

ATTORNEYS' FEES: WHAT CONSTITUTES A "BENEFIT" SUFFICIENT TO AWARD FEES FROM THIRD PARTY BENEFICIARIES

I. INTRODUCTION

As a general rule, a court of law does not have power to award attorneys' fees to a successful litigant.¹ A court of law may assess "costs" against a losing party,² but in the United States "costs" do not

1. *E.g.*, *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 391 (1970); *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 717 (1967); *Arcambel v. Wiseman*, 3 U.S. (3 Dall.) 306 (1796); *Gordon v. Woods*, 202 F.2d 476, 479 (1st Cir. 1953); *In re Continental Vending Machine Corp.*, 318 F. Supp. 421, 424 (E.D.N.Y. 1971); Hornstein, *Legal Therapeutics: The "Salvage" Factor in Counsel Fee Awards*, 69 HARV. L. REV. 658 (1956) [hereinafter cited as *Legal Therapeutics*].

This rule, of course, may be altered by statute. A few federal statutes provide for mandatory fee shifting where a plaintiff has been injured by their violation. *E.g.*, Clayton Act § 4, 15 U.S.C. § 15 (1963) (private antitrust action); Communications Act of 1934, § 206, 47 U.S.C. § 206 (1971) (actions against a common carrier). Statutes may also provide for discretionary fee shifting. *E.g.*, Civil Rights Act of 1964, § 204, 42 U.S.C. § 2000a-3(b) (1970) (segregation in places of public accommodation); Securities Act of 1933, § 206, 15 U.S.C. § 77k(e) (1971) (false registration statement).

2. "Costs" had their origin in the Roman law, where the author of a groundless suit had to reimburse his adversary for the expenses incurred in defending his legal rights. The author of the suit abused a privilege of citizenship by bringing a groundless suit, and thus was to be punished. At the early common law, the English crown levied an amercement against the plaintiff if he lost, thereby attempting to discourage the prosecution of wrongful demands. Watson, *A Rationale of the Law of Costs*, 16 CENT. L.J. 306, 306-07 (1883). The Statute of Gloucester, 6 Edw. I, c. 1 (1275) granted costs in certain actions to a successful plaintiff for the purposes of discouraging wrongful defenses and reimbursing plaintiffs for their expenses. Later, the Statute of Westminster, 4 Jac. I, c. 3 (1607), empowered courts of law to award counsel fees to defendants in all actions where such awards might be made to plaintiffs. Both English statutes included attorneys' fees as "costs". Goodhart, *Costs*, 38 YALE L.J. 849, 852 (1929).

Today, "costs" are amounts taxable against the losing party to defray the expenses the successful party incurred in pressing his cause. They are intended as punishment against the defeated party for causing the litigation. *Trust Co. of Chicago v. National Sur. Corp.*, 117 F.2d 816, 818 (7th Cir. 1949); *Vincennes Steel Corp. v. Miller*, 94 F.2d 347, 348 (5th Cir. 1938); Goodhart, *supra* at 853. Costs, being statutory in origin, cannot be levied by a court of law without express statutory authorization. *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 717 (1967); *Bradford v. Southern Ry.*, 195 U.S. 243, 251 (1904); *Day v. Woodworth*, 54 U.S. (13 How.) 363, 372 (1852).

ordinarily include attorneys' fees.³ It is within the inherent power and discretion of a court of equity, however, to grant attorneys' fees in appropriate cases.⁴ Historically, federal courts⁵ have granted fees in two broad categories of cases.

A. *Bad Faith Actions*

One area in which fees are granted is where a party, by bringing an unfounded suit or through procedural misconduct, calls his opponents' attorney's fees upon himself as a penalty.⁶ The granting of fees for

3. *E.g.*, *Kansas City S. Ry. v. Guardian Trust Co.*, 281 U.S. 1, 9 (1930); *Peter Kiewit Sons Co. v. Summit Constr. Co.*, 422 F.2d 242, 274 (8th Cir. 1969). *But see* 5 V.I.C. § 541(b) (1957) (attorneys' fees may be given in all cases as costs). The reason for not following the English practice of awarding fees to the successful litigant in all cases may rest in the psyche of the early American. When the Republic was young, law was considered a body of rules any intelligent man could understand. Paid attorneys were therefore considered not only unnecessary, but their retention placed one's adversary, possibly a poor man, at a disadvantage. Awarding fees merely for winning was therefore considered undemocratic and unfair, especially as lawyers were considered rather shady characters at best. Accordingly, attorney fee provisions were enacted in only a few states, and there they soon fell into disuse because of the reluctance of legislatures to raise the statutory amounts to anywhere near the actual costs of litigation. Goodhart, *supra* note 2, at 873-74.

4. Federal courts, which possessed equity jurisdiction, became endowed with all the powers possessed by the English Court of Chancery at the time the Constitution was adopted. *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161, 174 (1939); *Waterman v. The Canal-Louisiana Bank & Trust Co.*, 215 U.S. 33, 43 (1909); *White v. Berry*, 171 U.S. 366, 376 (1898); *Mississippi Mills v. Cohn*, 150 U.S. 202, 205 (1893); *McConihay v. Wright*, 121 U.S. 201, 206 (1887); *Russell v. Farley*, 105 U.S. 433, 445 (1881); *Payne v. Hook*, 74 U.S. (7 Wall.) 425, 430 (1868); *Fontain v. Ravenel*, 58 U.S. (17 How.) 369, 384 (1855).

The courts of the common law only granted statutory costs, including attorneys' fees, in certain types of actions. Chancery, whose goal was to do justice in each case, had the inherent power to grant costs not otherwise governed by statute according to the facts and circumstances of the case. *Kansas City S. Ry. v. Guardian Trust Co.*, 281 U.S. 1, 9 (1930); *Newton v. Consolidated Gas Co.*, 265 U.S. 78, 82 (1924); *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 460, 462 (1852); *Stallo v. Wagner*, 245 F. 636, 638 (2nd Cir. 1917); *Andrews v. Barnes*[1888] 39 Ch. D. 133, 138. *See* A. EVERTON, *WHAT IS EQUITY ABOUT?* 8 (1970); Goodhart, *supra* note 2, at 854. Chancery would grant attorneys' fees where a party made, but could not sustain, gross charges of fraud and misconduct; where a suit was unjust, vexatious, false, wanton or oppressive; and where a fiduciary relationship existed between the parties and the fiduciary was put to expense either in defending an unfounded suit or in administering, protecting or preserving the trust or pledged property. *Guardian Trust Co. v. Kansas City S. Ry.*, 28 F.2d 233, 241 (8th Cir. 1928), *rev'd on other grounds*, 281 U.S. 1 (1930). *See* Goodhart, *supra* note 2, at 861-62.

5. Except when helpful in the interpretation of federal court decisions, the actions of state courts are outside the scope of this note.

6. *E.g.*, *Universal Oil Prods. Co. v. Root Ref. Co.*, 328 U.S. 575 (1946) (fraud

"bad faith" is analogous to "costs", as they are intended as punishment upon the defeated party,⁷ the purpose being to deter unnecessary litigation and unfair litigious practices.⁸ In practice, this discretion is used sparingly. Courts are reluctant to punish one for bringing or defending what is considered to be an uncertain enterprise. In addition, it is felt the poor will be discouraged from initiating suits if the penalty for losing includes paying opponents' attorney's fees.⁹

B. *Third Party Beneficiaries*

The second category of cases in which fees are allowed is to a plaintiff from third parties where the plaintiff's successful suit confers a benefit upon them.¹⁰ This doctrine derived from the ancient rule that a trustee, because he is under a duty to act for others, is entitled to his expenses in administering the trust from the trust fund.¹¹ Where the trustee refuses to act to preserve or protect the fund, a beneficiary under it can act in the trustee's name.¹² If one creates, protects, or increases a fund in which others are interested, he could be said to be acting as a trustee vis-à-vis the others. Because one is to be encouraged to act as a trustee, and because individual recovery seldom warrants the expense of bringing suit, it was determined by the Supreme

upon the court in conduct of a suit); *Rude v. Buchhalter*, 286 U.S. 451 (1932) (fraud between the parties); *Toledo Scale Co. v. Computing Scale Co.*, 261 U.S. 399 (1923) (contempt of court); *Rolax v. Atlantic Coast Line Co.*, 186 F.2d 473 (4th Cir. 1950) (plaintiff suing to vindicate a right); *Even-Cut Abrasive Bond & Equip. Corp. v. Cleveland Container Co.*, 171 F.2d 873 (6th Cir. 1949) (patent infringement); *Cleveland v. Second Nat'l Bank & Trust Co.*, 149 F.2d 466 (6th Cir. 1945) (fiduciary put to expense in defending an unfounded suit); *Bernstein v. Brenner*, 320 F. Supp. 1080 (D.D.C. 1970) (charge of fraud made but not sustained).

7. See notes 4 & 6 *supra*.

8. Goodhart, *supra* note 2, at 862, 876.

9. See, e.g., *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 718 (1967); *Missouri Pac. R.R. v. Slayton*, 407 F.2d 1078, 1082 (8th Cir.), *cert. denied*, 395 U.S. 937 (1969), *rehearing denied*, 397 U.S. 1081 (1970).

10. E.g., *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970); *Central R.R. & Banking Co. v. Pettus*, 113 U.S. 116 (1885); *O'Hara v. Oakland County*, 136 F.2d 152 (6th Cir. 1943).

11. See, e.g., *Harken v. Brundage*, 276 U.S. 36 (1928); *Meddaugh v. Wilson*, 151 U.S. 333, 343 (1894); *Guardian Trust Co. v. Kansas City S. Ry.*, 28 F.2d 233, 245-46 (8th Cir. 1928); Hornstein, *The Counsel Fee in Stockholder's Derivative Suits*, 39 COLUM. L. REV. 784, 786-87 (1939) (hereinafter cited as *Stockholder's*).

12. *Winton v. Amos*, 255 U.S. 373 (1921). The beneficiary however, unlike the trustee, had to win his suit, as he was under no duty to act for the others. *Stockholder's*, *supra* note 11, at 790.

Court in *Trustees v. Greenough*,¹³ that a successful plaintiff so acting is entitled to contribution for all his litigation expenses, including attorney's fees, from those who share in the fund.¹⁴ Recovery can be based upon two theories, either of which is sufficient. A plaintiff can be viewed as representing all those interested and suing for them on a common cause of action, thereby allowing him fees as the agent of all;¹⁵ or, since to allow others to participate in the fund without contribution would enrich them unjustly at the expense of the plaintiff, recovery can be granted upon quasi-contract.¹⁶

After *Trustees*, courts began to find it both equitable and necessary to require third parties benefiting from another's suit to contribute to the plaintiff's litigation expenses in additional types of cases. As courts have extended the granting of fees, the continuing problem has been to determine what constitutes a "benefit" so that its conferral upon another will require him to contribute to the expenses of the suit procuring it. This note will explore what a "benefit" has been, what it is today, and what it may be tomorrow.

II. ALLOWING FEES FOR NON-PECUNIARY BENEFITS

A. *Sprague v. Ticonic National Bank*

Trustees showed that third party beneficiaries were liable for contribution for expenses incurred in bringing a fund into court. It logically followed that one should be awarded recovery if he established, not a fund, but the right to a fund. In the landmark case of *Sprague v. Ticonic National Bank*,¹⁷ plaintiff and fourteen others had trust funds in Ticonic. The monies were secured by bonds while on deposit in the bank pending investment. Ticonic then failed, and another bank assumed its indebtedness. When the second bank also failed, a common receiver was appointed. Plaintiff filed a bill against the banks and their receiver to impress upon the proceeds of the bonds a lien for

13. 105 U.S. 527 (1881).

14. *Id.* at 532-33.

15. *Id.* at 534.

16. *Id.* at 532. The benefited party had to accept the benefit conferred so that the court could find, in effect, some sort of implied agreement between the parties not unlike the agency argument itself. This was deemed necessary to circumvent the general rule that one who confers a benefit upon another who does not request it is not entitled to contribution from the benefited party. See RESTATEMENT, RESTITUTION § 106 (1937).

17. 307 U.S. 161 (1939).

her trust deposit. After plaintiff succeeded in establishing the lien,¹⁸ she brought this action to recover her counsel's fees and other litigation expenses from the fund created by the sale of the bonds. The lower courts denied recovery on the ground it was beyond the power of a federal district court to make such an award.¹⁹ The Supreme Court reversed, holding that all federal courts have broad discretionary power to award attorneys' fees in equity suits,²⁰ which power is properly exercised where a plaintiff recovers a common fund.²¹ The present case, the Court analogized, was merely a variant of the fund cases.²² Here, although the fund was not brought into court, the right of the other beneficiaries to the proceeds was established by *stare decisis*.²³

The *stare decisis* effect, the Court said, could be a sufficient enough benefit to the third parties to require contribution.²⁴ The case was remanded to the district court for an actual determination on the merits of the case.²⁵ In making its decision, the district court was to look to the totality of the facts, remembering that awards of attorneys' fees "are appropriate only in exceptional cases and for dominating reasons of justice."²⁶

Sprague dealt with the inherent power of federal courts to award attorneys' fees. That power is broad; courts may grant them at their discretion whenever they determine there is a "dominating reason of justice." Although *Sprague* analogized to the fund cases, the benefit in the case was non-pecuniary. The groundwork was therefore laid for a more general acceptance of non-pecuniary benefits.

B. Shareholder Derivative Suits

By another analogy to the trustee precedent, courts granted successful plaintiffs, suing derivatively, attorneys' fees from the corporation

18. *Id.* at 162-63.

19. *Id.* at 163.

20. *Id.* at 164.

21. *Id.* at 166.

22. *Id.*

23. *Id.* at 168.

24. *Id.* at 167.

25. On remand, the district court found that the plaintiff had been put to considerable expense in her suit and that she had conferred a benefit upon others. Therefore, the court concluded, this was a proper case in which to award attorneys' fees. *Sprague v. Ticonic Nat'l Bank*, 28 F. Supp. 229, 230 (S.D. Me. 1939). Recovery was the full amount of her legal expenses incurred in bringing the original action. *Id.* at 231.

26. 307 U.S. at 167.

when their suit resulted in monetary recovery by the corporation.²⁷ Because all the shareholders benefit by such a suit, as owners of the corporation,²⁸ and because the corporation is a sort of a fund,²⁹ recovery could be permitted out of it.³⁰ As a separate entity, the corporation also benefits, for a derivative suit is on a cause of action belonging to the corporation.³¹ Therefore, fees could be granted upon either agency or quasi-contract, as to the corporation or the shareholders collectively. Agency, standing alone, would appear to permit recovery by any plaintiff who brings a derivative suit. The courts, however, require the suit to be successful. Reasoning that success is a measure of meritoriousness, a plaintiff by winning did only what the corporation or another shareholder should have done, and it is reasonable to view him as their agent.³² After *Sprague*, since the basis for recovery in derivative suits and the fund cases are indetical,³³ there was no reason to limit the awarding of attorneys' fees in derivative suits to cases of pecuniary recovery.

C. *Individual Shareholder Suits*

An individual shareholder can sue an officer or director of a corporation for a breach of their fiduciary duty to him.³⁴ Because there is present in such a case neither agency with the corporation nor with all the shareholders, because the suit is upon a private cause of action, and because only the individual shareholder benefits, a plaintiff can not recover his attorney's fees.³⁵

27. *E.g.*, *Waters v. Disbrow & Co.*, 70 F.2d 572 (8th Cir. 1934); *Hutchinson Box Board & Paper Co. v. Van Horn*, 299 F. 424 (8th Cir. 1924); *Colley v. Wolcott*, 187 F. 595 (8th Cir. 1911); *Steinberg v. Hardy*, 93 F. Supp. 873 (D. Conn. 1950); *Coyler v. Atlantic & N.C.R.R.*, 132 F. 570 (C.C. E.D.N.C. 1904). Recovery in a derivative suit adheres to the corporation, not to the individual litigant. *See* H. HENN, *HANDBOOK OF THE LAW OF CORPORATIONS AND OTHER BUSINESS ENTERPRISES* § 373 (2d ed. 1970).

28. H. HENN, *supra* note 27, at § 373.

29. *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 394-95 (1970).

30. *See* cases cited note 27 *supra*.

31. The corporation, though listed as a defendant, is in actuality a plaintiff. *Stockholder's*, *supra* note 11, at 796.

32. *See* cases cited note 27 *supra*.

33. That is, a policy to encourage suits coupled with the theories of agency and unjust enrichment.

34. *See* H. HENN, *supra* note 27, at § 360; *Stockholder's*, *supra* note 11, at 785.

35. *Cf.* *Stockholder's*, *supra* note 11, at 790.

The line between individual and derivative suits has never been clear. The breach of an officer's or director's duty to a shareholder often involves a breach to the corporation as well.³⁶ In *Holthusen v. Edward G. Budd Mfg. Co.*,³⁷ an individual, suing for himself, was granted attorneys' fees from the corporation after he secured an injunction prohibiting the directors from issuing stock options to executives on the inequitable terms established in the company by-laws. The result obtained by the suit, retention of assets in the corporation, was equivalent, the court said, to the creation of a fund.³⁸ This result benefited both the corporation and the shareholders.³⁹ The case, therefore, was the same as if it were a derivative suit, and the plaintiff was entitled to his attorney's fees.⁴⁰

By adopting *Sprague* into the corporate context, *Holthusen* set the stage for an increase in the number of cases in which fees could be granted. Courts could henceforth look to the result obtained, not the form of the action,⁴¹ and the benefit could be non-pecuniary in nature. Shareholder suits were to be encouraged, because they protect minority stockholder rights, police corporations, and deter corporate mismanagement. And one way to encourage suits, which are expensive, is through the granting of attorneys' fees.⁴² *Holthusen*, then, prepared the way for the tests for a "benefit."

III. THE SUBSTANTIAL BENEFIT TEST

A. *Development of the Test*

When pecuniary recovery was necessary to an awardance of fees, courts willingly granted them. If a plaintiff won, it was fair upon unjust enrichment grounds to have the benefited third parties contribute

36. H. HENN, *supra* note 27, at § 360.

37. 55 F. Supp. 945 (E.D. Pa. 1944).

38. *Id.* at 947.

39. *Id.*

40. *Id.*

41. Traditionally, legal remedies weren't given in an equitable derivative suit, nor equitable relief in a legal individual suit. Cf. *Schechtman v. Wolfson*, 244 F.2d 537 (2d Cir. 1957). Further, the old view was that where an individual suit was legal, it could not be joined with a derivative suit. After *Holthusen*, the trend was to permit joinder. H. HENN, *supra* note 27, at § 353.

42. E.g., *Angoff v. Goldfine*, 270 F.2d 185, 192 (1st Cir. 1959); *Holthusen v. Edward G. Budd Mfg. Co.*, 55 F. Supp. 945, 946 (E.D. Pa. 1944); H. HENN, *supra* note 27, at § 358; *Stockholder's*, *supra* note 11, at 791.

to the expenses of the suit. Agency could also be found in the assumption the others would have brought the suit if the plaintiff had not. Once non-pecuniary recovery was enough to entitle a plaintiff to fees, however, courts became concerned over the possibilities of nuisance and strike suits, especially in the corporate context.⁴³ To forestall that development, courts felt they needed a standard by which to measure the benefit conferred. They finally settled upon requiring a "substantial" benefit.⁴⁴ In *Bosch v. Meeker Cooperative Light & Power Association*,⁴⁵ a "substantial" benefit was defined as one which:

. . . must be something more than technical in its consequence and be one that accomplishes a result which corrects or prevents an abuse which would be prejudicial to the rights and interests of the corporation or affect the enjoyment or protection of an essential right to the shareholder's interest.⁴⁶

This standard, intended to deter nuisance suits,⁴⁷ bears no relationship to the theoretical underpinnings of allowing recovery of fees at all.⁴⁸ In practice it was used to limit the granting of fees. *Schechtman v. Wolfson*,⁴⁹ where the test was born, is a good example of how it operates in practice. In *Schechtman*, plaintiff brought a derivative suit aimed at interlocking directorates in competing corporations, a violation of Section 8 of the Clayton Act.⁵⁰ The court, although acknowledging both that the general rule was to allow fees in successful derivative suits whether or not a fund is recovered,⁵¹ and that private suits to enforce the law were to be encouraged,⁵² denied the plaintiff's attorney's fees because the claimed benefits were not substantial."⁵³

43. "A 'strike suit' is an action brought by a security holder, not in good faith, but, through the exploitation of its nuisance value, to force the payment of a sum disproportionate to the nominal value of his interest as the price of discontinuance." Note, *Extortionate Corporate Litigation: The Strike Suit*, 34 COLUM. L. REV. 1308 (1934).

44. *Schechtman v. Wolfson*, 244 F.2d 537, 540 (2d Cir. 1957).

45. 257 Minn. 362, 101 N.W.2d 423 (1960).

46. *Bosch v. Meeker Co-op Light & Power Ass'n*, 257 Minn. 362, 367, 101 N.W.2d 423, 427 (1960).

47. *Schechtman v. Wolfson*, 244 F.2d 537, 540 (2d Cir. 1957).

48. That is, fees are awarded to a plaintiff because he acts for others or confers a benefit upon them. After *Sprague* and *Holthusen*, any limit placed upon the quantity of the benefit necessary was purely arbitrary.

49. 244 F.2d 537 (2d Cir. 1957).

50. 15 U.S.C. § 19 (1963).

51. 244 F.2d at 539-40.

52. *Id.* at 539.

53. *Id.* at 540.

Arguably, however, if the court in *Bosch* was correct in its definition of the test,⁵⁴ both the corporation and its shareholders received benefits through plaintiff's suit. The corporation had its affairs straightened out,⁵⁵ and the shareholders saw public confidence in the corporation restored.⁵⁶ Recovery could have been premised upon agency, as the plaintiff brought the corporation into line with federal statutory policy, or upon unjust enrichment, as he had enhanced the value of the corporate stock. In addition, the policy of encouraging plaintiffs to redress corporate mismanagement and enforce federal policies was certainly present.⁵⁷

Schechtman recognized that fees could be granted if a court found the non-pecuniary benefit to be "substantial." As *Holthusen* had shown, there was no reason to confine recovery to derivative suits. In *Bakery & Confectionery Workers of America v. Ratner*,⁵⁸ attorney's fees were granted a union member who, by securing injunctive relief to stop union officials from continuing to engage in acts of malfeasance in office, conferred substantial benefits upon the union and all its members.⁵⁹

B. *The Substantial Benefit Test in Practice*

Because the substantial benefit test was indefinite by definition, and because fees were granted at the discretion of the court, it was inevitable that holdings would vary. A few patterns have emerged, however, which are still with us today.

Where recovery is pecuniary, attorneys' fees are awarded upon unjust enrichment grounds irrespective of the form of action or the nature of the third party beneficiary.⁶⁰ It has been held, at least where the

54. See note 46 *supra* and accompanying text.

55. See *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 396 (1970); *United States v. Sears, Roebuck & Co.*, 111 F. Supp. 614, 616 (S.D.N.Y. 1953).

56. See *Ratner v. Bakery & Confectionery Workers Int'l Union of Am.*, 354 F.2d 504, 506 (D.C. Cir. 1965).

57. *E.g.*, *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 396 (1970); *Newman v. Piggie Park Enterprises*, 390 U.S. 400, 402 (1968); *Stockholder's*, *supra* note 11, at 791.

58. 335 F.2d 691 (D.C. Cir. 1964).

59. The benefits were: cessation of pilfering from the union treasury, strengthening of the pension fund, introduction of proper accounting procedures, and requiring union officials to act in accordance with the union constitution. *Id.* at 696.

60. *E.g.*, *Freeman v. Ryan*, 408 F.2d 1204 (D.C. Cir. 1968) (class action, benefit to similarly situated individuals outside class); *Jones v. Uris Sales Corp.*, 373 F.2d

benefited party is an organization, that a pecuniary judgment is enough, even if it is not actually collected.⁶¹ A few older cases denied recovery where the court could not find an implied contract between the plaintiff and the benefited parties.⁶² That position is a clear misreading of the letter and spirit of the fund cases, and is not followed today.

Where the benefit conferred is non-pecuniary, there is more divergence in the opinions. Most courts, following *Schechtman*, look to the nature of the benefit conferred. Thus, recovery of attorneys' fees has been allowed in situations like *Sprague*, where a plaintiff by his suit establishes the right of others to a fund⁶³ or establishes others' claims arising out of a common cause of action,⁶⁴ even if the proceeding is administrative in form.⁶⁵ Some courts even today deny recovery of fees where the benefit is non-pecuniary and they cannot find an implied contract with those benefited.⁶⁶ On theoretical grounds, this position is as wrong here as in the case of pecuniary recovery. The real reason these courts deny attorneys' fees is because they feel such an award constitutes a windfall to the attorney.⁶⁷ In situations such as *Holthusen*, where a plaintiff by his action retains money in an organization, fees are awarded.⁶⁸ Recovery has been allowed where members of an association filed a petition, in opposition to majority sentiment, requesting receivers be appointed for the association and a fund

644 (2d Cir. 1967) (derivative suit, benefit to corporation and shareholders); *Bebchick v. Public Utilities Comm'n*, 318 F.2d 187 (D.C. Cir.), *cert. denied*, 373 U.S. 913 (1963) (class action benefited other individuals); *Powell v. Pennsylvania R.R.*, 267 F.2d 241 (3d Cir. 1959) (union class action, benefit to non-union employees); *Smolowe v. Delendo Corp.*, 136 F.2d 231 (2d Cir. 1943) (derivative suit benefited corporation); *Philadelphia Elec. Co. v. Anaconda Am. Brass Co.*, 47 F.R.D. 557 (E.D. Pa. 1969) (class action; benefit to all class members even if didn't want successful attorney). See *Wright, Class Actions*, 47 F.R.D. 169, 185 (1969).

61. *Teamster's Local 107 v. Cohen*, 220 F. Supp. 735 (E.D. Pa. 1963).

62. *Lea v. Paterson Sav. Inst.*, 142 F.2d 932 (5th Cir. 1944); *Abbott, Puller & Myers v. Peyser*, 124 F.2d 524 (D.C. Cir. 1941).

63. *Gibbs v. Blackwelder*, 346 F.2d 943 (4th Cir. 1965).

64. *Doherty v. Bress*, 262 F.2d 20 (D.C. Cir. 1958), *cert. denied*, 359 U.S. 934 (1959).

65. *Honda v. Mitchell*, 419 F.2d 324 (D.C. Cir. 1969).

66. See, e.g., *Schleit v. British Overseas Airways Corp.*, 410 F.2d 261 (D.C. Cir. 1969); *Preston v. United States*, 284 F.2d 514 (9th Cir. 1960).

67. Cf. cases cited note 66 *supra*.

68. E.g., *Globus, Inc. v. Jaroff*, 279 F. Supp. 807 (S.D.N.Y. 1968); *Teamster's Local 107 v. Cohen*, 220 F. Supp. 735 (E.D. Pa. 1963).

was later created when the association went into receivership.⁶⁹ Similarly, an award was made to an attorney for a shareholder who notified the corporation that certain named directors were engaging in short swing profits and the corporation itself later recovered from the directors.⁷⁰

A few courts, instead of looking to the type of benefit conferred, look to whom is benefited. In these cases, which have arisen only in an organizational context, the courts attempt to distinguish between benefits accruing to the organization as an entity or the members collectively, on the one hand, and benefits to members if less than all, on the other. If the benefit to the individuals "outweighs" those to the organization or the members collectively, fees are denied.⁷¹ Fees have also been denied an attorney-shareholder who brought a derivative suit, on the theory an attorney is more likely to bring a nuisance suit because he receives the fee.⁷² The better view would be to do as the majority of the courts and not weigh the benefit among the beneficiaries. Attorneys' fees should be awarded, in relation to the value of the benefit conferred, from all benefited third parties.⁷³

As the substantial benefit test has been used, then, pecuniary recovery is always "substantial." In non-pecuniary cases, where the courts have discretion to look to the parties benefited or to determine what kind of a benefit is "substantial," the results vary. While most courts are liberal, there exists the opportunity to be niggardly. This latter attitude may work hardship upon plaintiffs who have valid claims but not the money to sue. This is especially true in the corporate context, where suits are expensive to maintain. Such an attitude clashes with both the policy of encouraging shareholder suits and the policy of encouraging private persons to act as private attorney generals by vindicating federal statutes.⁷⁴ Because it is so easy to vitiate those policies through use of the substantial benefit test, that test has recently been extended.

69. *Buford v. Tobacco Growers' Co-op Ass'n*, 42 F.2d 791 (4th Cir. 1930).

70. *Gilson v. Chock Full O'Nuts Corp.*, 331 F.2d 107 (2d Cir. 1964).

71. *E.g.*, *Missouri Pac. R.R. v. Slayton*, 407 F.2d 1078 (8th Cir. 1969); *Cutler v. American Fed'n of Musicians of U.S. & Can.*, 231 F. Supp. 845 (S.D.N.Y. 1964).

72. *Giesecke v. Pittsburgh Hotels*, 82 F. Supp. 64 (W.D. Pa. 1949), *aff'd*, 180 F.2d 65 (3rd Cir. 1950).

73. *See* *Murphy v. North Am. Light & Power Co.*, 33 F. Supp. 567 (S.D.N.Y. 1940). *Cf.* *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970).

74. *See* notes 44-73 *supra* and accompanying text.

IV. THE SUBSTANTIAL SERVICE TEST

A. *Mills v. Electric Auto-Lite Co.*

In *Mills v. Electric Auto-Lite Co.*,⁷⁵ plaintiff sought to dissolve a merger under Rule 14(a) of the Securities Exchange Act of 1934, forbidding solicitation of shareholders' votes by a materially misleading proxy statement.⁷⁶ The Supreme Court determined the solicitation to be misleading, and remanded to the district court for the proper relief. The Court granted plaintiff's petition for an award of counsel's fees from the company despite the facts that the ultimate relief was unknown and that other sections of the Act specifically granted plaintiffs' attorneys' fees,⁷⁷ whereas Section 14(a) did not.⁷⁸ The general rule, the Court said, is to grant a plaintiff attorneys' fees where he benefits a class as himself.⁷⁹ Here the plaintiff vindicated a breach of a fiduciary duty owed to the corporation by a director. Because it is the purpose of Section 14(a) to insure fair and informed corporate suffrage, the plaintiff, by fulfilling that purpose, "rendered a substantial service to the corporation and its shareholders."⁸⁰ That service was enough to entitle plaintiff to an award of fees from the corporation.⁸¹

B. *Mills Analyzed*

Some courts have viewed *Mills* as merely adding one more limited exception to the general rule prohibiting the granting of attorneys' fees.⁸² The Court in *Mills*, however, implied the decision was not to

75. 396 U.S. 375 (1970).

76. 15 U.S.C. § 78n(a) (1963).

77. §§ 9e and 18a (15 U.S.C. §§ 78i(e) and 78r(a)) of the Act deal, respectively, with manipulation of security prices and misleading statements in documents filed with the SEC. The Court cited *Smolowe v. Delendo Corp.*, 136 F.2d 231, 241 (2d Cir. 1943) as authority that those two provisions do not hamper a court in its granting of additional remedies for violations of other provisions of the Act because they only provide for additional punishment of wrongdoers in those specific situations. 396 U.S. at 390.

78. § 14(a), in fact, fails to even provide for a private right of action. That defect had been cured by implication in the case of *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964). The Court, then, was not dealing with a case where there were detailed statutory remedies, as were present in *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714 (1967), and therefore ignored the arguments utilized in *Fleischmann* to deny fees to the plaintiff.

79. 396 U.S. at 392.

80. *Id.* at 396.

81. *Id.*

82. *See, e.g., Bangor & Aroostook R.R. v. Brotherhood of Locomotive Firemen &*

be narrowly read.⁸³ Based upon the rationale employed in *Mills*, there is no reason to limit its application to either securities cases or derivative suits.

The Court determined that the plaintiff conferred upon the corporation a substantial *service*. A "service" is qualitatively different from a "benefit" as used in the substantial benefit test. "Benefit" connotes the conference of something tangible upon third parties;⁸⁴ a "service," on the other hand, is a helpful act, a good turn, useful labor that does not produce a tangible commodity.⁸⁵ There was no pecuniary recovery in *Mills*, nor a chance of any on remand.⁸⁶ By going through an analysis of the substantial benefit test, and grounding its decision on that line of cases,⁸⁷ the Court could only have meant to extend the meaning of "benefit" to include services performed for others. One service for which fees could be awarded is the establishing of a statutory violation by one's fiduciary. *Mills* thus impliedly overruled cases such as *Schechtman*, where fees were denied for the vindication of a statutory wrong.⁸⁸

The *Mills* Court also talked of "corporate therapeutics," that attorneys' fees are necessary to encourage corporate suits because they promote deterrence and redress of malfeasance by corporate officials.⁸⁹ This type of argument is equally applicable in non-corporate situations where one in a position of authority violates a statutory or common law

Enginemen, 442 F.2d 812 (D.C. Cir. 1971) (fees denied union which recovered monies due members and the union itself by certain railroads); *Yablonski v. United Mine Workers of Am.*, 314 F. Supp. 616 (D.D.C. 1970) (administrator of deceased union activist refused fees in cases where deceased had showed union discriminated against him in elections for union office).

83. 396 U.S. at 391.

84. In the fund cases, there was direct pecuniary recovery. In *Sprague* and *Holthusen*, and the cases which follow them, there was eventual pecuniary recovery. Fees were merely granted one or two steps removed in the process. See notes 60-70 *supra* and accompanying text.

85. WEBSTER'S SEVENTH NEW COLLEGIATE DICTIONARY 783 (1963).

86. 396 U.S. at 389, 396.

87. *Id.* at 393-96.

88. See notes 50-56 *supra* and accompanying text.

89. The term "corporate therapeutics" was coined by Professor Hornstein and expounded in two extremely influential law review articles, *The Counsel Fee in Stock-Holder's Derivative Suits*, 39 COLUM. L. REV. 784 (1939) and *Legal Therapeutics: The "Salvage" Factor in Counsel Fee Awards*, 69 HARV. L. REV. 658 (1956). The former of these articles was relied upon by the court in *Holthusen v. Edward G. Budd Mfg. Co.*, 55 F. Supp. 945, 947 (E.D. Pa. 1944), and has been cited by numerous other courts.

fiduciary duty. In the hands of a sympathetic court, the liberality of *Mills* could be translated into *social* therapeutics.⁹⁰

Sufficiency, a standard by which to measure the meritoriousness of a suit, has been deemed necessary, where fees are granted for non-pecuniary benefits, to prevent nuisance suits.⁹¹ In its form of "substantiality," retained by the Court in *Mills*,⁹² it allows an unsympathetic court to place an uncertain burden of proof upon the plaintiff.⁹³ The expense of bringing an unmeritorious suit, however, which can be easily measured by equating meritoriousness with victory, should in itself provide a sufficient deterrent to nuisance suits. As federal courts can review and approve any settlement of a class action or derivative suit,⁹⁴ collusion should be prevented. The courts can also vary the amount of the fee granted. If the plaintiff wins, his suit is *per se* meritorious, and he should recover at least nominal fees. *Quantum meruit* for more important cases would, of course, be higher, thus encouraging the vindication of important statutory policies.⁹⁵ As a last resort, and for a flagrant case, the court could invoke the bad faith doctrine and grant fees to the plaintiff's opponent.⁹⁶ Therefore, if suits to vindicate statutory duties and policies are to be encouraged, it would make more sense to drop the requirement of "substantiality." That requirement is not only vague, but can be used to vitiate the very policies the rule is intended to encourage.

If *Mills* is carried to its logical extension, there should be a new rule in non-pecuniary third party beneficiary cases: When a plaintiff determines a third party's legal rights in a matter in which the plaintiff also has a legal interest, the third party is liable for contribution to plaintiff's attorney's fees.

C. *Problems with the Rule: Causation*

Where the plaintiff's suit has gone to final judgment, or there has been a court-approved settlement, there is no problem in finding a

90. See p. 288 *infra*.

91. See notes 43-47 *supra* and accompanying text.

92. 396 U.S. at 396.

93. See Comment, *Shareholder Suits: Pecuniary Benefit Unnecessary for Counsel Fee Award*, 13 STAN. L. REV. 146, 150 (1960).

94. FED. R. CIV. P. 23(e), 23.1, 23.2.

95. See Comment, *Attorneys' Fees in Shareholder Derivative Suits: The Substantial Benefit Rule Reexamined*, 60 CAL. L. REV. 164, 190 (1972) [hereinafter cited as *Reexamined*].

96. See notes 6-9 *supra* and accompanying text.

“determination” of another’s legal rights. Where, however, the plaintiff has taken some sort of affirmative action and the defendant then acts to correct the abuse, the problem of causation arises. Several courts, where the suit has been settled prior to final determination, have used as a standard whether plaintiff’s suit was sufficient to withstand a motion to dismiss.⁹⁷ One commentator, taking that as a starting point, has suggested the following: Where a suit becomes moot by defendant’s unilateral act after plaintiff files his suit, the ability of the allegations to withstand a motion to dismiss should be sufficient unless the defendant can produce evidence he contemplated the move prior to knowledge of plaintiff’s actions and that he was not motivated by it. Ability to withstand a motion to dismiss would also be sufficient if settlement is made after the motion is denied. However, if a settlement is made prior to the time a suit is filed or before defendant contests it in any way, to allow defendant the benefit of the doubt the plaintiff should have to show his claim can withstand a motion for summary judgment. This higher requirement should prevent collusive suits by requiring the plaintiff to show the defendant should have acted on his own. If a settlement results from arbitration, no further test of the merits is necessary.⁹⁸ This scheme seems reasonable for, by adopting a minimal standard, it promotes suits, while retaining the requirement of meritoriousness.

D. *Problems with the Rule: Windfall Aspects*

In cases of non-pecuniary recovery, courts are sometimes reluctant to allow attorneys’ fees where to do so takes on the appearance of giving the attorney involved a windfall.⁹⁹ Since the attorney receives the reasonable value of his services measured by the total value of the benefit conferred on everyone,¹⁰⁰ he may be able to recover fees from people

97. See, e.g., *Kahan v. Rosenstiel*, 424 F.2d 161 (3rd Cir.), cert. denied, 398 U.S. 950 (1970); *Schechtman v. Wolfson*, 244 F.2d 537 (2nd Cir. 1957); *Globus, Inc. v. Jaroff*, 279 F. Supp. 807 (S.D.N.Y. 1968).

98. *Reexamined*, supra note 95, at 189-90.

99. See notes 60-67 supra and accompanying text.

100. Absent a stipulated or contingent fee arrangement, the attorney will receive as compensation the reasonable value of his services. The determination of that value is a matter of discretion for the trial court. See, e.g., *Ratner v. Bakery & Confectionery Workers Int’l Union of Am.*, 354 F.2d 504, 506-07 (D.C. Cir. 1965); *Angoff v. Goldfine*, 270 F.2d 185, 193 (1st Cir. 1959); *Legal Therapeutics*, supra note 1, at 682. If the trial court abuses its discretion, an appellate court may reduce

he never even contemplated. Thus, an attorney for a plaintiff who files a class action just prior to the running of the statute of limitations, in which suit others join,¹⁰¹ but who later separate out and pursue their own suits,¹⁰² should receive fees from them if they recover.¹⁰³ Or, if a plaintiff brings a private antitrust suit without a prior governmental action,¹⁰⁴ all who later bring actions in reliance upon plaintiff's determination of defendant's liability should have to contribute to plaintiff's attorney.¹⁰⁵

Courts are liable in these situations to dredge up the discredited doctrine of implied contract¹⁰⁶ or find other reasons to deny fees to the attorney. In light of *Mills* and its policy considerations, a better approach would be not to deny fees to the attorney, but to reward the plaintiff. It is, after all, the plaintiff who is to be encouraged to sue. This could be done in all cases by crediting any recovery of fees from non-parties against the fees the successful plaintiff has paid or contracted to pay his attorney.¹⁰⁷ It is arguable that this, in turn, unjustly enriches the plaintiff vis-à-vis third parties. It is, however, the plaintiff who sued and took the risk of losing, and he should be rewarded for his "pioneering spirit." For the same reasons, an attorney who himself brings the suit should not be denied reasonable fees.

V. POST MILLS DEVELOPMENTS

Mills has received a mixed reception in the lower federal courts.

the fee awarded. *See, e.g.*, *Lucern Investment Co. v. Estate Belvedere, Inc.*, 411 F.2d 1205, 1207 (3rd Cir. 1969).

101. FED. R. CIV. P. 23(c)(2) allows a court to hold open a suit for a reasonable time to allow other members of the class to join.

102. FED. R. CIV. P. 21 provides for separation out.

103. *Cf. Philadelphia Elec. Co. v. Anaconda Am. Brass Co.*, 47 F.R.D. 557 (E.D. Pa. 1969). *But see Wright, Class Actions*, 47 F.R.D. 169, 181 (1969).

104. The United States may bring an antitrust suit, and any final judgment or decree entered in a governmental suit is prima facie evidence against the same defendant in a subsequent private suit. 15 U.S.C. § 16(a) (1963).

105. In order to prevail in a treble damage suit, the plaintiff must show, in addition to a violation of the antitrust laws by the defendant, which may be supplied by an earlier suit, that he suffered a pecuniary injury to his business or property caused by defendant's violation. 15 U.S.C. § 15 (1963). *See E. TIMBERLAKE, FEDERAL TREBLE DAMAGE ANTITRUST ACTIONS* 18-26 (1965); Comment, *Causation for Treble Damages—Section 4 of the Clayton Act*, 32 U. PITT. L. REV. 193 (1970).

106. *See* note 66 *supra* and accompanying text.

107. *See Gibbs v. Blackwelder*, 346 F.2d 943, 946 (4th Cir. 1965); *In re Continental Vending Mach. Corp.*, 318 F. Supp. 421, 432-33 (E.D.N.Y. 1971). *Cf. Hobbs v. McLean*, 117 U.S. 567, 582 (1886).

The reception has been generally favorable. In *Bright v. Philadelphia-Baltimore-Washington Stock Exchange*,¹⁰⁸ plaintiff member of the Exchange obtained a declaratory judgment that he had been wrongfully kept from the governing board of the exchange by the incumbent members. He was granted his attorney's fees from the exchange because by his action he preserved the integrity of the exchange, which action "confer[red] a type of benefit upon the exchange and its members."¹⁰⁹

In one area, however, there has been considerable controversy. Plaintiffs have attempted to use the *Mills* rationale to extract fees from the losing party and not from a benefited third party. In these cases the courts have split. Fees have been assessed against defeated defendants in civil rights and securities cases.

*Lee v. Southern Home Sites Corporation*¹¹⁰ involved a civil rights suit against a defendant who discriminated in selling home lots. The plaintiff was awarded fees from the defendant because the court deemed it necessary to effectuate the Congressional policy of eliminating racial discrimination.¹¹¹

In *Kahan v. Rosenstiel*,¹¹² plaintiff shareholder sued certain directors and the controlling shareholder of the corporation for a violation of Section 10(b) of the Securities Exchange Act of 1934,¹¹³ alleging misrepresentation of a tender offer. The controlling shareholder sold all his stock to a second corporation, and announcements were issued stating an equivalent offer would be forthcoming to the rest of the shareholders. When the offer turned out to be too low, the plaintiff instituted suit, both individually and derivatively. Later, the offering corporation raised its offer to equivalent terms. Plaintiff then petitioned for his litigation expenses from the defendants. The lower court granted defendants' motion to dismiss, and the Court of Appeals, after determining that plaintiff's suit stated a cause of action, reversed. Citing *Mills*, the court held that if on remand plaintiff could establish a violation of 10(b), the defendants would be liable for fees.¹¹⁴

108. 327 F. Supp. 495 (E.D. Pa. 1971).

109. *Id.* at 506. See *Rosen v. Public Service Elec. & Gas Co.*, 328 F. Supp. 454 (D.N.J. 1970); *Fischman v. Wexler*, 309 F. Supp. 976 (D. Del. 1970).

110. 444 F.2d 143 (5th Cir. 1971).

111. *Id.* at 144-45.

112. 424 F.2d 161 (3rd Cir. 1970).

113. 15 U.S.C. § 78j(b) (1971).

114. 424 F.2d at 174.

The implied rationale in the preceding two cases is that, as private suits to redress statutory policies and breaches of fiduciary duties are to be encouraged, and as the determination of another's legal right is sufficient to require him to contribute, then the plaintiff through his suit confers a substantial service upon the defendant, and it is as fair to assess fees against him as against third parties. Those cases which have refused to assess fees against the defendant have rejected this argument on the ground that to so do constitutes, in essence, "punishment," which cannot be inflicted upon a losing party without some further showing of bad faith.¹¹⁵ This is the better view. Bad faith is a distinct and separate ground for awarding attorneys' fees. Where fees are awarded on that basis, courts have traditionally found the suit to be oppressive, vexatious or fraudulent.¹¹⁶ Those grounds should not be confused with conferring benefits upon third parties. The Court in *Mills*, in fact, alluded to that difference when it stated that fees are not given in the ordinary case as punishment.¹¹⁷

In civil rights cases, granting fees against a defendant may be desirable. It does not appear unreasonable to find bad faith where one knowingly denies to another his constitutional rights, thereby forcing the injured party to sue. To eliminate confusion, however, decisions so holding should clearly label their actions as proceeding upon bad faith grounds.¹¹⁸

In other cases of statutory redress outside the civil rights area, where bad faith may not be as clear, if the defendant is an official of an organization or an elected governmental official, fees could be awarded by adopting a theory of "social therapeutics." Redressing the organizational wrong confers a benefit upon the organization, and therefore the organization is liable for fees. In the case of a governmental official, where it is his responsibility to enforce a law, or take action under it, and he refuses, then a determination of his responsibility innures to the benefit of the public, and fees should be recovered from the

115. See *Walker v. C.B.S., Inc.*, 443 F.2d 33 (7th Cir. 1971); *Bangor & Aroostook R.R. v. Brotherhood of Locomotive Firemen & Enginemen*, 442 F.2d 812 (D.C. Cir. 1971); *de Haas v. Empire Petroleum Co.*, 435 F.2d 1223 (10th Cir. 1970).

116. See notes 4, 6-9 *supra* and accompanying text.

117. 396 U.S. at 396-97.

118. In *Bradley v. School Board of City of Richmond, Va.*, 324 F. Supp. 401 (E.D. Va. 1971) the court assessed fees against the school board on bad faith grounds, but clothed its decision in the language of *Mills*. *Id.* at 402.

public treasury.¹¹⁹ Recovery would be upon third party grounds, not bad faith. Awards of attorneys' fees in these instances would effectuate the policy of promoting individual suits to enforce statutory policies and at the same time would uphold the equally strong policy against punishing a defendant without a further showing of bad faith.¹²⁰

The court in *Kahan*, however, was clearly wrong.¹²¹ The case, if *Mills* were followed, called for an award from the corporation or all the shareholders. Without an explicit showing of bad faith, fees should not have been levied against the defendants. The Court in *Mills* was careful to say determination of a right is not rewardable *per se*. Not only is that punishment, but if courts can grant fees in such cases to the plaintiff, then "they should be permitted to do the same thing for the defendant when he succeeds in his defense, otherwise the parties are not suffered to contend in an equal field."¹²² To allow this would vitiate the very policy ground upon which the third party beneficiary cases rest. A plaintiff if liable for his opponent's attorney's fees if he loses will be discouraged, not encouraged, to sue.

VI. CONCLUSION

It may be that America should adopt the English practice of routinely assessing attorneys' fees from the losing party.¹²³ Courts should not attempt to read *Mills* so broadly, however, as to reach that result. A matter of such far reaching consequences is a reversal of all American practice and is much better left to the legislatures than implemented through strained judicial interpretation. *Mill's* result, that all third parties whose legal rights are determined by an interested plaintiff's suit are to contribute to the expenses of the suit, offers a sympathetic court a tool of great social importance. But it is a limited tool whose limitations must be recognized to enable it to be used more efficiently within its stated bounds.

119. The plaintiff, of course, must be careful, especially when suing under state statutes, to check whether the state has waived its Eleventh Amendment immunity from suit. See *Sincock v. Obara*, 320 F. Supp. 1098 (D. Del. 1970).

120. See *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 396-97 (1970); *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968); *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 718 (1967).

121. See notes 112-15 *supra* and accompanying text.

122. *Day v. Woodworth*, 54 U.S. (13 How.) 363, 373 (1952).

123. *Ehrenzweig, Reimbursement of Counsel Fees and the Great Society*, 54 CAL. L. REV. 792, 792-93 (1966).

