the court granted the plaintiff attorney's fees when the defendant obtained removal to federal court before reversing its position and attacking the court's subject matter jurisdiction. The court found that the sole object of the tactic was to seek a dismissal otherwise unobtainable in state court and stated that "[s]uch a frivolous, self-defeating invocation of federal procedure cannot be countenanced." 71 F.R.D. at 694.

In *Red School House*, the district court granted plaintiffs' fees under the bad faith exception because of the obdurate and contumacious conduct of the OEO's counsel throughout the trial. The court described the disapproved conduct in detail:

> [The OEO's conduct] constituted the most amazing and unacceptable conduct of an agency of the United States that the Court has observed. On occasion, OEO refused to produce witnesses as ordered by the Court, it failed to produce documents as ordered by

Willful misconduct or bad faith by opposing counsel, in narrowly defined circumstances, may also justify personal liability of the offending attorney for attorney's fees. The Supreme Court, in *Roadway Express, Inc. v. Piper*,[51] recently acknowledged that a district court's inherent disciplinary powers[52] could support imposition of attorney's fees against an attorney. The Court reasoned that the authority of courts over litigants and members of the bar is at least equivalent; both clients and counsel who abuse judicial processes are potentially liable for increased expenses.[53] *Roadway* appears, however, to limit attorney liability to extremely dilatory conduct.[54]

2. *Common Fund or Substantial Benefit*

Unlike the bad faith exception, fee awards under the common fund rationale are premised on the positive benefit conferred by a party's action. In *Boeing Co. v. Van Gemert*,[55] the Supreme Court reaffirmed the traditional common fund exception to the American rule. The Court held that a lawyer who recovers or preserves a common fund for the benefit of third parties is entitled to a reasonable attorney's fee from

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the Court after representing that it would do so, it resisted all reasonable efforts toward reconciling its differences with the plaintiffs, and certain OEO officials even refused to appear before the Court to attempt to justify such behavior. This conduct, in many circumstances, bordered on the contumacious.

386 F. Supp. at 1186-87.

51. 447 U.S. 752 (1980). For one interpretation of the scope of *Roadway Express*, see 60 B.U. L. REV. 950, 959-62 (1980) (arguing the case supports three distinct standards for attorney liability: negligence, malice, and intentional abuse).

52. *See generally* Renfrew, *Discovery Sanctions: A Judicial Perspective,* 67 CALIF. L. REV. 264, 268 (1979).

53. Congress agreed with this proposition and responded by amending 28 U.S.C. § 1927 (1976) to include attorney's fees. Formerly, § 1927 provided: "Any attorney or other person admitted to conduct cases in any court of the United States or any territory thereof who so multiplies the proceedings in any case as to increase costs unreasonably and vexatiously may be required by the court to satisfy personally such *excess costs*." 28 U.S.C. § 1927 (1976) (emphasis added).

After the amendment, section 1927 now states:

> Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the *excess* costs, expenses, and *attorney's fees* reasonably incurred because of such conduct.

28 U.S.C.A. § 1927 (Supp. 1981) (emphasis added).

54. Subjective bad faith is a prerequisite to any consideration of sanctions. 447 U.S. at 767. *See* Nemeroff v. Abelson, 620 F.2d 339, 348 (2d Cir. 1980); Browning Debenture Holders' Comm. v. DASA Corp., 560 F.2d 1078, 1088-89 (2d Cir. 1977); Foley v. Devaney, 528 F.2d 888, 891-92 (3d Cir. 1976). *See also* 6 MOORE'S FEDERAL PRACTICE ¶ 54.77[2], at 1709 (2d ed. 1981).

55. 444 U.S. 472 (1980).

the fund as a whole.[56] The Court observed that this doctrine, reflecting traditional practices in the equity courts,[57] represents a well-recognized exception to the general principle that each litigant must bear the expense of his own representation.[58] But the Court further held that the common fund exception applies only "when each member of a certified class has an undisputed and mathematically ascertainable claim to part of a lump sum judgment recovered on his behalf."[59] The *Boeing* decision illustrates the Court's disinclination to extend[60] the common fund theory to cases that seek nonmonetary benefits on behalf of the general public.[61]

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56. *Id.* at 478. *See* Mills v. Electric Auto-Lite Co., 396 U.S. 375, 390-97 (1970). *See also* Sprague v. Ticonic Nat'l Bank, 307 U.S. 161, 166-67 (1939).

57. 444 U.S. at 478. *See* Central R.R. & Banking Co. v. Pettus, 113 U.S. 116 (1885); Trustees v. Greenough, 105 U.S. 527 (1882).

58. 444 U.S. at 478; Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240 (1975) (bad faith and common fund exceptions expressly approved). *See* notes 21-26 *supra* and accompanying text.

59. 444 U.S. at 479.

60. In declining to extend the common fund-substantial benefit doctrine in *Alyeska* the Court commented:

> [I]n this Court's common-fund and common-benefit decisions, the classes of beneficiaries were small in number and easily identifiable. The benefits could be traced with some accuracy, and there was reason for confidence that the costs could indeed be shifted with some exactitude to those benefiting. In this case, however, sophisticated economic analysis would be required to gauge the extent to which the general public, the supposed beneficiary, as distinguished from selected elements of it, would bear the costs.

421 U.S. 240, 264-65 n.39. Justice Marshall favored extension of the common fund or benefit exception. *Id.* at 272 (Marshall, J., dissenting).

61. *Alyeska* and *Boeing* in tandem seemingly undercut, without expressly disavowing, prior Supreme Court decisions that suggested a relaxation of the traditional hard-line approach of the Court towards attorney's fee awards without statutory authorization. *See* Hall v. Cole, 412 U.S. 1 (1973); Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1970).

Mills involved a shareholders' derivative suit under § 14(a) of the Securities Exchange Act of 1934 (15 U.S.C. § 78n(a) (1976)) to dissolve a corporate merger approved by the shareholders but tainted by a misleading proxy statement. Relying on Smolowe v. Delendo Corp., 136 F.2d 231 (2d Cir. 1943) (attorney's fees awarded despite the lack of any statutory provision in § 16(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78p(b) (1976)), Justice Harlan awarded fees to the stockholder's attorney from the corporation on the theory that the expenses of the plaintiff's lawsuit had been incurred "for the benefit of the corporation and the other shareholders." 396 U.S. at 392. Despite the holding in Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 719 (1967), that courts should not develop exceptions to the traditional rule "in the context of statutory causes of action for which the legislature had provided intricate remedies," the Court ignored the fact that § 14(a) was silent on the question of fees whereas §§ 9(3) and 18(a) provided fee-shifting remedies. 15 U.S.C. §§ 78i(e), 78r(a) (1976). Once tied to the common fund exception, the Court was obliged to hold that the creation of an actual monetary fund was not essential, and so recognized: "The fact that this suit has not yet produced, and may never produce, a monetary recovery from which the fees would be paid does not preclude an award based on this rationale." 396 U.S.

3. *Private Attorney General*

The private attorney general exception emerged as a federal extension of the common benefit rationale.[62] Under this short-lived exception to the American rule, federal courts regularly shifted fees to reimburse plaintiffs who sued to enforce statutes pertaining to important public rights.[63] Even absent statutory authorization, federal courts awarded fees as a matter of course[64] to private parties vindicating

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at 392. *Mills* could be read narrowly to hold that a corporation should reimburse a shareholder for the costs of establishing a violation of the securities laws by the corporation regardless of whether the corporation obtained an actual money recovery from the derivative suit. *Id.* at 389-90. The decision, however, is generally considered an extension of the rationale in Newman v. Piggie Park Enterprises, 390 U.S. 400 (1968). *See* notes 93-94 *infra* and accompanying text.

In *Hall*, the Court awarded a union member attorney's fees after he prevailed in an action for denial of free speech against a labor union. The Court reimbursed the plaintiff because he had dispelled the "chill" cast upon all other members of the union. The Court's reliance on Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1970), and Sprague v. Ticonic Nat'l Bank, 307 U.S. 161 (1939) (action brought against insolvent banks and their receiver to impress a lien on certain trust funds in favor of petitioner and third parties), places the case squarely within the common fund exception. *See* Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 258 (1975).

The *Hall*, *Mills*, and *Sprague* decisions indicate that a plaintiff may obtain reimbursement of his attorney's fees when, though not in a technical sense suing for the benefit of others or to create a common fund, the litigant has secured a judgment with the effect of establishing the rights of a discernible class of persons. 412 U.S. at 13; 396 U.S. at 396; 307 U.S. at 167.

62. The private attorney general theory is closely akin to the benefit analysis applied in *Mills* and *Hall*. *See* note 60 *supra*. "In concept the benefit theory is defensive, preventing unjust enrichment by taxing the true beneficiaries of the litigation, while the private attorney general theory is offensive, promoting the effective implementation of public policy by taxing the defendant." Comment, *supra* note 2, at 667-68. For extended discussion of the private attorney general doctrine prior to *Alyeska*, see Derfner, *supra* note 2, at 443-45; Nussbaum, *supra* note 10, at 301. *See also* Note, *Private Attorney General Fees Emerge from the Wilderness,* 43 FORDHAM L. REV. 258 (1974); Note, *Awarding Attorneys' Fees to the "Private Attorney General": Judicial Green Light to Private Litigation in the Public Interest,* 24 HASTINGS L.J. 733 (1973).

63. A flurry of cases following the private attorney general rationale and awarding fees without statutory authorization emerged in the wake of the Supreme Court's decision in Newman v. Piggie Park Enterprises, 390 U.S. 400 (1968). *See, e.g.,* Souza v. Travisono, 512 F.2d 1137 (1st Cir. 1975); Taylor v. Perini, 503 F.2d 899 (6th Cir. 1974); Fowler v. Schwarzwalder, 498 F.2d 143 (8th Cir. 1974); Hoitt v. Vitek, 495 F.2d 219 (1st Cir. 1974); Cornist v. Richland Parish School Bd., 495 F.2d 189 (5th Cir. 1974); Brandenburger v. Thompson, 494 F.2d 885 (9th Cir. 1974); Fairley v. Patterson, 493 F.2d 598 (5th Cir. 1974); Morales v. Haines, 486 F.2d 880 (7th Cir. 1973); Cooper v. Allen, 467 F.2d 836 (5th Cir. 1972); Donahue v. Staunton, 471 F.2d 475 (7th Cir. 1972), *cert. denied,* 410 U.S. 955 (1973); Knight v. Auciello, 453 F.2d 852 (1st Cir. 1972); Lee v. Southern Home Sites Corp., 444 F.2d 143 (5th Cir. 1971); La Raza Unida v. Volpe, 57 F.R.D. 94 (N.D. Cal. 1972), *aff'd,* 488 F.2d 559 (9th Cir. 1973), *cert. denied,* 417 U.S. 968 (1974). The Fourth Circuit Court of Appeals presaged *Alyeska* by never adopting the private attorney general exception. *See* Bradley v. School Bd., 472 F.2d 318, 327-31 (4th Cir. 1972), *rev'd on other grounds,* 416 U.S. 696 (1974).

64. The Supreme Court held that "prevailing plaintiffs" under the Title II and Title VII fee-

strong congressional policies.[65] One court, although recognizing that the private attorney general rationale could not be utilized to subvert completely the American rule, nevertheless ruled that courts should apply the theory whenever "nothing in a statutory scheme . . . might be interpreted as precluding it."[66]

The Supreme Court abruptly foreclosed the shifting of attorney's fees under the private attorney general theory in federal litigation, absent specific statutory authorization, in the landmark decision of *Alyeska Pipeline Service Co. v. Wilderness Society*.[67] Environmental groups successfully brought suit to quash the Secretary of the Interior's issuance of permits required for construction of the trans-Alaska oil pipeline. The District of Columbia Circuit Court of Appeals granted the plaintiffs' attorney's fees under the private attorney general rationale.[68] The Supreme Court reversed, holding that Congress, not the judiciary, should determine which statutes further such substantial public policies as to warrant fee awards.[69] The *Alyeska* Court thus severely limited the previously unquestioned power of federal courts to award

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shifting provisions "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." Newman v. Piggie Park Enterprises, 390 U.S. 400, 402 (1968) (Title II). *Accord,* Albemarle Paper Co. v. Moody, 422 U.S. 405, 415 (1975) (Title VII). *See also* Northcross v. Board of Educ., 412 U.S. 427 (1973) (applying same standard under § 718 of the Emergency School Aid Act of 1972, 20 U.S.C. § 1617 (1976)). The lower courts transferred the prevailing plaintiff statutory standard to common-law private attorney general cases. *See* note 63 *supra* and accompanying text.

65. *See, e.g.,* Fowler v. Schwarzwalder, 498 F.2d 143 (8th Cir. 1974) (racial employment discrimination); Brandenburger v. Thompson, 494 F.2d 885 (9th Cir. 1974) (welfare discrimination against nonresidents); Donahue v. Staunton, 471 F.2d 475 (7th Cir. 1972) (freedom of speech), *cert. denied,* 410 U.S. 955 (1973); Knight v. Auciello, 453 F.2d 852 (1st Cir. 1972) (rental of public housing). *See generally* Derfner, *supra* note 2, at 443; Derfner, *supra* note 26, at 252 n.6.

66. La Raza Unida v. Volpe, 57 F.R.D. 94, 98 (N.D. Cal. 1972), *aff'd,* 488 F.2d 559 (9th Cir. 1973), *cert. denied,* 417 U.S. 968 (1974). The court cited three criteria for recovery under the private attorney general exception: "the strength of the Congressional policy, the number of people benefited by the litigants' efforts, and the necessity and financial burden of private enforcement." *Id.* at 99.

67. 421 U.S. 240, 269-71 (1975).

68. Wilderness Soc'y v. Morton, 495 F.2d 1026 (D.C. Cir. 1974).

69. The Court reviewed the development of the traditional American rule that, in conjunction with 28 U.S.C. §§ 1920, 1923(c) (1970) (current version 1976 & Supp. III 1979), evidenced Congress' intent ordinarily to limit fee awards to the sums provided in § 1923(c). 421 U.S. at 255-57. Recognizing the continuing validity of the common fund or benefit and bad faith exceptions, *id.* at 259, the Court nevertheless found that "Congress has not . . . extended any roving authority to the Judiciary to allow counsel fees as costs or otherwise whenever the courts might deem them warranted." *Id.* at 260. The Court held that "the circumstances under which attorneys' fees are to be awarded and the range of discretion of the courts in making those awards are matters for Congress to determine." *Id.* at 262. *See also* note 26 *supra* and accompanying text.

fees on a private attorney general rationale.[70]

II. Statutory Fee Shifting

A. *Generally*

Statutory fee-shifting provisions are becoming increasingly available in many areas of the law, partially as a legislative response to *Alyeska*,[71] but more fundamentally to augment public statutory regulations with private enforcement.[72] Fee legislation is appropriately analyzed at two levels. The first level defines the breadth of the interests promoted and the second level identifies the circumstances that permit fee awards and the parties to whom such fees are awarded.

With respect to the interests promoted, three categories of fee legislation exist. An omnibus provision[73] authorizes fee shifting in any civil litigation,[74] whether the interests are public or private.[75] A specific pro-

70. The federal courts were in general agreement as to the justifications for private attorney general fee shifting:

> Since someone must bear the cost of litigation, it is better that the adverse party do so, even though he may not have acted in bad faith. Otherwise, the "private attorney general" would be penalized by the significant cost of litigation for furthering important public interests through his individual suit. Without reimbursement for attorney fees, private litigants often could not protect the rights the law grants them. There should be no price tag on the enjoyment of constitutionally guaranteed freedoms.

Incarcerated Men v. Fair, 507 F.2d 281, 285 (6th Cir. 1974).

> [T]his court feels that in equitable suits to remedy violations of fourth amendment rights . . . , an award of attorney's fees as costs is within the court's power and responsibility. Where as here fee shifting is necessary to insure the vindication of important constitutional rights and appropriate because of the inadequate remedies otherwise available, because it is consistent with a remedy increasingly furnished by Congress, and because of the high social value placed upon the rights involved, an award of attorney's fees as costs is essential, lest these important rights be relegated to a mere platitude.

Stanford Daily v. Zurcher, 366 F. Supp. 18, 24-25 (N.D. Cal. 1973), *rev'd*, 436 U.S. 547, *reh'g denied* 439 U.S. 885 (1978) (footnote omitted).

71. Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240 (1975). Major legislative revisions, *e.g.*, Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. § 15c(a)(2) (1976); new public interests statutes, *e.g.*, Toxic Substances Control Act, 15 U.S.C. § 2619(c)(2) (1976); State & Local Fiscal Assistance Amendments of 1976, 31 U.S.C. § 1244(c) (1976); and the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988 (1976), all providing for fee-shifting, illustrate the immediate congressional reaction to *Alyeska*.

72. *See* notes 10, 11 & 18 *supra* and accompanying text.

73. An omnibus provision would codify the English Rule in all federal civil litigation if it specified mandatory fee-shifting.

74. *See generally* Derfner, *supra* note 26, at 255-56. Mary Frances Derfner, the Director of the Attorneys' Fees Project, Lawyers' Committee for Civil Rights Under Law, originated the breadth analysis of the fee legislation, employing the terms omnibus, specific, and generic to define the three categories of fee statutes.

75. Congress has provided fee-shifting provisions for few private causes of action. Most,

vision permits fee shifting under a single statute or statute section.[76] A generic provision allows fee awards in cases that fall into a specifiable category.[77]

In the second level, the types of statutory provisions generally fall into three categories. First, the statute may provide mandatory fee reimbursement to a prevailing plaintiff.[78] Second, the provision may give the court discretion to award fees, in exceptional circumstances, to either party to prevent gross injustice.[79] The third type of statute allows broad judicial discretion to balance equitable factors in awarding fees to prevailing parties.[80]

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however, involve private issues with substantial impact on the public. *See, e.g.,* The Plant Variety Protection Act, 7 U.S.C. § 2565 (1976); Trademark Act of 1946, 15 U.S.C. § 1117 (1976); Patent Act, 35 U.S.C. § 285 (1976).

76. *See* Derfner, *supra* note 26, at 259 n.26.

77. The Civil Rights Attorneys' Fees Awards Act, 42 U.S.C. § 1988 (1976), is the paradigm generic provision. Congress deemed fee awards essential to civil rights suits generally, and provided for them under six civil rights statutes in the Awards Act. *See* Derfner, *supra* note 26, at 262-68.

78. *See, e.g.,* Clayton Act, 15 U.S.C. § 15 (1976); Fair Labor Standards Act, 29 U.S.C. § 216(b) (1976 & Supp. III 1979); Interstate Commerce Act, 49 U.S.C. § 11705(d)(3) (Supp. III 1979); Truth in Lending Act, 15 U.S.C. § 1640(a)(3) (1976); Communications Act of 1934, 47 U.S.C. § 206 (1976); Merchant Marine Act, 46 U.S.C. § 1227 (1976); Packers and Stockyards Act, 7 U.S.C. § 210(f) (1976); Perishable Agricultural Commodities Act, 7 U.S.C. § 499g(b) (1976); Organized Crime Control Act of 1970, 18 U.S.C. § 1964(c) (1976); Railway Labor Act, 45 U.S.C. § 153(p) (1976).

79. In patent litigation "[t]he court in exceptional cases may award reasonable attorney fees to the prevailing party." 35 U.S.C. § 285 (1976).

80. In addition to the civil rights fee-shifting provisions, *see* notes 7-9 *supra* and accompanying text, the following statutes are examples of provisions that allow considerable discretion: Securities Act of 1933, 15 U.S.C. § 77k(e) (1976); Trust Indenture Act, 15 U.S.C. § 77www(a) (1976); Securities Exchange Act of 1934, 15 U.S.C. §§ 78i(e), 78r(a) (1976); Copyright Act, 17 U.S.C. § 116 (1976); Emergency School Aid Act of 1972, 20 U.S.C. § 3205 (Supp. III 1979); Clean Air Amendments of 1970, 42 U.S.C. § 7604(d) (Supp. III 1979); Fair Housing Act of 1968, 42 U.S.C. § 3612(c) (1976); and Noise Control Act of 1972, 42 U.S.C. § 4911(d) (1976).

The analysis will develop in some detail the following fee-shifting civil rights statutes: Title II of the Civil Rights Act of 1964, § 204(b), 42 U.S.C. § 2000a-3(b) (1976); Title VII of the Civil Rights Act of 1964, § 706(k), 42 U.S.C. § 2000e-5(k) (1976); The Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988 (1976). This is not to suggest that these are the only statutes with similar provisions or that the analysis presented is relevant to only these three. Congress has employed similar language in at least 25 statutes that courts have interpreted to authorize recoveries by defendants. *See, e.g.,* Federal Contested Election Act, 2 U.S.C. § 396 (1976); Agricultural Fair Practices Act of 1967, 7 U.S.C. §§ 2305(a), -(c) (1976); Plant Variety Protection Act, 7 U.S.C. § 2565 (1976); Bankruptcy Act, 11 U.S.C. § 104(a)(1) (1976); Railroad Reorganization Act of 1935, 11 U.S.C. § 205(c)(12) (1976); Corporate Reorganization Act, 11 U.S.C. §§ 641-644 (1976); Securities Act of 1933, 15 U.S.C. § 77k(e) (1976); Trust Indenture Act, 15 U.S.C. § 77www(a) (1976); Securities Exchange Act of 1934, 15 U.S.C. §§ 78i(e), 78r(a) (1976); Copyright Act, 17 U.S.C. § 116 (1976); Education Amendments of 1972, 20 U.S.C. § 1617 (1976); Employee Retire-

In both analytical levels, policy choices shape the contours of fee-shifting provisions. In the first level, for instance, an omnibus statute would require drastic alteration of the American rule.[81] Specific provisions permit development of standards to accomplish particular statutory goals, but impose a tremendous legislative burden on Congress.[82] Generic provisions lessen that burden somewhat because Congress can isolate areas that need special treatment and develop standards for substantive areas categorically.[83] Similarly, in the second level the decision to award fees to defendants depends on the perceived threat of spurious litigation. Moreover, the standards devised to instruct courts as to when awards are appropriate—mandatory, exceptional circumstances, or wide discretion—are related to the strength of the private enforcement policy.

B. *Civil Rights Fee-Shifting Statutes*

Statutory fee awards are available in the civil rights context in both specific[84] and generic forms.[85] Congress passed the Civil Rights Attorney's Fees Awards Act of 1976 in order "to remedy anomalous gaps in our civil rights laws created by . . . *Alyeska*, . . . and to achieve consis-

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ment Income Security Act, 29 U.S.C. § 1132(g) (1976); Federal Water Pollution Control Act, 33 U.S.C. § 1365(d) (1976); Ocean Dumping Act, 33 U.S.C. § 1415(g)(4) (1976); Deepwater Port Act of 1974, 33 U.S.C. § 1515 (1976); Patent Act, 35 U.S.C. § 285 (1976); Servicemen's Group Life Insurance Act, 38 U.S.C. § 784(g) (1976); Veterans Benefit Act, 38 U.S.C. § 3404(c) (1976); Voting Rights Act of 1965, 42 U.S.C. § 1973(e)(e) (1976); Clean Air Amendments of 1970, 42 U.S.C. § 7604(d) (Supp. III 1979); Noise Control Act of 1972, 42 U.S.C. § 4911(d) (1976); Interstate Commerce Act, 49 U.S.C. § 11708(c) (Supp. III 1979). In sum, more than 90 federal statutes confer a right to recover attorney's fees as part of the relief granted. For extensive compilations, see R. ARONSON, *supra* note 2, at 156; Berger, *Court Awarded Attorneys' Fees: What is "Reasonable"?*, 126 U. PA. L. REV. 281 (1977).

81. *See* note 73 *supra* and accompanying text. *See generally* Derfner, *supra* note 26, at 255.

82. For instance, in patent and trademark litigation Congress permits fee shifting "in exceptional circumstances" to plaintiffs and defendants because primarily private interests are implicated. Patent Act, 35 U.S.C. § 285 (1976); Trademark Act of 1946, 15 U.S.C. § 1117 (1976). Similarly, the Norris-LaGuardia Act provision permits fee awards only to defendants because defendants enforce federal rights. Norris-LaGuardia Act, 29 U.S.C. § 107(e) (1976). *See* Derfner, *supra* note 26, at 259. This approach, however, requires individual congressional consideration of fee bills for new statutes, and reconsideration of existing statutes to determine the appropriateness of fee awards. *See* Derfner, *supra* note 26, at 260-61.

83. *See* note 77 *supra* and accompanying text.

84. *See, e.g.,* Civil Rights Act of 1964, §§ 204(b), 706(k), 42 U.S.C. §§ 2000a-3(b), 2000e-5(k) (1976).

85. The Civil Rights Attorney's Fees Awards Act, 42 U.S.C. § 1988 (1976).

tency in our civil rights laws."[86] Specifically, Congress designed the Awards Act to parallel fee-shifting mechanisms in Titles II and VII of the Civil Rights Act of 1964.[87] Congress intended for the courts to read the Acts *in pari materia* and follow previous constructions[88] placed upon the "prevailing party" language utilized in the Awards Act.[89] Titles II and VII include specific fee provisions that apply only to actions under each respective title.[90] The Awards Act, however, is generic, promoting enforcement of various statutes.[91] Thus, the provisions differ in scope but apply identical standards. The Acts provide for fee

86. S. REP. No. 1011, *supra* note 18, at 1, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 5908, 5909. For an overview of the Act and its legislative history, see Larson, *The Civil Rights Attorney's Fee Awards Act of 1976,* 10 CLEARINGHOUSE REV. 778 (1977); Wolf, *In the Public Interest: Attorney's Fees in Civil Rights Cases,* DISTRICT LAW., Winter 1976, at 32; Note, *The Civil Rights Attorneys' Fees Awards Act of 1976, supra* note 27. For detailed analyses of the legislative history, see SUBCOMM. ON CONSTITUTIONAL RIGHTS OF THE SENATE COMM. ON THE JUDICIARY, CIVIL RIGHTS ATTORNEY'S FEES AWARDS ACT OF 1976 SOURCE BOOK: LEGISLATIVE HISTORY, TEXTS, AND OTHER ENACTMENTS, 94th Cong., 2d Sess. (1976); M. DERFNER, LEGISLATIVE HISTORY: CIVIL RIGHTS ATTORNEY'S FEES AWARDS ACT OF 1976 (1976); Derfner, *supra* note 2; Lipson, *Beyond Alyeska—Judicial Response to the Civil Rights Attorneys' Fees Awards Act,* 22 ST. LOUIS U.L.J. 243 (1978); Malson, *In Response to Alyeska—The Civil Rights Attorney's Fees Awards Act of 1976,* 21 ST. LOUIS U.L.J. 430 (1977).

87. *See* notes 8-9 *supra* and accompanying text. Congress considered it critical to remedy an anomaly: courts permitted fee awards in some civil rights cases and refused them in others. S. REP. No. 1011, *supra* note 18, at 4, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 5908, 5911-12.

88. S. REP. No. 1011, *supra* note 18, at 4-5, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 5908, 5911-13; H.R. REP. No. 1558, 94th Cong., 2d Sess. 6-7 (1976). The lower courts have followed Congress' directive to apply the same standards under the fee provisions. *See, e.g.,* Collins v. Chandler Unified School Dist., 644 F.2d 759, 763 (9th Cir. 1981); Seattle School Dist. No. 1 v. Washington, 633 F.2d 1338, 1348 (9th Cir. 1980); LeGare v. University of Pa. Medical School, 488 F. Supp. 1250, 1257 (E.D. Pa. 1980).

89. The relevant language in the statutes is virtually identical. Section 1988 provides:

> In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX. . . , or in any civil action. . . charging a violation of. . . title VI of the Civil Rights Act of 1964, the court, in its *discretion*, may allow the *prevailing party*, other than the United States, a *reasonable* attorney's fee as part of the costs.

42 U.S.C. § 1988 (1976) (emphasis added) (citations omitted). Title VII of the Civil Rights Act of 1964 contains its own attorney fee provision.

> In any action or proceeding under this subchapter the court, in its *discretion*, may allow the *prevailing* party, other than the Commission [EEOC] or the United States, a *reasonable* attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

42 U.S.C. § 2000e-5(k) (1976) (emphasis added). The Title II fee award provision provides in pertinent part: "In any action commenced pursuant to this subchapter, the court, in its *discretion*, may allow the *prevailing party*, other than the United States, a *reasonable* attorney's fee." 42 U.S.C. § 2000a-3(b) (1976) (emphasis added).

90. *See* note 89 *supra* and accompanying text.

91. *See* note 77 *supra* and accompanying text.

shifting to civil rights litigants in a broad range of civil rights actions.[92]

The Awards Act and its counterparts in Titles II and VII stipulate that prevailing parties in certain civil rights actions may, as a matter of judicial discretion, recover reasonable attorney's fees. The legislative history of the Awards Act instructs courts to follow a dual standard, developed legislatively and judicially, to effectuate the paramount private enforcement objective.[93]

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92. The Awards Act applies to causes of action for damages or equitable relief under the following civil rights statutes: 42 U.S.C. § 1981 (1976), proscribing race discrimination in employment and contractual relationships by government officials and private persons (*see, e.g.,* Johnson v. Railway Express Agency, Inc., 421 U.S. 454 (1975)); Tillman v. Wheaton-Haven Recreation Ass'n, 410 U.S. 431 (1973)); 42 U.S.C. § 1982 (1976), prohibiting discrimination in real estate transactions (*see, e.g.,* Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968)); 42 U.S.C. § 1983 (Supp. III 1979), forbidding the denial of constitutional and civil rights by persons acting under color of state law (*see, e.g.,* O'Connor v. Donaldson, 422 U.S. 563 (1975); Monroe v. Pape, 365 U.S. 167 (1961); Brown v. Board of Educ., 347 U.S. 483 (1954)); 42 U.S.C. § 1985 (Supp. III 1979), challenging public or private conspiracies to deny equal protection of the laws (*see, e.g.,* Griffin v. Breckenridge, 403 U.S. 88 (1971)); 42 U.S.C. § 1986 (1976), providing a cause of action against public officials with the power to prevent violations of § 1985 but who fail to do so; 42 U.S.C. § 2000d (1976) (Title VI of the Civil Rights Act of 1964), proscribing discrimination on the basis of race, color, or national origin in all federally-funded programs (*see, e.g.,* Hills v. Gautreaux, 425 U.S. 284 (1976); Lau v. Nichols, 414 U.S. 563 (1974)); and 20 U.S.C. § 1681 (1976) (Title IX), prohibiting discrimination on account of sex, blindness, or visual impairment in federally-assisted education activities.

Congress enacted Title VII to secure equal employment opportunity irrespective of race, color, sex, religion, or national origin. Employers are prohibited from using these characteristics as criteria for hiring, firing, disciplining, discriminating, or classifying applicants or employees in a detrimental fashion. 42 U.S.C. § 2000e-2(a) (1976). *See* Fitzpatrick v. Bitzer, 427 U.S. 445 (1976). *See generally* Walker, *Recovery of Attorney Fees in Civil Rights Litigation,* 39 ALA. LAW. 93, 99 n.45 (1978).

Title II seeks to eliminate discrimination in public accommodations based on state laws classifying persons on the grounds of race, color, religion, or national origin. 42 U.S.C. §§ 2000a-2000b (1976). *See* Newman v. Piggie Park Enterprises, 390 U.S. 400 (1968). *See also* note 9 *supra* and accompanying text.

The Awards Act also permits, under certain circumstances, an award of fees to a litigant against whom the United States has asserted a tax deficiency. *See generally* Patzkowski v. United States, 576 F.2d 134 (8th Cir. 1978); Ellentuck, Holub & Solomon, *Attorneys' Fees Awards in Tax Litigation Now Available to Successful Litigants,* 46 J. TAX. 157 (1977); Note, *Attorneys' Fees in Tax Litigation: Remedying the Substantive Imbalance,* 45 BROOKLYN L. REV. 53 (1978); Note, *Court Awarded Attorneys' Fees in Tax Litigation: 42 U.S.C. § 1988,* 126 U. PA. L. REV. 1368 (1978). Further discussion of fee awards in this context is beyond the scope of this Note.

93. Representative Drinan, the Awards Act's sponsor and floor manager in the House, coined the term "double standard" to describe the application of the prevailing party language. 122 CONG. REC. H12,160 (daily ed. Oct. 1, 1976). Congress intended that prevailing plaintiffs should receive fees as a matter of course, whereas prevailing defendants were limited to exceptional circumstances of bad faith or harassment. *See* S. REP. NO. 1011, *supra* note 18, at 4-5, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 5908, 5953-54; H.R. REP. NO. 1558, *supra* note 88, at 6-7, 8; 122 CONG. REC. S16,390 (daily ed. Sept. 22, 1976) (remarks of Sen. Bumpers, discussing unoffered

Prevailing plaintiffs serve as private attorneys general within this scheme and accordingly are afforded preferential treatment. The legislative history of the Awards Act indicates that the liberal standard announced in *Newman v. Piggie Park Enterprises*[94] limits judicial discretion to deny prevailing plaintiff fee awards.[95] In *Newman*, a pre-Awards Act Title II decision, the Supreme Court held that "one who succeeds . . . should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust."[96]

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amendment); 122 CONG. REC. S16,491 (daily ed. Sept. 23, 1976) (remarks of Rep. Bauman); 122 CONG. REC. H12,159-60 (daily ed. Oct. 1, 1976) (remarks of Rep. Drinan); 122 CONG. REC. H12,160-61 (daily ed. Oct. 1, 1976) (remarks of Rep. Drinan); 122 CONG. REC. H12,160-65 (daily ed. Oct. 1, 1976) (remarks of Reps. White & Drinan); 122 CONG. REC. H12,162 (daily ed. Oct. 1, 1976) (remarks of Reps. Kastenmeier & Bauman); 122 CONG. REC. H12,164-65 (daily ed. Oct. 1, 1976) (remarks of Reps. Jordan & Bauman); 122 CONG. REC. H12,165-66 (daily ed. Oct. 1, 1976) (remarks of Rep. Seiberling).

94. 390 U.S. 400 (1968) (per curiam).

95. The prevailing party plaintiff standard flows from Supreme Court opinions in Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400 (1968) (per curiam), and Northcross v. Board of Educ., 412 U.S. 427 (1973) (per curiam). Congress cited these cases with approval in S. REP. No. 1011, *supra* note 18, and in H. REP. No. 1558, *supra* note 88.

The standard finds broad acceptance in the lower courts. *See, e.g.,* Collins v. Chandler Unified School Dist., 644 F.2d 759 (9th Cir. 1981); Murphy v. Kolovits, 635 F.2d 662 (7th Cir. 1981); Staten v. Housing Auth., 638 F.2d 599 (3d Cir. 1980); Smith v. University of N.C., 632 F.2d 316 (4th Cir. 1980); Entertainment Concepts, Inc., III v. Maciejewski, 631 F.2d 497 (7th Cir. 1980), *cert. denied,* 450 U.S. 919 (1981); Chicano Police Officer's Ass'n v. Stover, 624 F.2d 127 (10th Cir. 1980); Swietlowich v. County of Bucks, 620 F.2d 33 (3d Cir. 1980); McManama v. Lukhard, 616 F.2d 727 (4th Cir. 1980); Perez v. University of Puerto Rico, 600 F.2d 1 (1st Cir. 1979); Dawson v. Pastrick, 600 F.2d 70 (7th Cir. 1979); Bonnes v. Long, 599 F.2d 1316 (3d Cir. 1979); Pickett v. Milam, 579 F.2d 1118 (8th Cir. 1978); Hickman v. Valley Local School Dist. Bd. of Educ., 513 F. Supp. 659 (S.D. Ohio 1981); Donnell v. General Motors Corp., 500 F. Supp. 176 (E.D. Mo. 1980); Rheuark v. Shaw, 477 F. Supp. 897 (N.D. Tex. 1979), *aff'd in part and rev'd in part,* 628 F.2d 297 (5th Cir. 1980), *cert. denied,* 450 U.S. 931 (1981); Massachusetts Fair Share v. O'Keefe, 476 F. Supp. 294 (D. Mass. 1979); Martin v. Wray, 473 F. Supp. 1131 (E.D. Wis. 1979); Ohland v. City of Montpelier, 467 F. Supp. 324 (D. Vt. 1979).

96. 390 U.S. at 402. The question of what constitutes special circumstances to preclude an award remains somewhat uncertain. Courts are split on whether financial ability to pay constitutes a special circumstance. *Compare* Ellwest Stereo Theatre, Inc. v. Jackson, 653 F.2d 1248 (9th Cir. 1981) (not a special circumstance); Entertainment Concepts, Inc. III v. Maciejewski, 631 F.2d 497 (7th Cir. 1980) (same), *cert. denied,* 450 U.S. 919 (1981); Aware Woman Clinic, Inc. v. City of Cocoa Beach, 629 F.2d 1146 (5th Cir. 1980) (same) *and* Johnson v. Mississippi, 606 F.2d 635 (5th Cir. 1979) (same) *with* Buxton v. Patel, 595 F.2d 1182 (9th Cir. 1979) (contingent fee-recovery prospects bright). Although good faith is not a defense to a prevailing plaintiff's request for attorney's fees, *e.g.,* Ellwest Stereo Theatre, Inc. v. Jackson, 653 F.2d 954 (5th Cir. 1981); Teitelbaum v. Sorenson, 648 F.2d 1248 (9th Cir. 1981); Winslow v. Kansas Bd. of State Fair Managers, 512 F. Supp. 576 (D. Kan. 1981); Lackey v. Bowling, 476 F. Supp. 1111 (N.D. Ill. 1979), courts generally seek to balance all circumstances in the case. *See* Seattle School Dist. No. 1 v. Washington, 633 F.2d 1338 (9th Cir. 1980); Dennis v. Chang, 611 F.2d 1302 (9th Cir. 1980); Johnson v. Mississippi,

Prevailing defendant fee awards serve a fundamentally different purpose than plaintiff awards. Judicial discretion to grant defendant fee awards is limited. Courts therefore have difficulty justifying awards to prevailing defendants notwithstanding the need to deter baseless claims.[97] One court indicated that because civil rights defendants are not "cloaked in a mantle of public interest," there was no compelling reason to permit customary defendant fee recoveries.[98] Moreover, if courts allowed defendants to recover fees under the prevailing plaintiff standard it would undermine the congressional private enforcement objective. The prospect of paying opponents' counsel would discourage impecunious plaintiffs from seeking judicial redress unless their claims were very strong.[99]

Congress, recognizing these concerns, provided for defendant fee awards from plaintiffs "only if the action is vexatious and frivolous, or if the plaintiff has instituted it solely to 'harass or embarrass' the defendant."[100] In *Christiansburg Garment Co. v. EEOC*[101] the Supreme Court semantically modified this standard by holding that courts should award attorney's fees to a prevailing defendant "upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith."[102]

606 F.2d 635 (5th Cir. 1979); Cairo v. Skow, 510 F. Supp. 201 (E.D. Wis. 1981). Other courts apportion fees based on the relative success of the parties. *See* Planned Parenthood Ass'n v. Ashcroft, 655 F.2d 848 (8th Cir. 1981); Littlefield v. Deland, 641 F.2d 729 (10th Cir. 1981); Gurule v. Wilson, 635 F.2d 782 (10th Cir. 1980); Miller v. Carson, 628 F.2d 346 (5th Cir. 1980); Johnson v. Nordstrom-Larpenteur Agency, Inc., 623 F.2d 1279 (8th Cir.), *cert. denied,* 449 U.S. 1042 (1980); Stenson v. Blum, 512 F. Supp. 680 (S.D.N.Y. 1981). *But cf.* Donnell v. General Motors Corp., 500 F. Supp. 176, 179-80 (E.D. Mo. 1980) (impossible to segregate work performed on successful and unsuccessful claims—normally award covers both successful and unsuccessful issues). Other courts have denied or limited recovery when adequate independent damages are recovered or the prospect of recovery is sufficient to attract competent counsel on a contingent fee basis. *See* Buxton v. Patel, 595 F.2d 1182 (9th Cir. 1979); Zarcone v. Perry, 581 F.2d 1039 (2d Cir. 1978), *cert. denied,* 439 U.S. 1072 (1979). This view is inconsistent with the overriding private enforcement objective of the Acts. Sargeant v. Sharp, 579 F.2d 645, 649 (1st Cir. 1978). "The Court should address the issue of entitlement as an antecedent and separate question, applying the *Newman* standard, without regard to the existence of a private fee arrangement." *Id.* at 648.

97. *See* Heinsz, *supra* note 11, at 268-74.

98. United States Steel Corp. v. United States, 519 F.2d 359, 364 (3d Cir. 1975).

99. *See* note 27 *supra* and accompanying text.

100. H.R. REP. No. 1558, *supra* note 88, at 7. *See also* S. REP. No. 1011, *supra* note 18, at 5, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 5908, 5912-15.

101. 434 U.S. 412 (1978).

102. *Id.* at 421. The standard for prevailing defendants—whether the plaintiff's action was frivolous, unreasonable, or without foundation—was determined by the Supreme Court in Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 415-22 (1978), by approval of the standards em-

Exercise of judicial discretion to award fees under these standards occurs only after a court deems a plaintiff or defendant a "prevailing party." If a civil rights plaintiff succeeds in obtaining the essential relief sought on the merits, the plaintiff has prevailed and will normally procure a fee award.[103] A successful plaintiff whose case ends in a settlement or consent decree is considered a prevailing party for fee-shifting purposes.[104] Similarly, if a lawsuit is the catalyst behind a defendant's voluntary compliance with a civil rights statute, the plaintiff prevails for fee purposes despite the nonjudicial nature of the re-

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ployed in the Second and Third Circuits in Carrion v. Yeshiva Univ., 535 F.2d 722 (2d Cir. 1976), and United States Steel Corp. v. United States, 519 F.2d 359 (3d Cir. 1975). The rule is now well settled. *See* Wooten v. Clifton Forge School Bd., 655 F.2d 552 (4th Cir. 1981); Harbulak v. Suffolk County, 654 F.2d 194 (2d Cir. 1981); Gresham Park Community Org. v. Howell, 652 F.2d 1227 (5th Cir. 1981); Ellis v. Cassidy, 625 F.2d 227 (9th Cir. 1980); Lujan v. New Mexico Health & Social Serv. Dep't, 624 F.2d 968 (10th Cir. 1980); Smith v. Josten's Am. Yearbook Co., 624 F.2d 125 (10th Cir. 1980); Anthony v. Marion County Gen. Hosp., 617 F.2d 1164 (5th Cir. 1980); Crawford v. Western Elec. Co., 614 F.2d 1300 (5th Cir. 1980); Luna v. Aerospace Workers Local 36, 614 F.2d 529 (5th Cir. 1980); Bowers v. Kraft Foods Corp., 606 F.2d 816 (8th Cir. 1979); Hernas v. City of Hickory Hills, 517 F. Supp. 592 (N.D. Ill. 1981); EEOC v. Chandelle Club, 506 F. Supp. 75 (W.D. Okla. 1980); Barriner v. Stedman, 504 F. Supp. 52 (W.D. Okla. 1980); Thompson v. Village of Evergreen Park, 503 F. Supp. 251 (N.D. Ill. 1980). Initially, however, some courts failed to apply the dual standard. The Fifth Circuit, for example, previously held that the same standards should apply to both plaintiffs and defendants in Title VII fee awards, and allowed prevailing defendants to recover as a matter of course. United States v. Allegheny-Ludlum Indus., 558 F.2d 742, 744 (5th Cir. 1977). The courts, however, eventually recognized the double standard. Crawford v. Western Elec. Co., 614 F.2d 1300, 1321 (5th Cir. 1980). *See generally* notes 95 & 101 *supra* and accompanying text.

103. *See* Hanrahan v. Hampton, 446 U.S. 754 (1980); Morrison v. Ayoob, 627 F.2d 669 (3d Cir. 1980), *cert. denied,* 449 U.S. 1102 (1981); Swietlowich v. County of Bucks, 620 F.2d 33 (3d Cir. 1980); Hirschkop v. Snead, 475 F. Supp. 59 (E.D. Va. 1979), *aff'd,* 646 F.2d 149 (4th Cir. 1981); Brown v. American Enka Corp., 452 F. Supp. 154 (E.D. Tenn. 1976). If judicial relief is obtained in any form most courts hold that the prevailing plaintiff is entitled to fees, even if only nominal damages or injunctive relief is received. Barrett v. Thomas, 649 F.2d 1193 (5th Cir. 1981) (injunction); Skoda v. Fontani, 646 F.2d 1193 (7th Cir. 1981) (nominal damages—$1.00); Perez v. University of Puerto Rico, 600 F.2d 1 (1st Cir. 1979) (nominal damages); Dunten v. Kibler, 518 F. Supp. 1146 (N.D. Ga. 1981) (nominal damages—$1.00, a "moral victory"); Rheuark v. Shaw, 477 F. Supp. 897 (N.D. Tex. 1979) (nominal damages), *aff'd in part and rev'd in part,* 628 F.2d 297 (5th Cir. 1980), *cert. denied,* 450 U.S. 931 (1981).

104. *See* Bonnes v. Long, 651 F.2d 214 (4th Cir. 1981); Collins v. Thomas, 649 F.2d 1203 (5th Cir. 1981); Williams v. City of Fairburn, 640 F.2d 635 (5th Cir. 1981); Seattle School Dist. No. 1 v. Washington, 633 F.2d 1338 (9th Cir. 1980); Smith v. University of N.C., 632 F.2d 316 (4th Cir. 1980); Morrison v. Ayoob, 627 F.2d 669 (3d Cir. 1980); Dayan v. Board of Regents, 620 F.2d 107 (5th Cir. 1980); Knighton v. Watkins, 616 F.2d 795 (5th Cir. 1980); Young v. Kenley, 614 F.2d 373 (4th Cir. 1979); Keith v. Volpe, 501 F. Supp. 403 (C.D. Cal. 1980); Massachusetts Fair Share v. O'Keefe, 476 F. Supp. 294 (D. Mass. 1979). *See generally* Note, *Administrative Law: Recovery of Attorney's Fees by Prevailing Plaintiff's in Title VII Actions,* 33 OKLA. L. REV. 98 (1980).

lief.[105] Nevertheless, courts may deny fee awards when it is determined that a defendant settled to avoid the nuisance of litigation.[106]

The circumstances in which a defendant "prevails" for fee purposes are predictably more narrowly defined.[107] Normally, a defendant must

105. Morrison v. Ayoob, 627 F.2d 669 (3d Cir. 1980); Williams v. Miller, 620 F.2d 199 (8th Cir. 1980); Dayan v. Board of Regents, 620 F.2d 107 (5th Cir. 1980); Bagby v. Beal, 606 F.2d 411 (3d Cir. 1979); Dawson v. Pastrick, 600 F.2d 70 (7th Cir. 1979); Bonnes v. Long, 599 F.2d 1316 (4th Cir. 1979); Massachusetts Fair Share v. O'Keefe, 476 F. Supp. 294 (D. Mass. 1979).

Courts are in general agreement as to the burden to be carried to establish prevalence for fee purposes. In *Morrison* the court dismissed as moot the plaintiffs' action challenging a district judge's practice of summarily sending convicted indigents to jail for petty offenses without first affording a right to counsel because the judge had ceased the practice. 627 F.2d at 671. The court granted plaintiff's motion for attorney's fees because plaintiff had essentially succeeded in obtaining the relief sought. The court further held that there must be a *causal relationship* between the action and the ultimate relief received. *Id.* When more than one cause contributes to the cessation of improper conduct, a plaintiff prevails if suit was a *material factor* in bringing about defendant's action. *Id.* Another court crystallized these considerations into three requirements: (1) some improvement in the party's position; (2) suit and attorney's efforts were "necessary and important" factor in achieving improvement; and (3) defendant's concessions were legally compelled. Massachusetts Fair Share v. O'Keefe, 476 F. Supp. 294, 297 (D. Mass. 1979). *See also* American Constitutional Party v. Munro, 650 F.2d 184 (9th Cir. 1981); Iranian Students Ass'n v. Sawyer, 639 F.2d 1160 (5th Cir. 1981); Coen v. Harrison County School Bd., 638 F.2d 24 (5th Cir. 1981).

106. *See* Smith v. University of N.C., 632 F.2d 316, 352 (4th Cir. 1980); Chicano Police Officer's Ass'n v. Stover, 624 F.2d 127, 131 (10th Cir. 1980); Parker v. Matthews, 411 F. Supp. 1059, 1064 (D.D.C. 1976), *aff'd sub nom.* Parker v. Califano, 561 F.2d 320 (D.C. Cir. 1977).

107. *See generally* Ellis v. Cassidy, 625 F.2d 227 (9th Cir. 1980); Smith v. Josten's Am. Yearbook Co., 624 F.2d 125 (10th Cir. 1980); Anthony v. Marion County Gen. Hosp., 617 F.2d 1164 (5th Cir. 1980); Harris v. Plastics Mfg. Co., 617 F.2d 438 (5th Cir. 1980); Luna v. International Ass'n of Mach. & Aerospace Workers Local 36, 614 F.2d 529 (5th Cir. 1980); Jones v. United States, 613 F.2d 1311 (5th Cir. 1980); Faraci v. Hickey-Freeman Co., 607 F.2d 1025 (2d Cir. 1979); Bowers v. Kraft Foods Corp., 606 F.2d 816 (8th Cir. 1979); Olitsky v. O'Malley, 597 F.2d 303 (1st Cir. 1979); EEOC v. First Ala. Bank, 595 F.2d 1050 (5th Cir. 1979); Bennett v. Cramer, 495 F. Supp. 191 (E.D. Wis. 1980); LeGare v. University of Pa. Medical School, 488 F. Supp. 1250 (E.D. Pa. 1980); Obin v. District 9, International Ass'n of Mach. & Aerospace Workers, 487 F. Supp. 368 (E.D. Mo. 1980), *aff'd in part, rev'd in part, and vacated in part,* 651 F.2d 574 (8th Cir. 1981); Ohland v. City of Montpelier, 467 F. Supp. 324 (D. Vt. 1979); Isaacs v. Temple Univ., 467 F. Supp. 67 (E.D. Pa. 1979); Keown v. Storti, 456 F. Supp. 232 (E.D. Pa. 1978), *aff'd,* 601 F.2d 575 (3d Cir. 1979).

In certain circumstances, the defendant is the party who prevents unlawful practices and thereby enforces congressional policy. When this occurs the restrictive *Christiansburg* defendant-recovery rule is inapplicable, and some courts permit prevailing defendants to recover fees under the prevailing plaintiff standards. *See, e.g.,* Baker v. City of Detroit, 504 F.. Supp. 841 (E.D. Mich. 1980). This interpretation finds some support in the legislative history of the Awards Act: "In the large majority of cases the party or parties seeking to enforce such rights will be the plaintiffs and/or plaintiff-intervenors. However, in the procedural posture of some cases, the parties seeking to enforce such rights may be the defendants and/or defendant-intervenors." S. REP. No. 1011, *supra* note 18, at 4 n.4, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 5908, 5912

defend successfully against all of a plaintiff's claims. Once a court reaches this relatively simple conclusion, it applies the prevailing-defendant discretionary standards, focusing on the plaintiff's assertions rather than on the defendant's conduct or offenses.[108] Defendant recoveries under the civil rights fee provisions have generally fallen into four categories:[109] (1) those in which plaintiffs simply lose on the merits despite pressing claims that raise factual and legal issues warranting resolution;[110] (2) those in which plaintiffs' causes of action have no merit whatsoever when filed;[111] (3) those in which plaintiffs engage in harassment, bad faith, or other misconduct;[112] and (4) those in which a baseless claim is combined with plaintiff misconduct.[113]

Other practical problems may prevent either a prevailing plaintiff or defendant from recovering otherwise available fees. The character of the representation—public interest group legal assistance or *pro se* representation—may pose barriers to relief.[114] The procedural posture of

n.4. Thus, a "defendant-enforcer" class of prevailing defendants may obtain fee awards under the liberal plaintiff award standards. *See generally* Malson, *supra* note 86, at 436-37.

108. Heinsz, *supra* note 11, at 268-74.

109. *Id.* at 274.

110. *See, e.g.,* Ash v. Hobart Mfg. Co., 11 FEP Cas. 307 (S.D. Ohio 1975); Matyi v. Beer Bottlers Local 1187, 392 F. Supp. 60 (E.D. Mo. 1974). *But see* Isaacs v. Temple Univ., 467 F. Supp. 67 (E.D. Pa. 1979).

111. *See, e.g.,* EEOC v. First Ala. Bank, 595 F.2d 1050 (5th Cir. 1979); Moss v. ITT Continental Baking Co., 468 F. Supp. 420 (E.D. Va. 1979); Lee v. Chesapeake & Ohio Ry., 389 F. Supp. 84 (D. Md. 1975). *But see* Ohland v. City of Montpelier, 467 F. Supp. 324 (D. Vt. 1979); EEOC v. South Carolina Nat'l Bank, 12 FEP Cas. 1565 (D.S.C. 1976), *rev'd,* 562 F.2d 329 (4th Cir. 1977).

112. *See, e.g.,* EEOC v. AAA, 12 FEP Cas. 995 (S.D. Fla. 1976); Robinson v. KMOX-TV, 407 F. Supp. 1272 (E.D. Mo. 1975); Carrion v. Yeshiva Univ., 397 F. Supp. 852 (S.D.N.Y. 1975), *aff'd,* 535 F.2d 722 (2d Cir. 1976). *But see* Lujan v. New Mexico Health & Soc. Serv. Dept., 624 F.2d 968 (10th Cir. 1980).

113. *See, e.g.,* Reed v. Sisters of Charity, 447 F. Supp. 309 (W.D. La. 1978); Copeland v. Martinez, 435 F. Supp. 1178 (D.D.C. 1977), *aff'd,* 603 F.2d 981 (D.C. Cir. 1979), *cert. denied,* 444 U.S. 1044 (1980); Sek v. Bethlehem Steel Corp., 421 F. Supp. 983 (E.D. Pa. 1976), *aff'd,* 565 F.2d 153 (3d Cir. 1977), *cert. denied,* 436 U.S. 920 (1980).

114. Courts generally hold that public interest organizations, whether publicly or privately funded, deserve fees on the same basis as private practitioners without limitation to the organization's cost. *See, e.g.,* Gates v. Collier, 616 F.2d 1268 (5th Cir. 1980); Lackey v. Bowling, 476 F. Supp. 1111 (N.D. Ill. 1979). Some courts require that publicly-funded organizations advance important constitutional values for fee eligibility. *See, e.g.,* Seattle School Dist. No. 1 v. Washington, 633 F.2d 1338, 1340 (9th Cir. 1980). Courts also hold that the purposes of the civil rights fee statutes—provision of fees to prevailing parties in order to give private citizens meaningful opportunity to vindicate their rights by securing competent counsel—do not include compensation of *pro se* litigants who retain no professional assistance. *See, e.g.,* Davis v. Parrat, 608 F.2d 717 (8th Cir. 1979).

the case can delay recovery or create additional attorney's fees.[115] The character of the opponent may, for instance, allow immunity defenses to block a motion for fees.[116] Finally, a court, in its discretionary calcu-

115. Significant questions arise as to the point at which a party has prevailed for fee purposes. The circuits have taken at least three positions in identifying when a district court's jurisdiction to award fees expires. The First and Fourth Circuits treat fee claims as motions to alter or amend a judgment that parties must file within 10 days after entry of judgment. FED. R. CIV. P. 59(e); White v. New Hampshire Dep't of Employment Security, 629 F.2d 697, 699-700 (1st Cir. 1980), *cert. granted,* 101 S. Ct. 2313 (1981); Wright v. Jackson, 522 F.2d 955, 957-58 (4th Cir. 1975); Hirschkop v. Snead, 475 F. Supp. 59, 62 (E.D. Va. 1979), *aff'd,* 646 F.2d 149 (4th Cir. 1981). *Cf.* Gary v. Spires, 634 F.2d 772 (4th Cir. 1980) (court applied Fed. R. Civ. P. 54(d) to find attorney's fees were part of the costs). *See also* Reyes v. Edmunds, 472 F. Supp. 1218, 1230 (D. Minn. 1979); Brown v. American Enka Corp., 452 F. Supp. 154, 159-60 (E.D. Tenn. 1976). The Fifth, Sixth, and Seventh Circuits, however, treat fees as an item of costs, which under Federal Rules of Civil Procedure 54(d) and 58 are available after entry of judgment on the merits without a jurisdictional time limitation. FED. R. CIV. P. 54(d), 58; Johnson v. Snyder, 639 F.2d 316, 317 (6th Cir. 1981); Jones v. Dealers Tractor & Equip. Co., 634 F.2d 180, 181-82 (5th Cir. 1981); Bond v. Stanton, 630 F.2d 1231, 1234 (7th Cir. 1980); Van Ooteghem v. Gray, 628 F.2d 488, 496-97 (5th Cir. 1980), *cert. denied,* 101 S. Ct. 2031 (1981); Knighton v. Watkins, 616 F.2d 795, 797-98 (5th Cir. 1980). The Eighth Circuit recently adopted a hybrid position that avoids the conceptual problem of equating costs and fees and also ameliorates the possible conflict of interest (*see* Mendoza v. United States, 623 F.2d 1338, 1352-53 (9th Cir. 1980), *cert. denied,* 450 U.S. 912 (1981); Prandini v. National Tea Co., 557 F.2d 1015, 1021 (3d Cir. 1977)) counsel could confront when forced to consider simultaneously the substantive issues and the amount of the fee award. Obin v. District 9, International Ass'n of Mach. & Aerospace Workers, 651 F.2d 574, 584 (8th Cir. 1981). Treating a fee claim as a matter collateral to and independent of the merits of the litigation, the court instructed the district courts to adopt a uniform rule requiring that parties file fee claims within 21 days of judgment. *Id.* at 584. *See generally* 10 C. WRIGHT & A. MILLER, FEDERAL PRACTICE & PROCEDURE § 2679, at 239 (1973); 6 MOORE'S FEDERAL PRACTICE, *supra* note 54, at 1753. *See also* Note, *Procedural Characterization of Post-Judgment Requests for Attorney's Fees in Civil Rights Cases—Eliminating Artificial Barriers to Awards,* 49 FORDHAM L. REV. 827 (1981).

Furthermore, courts hold that fee awards should include time spent litigating the fee award, *e.g.,* Littlefield v. Deland, 641 F.2d 729, 733 (10th Cir. 1981); Gurule v. Wilson, 635 F.2d 782, 792 (10th Cir. 1980); Bagby v. Beal, 606 F.2d 411, 416 (3d Cir. 1979); Massachusetts Fair Share v. O'Keefe, 476 F. Supp. 294, 300 (D. Mass. 1979), and collecting the judgment, *e.g.,* Balark v. Curtin, 655 F.2d 798, 803 (7th Cir. 1981).

116. Because Congress enacted the fee provisions of the civil rights statutes pursuant to its plenary power to enforce the fourteenth amendment against the states, the eleventh amendment and sovereign immunity do not stand as absolute bars to such awards. *See* Supreme Court of Va. v. Consumers Union, 446 U.S. 719, 737-39 (1980); Hutto v. Finney, 437 U.S. 678, 693 (1978); Imbler v. Pachtman, 424 U.S. 409, 417-31 (1976); Hirschkop v. Snead, 646 F.2d 149, 151 (4th Cir. 1981); Knights of KKK v. East Baton Rouge Parish School Bd., 643 F.2d 1034, 1039 (5th Cir. 1981); Entertainment Concepts, Inc., III v. Maciejewski, 631 F.2d 497, 507 (7th Cir. 1980), *cert. denied,* 450 U.S. 919 (1981); Morrison v. Ayoob, 627 F.2d 669, 672 (3d Cir. 1980), *cert. denied,* 449 U.S. 1102 (1981); Familias Unidas v. Briscoe, 619 F.2d 391, 405 (5th Cir. 1980); Rheuark v. Shaw, 477 F. Supp. 897, 924-27 (N.D. Tex. 1979), *aff'd in part and rev'd in part,* 628 F.2d 297 (5th Cir. 1980), *cert. denied,* 450 U.S. 931 (1981). Governmental officers acting in their official capacities in good faith are immune from personal liability but fees may be obtained from them in their official capacities even in the absence of bad faith. Rheuark v. Shaw, 477 F. Supp. 897, 924-27 (N.D. Tex.

lation of a reasonable fee, may increase or decrease liability for fees in accordance with its subjective view of what is equitable in particular circumstances.[117]

III. ANALYSIS

The potential for courts to abuse their discretion in shifting fees to prevailing defendants is unfortunately great. Good faith litigants with reasonable claims are often inadvertently punished. Courts should not discourage plaintiffs proceeding upon the advice of competent counsel from seeking vindication of their civil rights.[118] Quite often the civil rights litigant is poor or otherwise disadvantaged and, although uninformed, believes that another has discriminated against him.[119] A

1979), *aff'd in part and rev'd in part,* 628 F.2d 297 (5th Cir. 1980), *cert. denied,* 450 U.S. 931 (1981). Although the federal government is generally immune from fee awards, Congress is considering expansion of federal liability in agency proceedings and court actions. One proposal, the "Equal Access to Justice Act" (S. 265), imposes awards against the United States when it loses, unless the government can show substantial justification for its position or that an award would be unjust. *See Award of Attorneys' Fees Against the Federal Government: Hearings Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice,* 96th Cong., 2d Sess. 1-14 (1980).

117. Courts generally apply a 12-factor analysis, promulgated in Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 717-19 (5th Cir. 1974), to calculate a reasonable fee. The analysis examines: (1) time and labor required; (2) novelty and difficulty of the question presented; (3) skill required to perform the legal services; (4) preclusion of other employment due to acceptance; (5) customary fee in the community; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or circumstances of the case; (8) amount involved and results obtained; (9) experience, reputation, and ability of the attorney; (10) undesirability of the case; (11) nature and length of the professional relationship; and (12) awards in similar cases. *See generally* Planned Parenthood Ass'n v. Ashcroft, 655 F.2d 848 (8th Cir. 1981); Higgins v. Okla. *ex rel.* Okla. Employment Security Comm'n, 642 F.2d 1199 (10th Cir. 1981); David v. City of Abbeville, 633 F.2d 1161 (5th Cir. 1981); Entertainment Concepts, Inc., III v. Maciejewski, 631 F.2d 497 (7th Cir. 1980), *cert. denied,* 450 U.S. 919 (1981); Neely v. City of Grenada, 624 F.2d 547 (5th Cir. 1980); McManama v. Lukhard, 616 F.2d 727 (4th Cir. 1980); Bagby v. Beal, 606 F.2d 411 (3d Cir. 1979); Donnell v. General Motors Corp., 500 F. Supp. 176 (E.D. Mo. 1980); Unemployed Workers Organizing Comm. v. Batterton, 477 F. Supp. 509 (D. Md. 1979). *See also* ABA CODE OF PROFESSIONAL RESPONSIBILITY DR 2-106 (1978). The *Johnson* factors are normally applied after the court computes a "lodestar amount" (hours times billing rate), which is then adjusted up or down at the court's discretion. Neely v. City of Granada, 624 F.2d 547, 549 (5th Cir. 1980); Anthony v. Marion County Gen. Hosp., 617 F.2d 1164, 1171 (5th Cir. 1980); Donnell v. General Motors Corp., 500 F. Supp. 176, 179-80 (E.D. Mo. 1980).

118. Plaintiffs proceeding upon the advice of competent counsel should not be deterred from seeking vindication of their civil rights. Silver v. KCA, 586 F.2d 138 (9th Cir. 1978); McCampbell v. Chrysler Corp., 425 F. Supp. 1326 (E.D. Mich. 1977); Burgess v. Hampton, 73 F.R.D. 540 (D.D.C. 1976); Richardson v. Hotel Corp. of Am., 332 F. Supp. 519 (E.D. La. 1971), *aff'd,* 468 F.2d 951 (5th Cir. 1972).

119. *E.g.,* McCampbell v. Chrysler Corp., 425 F. Supp. 1326, 1327 (E.D. Mich. 1977).

party's good faith reliance on the advice of an attorney that such a belief is sufficiently well-founded to warrant a lawsuit, however, does not avoid liability for fee awards.[120] In *Christiansburg Garment Co. v. EEOC*[121] the Supreme Court recognized this problem and directed the district courts to avoid interjection of subjective views and hindsight logic into prevailing defendant fee award determinations.[122] Regrettably, courts often forget the *Christiansburg* admonition.[123]

On the other hand, the deterrence of frivolous suits is also an important policy objective for at least two reasons. First, complex, costly, and lengthy civil rights suits can impose unreasonably on parties who have not violated the law. Second, vital judicial resources otherwise available to resolve legitimate disputes are wasted.[124] Furthermore, unnecessary extension of judicial proceedings "breeds frustration with the federal courts and, ultimately, disrespect for the law."[125] Currently, however, statutory fee shifting and the bad faith exception to the American rule inappropriately accommodate these competing values.

A. *Inadequacy of Common-Law Bad Faith*

The standards for fee awards under the bad faith exception to the American rule are stringent.[126] Unlike current statutory awards, the

120. When statutory fees to prevailing parties are available, a subtle conflict of interest may arise between attorney and client with regard to the desirability of pursuing the claim by private suit or in consideration of settlement proposals. *See* notes 11 & 115 *supra* and accompanying text. *See also* Note, *Promoting the Vindication of Civil Rights Through the Attorney's Fees Awards Act, supra* note 27.

121. 434 U.S. 412 (1978).

122. [I]t is important that a district court resist the understandable temptation to engage in *post hoc* reasoning by concluding that, because a plaintiff did not ultimately prevail, his action must have been unreasonable or without foundation. This kind of hindsight logic could discourage all but the most airtight claims, for seldom can a prospective plaintiff be sure of ultimate success. No matter how honest one's belief that he has been the victim of discrimination, no matter how meritorious one's claim may appear at the outset, the course of litigation is rarely predictable. Decisive facts may not emerge until discovery or trial. The law may change or clarify in the midst of litigation. Even when the law or the facts appear questionable or unfavorable at the outset, a party may have an entirely reasonable ground for bringing suit.

Id. at 421-22.

123. *See* notes 137-61 *infra* and accompanying text.

124. *See Hearings: Fees in Federal Courts, supra* note 10, at 22 (statement of Paul Nejelski).

125. Roadway Express, Inc. v. Piper, 447 U.S. 752, 757 n.4 (1980).

126. *See* Obin v. District 9, International Ass'n of Mach. & Aerospace Workers, 487 F. Supp. 368 (E.D. Mo. 1980), *aff'd in part, rev'd in part, and vacated in part,* 651 F.2d 574 (8th Cir. 1981); Lipscomb v. Wise, 399 F. Supp. 782 (N.D. Tex. 1975), *rev'd,* 551 F.2d 1043 (5th Cir. 1977), *rev'd,* 437 U.S. 535 (1978).

bad faith rule requires a demonstration of subjective bad faith.[127] The rationale for bad faith fee awards is essentially punitive: to deter abusive litigation generally and protect the integrity of the judicial process.[128] Furthermore, although civil rights statutory fee provisions do not preempt bad faith awards,[129] they do reduce their significance. Most forms of bad faith conduct activate statutory fee awards.

Courts also award fees under the civil rights fee-shifting provisions when plaintiffs engage in bad faith conduct. In *Copeland v. Martinez*[130] the court awarded fees upon finding bad faith conduct in plaintiff's intent to harass her supervisors in a Title VII dispute.[131] Similarly, a plaintiff seeking relitigation of a previously unsuccessful claim risks statutory fee shifting.[132] When a party forces litigation, with no objective factual[133] or legal[134] issues, courts properly shift fees. Obfuscation, unreasonably enlarged complaints, and failure to follow procedural guidelines or court orders may also lead to statutory fee shifting.[135] In short, there is considerable overlap between the statutory fee-shifting provisions and the common-law bad faith exception to the American rule.[136]

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127. *See* Roadway Express, Inc. v. Piper, 447 U.S. 752 (1980); Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1977); Harris v. Plastics Mfg. Co., 617 F.2d 438 (5th Cir. 1980).

128. *See* Copeland v. Martinez, 603 F.2d 981, 984 (D.C. Cir. 1979), *cert. denied,* 444 U.S. 1044 (1980).

129. *Id.*

130. 435 F. Supp. 1178 (D.D.C. 1977), *aff'd,* 603 F.2d 981 (D.C. Cir. 1979), *cert. denied,* 444 U.S. 1044 (1980).

131. *Id. See also* Bowers v. Kraft Foods Corp., 606 F.2d 816 (8th Cir. 1979); Haycraft v. Hollenbach, 606 F.2d 128 (6th Cir. 1979); Obin v. District 9, International Ass'n of Mach. & Aerospace Workers, 487 F. Supp. 368 (E.D. Mo. 1980), *aff'd in part, rev'd in part, and vacated in part,* 651 F.2d 574 (8th Cir. 1981).

132. *See, e.g.,* Ellis v. Cassidy, 625 F.2d 227 (9th Cir. 1980); Haycraft v. Hollenbach, 606 F.2d 128 (6th Cir. 1979); Matyi v. Beer Bottlers Local 1187, 392 F. Supp. 60 (E.D. Mo. 1974).

133. *See, e.g.,* Faraci v. Hickey-Freeman Co., 607 F.2d 1025 (2d Cir. 1979); EEOC v. First Ala. Bank, 595 F.2d 1050 (5th Cir. 1979).

134. *See, e.g.,* LeGare v. University of Pa. Medical School, 488 F. Supp. 1250, 1257 (E.D. Pa. 1980); Goff v. Texas Instruments, Inc., 429 F. Supp. 973, 976 (N.D. Tex. 1977).

135. *See, e.g.,* Anthony v. Marion County Gen. Hosp., 617 F.2d 1164 (5th Cir. 1980); Faraci v. Hickey-Freeman Co., 607 F.2d 1025 (2d Cir. 1979); Monk v. Roadway Express, Inc., 73 F.R.D. 411 (E.D. La. 1977), *vacated,* 599 F.2d 1378 (5th Cir. 1979), *aff'd sub nom.* Roadway Express, Inc. v. Piper, 447 U.S. 752 (1980); Robinson v. KMOX-TV, 407 F. Supp. 1272 (E.D. Mo. 1976); Matyi v. Beer Bottlers Local 1187, 392 F. Supp. 60 (E.D. Mo. 1974). *But see* Merritt v. International Bhd. of Boilermakers, 495 F. Supp. 17, 24 (N.D. Miss. 1979).

136. *See* Merritt v. International Bhd. of Boilermakers, 495 F. Supp. 17, 24-25 (N.D. Miss. 1979).

One other aspect of the bad faith concept merits further attention. After *Roadway*, it is clear

B. *Judicial Misconstruction of Statutory Defendant Awards*

Overzealous application of the prevailing defendant standard in civil rights cases thwarts the overriding congressional objective to encourage vigorous enforcement by private parties of favored civil rights laws. Claims that raise factual or legal issues but nevertheless fall into the gray area between frivolousness and reasonableness present the most difficult cases for balancing the enforcement and deterrence policies. An examination of several recent cases illustrates the uncertainty that potential litigants face when evaluating the merits of a case and the likelihood of an adverse fee award. In the absence of bad faith conduct, courts often act capriciously. Thus, courts are less likely to award attorney's fees to a defendant when the plaintiff presents a jury submissible case but loses[137] than in a case in which the plaintiff presents no evidence at all.[138] This is not an inflexible rule, however, and peculiar circumstances may influence courts to deny fee awards when they would otherwise appear to be proper.

In *Bowers v. Kraft Foods Corp.* [139] a black employee alleged that racial motivations prompted her dismissal. The district court ruled that evidence of her unsatisfactory work performance, attitude, and employment record justified the employer's action. It based its award of fees to the prevailing employer-defendant on its conclusion that Bowers had "no foundation in fact for her lawsuit and . . . this is a frivolous lawsuit maliciously filed."[140] The Eighth Circuit vacated the fee award for two reasons. First, plaintiff received a right to sue letter from the

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that attorneys who engage in bad faith conduct risk personal liability for excess expenses created by their conduct. The civil rights fee provisions do not offer courts that option. *See* notes 51-54 *supra* and accompanying text.

137. *See, e.g.,* Wooten v. Clifton Forge School Bd., 655 F.2d 552 (4th Cir. 1981); Gresham Park Community Org. v. Howell, 652 F.2d 1227 (5th Cir. 1981); Anthony v. Marion County Gen. Hosp., 617 F.2d 1164 (5th Cir. 1980); Mosby v. Webster College, 563 F.2d 901 (8th Cir. 1977); Wright v. Stone Container Corp., 524 F.2d 1058 (8th Cir. 1975); Merritt v. International Bhd. of Boilermakers, 495 F. Supp. 17 (N.D. Miss. 1979); Bennett v. Cramer, 495 F. Supp. 191 (E.D. Wis. 1980); Isaacs v. Temple Univ., 467 F. Supp. 67 (E.D. Pa. 1979); Ohland v. City of Montpelier, 467 F. Supp. 324 (D. Vt. 1979); Keown v. Storti, 456 F. Supp. 232 (E.D. Pa. 1978), *aff'd,* 601 F.2d 575 (4th Cir. 1979); Milburn v. Girard, 455 F. Supp. 283 (E.D. Pa. 1978). *But see* Prochaska v. Marcoux, 632 F.2d 848 (10th Cir. 1980), *cert. denied,* 101 S. Ct. 2316 (1981).

138. *See, e.g.,* Harbulak v. County of Suffolk, 654 F.2d 194 (2d Cir. 1981); United States v. Terminal Transp. Co., 653 F.2d 1016 (5th Cir. 1981); Church of Scientology v. Cazares, 638 F.2d 1272 (5th Cir. 1981); Haywood v. Ball, 634 F.2d 740 (4th Cir. 1980).

139. 606 F.2d 816 (8th Cir. 1979).

140. Bowers v. Kraft Foods Corp., 467 F. Supp. 971, 974 (E.D. Mo.), *aff'd in part and rev'd in part,* 606 F.2d 816 (8th Cir. 1979).

EEOC that reasonably could have led her to believe in the merit of her claim.[141] Second, the court held that although the evidence was weak, it conceivably was sufficient to convince a lay person that a stronger case existed.[142] Other courts have similarly vacated fee awards to prevailing defendants when the plaintiff could not reasonably foresee the unreasonableness of the action[143] before trial or when other peculiar facts[144] hampered plaintiff's efforts to evaluate the merits fully before filing suit.

Similarly, in *Reed v. Famous Barr Division*,[145] a district court determined that an employer's dismissal of a male employee was not based on his sex. The record disclosed ample business justification for the dismissal and other evidence discrediting his assertion of discrimination. Nevertheless, the court, in deference to the "chilling and repressive" "precedential impact" of prevailing defendant fee awards, denied defendant's fee motion.[146] The court refused to emphasize the poor judgment, anger, and subjective motivations of the plaintiff in filing suit in favor of a "totality of the circumstances" test.[147]

By contrast, in *Prochaska v. Marcoux*[148] and *Fantroy v. Greater St. Louis Labor Council*[149] courts compelled civil rights plaintiffs to pay their opponent's fees after they raised submissible questions under the civil rights acts but lost on the merits.

Prochaska initiated a civil rights action for deprivation of constitutional rights stemming from his arrest and conviction under Colorado's boating safety laws.[150] He alleged that the arresting officer lacked probable cause to suspect invalid registration and acted "in utter and callous disregard of [his] rights" in searching the boat for fishing

141. 606 F.2d at 818.

142. *Id.*

143. *See, e.g.,* Smith v. Josten's Am. Yearbook Co., 624 F.2d 125 (10th Cir. 1980); Olitsky v. O'Malley, 597 F.2d 303 (1st Cir. 1979); EEOC v. Chandelle Club, 506 F. Supp. 75 (W.D. Okla. 1980).

144. *See, e.g.,* Luna v. International Ass'n of Mach. & Aerospace Workers Local 36, 614 F.2d 529 (5th Cir. 1980); Ohland v. City of Montpelier, 467 F. Supp. 324 (D. Vt. 1979); McCampbell v. Chrysler Corp., 425 F. Supp. 1326 (E.D. Mich. 1977); Richardson v. Hotel Corp. of Am., 332 F. Supp. 519 (E.D. La. 1971), *aff'd,* 468 F.2d 951 (5th Cir. 1972).

145. 518 F. Supp. 538 (E.D. Mo. 1981).

146. *Id.* at 543.

147. *Id.*

148. 632 F.2d 848 (10th Cir. 1980), *cert. denied,* 101 S. Ct. 2316 (1981).

149. 511 F. Supp. 70 (E.D. Mo. 1980) (motion for attorney's fees granted); Fantroy v. Greater St. Louis Labor Council, 478 F. Supp. 355 (E.D. Mo. 1979) (order denying summary judgment).

150. Prochaska sought relief under 42 U.S.C. § 1983 (1976).

licenses and boat safety gear.[151] The registration proved valid, and the court dismissed the citation. In Prochaska's subsequent civil rights suit the trial court found the action was not frivolous, unreasonable, or without foundation and denied the defendant's motion for attorney's fees.[152] Unrestrained by the usual scope of review in statutory fee awards,[153] the appellate court granted defendant's cross-appeal for fees under the Awards Act and held that as a matter of law plaintiff's suit squarely fit the *Christiansburg* criteria.

In *Fantroy*, plaintiffs filed a complaint[154] "alleging a widespread conspiracy to thwart plaintiffs' efforts" to secure a referendum to pass a controversial "Right-to-Work" amendment in Missouri.[155] On motions for summary judgment the district court ruled that plaintiffs had alleged a cause of action for conspiracy to discriminate against members of a political group.[156] Although the court indicated that plaintiffs produced evidence during discovery that linked defendants with the allegations in the complaint,[157] it also questioned whether plaintiffs could establish the conspiracy, stressing the existence of factual issues.[158]

The jury resolved the conspiracy issue against plaintiffs. The court then granted defendants' motions for fees even though "plaintiffs ar-

151. 632 F.2d at 854.

152. *Id.* at 853.

153. Some confusion exists as to the appropriate standard of review. Some circuit courts apply the clearly erroneous standard. *See, e.g.,* Prochaska v. Marcoux, 632 F.2d 848, 853 (10th Cir. 1980) (Doyle, J., concurring in part and dissenting in part), *cert. denied,* 101 S. Ct. 2316 (1981). Others apply an abuse of discretion standard. *See, e.g.,* Wooten v. Clifton Forge School Bd., 655 F.2d 552, 556 (4th Cir. 1981); Harbulak v. County of Suffolk, 654 F.2d 194, 198 (2d Cir. 1981). The Fifth Circuit apparently employs both. *Compare* Coen v. Harrison County School Bd., 638 F.2d 24, 26 (5th Cir. 1981) (clearly erroneous) *with* Ellwest Stereo Theatre, Inc. v. Jackson, 653 F.2d 954, 955 (5th Cir. 1981) (abuse of discretion). Under either standard, appellate courts should substantially defer to the district court's sound discretion to award or deny attorney's fees. *See* Obin v. District 9, International Ass'n of Mach. & Aerospace Workers, 651 F.2d 574, 586 (8th Cir. 1981); Cronin v. Sears, Roebuck & Co., 588 F.2d 616, 619 (8th Cir. 1978).

154. The original complaint attempted to state causes of action under 42 U.S.C. §§ 1981, 1982, 1985(3) (1976). The district court dismissed the claims under §§ 1981 and 1982 for failure to state a cause of action under sections proscribing denial of equal protection of laws and discrimination in property transactions. Fantroy v. Greater St. Louis Labor Council, 478 F. Supp. 355, 357 (E.D. Mo. 1979).

155. 478 F. Supp. at 356.

156. 478 F. Supp. at 357. *See* 42 U.S.C. § 1985(3) (1976).

157. 478 F. Supp. at 356-57.

158. *Id.* at 357. The court stated: "Whether or not plaintiffs will eventually be able to prove the widespread conspiracy which they allege is unclear at this time. It is apparent, though, that there are issues of fact remaining as to these defendants' involvement." *Id.*

guably established a civil rights precedent—that political petitioners constitute a protected class under 42 U.S.C. § 1985(3)."[159] On similar facts, other courts have denied prevailing defendant's motions for fees under the civil rights fee-shifting provisions.[160] Plaintiffs later dropped all substantive claims in return for defendants' offer to waive the fee award.[161]

When plaintiffs raise no material or admissible evidence, the likelihood of fee awards to defendants increases. In *Church of Scientology v. Cazares*,[162] a church organization sued the mayor of Clearwater, Florida, on defamation and civil rights grounds.[163] The church alleged that the mayor engaged in a course of conduct designed to deter its free exercise of religion and ostracize the church from the community. The Fifth Circuit sustained the mayor's summary judgment motion because no material issues of fact existed.[164] The court granted defendant's mo-

159. Fantroy v. Greater St. Louis Labor Council, 511 F. Supp. 70, 72 (E.D. Mo. 1980).

160. *Cf.* Gresham Park Community Org. v. Howell, 652 F.2d 1227 (5th Cir. 1981) (issues not so clear-cut as to render plaintiff's constitutional claim frivolous); Anthony v. Marion County Gen. Hosp., 617 F.2d 1164 (5th Cir. 1980) (plaintiff's mere failure to prosecute, which resulted in dismissal, insufficient to establish frivolity or vexatiousness); Bowers v. Kraft Foods Corp., 606 F.2d 816 (8th Cir. 1979) (weak evidence from litigants' perspective; issue reached jury); Bennett v. Cramer, 495 F. Supp. 191 (E.D. Wis. 1980) (plaintiff failed to show a causal connection between injury and defendant's act; submissible jury issue for nominal damages on constitutional rights deprivation made fee award improper); Merritt v. International Bhd. of Boilermakers, 495 F. Supp. 17 (N.D. Miss. 1979) (insufficient evidentiary facts to sustain allegations; plethora of motions extending length of litigation); Ohland v. City of Montpelier, 467 F. Supp. 324 (D. Vt. 1979) (extended discussion of legal issues evidences fact that suit not groundless, vexatious, frivolous, or unreasonable); Burgess v. Hampton, 73 F.R.D. 540 (D.D.C. 1976) (although evidence did not bear out allegation plaintiff suspected discrimination; pursued claim in good faith in reasonable manner). *But see* Teitelbaum v. Sorenson, 648 F.2d 1248 (9th Cir. 1981) (district court erred in denying fee award on basis of plaintiff's good faith and novelty of claim); Church of Scientology v. Cazares, 638 F.2d 1272 (5th Cir. 1981) (extended consideration of legal issues, existence of some evidence, novelty of legal issues insufficient to avoid frivolity).

161. An agreement between the parties enabled the plaintiff, who earned $250 a week, to escape liability for a fee award of $100,582 plus interest. After agreeing to drop appeals from the verdict the plaintiff likened the settlement to blackmail: "I had no choice. I was faced with paying the other side's attorneys' fees. It became a matter of money instead of principle. I still believe in the lawsuit." St. Louis Globe-Democrat, June 12, 1981, at 12A, col. 2.

162. 638 F.2d 1272 (5th Cir. 1981).

163. Count I alleged a § 1983 violation, contending that the mayor, under color of state law, deprived the Church of its first amendment freedom of religious privileges. Count II alleged state law defamation under the federal court's diversity jurisdiction. *Id.* at 1275.

164. The district court did not pass on the existence of factual issues, but dismissed the Church's complaint for lack of standing to sue. *Id.* at 1281. The court of appeals then affirmed summary judgment on its conclusion that no material issues of fact existed with respect to the civil rights claim. *Id.* at 1284.

tion for attorney's fees despite the viability of the church's complaint for over two years and the district court's explicit recognition that the case presented novel legal issues.[165]

In *Anthony v. Marion County General Hospital*,[166] however, the Fifth Circuit vacated a prevailing defendant fee award imposed after the district court dismissed plaintiff's claim for failure to prosecute.[167] The district court found a failure to prosecute because the plaintiff repeatedly filed for continuances to prepare responses to defendant's summary judgment motions, failed to obtain new counsel after an attorney withdrew, refused to acknowledge receipt of various notices by mail, and finally, failed to appear at two dismissal hearings. The circuit court held that fee shifting was inappropriate because the court could not characterize the plaintiff's actions as frivolous or vexatious without hearing the merits. It did not consider the unreasonableness of this conduct sufficient to support an award.[168]

Thus, in similar fact situations, some courts grant and some courts deny prevailing defendants' motions for fees under the civil rights fee-shifting provisions.[169] These cases illustrate the difficulty prospective civil rights plaintiffs encounter in gauging the risk of adverse fee awards, as the award often depends on the trial court's *post hoc* subjective view of the merits. Seemingly irreconcilable federal decisions compound the problem.[170] Moreover, effective appellate review is often difficult because of the deferential abuse of discretion standard. Review is particularly difficult when district courts cryptically address fee motions in their opinions.[171] Increased uniformity is essential.

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165. *Id.* at 1290.

166. 617 F.2d 1164 (5th Cir. 1980).

167. *Id.* at 1170.

168. The court remanded the case to the district court to consider whether the circumstances warranted a fee award. *Id.*

169. *See* note 160 *supra* and accompanying text.

170. *Compare* Reed v. Famous Barr Div., 518 F. Supp. 538 (E.D. Mo. 1981) (weak factual issues raised, subjective motivations for suit downplayed—no fee award to prevailing defendant) *with* Fantroy v. Greater St. Louis Labor Council, 511 F. Supp. 70 (E.D. Mo. 1980) (factual issues raised, but court concluded claim was meritless because plaintiffs continued to litigate after plaintiffs and the court dismissed most defendants—fee award to prevailing defendants); *and compare* Church of Scientology v. Cazares, 638 F.2d 1272 (5th Cir. 1981) (court granted summary judgment and assessed fees without explicit findings of fact by district court) *with* Anthony v. Marion County Gen. Hosp., 617 F.2d 1164 (5th Cir. 1980) (court remanded issue of fee award appropriateness to district court because it could not consider claim frivolous for mere failure to prosecute).

171. *See, e.g.*, Middleton v. Remington Arms Co., 594 F.2d 1210, 1213 (8th Cir. 1979). The

C. *Alternative Devices to Discourage Frivolous Suits*

Fee shifting is not the only means of deterring frivolous suits by plaintiffs. Frivolous litigation is by no means confined to the civil rights context, and other areas of law have developed different solutions. Before considering legislative methods to improve fee-shifting deterrence it is useful to examine some of these alternatives.

1. *Internal Remedies*[172]

a. Procedural Restraints on Frivolous Suits

The Federal Rules of Civil Procedure provide courts with effective measures to weed out frivolous or groundless suits. For instance, Rule 37 allows a court to tax attorney's fees to a party not cooperating with discovery procedures,[173] Rule 41 allows discretionary fee awards

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court denied the prevailing defendant's claim for fees without any objective analysis whatsoever. The court stated cursorily:

> Remington Arms requests . . . attorney's fees . . . on the basis that Middleton prosecuted this appeal after he should have known that his claims were frivolous. Although we have upheld the judgment of the District Court, *we do not believe* that Middleton's contentions on appeal were so frivolous as to justify an award of attorney's fees to Remington Arms.

Id. at 1213 (emphasis added) (footnote omitted). For precedential value and consistency, courts should issue findings of fact and conclusions of law justifying grants or denials of all fee requests. *See generally* Cohn v. Papke, 655 F.2d 191, 195 n.3 (9th Cir. 1981); Collins v. Chandler Unified School Dist., 644 F.2d 759, 763 (9th Cir. 1981); Murphy v. Kolovitz, 635 F.2d 662, 663 (7th Cir. 1981); Sethy v. Alameda County Water Dist., 602 F.2d 894, 897 (9th Cir. 1979), *cert. denied,* 444 U.S. 1046 (1980).

172. Internal remedies are those that parties or courts may invoke during a lawsuit itself.

173. Rule 37 fee shifting under the Federal Rules of Civil Procedure is the primary deterrent to "frivolous requests for or objections to discovery." Advisory Comm. Note, 48 F.R.D. 487, 540 (1970). A substantial justification standard is provided to govern courts' determinations of whether a motion, or opposition to a motion, is genuine. *See generally* 8 C. WRIGHT & A. MILLER, *supra* note 115, § 2288, at 786, 790; Note, *Proposed 1967 Amendment to the Federal Discovery Rules,* 68 COLUM. L. REV. 271, 292 (1968).

The sanctions available to courts for regulating discovery are varied and flexible. A district court has broad discretion to treat "failure to comply with a discovery order as contempt of court, require payment of reasonable attorney['s] fees, stay the action until [compliance is forthcoming], require admissions, allow designated evidence, strike pleadings, or enter a dismissal or a default judgment." Kropp v. Ziebarth, 557 F.2d 142, 146 (8th Cir. 1977). *See In re* Professional Hockey Antitrust Litigation, 531 F.2d 1188 (3d Cir.), *rev'd on other grounds,* 427 U.S. 639 (1976). The rule also allows assessment of expenses, including attorney's fees, against an attorney advising a party as well as against party who fails to comply. *See* Ogletree v. Keebler Co., 78 F.R.D. 661 (N.D. Ga. 1978); Palma v. Lake Waukomis Dev. Co., 48 F.R.D. 366 (W.D. Mo. 1970).

The Federal Rules of Civil Procedure address the issue of attorney's fees. Rule 37 provides attorney's fees and expenses against parties or attorneys who force their opponents to move for orders compelling discovery (Rule 37(a)(4)); against parties or attorneys who fail to comply with

against parties seeking a second dismissal of complaints,[174] and Rule 38 of the Federal Rules of Appellate Procedure awards fees against an appellant who conducts a frivolous appeal. These provisions partially codify the bad faith rule.[175] Other rules that do not provide for recovery of attorney's fees but nevertheless promote veracity and reasonableness in complaints include the requirements for signed pleadings[176] and rules governing dismissal.[177] Rule 54(d) permits discretionary judicial assessment of costs not including attorney's fees.[178]

Section 1927 of Title 28 now penalizes attorneys for unreasonable and vexatious conduct that multiplies proceedings and increases costs unnecessarily.[179] Prior to *Roadway Express, Inc. v. Piper*,[180] the circuits disputed the viability of section 1927 as a basis for imposing attorney's

discovery orders (Rule 37(b)(2)); against parties who fail to admit matters requested under Rule 36 (Rule 37(c)); and against parties or attorneys who fail to attend their own depositions, serve answers to interrogatories, or respond to requests for inspection (Rule 37(d)). FED. R. CIV. P. 37(a)-(d). *See* United States v. Sumitomo Marine & Fire Ins. Co., 617 F.2d 1365 (9th Cir. 1980) (Rule 37(b)(2)); Weigel v. Shapiro, 608 F.2d 268 (7th Cir. 1979) (Rule 37(b)(2), (d)); Admiral Theatre Corp. v. Douglas Theatre Co., 585 F.2d 877 (8th Cir. 1978) (Rule 37(b)(2)); Marquis v. Chrysler Corp., 577 F.2d 624 (9th Cir. 1978) (Rule 37(a)(4)). *See generally* Roadway Express, Inc. v. Piper, 447 U.S. 752 (1980); Browne, *Civil Rule 11: The Signature and Signature Block,* 9 CAP. U.L. REV. 291 (1979); Risinger, *supra* note 20.

174. Involuntary dismissal imposed by courts *sua sponte* or on motions to dismiss is an extraordinary remedy requiring a clear record of bad faith, abuse of process, or complete lack of factual support for claims alleged. FED. R. CIV. P. 41(b), (d). *See* Anthony v. Marion County Gen. Hosp., 617 F.2d 1164 (5th Cir. 1980); Olitsky v. O'Malley, 597 F.2d 303 (1st Cir. 1979); Windsor v. Bethesda Gen. Hosp., 523 F.2d 891 (8th Cir. 1975); Carter v. United States, 83 F.R.D. 116 (E.D. Mo. 1979).

175. FED. R. APP. P. 38 (just damages or double costs).

176. Rule 11 places a responsibility on attorneys before signing their names on complaints to ascertain that a reasonable basis exists for the allegations of jurisdiction and the relief requested. FED. R. CIV. P. 11. *See* Delgado v. de Jesus, 440 F. Supp. 979 (D.P.R. 1976). Lawyers must investigate to ascertain that a reasonable basis exists, even if allegations are made on information or belief. *See* Helfant v. Louisiana & S. Life Ins. Co., 82 F.R.D. 53 (E.D.N.Y. 1979); Miller v. Schweickart, 413 F. Supp. 1062 (S.D.N.Y. 1976). The rule provides that the attorney may be subject to appropriate disciplinary action when a violation occurs. It does not, however, provide authority for awarding fees against unsuccessful litigants. *See* United States v. Standard Oil Co., 603 F.2d 100 (9th Cir. 1979). *But see* Nemeroff v. Abelson, 620 F.2d 339, 350 (2d Cir. 1980) (assuming fees appropriate under Rule 11 if bad faith conduct present); LeGare v. University of Pa. Medical School, 488 F. Supp. 1250, 1257 n.12 (E.D. Pa. 1980) (inherent disciplinary power of trial court).

177. FED. R. CIV. P. 12(c) (motion for judgment on the pleadings); *id.* 41(b) (involuntary dismissal); *id.* 50(a) (motion for directed verdict); *id.* 56 (summary judgment).

178. *Id.* 54(d). *See* Delta Airlines, Inc. v. August, 450 U.S. 346 (1981).

179. *See* notes 51-53 *supra* and accompanying text.

180. 447 U.S. 752 (1980).

fees.[181] In *Roadway* the Supreme Court resolved the issue by excluding attorney's fees from the "costs" that courts may award under the section. Thereafter, Congress amended section 1927 expressly to permit taxation of "excess costs, expenses, and attorney's fees" caused by dilatory conduct.[182] Thus, a federal court may require an offending attorney to indemnify an opponent for unreasonable conduct under section 1927 or under the judiciary's inherent power to administer its affairs efficiently.

b. The Contempt Power

Extreme and willful obstructive or disruptive conduct by an attorney or a litigant may warrant exercise of a court's inherent contempt powers. Since 1789 federal statutes[183] have authorized contempt citations to maintain order in judicial proceedings and promote the fair administration of justice.[184] Because of its drastic nature and stringent *mens rea* requirements,[185] contempt is of limited value in discouraging frivolous suits. An attorney, to engage in contemptuous conduct, must willfully disregard or disobey a court's authority. Moreover, a separate

181. Some courts interpreted § 1927 to embrace attorney's fees. *See, e.g.,* Browning Debenture Holders' Comm. v. DASA Corp., 560 F.2d 1078, 1089 (2d Cir. 1977); Meitzner v. Mindick, 549 F.2d 775, 784 (C.C.P.A.) (dictum), *cert. denied,* 434 U.S. 854 (1977); Harrell v. Joffrion, 73 F.R.D. 267, 268 (W.D. La.), *aff'd mem.,* 545 F.2d 167 (5th Cir. 1976). Others limited § 1927 to traditional costs, which do not include attorney's fees. *See, e.g.,* United States v. Ross, 535 F.2d 346 (6th Cir. 1976); 1507 Corp. v. Henderson, 447 F.2d 540 (7th Cir. 1971); Chrysler Corp. v. Lakeshore Commercial Fin. Corp., 389 F. Supp. 1216 (E.D. Wis. 1975), *aff'd mem.,* 549 F.2d 804 (7th Cir. 1977). *See generally* 60 B.U.L. REV. 950, 952-53 (1980).

182. *See* notes 51-53 *supra* and accompanying text.

183. The Judiciary Act of 1789 authorized federal courts "to punish . . . by fine or imprisonment, at the discretion of said courts, all contempts of authority in any cause or hearing before same." Judiciary Act of 1789, ch. 20, § 17, 1 Stat. 83. Currently, 18 U.S.C. § 401 (1976) provides:

> A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—
>
> (1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;
>
> (2) Misbehavior of any of its officers in their official transactions;
>
> (3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

The Federal Rules of Criminal Procedure establish summary contempt disposition if the conduct constituting contempt occurs in a court's presence. FED. R. CRIM. P. 42(a). If the conduct occurs without the court's presence the contemner is entitled to notice and a hearing. *Id.* 42(b).

184. *See generally Ex parte* Robinson, 86 U.S. (19 Wall.) 505 (1873); R. GOLDFARB, THE CONTEMPT POWER (1963); Note, *Sanctions Imposed by Courts on Attorneys Who Abuse the Judicial Process,* 44 U. CHI. L. REV. 619 (1977); 64 J. CRIM. L. & CRIMINOLOGY 300 (1973).

185. *See* Sykes v. United States, 444 F.2d 928, 930 (D.C. Cir. 1971).

trial is necessary to punish the contemner, unless the conduct occurs in the court's presence.[186]

Courts should employ internal procedural sanctions vigorously to inhibit groundless litigation and prevent avoidable expense. Some procedural sanctions also offer the added advantage of penalizing the attorney, rather than the good-faith litigant, for unjustifiably forwarding claims and abusing judicial processes.[187] The primary objective of private enforcement of the civil rights laws provided by Congress is better served by mechanisms that avoid intimidating good-faith plaintiffs. Nevertheless, these measures all require bad faith or intentional misconduct—unsatisfactory elements for a deterrence scheme in the civil rights context.

2. *External Remedies*[188]

a. Wrongful Civil Process/Abuse of Process[189]

The wrongful civil process tort balances the same conflicting policies that complicate the tension between prevailing plaintiff and prevailing defendant fee awards: free access to judicial relief unfettered by retaliatory actions and the adverse effects of groundless, frivolous, coercive, or harassing lawsuits.[190] From the inception of the tort, however, courts have carefully safeguarded the free access policy.[191] The majority rule requires that the plaintiff establish favorable resolution of a prior suit that the defendant maliciously instituted without reasonable

186. *See* note 183 *supra*.

187. *See* notes 173, 176 & 179-83 *supra* and accompanying text.

188. External remedies require separate proceedings to remedy damages caused by groundless litigation or deter future instances of misconduct. Internal remedies are obviously preferable because they avoid needless duplication of proofs, the additional costs imposed on the litigant, and, in some cases, court congestion.

189. Wrongful civil proceedings and malicious prosecution are often employed interchangeably to refer to the same tort in civil actions. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 120, at 853 (4th ed. 1971); RESTATEMENT (SECOND) OF TORTS § 674 (1977).

190. Mallen, *An Attorney's Liability for Malicious Prosecution, A Misunderstood Tort,* 46 INS. COUNSEL J. 407, 409 (1979). *See also* Note, *Liability for Proceeding with Unfounded Litigation,* 33 VAND. L. REV. 743 (1980) [hereinafter cited as Note, *Unfounded Litigation*]; Note, *A Lawyer's Duty to Reject Groundless Litigation,* 26 WAYNE L. REV. 1561 (1980) [hereinafter cited as Note, *Groundless Litigation*]; Note, *Groundless Litigation and the Malicious Prosecution Debate: A Historical Analysis,* 88 YALE L.J. 1218 (1979) [hereinafter cited as Note, *Malicious Prosecution Debate*].

191. W. PROSSER, *supra* note 189, § 120, at 850-53 (collecting cases); Note, *Groundless Litigation, supra* note 190, at 1564.

and probable cause.[192] The minority, or English rule, includes an additional special damages element.[193]

The abuse of process and wrongful civil proceedings torts are related but concentrate on different aspects of the frivolous suit problem.[194] The wrongful civil proceedings tort presupposes a meritless action, initiated without foundation. Abuse of process, by contrast, punishes parties who commence a justifiable action to attain improper collateral objectives.[195] The complaining party, however, must demonstrate an ulterior motive and a definite act or threat in addition to the justifiable action.[196]

Both torts exhibit characteristics that reduce their effectiveness as deterrents of frivolous suits. The most significant drawbacks are immunity defenses available to attorneys. In wrongful civil proceedings suits, attorneys are immune if they act without knowledge of their clients' wrongful purposes.[197] No general immunity exists for attorneys in abuse of process cases, but courts have held attorneys liable only for egregious misconduct.[198] Moreover, establishing malice in wrongful civil process cases is particularly difficult.[199] Several courts have inferred probable cause if an attorney has advised the defendant to

192. *See* RESTATEMENT (SECOND) OF TORTS § 674, Comment e (1977); Note, *Unfounded Litigation, supra* note 190, at 1564; Note, *Groundless Litigation, supra* note 190, at 746; Note, *Malicious Prosecution Debate, supra* note 190, at 1219-20.

193. Note, *Unfounded Litigation, supra* note 190, at 746. *See also* Note, *Groundless Litigation, supra* note 190, at 1565. Compensatory damages under either rule include all expenses and damage incurred by reason of the wrongful litigation. RESTATEMENT (SECOND) OF TORTS § 681 (1977).

194. *See* W. PROSSER, *supra* note 189, § 121, at 856-57; Note, *Groundless Litigation, supra* note 190, at 1565.

195. W. PROSSER, *supra* note 189, § 121, at 856; Note, *Unfounded Litigation, supra* note 190, at 751; Note, *Groundless Litigation, supra* note 190, at 1565.

196. W. PROSSER, *supra* note 189, § 121, at 857.

197. Mallen, *supra* note 190, at 409; Note, *supra* note 184, at 637.

198. Note, *supra* note 184, at 638-39. The distinction between the potential liability of attorneys in wrongful civil proceedings cases and abuse of process cases is justifiable. The tort of wrongful civil proceedings attacks frivolous litigation. Few attorneys would press novel issues, litigate difficult issues, or challenge the propriety of existing legal doctrine if threatened by retaliatory wrongful civil proceedings suits. Mallen, *supra* note 190, at 409. Abuse of process, by contrast, focuses on misapplication of judicial processes. Because probable cause for suit is irrelevant, it is more likely that the attorney has collaborated in the abusive course of action.

199. *See* W. PROSSER, *supra* note 187, § 120, at 855; RESTATEMENT (SECOND) OF TORTS §§ 675, 676 (1977); Note, *Unfounded Litigation, supra* note 190, at 747-48. To establish the malice of an attorney at common law a party had to prove the attorney's knowledge of the lack of probable cause for the action, and an improper motive by the attorney or the attorney's knowledge of the client's malice. Mallen, *supra* note 190, at 418.

sue.[200] Special damages requirements also hinder recovery.

b. Bar Disciplinary Proceedings

Few courts have considered the role of the attorney in discouraging groundless suits in the civil rights context. Those courts that have addressed the issue focus more on the inability of the client to ascertain the legal validity of his claim than on the attorney's failure to apprise the client of the potential liabilities of filing suit.[201] Heightened awareness of the problem and internal enforcement measures within the profession could serve as a useful adjunct in further deterring groundless suits.

The ethical foundation for such an approach arises from consideration of Canon 7: "A Lawyer Should Represent a Client Zealously *Within the Bounds of the Law*."[202] Disciplinary Rule (DR) 7-102(A)(1) subjects an attorney to disciplinary action[203] "when he knows or when it is obvious" that commencing suit only "harass[es] or maliciously injure[s] another."[204] DR7-102(A)(2) prohibits advancement of a claim with knowledge that it is unwarranted by law, if no good faith argument for extending, modifying, or reversing current law exists.[205] Affirmative duties of disclosure[206] and proper representation[207] bear on decisions to commence suit and the methods by which the suit is con-

200. Most courts, however, apply an objective standard to measure the probable cause element. Mallen, *supra* note 190, at 415; Note, *Unfounded Litigation, supra* note 190, at 747.

201. *See, e.g.*, LeGare v. University of Pa. Medical School, 488 F. Supp. 1250, 1257 (E.D. Pa. 1980). "Certainly a civil rights plaintiff should not lightly be penalized for her lawyer's . . . errors." *Id. See* note 138 *supra* and accompanying text.

202. ABA CANONS OF PROFESSIONAL ETHICS No. 7 (emphasis added).

203. Generally, a court or bar association that has the power to admit an attorney to practice law in a jurisdiction has the power to disbar, suspend, censure, or reprimand publicly or privately an attorney. Any interested person can initiate disciplinary proceedings. The ABA Code itself, however, does not provide for procedures or penalties:

> The Code makes no attempt to prescribe either disciplinary procedures or penalties for violation of a Disciplinary Rule, nor does it undertake to define standards for civil liability of lawyers for professional conduct. The severity of judgment against one found guilty of violating a Disciplinary Rule should be determined by the character of the offense and the attendant circumstances.

Preliminary Statement, ABA CODE OF PROFESSIONAL RESPONSIBILITY (1978) [hereinafter cited as ABA CODE].

204. ABA CODE, *supra* note 203, DR7-102(A)(1).

205. *Id.* DR7-102(A)(2).

206. *See id.* DR7-102(A)(1)-(3), -(7); EC 7-5, 7-8.

207. *See id.* DR7-106(c)(1); EC 7-4, 7-9, 7-25, 7-39.

ducted.[208] The client, of course, retains the ultimate power to decide whether to undertake an action. This decision, however, is largely dependent on competent legal advice based on all facts known to counsel.

Bar discipline, however, only symbolically compensates the victim of frivolous litigation.[209] Furthermore, the current code requires actual attorney knowledge of clients' improper motives,[210] without considering the degree of care the attorney used to evaluate the merits of the case.[211] Moreover, legitimate criticisms of the profession's record as a self-disciplining entity indicate that bar proceedings inadequately regulate professional abuses.[212]

IV. CONCLUSION: A PROPOSAL

The competing values of encouraging private enforcement of civil rights laws and discouraging frivolous litigation through prevailing party fee awards are not easily accommodated. The statutory provisions governing awards to defendants, moreover, do not balance these interests fairly. Good faith litigants who press factual and legal issues for judicial resolution are often punished under current prevailing defendant statutory award standards. Regrettably, courts and attorneys

208. The attorney's duty to withdraw from a frivolous action is uncertain at best. When a claim is not warranted under current law and no good faith modification or extension arguments exist, DR2-110(C) allows, but does not mandate, withdrawal. An attorney, however, must withdraw if he "knows or it is obvious that his continued employment will result in violation of a Disciplinary Rule." ABA CODE, *supra* note 203, DR2-110(B). Because a lawyer violates DR7-102(A)(2) when he knowingly advances unwarranted claims, arguably the Code requires withdrawal for this violation. *See* Cann, *Frivolous Lawsuits—The Lawyer's Duty to Say "No"*, 52 COLO. L. REV. 367, 377 n.51 (1981).

209. There is no financial inducement to file a complaint with a bar agency. *See* note 203 *supra*.

210. *See* notes 203-05 *supra* and accompanying text.

211. The proposed Model Rules of Professional Conduct remove the restrictive knowledge standard and provide an objective measure of the attorney's conduct. Section (b) of Rule 3.3 states that "a lawyer shall bring or defend a proceeding, or assert or controvert an issue therein, only when a lawyer acting in good faith would conclude that there is a reasonable basis for doing so." ABA MODEL RULES OF PROFESSIONAL CONDUCT 3.3(b), at 71 (Discussion Draft 1980). A "reasonable basis for doing so" is defined in the accompanying comments with an objective "substantial basis" standard. *Id.* at 72.

212. *See, e.g.*, ABA SPECIAL COMMITTEE ON EVALUATION OF DISCIPLINARY ENFORCEMENT, PROBLEMS AND RECOMMENDATIONS IN DISCIPLINARY ENFORCEMENT (1970) (Clark Committee), *reprinted in* A. KAUFMAN, PROBLEMS IN PROFESSIONAL RESPONSIBILITY 515-22 (1976); S. TISHER, L. BERNABEI & M. GREEN, BRINGING THE BAR TO JUSTICE: A STUDY OF SIX BAR ASSOCIATIONS 86 (1977); Marks & Cathcart, *Discipline Within the Legal Profession: Is it Self-Regulation,* 1974 U. ILL. L.F. 193; Steele & Nimmer, *Lawyers, Clients and Professional Regulation,* 1976 AM. B. FOUNDATION RESEARCH J. 917.

are often in a position to avoid needless pain and expense to the litigant but fail to do so.[213] Furthermore, inconsistency abounds in the application of the standards, which denies potential plaintiffs the opportunity to assess accurately the likelihood that a court will impose a fee award. In addition, judicially created exceptions to the American rule[214] and traditional alternatives to deter frivolous suits[215] do not adequately protect against the threat of spurious litigation—especially in the civil rights context in which the statutory and practical incentives to litigate are great.[216]

Commentators have suggested sweeping alteration of the breadth of fee shifting; these modified omnibus proposals countenance discretionary fee awards in public interest litigation whenever the interests of justice so require.[217] Some would alter the traditional presumption of

213. In *Fantroy*, for instance, the district court had repeated opportunities to dismiss the cause upon defendants' motions but instead it allowed the case to proceed through the jury's deliberations before deciding that plaintiff's pursuit of relief was unreasonable. Fantroy v. Greater St. Louis Labor Council, 511 F. Supp. 70, 72 (E.D. Mo. 1980).

214. *See* notes 39-70 *supra* and accompanying text.

215. *See* notes 172-212 *supra* and accompanying text. Commentators have urged adoption of several nontraditional alternatives. Criticizing the reliance on duplicative litigation in wrongful civil proceedings and abuse of process cases, some urge adoption of a compulsory counterclaim for groundless suits. A counterclaimant would have to prove that the opposing party sued without probable cause under a reasonableness standard; the proofs coinciding with the merits in the action. *See* Note, *Unfounded Litigation, supra* note 190, at 752-53; Note, *Malicious Prosecution Debate, supra* note 190, at 1232-35.

Others propose creation of duties running from an attorney to his adversary, by permitting the adversary to sue for legal malpractice if damaged by frivolous litigation. *See* Note, *Groundless Litigation, supra* note 190, at 1570-87. To date, no American jurisdiction has recognized a litigating attorney's duty to his client's adversary or otherwise held the attorney liable to that party for negligence. *See* R. MALLEN & V. LEVIT, LEGAL MALPRACTICE § 325 (1977 & Supp. 1980); Cann, *supra* note 208, at 375. Other professionals are subject to such malpractice duties. *See, e.g.*, Rusch Factors, Inc. v. Levin, 284 F. Supp. 85 (D.R.I. 1968) (accountant); Tarasoff v. Regents of Univ. of Cal., 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976) (psychiatrist owes duty to victim of client's attack); Connor v. Great W. Sav. & Loan Ass'n, 69 Cal. 2d 850, 447 P.2d 609, 73 Cal. Rptr. 369 (1968) (banker controlling development owes duty to purchasers). *See generally* Note, *Public Accountants and Attorneys: Negligence and the Third Party*, 47 NOTRE DAME LAW. 588 (1972).

216. The statutory incentive arises from the prevailing plaintiff standard that liberally distributes fees to litigants who prevail on at least one issue or compel voluntary compliance with civil rights laws. *See* notes 94-96 & 103-06 *supra* and accompanying text. The practical incentive exists because the plaintiff may have nothing to lose due to his economic status. A fee award from a judgment-proof plaintiff is of little value to the prevailing defendant.

217. Public interest groups lobby for adoption of a "public interest" exception to the American rule that is essentially a codification of the "private attorneys general" exception. The Council for Public Interest Law urged a congressional subcommittee to:

the American rule and award fees to the prevailing litigant unless the loser acted with substantial justification or the interests of justice and free access to the courts required otherwise.[218] Others suggest deterrence of frivolous suits by legislatively synthesizing fee awards and alternative methods in a uniform statutory approach.[219] These radical reforms, however, are not justified.

The problem of prevailing defendant fee awards requires legislative adjustment at a different analytical level. Inconsistency and subjectivity are the chief failures of the current standard. A congressional revision that narrows courts' discretion to award fees to defendants would enhance the likelihood of objective and consistent results. This, in turn, would promote the strength of the private enforcement policy and restrain frivolous suits at a level appropriately addressing the need for deterrence of spurious claims. Good faith assertions that merely fail before the jury are not an example of spurious litigation. Moreover, fee awards imposed on litigants presenting jury submissible claims thwart the congressional objective of private enforcement.[220]

Congress should pass a generic measure, tailored to further the spe-

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(1) pass legislation that would permit federal courts, in any civil action arising under a statute of the United States or the Constitution, in the interest of justice, to allow reasonable attorney fees and other costs of litigation to a party who substantially prevails if the court determines that (a) the action results in a substantial public benefit; and (b)(1) the economic interest of the party is small in comparison to the costs of effective participation, or (2) the party does not have sufficient resources adequately to compensate counsel.

Hearings: Fees in Federal Courts, supra note 10, at 59 (statement of Susan Goss). "[W]e [National Resource Center for Consumers of Legal Services] argue for a public interest exception to the American rule because we feel that litigation in the public interest has greater social implications than the mere redress of pecuniary loss." *Id.* at 5-6 (statement of Lenore Otrowsky).

218. One proposal submitted to the ABA's House of Delegates in 1977 provided:

Resolved . . . That in civil litigation courts and administrative agencies should require losing parties to pay reasonable attorney fees as an item of costs to prevailing parties unless (1) the conduct of the losing party and opposing the prevailing parties position was substantially justified or (2) for the reason an award would (a) be unjust or (b) tend to have a chilling effect on the utilization of legal remedies or defenses pursued in good faith.

Id. at 41 (statement of C. Dallas Sands).

219. *See* note 215 *supra*.

220. *See* Bennett v. Cramer, 495 F. Supp. 191 (E.D. Wis. 1980). The court stated:

To hold that parties with arguably meritorious claims should be liable for attorney's fees after they lose at trial would have a chlling impact on potential plaintiffs and retard Congressional policy.

. . . .

. . . Had the court believed that Mr. Bennett's [plaintiff's] claim was frivolous, unreasonable or groundless, it would have never allowed that issue to go to the jury.

Id. at 193.

cific policies behind civil rights fee awards. The amended Awards Act, section 1988, would, with the addition of such a section, provide:

> In any civil action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, titles II, VI, and VII of the Civil Rights Act of 1964, and title IX of Public Law 92-318, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs. Prevailing plaintiffs should recover fees unless special circumstances render an award unjust. *Prevailing defendants should recover fees only in exceptional circumstances.*

The legislative history would amplify the significance of the changes[221] and define the "exceptional circumstances" that warrant defendant fee awards. Exceptional circumstances are vexatious, frivolous, unreasonable, or harassing suits instigated without substantial justification. Bad faith is not a *sine qua non* for a defendant award, but merely one factor for courts to consider when evaluating a litigant's justification for filing suit. Substantial justification is measured by a reasonableness standard that essentially examines whether a litigant, not an attorney, should have foreseen the meritlessness of his claim.[222] When the litigant establishes genuine issues of material fact or the law is unclear as to the respective parties' rights, substantial justification is conclusively presumed.[223] To facilitate administration of fee claims and consistency, explicit evaluation by courts of these fairly specific guidelines is required.[224]

This legislative modification of the civil rights prevailing defendant

221. Courts' discretion is narrow under the same prevailing plaintiff standard. *See* note 95 *supra* and accompanying text. Courts' discretion in awarding fees to prevailing defendants is significantly narrowed and limited to situations in which plaintiffs' causes of action clearly lacked legal or factual foundation when filed, or in which plaintiffs' suits evidence harassment, bad faith, or other misconduct.

222. Consideration of a litigant's substantial justification distinguishes the new standard from the *Christiansburg* standard. The reasonableness is not measured from the attorney's perspective because the primary objective of civil rights fee statutes is private enforcement, not punishing attorneys for misconduct or unreasonableness. Moreover, few attorneys would litigate novel claims if courts imposed direct fee shifting against the advocate. Other remedies are better equipped to deal with attorneys who abuse judicial processes and file groundless suits. Imposition of costs under § 1927, and fees and expenses under civil procedure rules when appropriate, serve as sufficient deterrents to attorney misconduct. *See* notes 173, 176 & 179 *supra* and accompanying text.

223. This presumption is appropriate, under a reasonableness standard that measures a layman's motivations, when a litigant's attorney has accepted and prosecuted a suit successfully enough to prevent a court from removing the case from the jury.

224. The trial court should explicitly state its reasoning to facilitate appellate review and promote certainty. *See* Davis v. City of Abbeville, 633 F.2d 1161 (5th Cir. 1981).

fee award standard is necessary to achieve fully private enforcement of civil rights laws. The current prevailing plaintiff standard has proven its value as an effective enforcement incentive. Without alteration of the prevailing defendant standard, however, its capacity to encourage private parties to seek redress under federal civil rights law is emasculated. Frivolous suits remain a perplexing problem in the civil rights context. Nevertheless, statutory fee awards should not exalt eradication of this concern over the private enforcement objective. Irresponsibly liberal fee awards to defendants deter reasonable and justifiable complaints. The proposed Awards Act prevailing defendant standard ensures vigorous enforcement by limiting courts' discretion to award fees to civil rights defendants.

The amended statute thus provides a yardstick to measure the frivolity of a case so that the chancellor need no longer rely on the length of his foot.

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