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Awarding Counsel Fees; American Rule; Equitable Exceptions; Private Attorney General Theory; Limitations; Alyeska Pipeline Service Co. v. Wilderness Society

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which the states have provided for the care of mental patients; a situation which conceivably could pose as many difficulties in terms of judicial policing as have resulted from *Brown v. Board of Education*⁶⁷ and its progeny.

GARY G. COOPER

⁶⁷ 349 U.S. 294 (1955).

REMEDIES

Awarding Counsel Fees • American Rule • Equitable Exceptions • Private Attorney General Theory • Limitations

Alyeska Pipeline Service Co. v. Wilderness Society,
95 S. Ct. 1616 (1975)

THE UNITED STATES SUPREME COURT, in its decision in *Alyeska Pipeline Service Co. v. Wilderness Society*,¹ denied the federal courts the power to assess attorney's fees against a party to a suit, solely upon the court's appraisal of the social value of a successful plaintiff's suit.

The *Alyeska* case arose out of the litigation to enjoin construction of the trans-Alaska oil pipeline. The plaintiffs, three environmentalist groups,² brought action in March, 1970, in the District Court for the District of Columbia, to enjoin the defendant, the Secretary of the Interior, from issuing permits to the Trans-Alaska Pipeline System,³ which would allow construction of the pipeline across public lands.⁴ The plaintiffs alleged that the Department of the Interior had failed to file an adequate "environmental impact statement" as required under the National Environmental Policy Act of 1969,⁵ and that the Secretary of Interior could not grant any request for temporary land-use permits adjacent to a permanent right-of-way without violating the provisions of the Mineral Leasing Act of 1920.⁶

¹ *Wilderness Soc'y v. Morton*, 495 F.2d 1026 (D.C. Cir. 1974), *rev'd sub. nom. Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 95 S. Ct. 1612 (1975).

² The three environmental groups involved were the Wilderness Society, the Environmental Defense Fund, and the Friends of the Earth.

³ A subsidiary of the oil company consortium developing the North Slope, later changed to Alyeska Pipeline Service Co.

⁴ *Wilderness Soc'y v. Hickel*, 325 F. Supp. 422 (D.D.C. 1970).

⁵ 42 U.S.C. § 4321 *et seq.* (1970).

⁶ 30 U.S.C. § 185 (1970), provides in part that:

Rights of way through the public lands, including the forest reserves of the United States, may be granted by the Secretary of the Interior for pipeline purposes for the transportation of oil or natural gas to any applicant possessing the qualifications provided in section 181 of this title, to the extent of the ground occupied by the said

Alyeska became a party to the suit by intervention in September, 1971.⁷ In March, 1972, the Department of the Interior filed a revised environmental impact statement.⁸ Following this action, the district court in August, 1972, dissolved its preliminary injunction, denied a permanent injunction, and dismissed the complaint.⁹ The court of appeals reversed, holding that Congress had meant for the right-of-way limitations to the Mineral Leasing Act to be adhered to strictly,¹⁰ and therefore instructed the district court to enjoin the Secretary of the Interior from issuing the special land use permits for widths of land adjacent to the permanent right-of-way.¹¹ Since this ruling made construction of the pipeline impossible, the circuit court of appeals did not rule upon the issue relating to the environmental impact statement.¹²

Congress, in November, 1973, overrode the court order by enacting legislation authorizing construction of the trans-Alaska pipeline.¹³ In June, 1974, the court of appeals assessed half of plaintiff-appellants' attorneys' fees against Alyeska, justifying the shifting of fees under the "private attorney general" theory, which holds that an individual citizen or group that brings suit on behalf of the public, to effectuate compliance with the law, should not be required to bear the cost of the litigation.¹⁴ The court indicated that the other half of plaintiffs' counsel fees would have been assessable against the United States, but that such assessment was barred by statute.¹⁵ Thus, only Alyeska sought certiorari to the United States Supreme Court.

pipeline and twenty-five feet on each side of the same. . . .

Alyeska had requested "special land use permits" for the duration of actual construction of the pipeline increasing the total width allocated for construction to 100 feet. *See Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 95 S. Ct. 1612, 1614 (1975); *Wilderness Soc'y v. Hickel*, 325 F. Supp. 422, 423 (D.D.C. 1970).

⁷ 95 S. Ct. at 1615.

⁸ *Wilderness Soc'y v. Morton*, 479 F.2d 842 (D.C. Cir. 1973).

⁹ *Id.* at 846.

¹⁰ *Id.* at 864.

It might fairly be said that Congress overreacted to the prior excesses of railroad rights-of-way. But it is not our function when we pass on either the constitutionality of statutes or their interpretation, to substitute our opinion as to what is wise for that of Congress. . . . Congress chose not to be foresightful: it chose to retain control of the width of pipeline rights-of-way over public land itself, and that decision must stand until Congress chooses otherwise.

¹¹ *Id.* at 893.

¹² *Id.* at 889. "[A] ruling on the NEPA issues will not affect the real outcome of the present litigation. Our holding that the special land use permit for construction purposes is illegal under the Mineral Leasing Act makes it impossible to construct this pipeline until Congress decides to amend the Act."

¹³ 30 U.S.C.A. § 185 (Supp. 1975).

¹⁴ *Wilderness Soc'y v. Morton*, 495 F.2d 1026, 1036 (D.C. Cir. 1974). For the rationale of the "private attorney general" theory see notes 35-36 and accompanying text *infra*. *See also Note, Private Attorney Generals' Fees Emerge from the Wilderness*, 43 *FORDHAM L. REV.* 258 (1974).

¹⁵ 495 F.2d at 1036.

The Supreme Court, on review, reemphasized its adherence to the American rule by holding that each party to a civil suit must bear its own legal costs, and that only under exceptional circumstances will the attorney's fees of one party be assessed against an adverse party.¹⁶

When the American rule is strictly adhered to even the successful litigant cannot recover the cost of protecting his legal rights. In public interest litigation this acts as a deterrent to asserting one's rights, since legal fees are usually not offset by the recovery of damages.¹⁷ This inequitable result has brought the American rule under considerable attack in recent years.¹⁸ Critics urge the adoption of the English system,¹⁹ which ordinarily provides for the prevailing party to recover counsel fees.²⁰ While the American judiciary has not been willing to subscribe to the English system, they have modified the traditional American approach through the application of equitable exceptions.²¹ Prior to the *Alyeska* ruling the private attorney general theory had emerged as one of the major judicial exceptions to the American rule.²²

The private attorney general theory was first expressed in *Newman v. Piggie Park Enterprises, Inc.*,²³ brought in 1968, under Section 204A, Title II of the Civil Rights Act of 1964.²⁴ The court, in *Newman*, interpreted the Civil Rights Act as requiring an award of attorney's fees to a successful plaintiff, in all but exceptional circumstances.²⁵ The Supreme Court in *Newman* held:

A Title II suit is . . . private in form only. When a plaintiff brings an action under that Title, he cannot recover damages. If he obtains an injunction, he does so not for himself alone but also as a private attorney general, vindicating a policy that Congress considered of the highest priority.²⁶

¹⁶ 95 S. Ct. at 1628.

¹⁷ See Note, *Awarding Attorney and Expert Witness Fees in Environmental Litigation*, 58 CORNELL L. REV. at 1222, which states that: "Without court-awarded fees for the private citizen litigating in the public interest, the call for individual citizen participation becomes hollow."

¹⁸ See, e.g., Ehrenzweig, *Reimbursement of Counsel Fees and the Great Society*, 54 CAL. L. REV. 792 (1966) [hereinafter cited as Ehrenzweig]; Kuenzel, *The Attorney's Fee: Why Not a Cost of Litigation?* 49 IOWA L. REV. 75 (1963); Mayer and Stix, *The Prevailing Party Should Recover Counsel Fees*, 8 AKRON L. REV. 426 (1975); McLaughlin, *The Recovery of Attorney's Fees: A New Method of Financing Legal Services*, 40 FORDHAM L. REV. 761 (1972).

¹⁹ See Ehrenzweig, *supra* note 18, at 798.

²⁰ See Comment, *Distribution of Legal Expenses Among Litigants*, 49 YALE L.J. 699 (1940), which compares the English and American rules. See also Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. LEGAL STUDIES 399, 428, 437 (1973).

²¹ See notes 39-40 and accompanying text *infra*.

²² The two well-recognized judicial exceptions to the American rule are the "common benefit" exception and the "bad faith" exception. See notes 39-40 *infra*.

²³ 390 U.S. 400 (1968).

²⁴ 42 U.S.C. § 2000a-3 (1970).

²⁵ 390 U.S. at 402.

²⁶ *Id.* at 401-02.

Thus, the private attorney general theory originated solely as a statutory exception, sounding in the congressional intent to award attorney's fees to a plaintiff who brought an action deemed to be in the public interest. However, the private attorney general theory quickly outgrew its parent, the statutory exception, and came to be applied as a third equitable exception, in cases where statutes did not specifically authorize fee assessment against the losing party.

The growth of the private attorney general exception found apparent support in two Supreme Court cases, *Mills v. Electric Auto-Lite Co.*,²⁷ and *Hall v. Cole*.²⁸ *Mills v. Electric Auto-Lite Co.* was brought under Section 14(a) of the Securities Exchange Act of 1934,²⁹ a statute not specifically authorizing the award of attorneys' fees. Here the Supreme Court justified fee assessment against the defendant corporation under the established "common benefit" exception,³⁰ looking to the Securities Exchange Act only to ascertain that Congress had not, by the terms of the Act, precluded equitable assessment of fees.³¹ *Hall v. Cole* was brought under Section 102 of the Labor Management Reporting and Disclosure Act of 1959,³² which, in its pertinent section, did not authorize fee assessment, but which was "cast as a broad mandate to the courts to fashion 'appropriate' relief." Again, in referring to the Labor Management Reporting and Disclosure Act, the Supreme Court did no more than determine that "appropriate" relief included equitable fee assessment, so that the statute did not preclude fee-shifting.³³

Neither *Mills* nor *Hall* purported to establish the private attorney general theory as an independent equitable exception. Nevertheless in *La Raza Unida v. Volpe*,³⁴ an action brought to enjoin a highway construction project, the District Court for the Northern District of California applied the private attorney general theory, as though firmly established. The court reasoned that

²⁷ 396 U.S. 375 (1970). *Mills* was a stockholders' derivative action to void a merger.

²⁸ 412 U.S. 1 (1973).

²⁹ 15 U.S.C. § 78(n) (1970).

³⁰ 396 U.S. at 393-94, where it is stated that: "[W]here the litigation has conferred a substantial benefit on the members of an ascertainable class, and where the court's jurisdiction over the subject matter makes possible an award that will operate to spread the costs proportionately among them."

³¹ *Id.* at 390. The *Mills*' holding has been acclaimed along with *Newman* as the first step in the destruction of the American rule. See Nussbaum, *Attorneys Fees in Public Interest Litigation*, 48 N.Y.U. L. REV. 301 (1973); Comment, *Awarding Attorneys' Fees to the "Private Attorney General": Judicial Green Light to Private Litigation in the Public Interest*, 24 HASTINGS L.J. 733 (1973).

³² 29 U.S.C. § 412 (1970), which provides that: "Any person whose right secured by the provisions of this subchapter have been infringed by any violation of this subchapter may bring a civil action in a district court of the United States for such relief (including injunctions) as may be appropriate."

³³ 412 U.S. at 14.

³⁴ 57 F.R.D. 84 (N.D. Cal. 1972).

under *Newman*, the private attorney general theory was apparently a recognized exception, and that based on the authority of the *Mills* decision, a court in applying an equitable exception need only look to the congressional intent to discern whether the statute involved did not preclude fee-shifting. It therefore followed that:

Whenever there is nothing in a statutory scheme which might be interpreted as precluding it, a "private attorney general" should be awarded attorneys' fees when he has effectuated a strong Congressional policy which has benefitted a large class of people, and where further the necessary and financial burden of private enforcement are such as to make the award essential.³⁵

Thus, the private attorney general theory was developed into an equitable exception independent of any statutory language, resulting in an almost automatic award of counsel fees to the plaintiff who brought suit for injunction in the name of public interest. The Supreme Court in *Alyeska* rejected this non-statutory expansion of the private attorney general theory; instead it adhered to the American system of not awarding attorney's fees to the prevailing party, except in the case where one of the two traditional equitable exceptions is applicable.³⁶

Under the Act of 1853,³⁷ Congress prescribed what costs may be asserted against a party by the federal courts.³⁸ The Supreme Court in *Alyeska* proceeded to recognize the existence of only two generally accepted equitable exceptions to the provisions of the Act of 1853. But the Court did not find either exception, *i.e.*, the "common benefit"³⁹ or the "bad faith"⁴⁰ exception, applicable to the present case.⁴¹ In contrast to the Supreme Court, the court of appeals recognized the private attorney general theory as an independent exception.⁴² At issue in *Alyeska*, therefore, was the power of the federal courts to create equitable exceptions to the American approach absent statutory authority.

³⁵ *Id.* at 98.

³⁶ 95 S. Ct. at 1627-28.

³⁷ 10 Stat. 161 (1853) [now Docket Fees and Costs of Briefs, 28 U.S.C. § 1923 (1970)].

³⁸ *Id.* The statute limits accessible costs in all cases to virtually nominal amounts.

³⁹ Originally the "common fund" exception applied only where a common trust or fund existed such that a beneficiary by bringing suit could obtain distribution of the fund on behalf of all the beneficiaries. The attorneys' fees incurred by the plaintiff beneficiary would be deducted from the fund prior to distribution, thus ensuring that all beneficiaries bore the cost of securing the fund. *See Trustees v. Greenough*, 105 U.S. 527, 532-33 (1882); *see also* 95 S. Ct. at 1635 (Marshall, J., dissenting), arguing the adoption and expansion of the common benefit theory.

⁴⁰ The bad faith exception is applicable only where a party has clearly compelled litigation in bad faith. Thus it is not applicable against a party such as *Alyeska* who litigated in good faith. 495 F.2d at 1029.

⁴¹ 95 S. Ct. at 1622.

⁴² 495 F.2d at 1030.

The Supreme Court in *Alyeska* noted that Congress had created some 30⁴³ statutory exceptions to the Act of 1853, which authorized the assessment of counsel fees in limited situations. Since the private attorney general theory arose in association with such statutory exceptions, the Supreme Court concluded that the private attorney general theory could only be applied in connection with exceptions based on statutory designation.⁴⁴ It was upon this rationale that the Supreme Court found the private attorney general theory was not applicable in *Alyeska*.⁴⁵

The Supreme Court also noted a major inequity in fee assessment under the private attorney general theory, which becomes apparent in such circumstances as those present in *Alyeska*. Whenever an action for injunction is brought against the United States, assessment of fees is barred by statute.⁴⁶ In *Sierra Club v. Lynn*,⁴⁷ an action to enjoin construction of a HUD-financed community, plaintiffs brought suit against a department of the federal government alleging a failure to file an adequate environmental impact statement. Here as in *Alyeska*, the burden of paying plaintiff's legal expenses fell not upon the federal government, which was immune, but upon the private defendant,⁴⁸ San Antonio Ranch Ltd.⁴⁹

Had it chosen to do so, the Supreme Court could easily have justified the elimination of the private attorney general theory as an accepted equitable exception on the grounds that it creates an inequitable taxing of fees against an innocent party instead of the government. If the Supreme Court limited its decision in this manner, the private attorney general theory would only have been rendered inapplicable in a case such as *Alyeska*. Instead, the Court decided to eliminate the private attorney general theory as a third equitable exception, by holding that only Congress⁵⁰ has the power to prescribe what

⁴³ 95 S. Ct. at 1623 n. 33. See, e.g., Clayton Act 15 U.S.C. § 15 (1914); Securities Act of 1933 15 U.S.C. § 77K(e) (1933).

⁴⁴ 95 S. Ct. at 1623, where the Court stated: "Nor has it [Congress] extended any ruling authority to the Judiciary to allow counsel fees as costs or otherwise whenever the courts might deem them warranted."

⁴⁵ *Id.* at 1627.

⁴⁶ See 28 U.S.C. § 2412 (1970), which states: "Except as otherwise specifically provided by statute, a judgment for costs, as enumerated in section 1920 of this title but not including the fees and expenses of attorneys may be awarded to the prevailing party in any civil action brought by or against the United States. . . ."

⁴⁷ 364 F. Supp. 834 (W.D. Tex. 1973).

⁴⁸ *Id.* at 852.

⁴⁹ *Sierra Club v. Lynn* was reversed by the Fifth Circuit as to assessment of fees, but only after the present case had been decided by the District of Columbia Circuit Court of Appeals. See *Sierra Club v. Lynn*, 502 F.2d 43, 67 (5th Cir. 1974).

fees may be assessed.⁵¹ The Court concluded:

It appears to us that the rule suggested here and adopted by the Court of Appeals would make major inroads on a policy matter that Congress has reserved for itself. . . . [C]ourts are not free to fashion drastic new rules with respect to the allowance of attorneys' fees to the prevailing party in federal litigation or to pick and choose among plaintiffs and the statutes under which they sue and to award fees in some cases but not in others, depending upon the court's assessment of the importance of the public policies involved in particular cases. Nor should the federal courts purport to adopt a rule awarding attorneys' fees on the private attorney general approach when such judicial rule will operate only against private parties and not against the Government.⁵²

In his dissenting opinion, Justice Marshall argues that the majority has determined that no equitable circumstances justifying fee assessment exists, "simply because the claim does not fit comfortably within one of the previously sanctioned judicial exceptions to the American rule."⁵³ He further suggests that fee-shifting should be permitted under the private attorney general theory when the following three criteria are met:

(1) the important right being protected is one actually or necessarily shared by the general public or some class thereof; (2) the plaintiff's pecuniary interest in the outcome, if any, would not normally justify incurring the cost of counsel; and (3) shifting that cost to the defendant would effectively place it on a class that benefits from the litigation.⁵⁴

Even in a limited form, the private attorney general theory could not co-exist with the American rule. If attorneys' fees were awarded as a matter of course in such cases as *Alyeska*, a plaintiff, purporting to act in the "public interest" but alleging no real damages,⁵⁵ would nevertheless be awarded the cost of suing for an injunction, while the individual plaintiff, suing for damages and alleging a direct and definite injury, would not be allowed to recover attorneys' fees.

A trend is evident in recent Supreme Court cases, to discourage an individual or small group from suing in the name of "the public" or a denominated class.⁵⁶ In *Alyeska* and a prior case, *F. D. Rich Co. v. Industrial*

⁵¹ Congress itself presumably has the power and judgment to pick and choose among its statutes and to allow attorneys' fees under some, but not others. *Id.* at 1625.

⁵² *Id.* at 1627.

⁵³ *Id.* at 1629.

⁵⁴ *Id.* at 1635. Under Justice Marshall's approach, the private attorney general theory would bear a strong resemblance to the common benefit theory. See cases cited note 39 *supra*.

⁵⁵ *E.g.*, *Sierra Club v. Morton*, 405 U.S. 727 (1972).

⁵⁶ *E.g.*, *Eisen v. Carlisle*, 417 U.S. 156 (1974) (limiting ability of individuals to bring class actions on behalf of large segments of the public); *Sierra Club v. Morton*, 405 U.S. 727 (1972) (denying plaintiff standing to sue without alleging injury to members of plaintiff's organization).

Lumber Co.,⁵⁷ the Supreme Court put an end to what it sees as unjustifiable awarding of fees to plaintiffs by the lower courts. The message of *Alyeska* is clear: He who would litigate for the benefit of the public must neither expect that the courts will encourage him, nor the public will repay him, for his efforts.

JAMES LOCKHART

⁵⁷ 417 U.S. 116 (1974), holding that where plaintiff's cause of action is based upon a federal statute, a court may not justify fee assessment by reference to the customary state practice under a corresponding state law.

CONSTITUTIONAL LAW

Double Jeopardy • Juvenile Courts • Transfer to Criminal Court • Adjudicatory Proceedings Breed v. Jones, 95 S. Ct. 1779 (1975)

THE FIFTH AMENDMENT prohibition against double jeopardy¹ is designed to protect both federal and state² defendants from the embarrassment, expense and ordeal of successive criminal trials, which not only create anxiety and uncertainty in an accused, but also increase the danger that an innocent person may be convicted.³ However, as a result of the "juvenile court's assumed ability to function in a unique manner"⁴ a juvenile is not extended the protection of the panoply of constitutional rights afforded an adult in a criminal proceeding.⁵ Accordingly, the Supreme Court, in *Breed v. Jones*,⁶ was called upon to determine the applicability and impact of the double jeopardy clause on juvenile proceedings.

In February, 1971, a petition was filed by Breed, the Director of the California Youth Authority, in the Superior Court of California, County of Los Angeles Juvenile Court, alleging that respondent Jones, then 17 years old, had committed acts which, if committed by an adult, would constitute the

¹ U.S. CONST. amend. V, which states in relevant part: "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb."

² *Benton v. Maryland*, 395 U.S. 784 (1969). This case held the double jeopardy clause applicable to state criminal proceedings through the due process clause of the fourteenth amendment.

³ *Green v. United States*, 355 U.S. 184, 187-88 (1957).

⁴ *McKeiver v. Pennsylvania*, 403 U.S. 528, 547 (1971).

⁵ *Id.*

⁶ 95 S. Ct. 1779 (1975).