Washington and Lee Law Review

Volume 34 | Issue 1 Article 11

1-1-1977

The Civil Rights Attorneys' Fees Awards Act Of 1976

THE CIVIL RIGHTS ATTORNEYS' FEES AWARDS ACT OF 1976

The American rule of attorneys' fees provides that each party to litigation pays his own attorney in the absence of statutory or contractual provisions to the contrary.[1] Courts, however, have authority to shift the burden of fees to a particular party under equitable exceptions to the American rule.[2] Fees will be shifted when a party acts in bad faith,[3] or when a fee award will spread the costs of counsel among those who benefit substantially from the lawsuit.[4] A third exception to the rule, the private attorney general rationale, permitted courts to award fees to a prevailing plaintiff when the suit had furthered a congressional policy envisioning private enforcement of federal law.[5] These exceptions to the American rule are derived from the inherent equitable powers of the courts in the absence of statutory direction.[6] This lack of statutory authority proved fatal to the private attorney general concept in *Alyeska Pipeline Service Co. v. Wilderness Society.*[7] In *Alyeska* the Supreme Court held that Congress alone was responsible for determining when private prosecution of specific statutes furthered public policy;[8] therefore, fees would not be awarded

---

[1] Hall v. Cole, 412 U.S. 1, 4-5 (1973); *see* text accompanying notes 18-22 *infra.*

[2] Sprague v. Ticonic Nat'l Bank, 307 U.S. 161 (1939).

[3] Vaughan v. Atkinson, 369 U.S. 527 (1962); *see* text accompanying notes 26-33 *infra.*

[4] Hall v. Cole, 412 U.S. 1 (1973); *see* text accompanying notes 36-45 *infra.*

[5] *See* 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. Calif. 1972), *aff'd,* 488 F.2d 559 (9th Cir. 1973); text accompanying notes 46-59 *infra.* The private attorney general doctrine provided a vehicle by which courts were able to ease the financial burden placed upon plaintiffs bringing environmental and civil rights suits for injunctive relief. *See generally Awarding Attorneys' Fees to the "Private Attorney General"; Judicial Green Light to Private Litigation in the Public Interest,* 24 HASTINGS L.J. 733 (1973).

[6] *See* Hall v. Cole, 412 U.S. 1, 5 (1973); Sprague v. Ticonic Nat'l Bank, 307 U.S. 161, 166 (1939).

[7] 421 U.S. 240 (1975). Plaintiff Wilderness Society brought suit to enjoin the Secretary of the Interior from issuing permits authorizing construction of the Alaska pipeline. The Society alleged that the plans submitted failed to comply with the Mineral Lands Leasing Act, 87 Stat. 576 (1920) (current version at 30 U.S.C. § 185, (Supp. V 1975)), and that the Secretary had failed to comply with the requirements of the National Environmental Policy Act of 1969, 42 U.S.C. § 4321 *et seq.* (1970). Alyeska, a consortium of oil companies constructing the project, intervened. Fees were awarded against Alyeska by the court of appeals on the private attorney general theory, 495 F.2d 1026 (D.C. Cir. 1974), *rev'd,* 421 U.S. 240 (1975).

[8] 421 U.S. at 262. *See* Cedar, *Defrosting the Alyeska Chill: The Future of Attorneys' Fees Awards in Environmental Litigation,* 5 ENVT'L AFF. 297 (1976).

under the private attorney general theory to a prevailing plaintiff without congressional authority.

Congress responded to the *Alyeska* decision with the Civil Rights Attorneys' Fees Awards Act of 1976.[9] The Act amends 42 U.S.C. § 1988 and provides federal courts with discretionary authority to award attorneys' fees to prevailing parties in private lawsuits when enforcing the Reconstruction-era civil rights acts,[10] Title VI of the Civil Rights Act of 1964,[11] and Title IX of the Education Amendments of 1972.[12] Although Congress has provided for similar attorneys' fees awards in most civil rights legislation since 1964,[13] the laws covered by the Attorneys' Fees Act have no such integrated provisions. Plaintiffs bringing suit under § 1983,[14] for example, could not recover counsel fees unless their suit fell within a traditional equitable exception to the no-fee rule. Moreover, the circumstances under which these civil rights plaintiffs could recover attorneys' fees were severely restricted by the demise of the private attorney general exception. As a result, Congress feared that the high cost of civil rights litigation would discourage potential plaintiffs from bringing suit in the absence of a reasonable prospect of recovering attorneys' fees.[15] Furthermore, the Senate Judiciary Committee noted that the civil rights statutes would not be enforced, and civil liberties would not be protected, without private plaintiffs.[16] Thus, the 1976 Attorneys' Fees Act is a direct congressional response to *Alyeska's* inhibiting influence upon civil rights litigation.[17]

---

[9] Pub. L. No. 94-559, 90 Stat. 2641 (to be codified in 42 U.S.C. § 1988). The Senate Judiciary Committee declared that the purpose the bill was to "remedy anomalous gaps in our civil rights laws created by the United States Supreme Court's recent decision in *Alyeska*. . . ." S. REP. No. 1011, 94th Cong., 2d Sess. 1 (1976) [hereinafter cited as S. REP.].

[10] 42 U.S.C. §§ 1981-1983, 1985, 1986 (1970).

[11] 42 U.S.C. §§ 2000d *et seq.* (1970).

[12] 20 U.S.C. §§ 1681 *et seq.* (Supp. IV 1974).

[13] *See, e.g.*, Civil Rights Act of 1968, Title VIII, 42 U.S.C. § 3612(c)(1970); Emergency School Aid Act of 1972, 20 U.S.C. § 1617 (Supp. V 1975); Equal Employment Admendments of 1972, 42 U.S.C. § 2000e-16(d)(Supp. V 1975); Voting Rights Act Extension of 1975, 42 U.S.C. § 1973l(e) (Supp. V 1975).

[14] 42 U.S.C. § 1983 (1970).

[15] S. REP. *supra* note 9, at 1. The Senate Report stated that "[i]f the cost of private enforcement becomes too great, there will be no private enforcement." *Id.* at 6.

[16] *Id.* at 6. The Judiciary Committee predicted that fee awards to prevailing plaintiffs would insure that the civil rights statutes would not become "mere hollow pronouncements which the average citizen cannot enforce." *Id.*

[17] *Id.* at 1. The Act does not reverse *Alyeska* directly, since the Act does not provide for fees in the environmental statutes sued upon in *Alyeska*. *See* note 7 *supra*. The Act deals only with *Alyeska's* effect upon civil rights litigation.

The *Alyeska* decision reaffiarmed the vitality of the basic American rule that each litigant must pay his own attorney in the absence of statutory or contractual provisions to the contrary.[18] The principal justification for the rule is that a strict policy of shifting fees to the losing party would discourage impecunious plaintiffs due to fear of failure and the resulting burden of satisfying the defendant's attorneys' fees.[19] Nevertheless, the American rule has been criticized as an unwarranted impediment to indigent plaintiffs, since deduction of fees from damage recoveries will not make a prevailing plaintiff whole.[20] The principle is particularly harsh in denying fee awards to successful plaintiffs in civil rights actions which will not result in the payment of damages.[21] The American rule, however, is not absolute; Congress has created statutory exceptions,[22] while federal courts have exercised their inherent equitable powers to develop additional exceptions.[23]

Federal courts have recognized two general categories of equitable exceptions to the American rule: the common benefit and bad faith

---

[18] Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 247 (1975); Hall v. Cole, 412 U.S. 1, 4 (1973); Arcambel v. Wiseman, 3 U.S. (3 Dall.) 306 (1796). The American rule differs from the general practice in other nations, including Great Britain, of awarding fees to the prevailing party. *See* Hall v. Cole, 412 U.S. 1, 4 n.4 (1973); Comment, *Court Awarded Attorneys' Fees and Equal Access to the Courts*, 122 U. PA. L. REV. 636, 639 (1974). American deviation from the British approach has been attributed to American distrust of lawyers, *id.* at 641, and to the failure of statutory fee scales to keep pace with inflation, Ehrenzweig, *Reimbursement of Counsel Fees and the Great Society*, 54 CALIF. L. REV. 792 (1966).

[19] F.D. Rich Co. v. Industrial Lumber Co. 417 U.S. 116, 126 (1974); Mause, *Winner Takes All: A Re-examination of the Indemnity System*, 55 IOWA L. REV. 26 (1969). In *F.D. Rich* the Court suggested that an idemnification procedure would burden the judiciary with hearings to determine a reasonable fee award figure. 417 U.S. at 126. The Court also feared the threat to an independent bar posed by placing the judiciary in control of attorneys' incomes. *Id.*

[20] *See* Ehrenzweig, *Reimbursement of Counsel Fees and the Great Society*, 54 CALIF. L. REV. 792 (1966); Kuenzel, *The Attorney's Fee: Why Not A Cost of Litigation?*, 49 IOWA L. REV. 75 (1963); McCormick, *Counsel Fees and Other Expenses of Litigation as an Element of Damages*, 15 MINN. L. REV. 619 (1931); Stoebuck, *Counsel Fees Included in Costs: A Logical Development*, 38 U. COLO. L. REV. 202 (1966).

[21] *See* Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400 (1968)(per curiam); Lee v. Southern Home Sites Corp., 444 F.2d 143 (5th Cir. 1971); Note, *Allowance of Attorney Fees in Civil Rights Actions*, 7 COLUM. J. L. & SOC. PROB. 381 (1971).

[22] *See* note 13 *supra*. *See also* H.R. REP. No. 1558, 94th Cong., 2d Sess. 13-14 (1976) [hereinafter cited as H.R. REP.], which lists fifty-four statutes providing for fee awards. (H.R. 15460, which was superseded by the Senate version of the Civil Rights Attorneys' Fees Awards Act of 1976, was a companion to the Senate bill.)

[23] Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 259 (1975); Sprague v. Ticonic Nat'l Bank, 307 U.S. 161 (1939).

doctrines. Gradual expansion of these doctrines led to development of a third exception, the private attorney general theory.[24] The Supreme Court repudiated the private attorney general theory in *Alyeska,* but explicitly affirmed the viability of the common benefit and bad faith rationales.[25]

The bad faith exception to the American rule of attorneys' fees allows a court to shift fees to any party found to have instituted an action or asserted a defense in "bad faith, vexatiously, wantonly, or for oppressive reasons."[26] If the court determines that a suit is frivolous or brought solely for purposes of harrassment, the plaintiff may be required to pay the defendant's attorneys' fees.[27] If either party to an action utilizes intentionally dilatory tactics, the court may transfer fees to the culpable party.[28] Although this discretionary power is exercised in a highly subjective and frequently inconsistent manner,[29]

---

[24] *See* text accompanying notes 33-35 and 46-59 *infra.*

[25] 421 U.S. at 257-59.

[26] 6 MOORE'S FEDERAL PRACTICE ¶ 54.77, at 1709 (2d ed. 1976); *accord,* Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 259 (1975); F. D. Rich Co. v. Industrial Lumber Co., 417 U.S. 116, 129 (1974).

[27] *See, e.g.,* Carrion v. Yeshiva Univ., 535 F.2d 722 (2d Cir. 1976); United States Steel Corp. v. United States, 519 F.2d 359 (3d Cir. 1975); Gazan v. Vadsco Sales Corp., 6 F.Supp. 568 (E.D.N.Y. 1934). *Carrion* and *United States Steel* both involved statutes authorizing fee awards to prevailing parties within the court's discretion. Although statutorily authorized, the applicable standards for the exercise of a court's discretion are the same as those used in awarding fees under an equitable exception to the American rule. *See* text accompanying notes 94-98 *infra.*

[28] *See, e.g.,* Bond v. Stanton, 528 F.2d 688 (7th Cir.), *vacated,* 45 U.S.L.W. 3394 (U.S. Nov. 30, 1976), where the court found that defendant's bad faith conduct had prolonged unnecessarily the litigation. Plaintiff had filed suit to compel Indiana to comply with Title XIX of the Social Security Act, 42 U.S.C. §§ 1396-1396i (1970). An amendment to that Act required all states receiving federal funds under the Act to develop a health screening program by February, 1972, for children eligible for Medicaid benefits. 42 U.S.C.§ 1396d(a)(4)(B)(1970). The State failed to meet the deadline, and plaintiff's subsequent action obtained an injunction ordering compliance by July, 1974. The court of appeals found that once the lawsuit had begun, defendants "continually asserted compliance with HEW requirements in the face of documentation to the contrary." 528 F.2d at 690.

In Doe v. Poelker, 515 F.2d 541 (8th Cir.), *cert. granted,* 96 S. Ct. 3220 (1976), a suit to obtain relief against a city operated obstetrics-gynecology clinic which refused to administer abortions, the city asserted that since the plaintiff was no longer pregnant, she had lost standing to sue. The court found the defense completely frivolous in view of the Supreme Court's rejection of the same argument in Roe v. Wade, 410 U.S. 113 (1973). The Eighth Circuit awarded fees to the plaintiff.

[29] Falcon, *Award of Attorneys' Fees in Civil Rights and Constitutonal Litigation,* 33 MD. L. REV. 379 (1973) [hereinafter cited as *Attorney's Fees in Civil Rights Litigation*].

the capability allows the judiciary to maintain a docket free of unfounded and unnecessarily time consuming litigation.[30] Thus, the bad faith fee award will punish wrongful intentions and deter future conduct of a similar nature.[31]

Courts supplemented these motives of judicial efficiency and punishment of wrongdoers by utilizing the bad faith doctrine to encourage prompt compliance with the law. This result was achieved by expanding the concept of bad faith to encompass cases necessitated by the defendant's "obdurate obstinacy" in the evasion of a clear legal duty.[32] The expanded use of the bad faith doctrine coincided with federal judicial enforcement of desegregation policy in the 1960s, when some school boards resisted integration by refusing to comply with the law.[33] The courts recognized the injustice of requiring victims of such civil rights violations to pay attorneys to protect those rights.[34] The increased willingness of courts to award fees in civil

---

Compare Cato v. Parham, 293 F. Supp. 1375 (E.D. Ark.), *aff'd*, 403 F.2d 12 (8th Cir. 1968), *with* Bradley v. School Bd., 53 F.R.D. 28 (E.D. Va. 1971), *rev'd*, 472 F.2d 318 (4th Cir. 1972), *vacated* 416 U.S. 696 (1974). Both *Cato* and *Bradley* were school desegregation cases. In *Cato* the district court awarded fees under an obdurate obstinacy theory, even though the court did not question the school board's good faith. The court found that despite the school board's good intentions, "whatever progress has been made has followed judicial prodding." 293 F. Supp. at 1378. The court of appeals affirmed the award with little discussion, saying only that the award was within the trial judge's discretion. 403 F.2d at 16.

In *Bradley*, the district court also awarded fees to the plaintiff. The court found that "given the choice between desegregating the schools and committing a contempt of court, they would choose the first, but . . . in any event desegregation would only come about by court order." 53 F.R.D. at 39. The court of appeals reversed, terming the fee award "unfair" since the law in the area was unclear. 472 F.2d at 327.

[30] *See* Note, *Attorneys' Fees and the Eleventh Amendment*, 88 HARV. L. REV. 1875, 1892 (1975).

[31] Hall v. Cole, 412 U.S. 1, 5 (1973).

[32] *See* Bradley v. School Bd., 345 F.2d 310 (4th Cir.) *vacated* 382 U.S. 103 (1965); Bell v. School Bd., 321 F.2d 494 (4th Cir. 1963). In *Bradley* the court noted that fees were to be awarded only in exceptional cases. "Attorneys' fees are appropriate only when it is found that the bringing of the action should have been unnecessary and was compelled by the school board's unreasonable, obdurate obstinacy." 345 F.2d at 321.

[33] Note, *Attorneys' Fees—"Bad Faith" Exception—Attorneys' Fees Allowed Under Bad Faith Exception After Alyeska Decision Narrowed "Private Attorney General" Doctrine:* Doe v. Poelker, 515 F.2d 541 (2d Cir. 1975), 8 CONN. L. REV. 551 (1976); Note, *Awarding Attorneys' Fees to the "Private Attorney General": Judicial Green Light to Private Litigation in the Public Interest*, 24 HASTINGS L.J. 733, 735 (1973).

[34] *See, e.g.*, Clark v. Board of Educ., 369 F.2d 661 (8th Cir. 1966). The court reluctantly affirmed a fee award of only $250. The plaintiff had appealed the low amount of the award, but the circuit court found that the trial judge had not abused his discretion. The court of appeals noted that although the matter of fee awards could

rights cases conditioned the judiciary to accept a fee shifting rationale based principally upon social policy considerations.[35]

While the bad faith fee award transfers fees to a culpable party, the goal of the common benefit approach is an equitable distribution of attorneys' fees among the beneficiaries of the lawsuit.[36] The common benefit doctrine provides that fees may be awarded to a successful plaintiff where the action has conferred a substantial benefit upon members of an ascertainable class,[37] and where the fee award will spread the costs of counsel among members of the beneficiary class.[38]

Originally, application of the common benefit doctrine was limited to suits which had resulted in judgments of damages or recovery of monetary funds from which fees could be paid.[39] In *Mills v. Electric Auto-Lite Co.*,[40] however, the Supreme Court held that the benefit recovered need not be pecuniary in nature for application of the common benefit concept.[41] *Mills* was a shareholder suit in which the

---

be reviewed only for abuse of discretion, "[t]he time is coming to an end when recalcitrant state officials can force unwilling victims of illegal discrimination to bear the constant and crushing expense of enforcing their constitutionally accorded rights." *Id.* at 671.

[35] King & Plater, *The Right to Counsel Fees in Public Interest Environmental Litigation*, 41 TENN. L. REV. 27, 29 (1973) [hereinafter cited as *Right to Counsel Fees*].

[36] *Attorneys' Fees in Civil Rights Litigation, supra* note 29, at 402; Right to Counsel Fees, supra note 35, at 43.

[37] The common benefit doctrine is especially useful in class actions certified under FED. R. CIV. P. 23. *See, e.g.*, Lindy Bros. Builders, Inc. v. American Radiator and Standard Sanitary Corp., 487 F.2d 161 (3d Cir. 1973); Alpine Pharmacy, Inc. v. Chas. Pfizer & Co., 481 F.2d 1045 (2d Cir.), *cert. denied*, 414 U.S. 1092 (1973); 3b MOORE'S FEDERAL PRACTICE ¶ 23.91 (2d ed. 1976).

[38] The common benefit doctrine should not be applied in cases in which the beneficiary class must be defined as the public at large, since determining which persons actually had benefited from the action would be impossible. *See* text accompanying note 44 *infra*.

[39] Hall v. Cole, 412 U.S. 1, 5-6 n.7 (1973). *See also* Sprague v. Ticonic Nat'l Bank, 307 U.S. 161 (1939); Trustees v. Greennough, 105 U.S. 527 (1882); Dawson, *Lawyers and Involuntary Clients: Attorney Fees From Funds*, 87 HARV. L. REV. 1597 (1974).

[40] 396 U.S. 375 (1970).

[41] *Id.* at 392. The Court stated that

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

Id.

plaintiff challenged the corporation's use of misleading proxy statements.[42] The Court held that the plaintiff's initiative in compelling company compliance with federal statutory requirements had benefited the other shareholders by protecting their statutory right to an informed corporate election.[43] The beneficiary class in *Mills* was limited in number and the Court reasonably could determine that each member had benefited from the suit.[44] In a civil rights suit, however, such a determination is not possible. The beneficiaries of civil rights suits often are members of large segments of the public. Thus, courts would be unable to assess accurately the impact of fees upon individual members of those groups.[45] Nevertheless, the *Mills* emphasis on the value of private enforcement of statutory rights formed the basis for the private attorney general doctrine.

The private attorney general doctrine operates to encourage private enforcement of federal statutes by awarding attorneys' fees to plaintiffs who prevail in lawsuits under those statutes.[46] The doctrine developed through interpretation of explicit attorneys' fees provisions in civil rights statutes enacted since 1964,[47] which give the trial judge discretion to award attorneys' fees to prevailing parties.[48] The Supreme Court considered such a provision of Title II of the Civil Rights Act of 1964,[49] in *Newman v. Piggie Park Enterprises, Inc.*[50] *Newman* held that the discretion of the trial judge to award fees under Title II is guided by congressional intent to encourage private enforcement of

---

[42] *Id.* at 377-78. The complaint alleged that the proxy statement violated § 14(a) of Securities Exchange Act of 1934, 15 U.S.C. § 78n(a)(1970).

[43] *See* text accompanying note 53 *infra.*

[44] Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 265 n.39 (1975).

[45] *Id.;* Lytle v. Commissioners of Election, 541 F.2d 421 (4th Cir. 1976); Satoskar v. Real Estate Comm'n, 517 F.2d 696 (7th Cir.), *cert. denied,* 423 U.S. 928 (1975); La Raza Unida v. Volpe, 57 F.R.D. 94 (N.D. Calif. 1972), *aff'd,* 488 F.2d 559 (9th Cir. 1973); Bradley v. School Bd., 53 F.R.D. 28 (E.D. Va. 1971), *rev'd on other grounds,* 345 F.2d 318 (4th Cir. 1972), *vacated on other grounds,* 416 U.S. 696 (1974).

[46] Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400 (1968) (per curiam); Lee v. Southern Home Sites Corp., 444 F.2d 143 (5th Cir. 1972); La Raza Unida v. Volpe; 57 F.R.D. 94 (N.D. Calif. 1972), *aff'd,* 488 F.2d 559 (9th Cir. 1973).

[47] *See generally Right to Counsel Fees, supra* note 35; 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).

[48] *See, e.g.,* Education Amendments of 1972, 20 U.S.C. § 1617 (Supp. IV 1974); Civil Rights Act of 1964, Title II, 42 U.S.C. § 2000a-3(b)(1970); Civil Rights Act of 1964, Title VII, 42 U.S.C. § 2000e-5(k)(1970); Civil Rights Act of 1968, Title VIII, 42 U.S.C. § 3612(c)(1970).

[49] 42 U.S.C. § 2000a-3(b)(1970).

[50] 390 U.S. 400 (1968).

the Act.[51] In order to foster suits under Title II pertaining to racial discrmination in public accommodations by private attorneys general, the Court stated that fee awards should not be limited to bad faith situations.[52] The Court ruled that plaintiffs prevailing in suits under Title II should recover fees in all but exceptional circumstances.[53]

The principles enumerated in *Newman*, synthesized with the language of *Mills*, provided a basis for expansion of the private attorney general concept into situations in which fee awards were not statutorily authorized.[54] In *Mills*, the Court concluded that the shareholders of the defendant company had benefited substantially from plaintiff's initiative in compelling corporate compliance with federal securities laws.[55] *Newman* also emphasized the importance of private action to enforce federal laws.[56] Although *Mills* did not involve an attorneys' fee statute, both *Newman* and *Mills* promoted identical policy considerations. Some courts used this similarity to apply the liberal discretionary standards of *Newman* to award fees where applicable statutes failed to provide for attorneys' fees.[57] These courts awarded fees to plaintiffs prevailing in civil rights and environmental lawsuits in which the trial judge found that private action was an important part of the statutory enforcement scheme.[58] Thus, the pri-

---

[51] 390 U.S. at 402. The Court explained:

> If successful plaintiffs were routinely forced to bear their own attorneys' fees, few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the federal courts. Congress therefore enacted the provision for counsel fees . . . to encourage individuals injured by racial discrimination to seek judicial relief under Title II.

Id. (footnotes omitted).

[52] *Id. See Attorneys' Fees in Civil Rights Litigation*, *supra* note 29, at 396.

[53] 390 U.S. at 402. The Court held that in suits under Title II, "one who succeeds in obtaining an injunction under that Title should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." *Id.*

[54] *See, e.g., La Raza Unida v. Volpe, 57 F.R.D. 94 (N.D. Calif. 1972), aff'd*, 488 F.2d 559 (9th Cir. 1973).

[55] 396 U.S. at 396. The Court concluded that "the stress placed by Congress on the importance of fair and informed corporate suffrage leads to the conclusion that, in vindicating the statutory policy, petitioners have rendered a substantial service to the corporation and its shareholders." *Id.*

[56] *See* text accompanying note 51 *supra.*

[57] *See, e.g.*, 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. Calif. 1972), *aff'd*, 488 F.2d 559 (9th Cir. 1973); cases collected in Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 270 n.46 (1975).

vate attorney general concept of *Newman* developed into a third equitable exception to the American rule of attorneys fees.[59]

The Supreme Court seized upon the lack of statutory authorization in *Alyeska* to quash the private attorney general doctrine and reaffirm the American rule. The Court followed the rule established in the 1796 case of *Arcambel v. Wiseman*[60] that federal courts would not award attorneys' fees as a part of costs until Congress authorized the practice.[61] The *Alyeska* Court enforced the American rule since it could find no congressional repudiation of the no-fee rule; federal attorneys' fees statutes were merely congressionally created exceptions to the general rule.[62] The Court, despite endorsing the bad faith and common benefit doctrines as legitimate equitable alternatives,[63] ruled that the exercise of judicial equitable powers would not support a fee award intended to facilitate private protection of federal rights.[64] Thus, *Alyeska* requires Congress to select those statutes which should include attorneys' fees provisions designed to encourage private litigation and enforcement.[65] Congress responded to the Court's sugges-

---

[59] *See* La Raza Unida v. Volpe, 57 F.R.D. 94 (N.D. Calif. 1972), *aff'd*, 488 F.2d 559 (9th Cir. 1973).

[59] The court of appeals in *Alyeska* awarded attorneys' fees to the plaintiff even though the court found the bad faith and common benefit doctrines inapplicable, and no statute authorized the award. Wilderness Soc'y v. Morton, 495 F.2d 1026 (D.C. Cir.), *rev'd sub nom* Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240 (1975).

[60] 3 U.S. (3 Dall.) 306 (1796).

[61] The Court refused to sustain inclusion of $1600 in attorneys' fees as an element of damages. "The general practice of the *United States* is in opposition to it; and even if that practice were not strictly correct in principle, it is entitled to the respect of the court, till it is changed, or modified, by statute." *Id.*

[62] 421 U.S. at 260. The Court stated that "[w]hat Congress has done, however, while fully recognizing and accepting the general rule, is to make specific and explicit provisions for the allowance of attorneys' fees under selected statutes granting or protecting various federal rights." *Id.* (footnote omitted).

[63] *Id.* at 258-59.

[64] *Id.* at 260.

[65] *Id.* at 263-64. The Court reasoned that the judiciary is ill suited to make the policy judgments required to apply the private attorney general doctrine:

> 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. But it would be difficult, indeed, for the courts, without legislative guidance, to consider some statutes important and others unimportant and to allow attorneys' fees only in connection with the former.

Id.

tion with the Civil Rights Attorneys' Fees Awards Act of 1976.[66]

Congress intended the Act to promote private litigation[67] under the Reconstruction-era civil rights acts,[68] Title VI of the Civil Rights Act of 1964,[69] and Title IX of the Education Amendments of 1972.[70] The Act provides that in any action under those statutes "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."[71] The language of the Act leaves much to the discretion of the trial judge. A court first must determine whether an award of fees to the prevailing party would be consistent with the policies of the Act.[72] The trial

---

[66] Pub. L. No. 94-559, 90 Stat. 2641 (to be codified in 42 U.S.C. § 1988).

[67] S. REP., *supra* note 9, at 2. The report of the Senate Judiciary Committee explained that "[a]ll 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." *Id.*

[68] 42 U.S.C. § 1981 (1970) (equal rights of citizens); 42 U.S.C. § 1982 (1970) (property rights of citizens); 42 U.S.C. § 1983 (1970) (civil action for deprivation of rights); 42 U.S.C. § 1985 (1970) (conspiracy to interfere with civil rights); 42 U.S.C. § 1986 (1970) (action for neglecting to prevent conspiracy to interfere with civil rights).

[69] 42 U.S.C. §§ 2000d *et seq.* (1970) (prohibition against exclusion from participation in, denial of benefits of, and discrimination under federally assisted programs on grounds of race, color, or national origin).

[70] 20 U.S.C. §§ 1681 *et seq.* (Supp. V 1975) (prohibition against exclusion from participation in, denial of benefits of, and discrmination under federally assisted education program on grounds of sex or blindness).

No private causes of action have arisen under Title IX. Suits under 42 U.S.C. § 1983, however, may be sufficient to enforce provisions of the statute against most federally assisted school systems. *See, e.g.*, Berkelman v. United School Dist., 501 F.2d 1264 (9th Cir. 1974); Brenden v. Independent School Dist., 477 F.2d 1292 (8th Cir. 1973); Trent v. Perritt, 391 F. Supp. 171 (S.D. Miss. 1975). Representative Railsback, one of the floor leaders of the bill in the House, indicated that the Act was not designed to create a private cause of action under Title IX. Rather, Railsback said that the purpose of the Title IX fee provision was to provide fees if the courts ever should allow private causes of action under Title IX. 122 CONG. REC. 12153 (daily ed., October 1, 1976).

The language and structure of Title VI and Title IX are almost identical. The only major difference between the two statutes is that while Title IX denies federal funds to educational institutions that discriminate on the basis of sex and blindness, Title VI denies funds to programs which discriminate on the basis of race. In Lau v. Nichols, 414 U.S. 563 (1974), the Court sustained a cause of action under Title VI for ethnic segregation in education. The complaint had charged violations of Title VI as well as the equal protection clause. The Court found it unnecessary to reach the equal protection issues and decided the case solely on the basis of Title VI. *Id.* at 566. Since the courts have allowed causes of action based solely upon the provisions of Title VI, a private cause of action under Title IX would seem equally justified.

[71] Pub. L. No. 94-559, 90 Stat. 2641 (to be codified in 42 U.S.C. § 1988).

[72] *See* text accompanying notes 76-98 *infra*.

judge also must decide whether the party seeking fees has "prevailed" within the meaning of the statute.[73] Finally, the court must exercise its discretion to determine a fee that is "reasonable" in amount.[74] In each instance, Congress intended that the trial court's discretion be guided by existing judicial interpretations of similar fee provisions in civil rights statutes.[75]

Cases interpreting similar attorneys' fees statutes have established the standards to be used in determining the propriety of fee awards to prevailing parties. The Supreme Court in *Newman* determined that fee provisions in civil rights statutes are designed to facilitate private enforcement of those rights.[76] Thus, the courts should be concerned primarily with assuring potential plaintiffs that they will not be burdened with attorneys' fees.[77] Liberal shifting of fees in favor of prevailing plaintiffs in civil rights actions will encourage private litigation and promote the enforcement objectives of the civil rights statutes.[78] Fee awards to prevailing defendants, however, will not encourage potential plaintiffs to bring suits under those statutes, and such awards rarely should be permitted.[79] Awards to prevailing plaintiffs merit different considerations than those involved in awards to prevailing defendants. Therefore, two different judicial standards have developed for application in awarding fees.

The Supreme Court announced the standard to be applied to prevailing plaintiffs in *Newman v. Piggie Park Enterprises, Inc.*[80] The Court ruled that under the terms and policy objectives of the Title II fee award provision,[81] prevailing plaintiffs "should ordinarily recover an attorney's fee unless special circumstances would render such an

---

[73] *See* text accompanying notes 99-106 *infra.*

[74] *See* text accompanying notes 107-113 *infra.*

[75] S. REP., *supra* note 9, at 6.

[76] Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400, 402 (1968) (per curiam).

[77] *Id.*; *see also* Note, *Allowance of Attorney Fees in Civil Rights Actions*, 7 COLUM. J.L. & SOC. PROB. 381 (1971); Note, *Civil Rights—Attorneys' Fees—A Plaintiff Should Ordinarily Recover Attorneys' Fees Under Title II of the 1964 Civil Rights Act (Public Accommodations Section)*, 4 HARV. C.R.—C.L. L. REV. 223 (1968).

[78] Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400 (1968) (per curiam).

[79] S. REP., *supra* note 9, at 5; Walker, *Title VII: Complaint and Enforcement Procedures and Relief and Remedies*, 7 B.C. IND. & COM. L. REV. 495, 506 (1966); Comment, *Title VII, Civil Rights Act of 1964: Standards for Award of Attorneys' Fees to Prevailing Defendants*, 1976 WIS. L. REV. 207.

[80] 390 U.S. 400 (1968) (per curiam).

[81] 42 U.S.C. 2000a-3(b) (1970), pertaining to attorneys' fees, provides in 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 . . . .

award unjust."[82] The Court justified this liberal standard by noting that congressional intent to encourage civil rights would be frustrated by awarding fees only under the more restrictive bad faith standard.[83] Moreover, the Court determined that fees should be ordinarily recoverable in Title II suits since the statute does not allow recovery of damages from which fees could be paid.[84] Therefore, the Court established a standard that awards fees to plaintiffs prevailing in virtually every case under Title II.

The Court indicated that this standard is applicable to other civil rights statutes in *Northcross v. Board of Education.*[85] *Northcross* involved a suit to enjoin school segregation under the Emergency School Aid Act of 1972.[86] That Act provides for attorneys' fees in language similar to the Title II provision.[87] The *Northcross* Court determined that the statutory similarity justified the presumption that both statutes should be construed alike. This presumption was reinforced by the common purpose shared by the statutes to effect compliance with federal civil rights statutes.[88]

The *Newman-Northcross* standard should apply with equal justification to plaintiffs prevailing in suits under the civil rights statutes covered by the 1976 Attorneys' Fees Act.[89] The language of the Act is virtually identical to the language interpreted in both *Newman* and *Northcross.*[90] Moreover, the declared purpose of the Act is to encour-

---

[82] 390 U.S. at 402.

[83] *Id.*

[84] *Id.*

[85] 412 U.S. 427 (1973)(per curiam).

[86] 20 U.S.C. § 1617 (Supp. V 1975).

[87] 20 U.S.C. § 1617 (Supp. V 1975) provides:

> Upon the entry of a final order by a court [for racial discrimination in education], the court, in its discretion, upon a finding that the proceedings were necessary to bring about compliance, may allow the prevailing party other than the United States, a reasonable attorney's fee as part of the costs.

See also note 81 *supra.*

[88] 412 U.S. at 428; Johnson v. Combs, 471 F.2d 84, 86 (5th Cir. 1972), *cert. denied*, 413 U.S. 922 (1973).

[89] The *Newman-Northcross* standard also has been applied to other civil rights attorneys' fees provisions. In Parham v. Southwestern Bell Tel. Co., 433 F.2d 421 (8th Cir. 1970), the court used the *Newman-Northcross* standard to award fees under 42 U.S.C. § 2000e-5(k)(1970), the attorneys' fees provision of Title VII of the Civil Rights Act of 1964. The wording of that statute is virtually identical to the fee provision interpreted in *Newman. See* note 81 *supra.* The same standard also has been applied to the fee provision of Title VIII of the Civil Rights Act of 1968, 42 U.S.C. § 3612 (1970)(Fair Housing). Jeanty v. McKey & Poague, Inc., 496 F.2d 1119 (7th Cir. 1974); *contra,* Fort v. White, 520 F.2d 1113 (2d Cir. 1976). *See* note 92 *infra.*

[90] *Compare* text at note 71 *supra* with notes 81 and 87 *supra.*

age private enforcement of civil rights. The fact that damages are available under some of the statutes covered by the Act should not preclude an award of attorneys' fees.[91] Damages will not make the plaintiff whole if he subsequently must deduct attorneys' fees from the recovery.[92] Moreover, in suits against public officials under 42 U.S.C. § 1983, damage recoveries often are limited or prohibited entirely by the common law immunities available to public defendants.[93] Despite the theoretical availability of damages, private civil rights litigants under the statutes will be burdened by attorneys' fees. Application of the near mandatory standard of *Newman-Northcross* to the Act should alleviate that burden, and help realize congressional intent to promote civil rights litigation.

Congressional policy of encouraging litigation by private plaintiffs, however, will not support a discretionary standard that results in regular fee awards to prevailing defendants.[94] Plaintiffs who bring

---

[91] H.R. Rep., *supra* note 22, at 8-9.

[92] The American no-fee rule penalizes plaintiffs in tort suits as well as civil rights actions. *See* Ehrenzweig, *Reimbursement of Counsel Fees and the Great Society*, 54 CALIF. L. REV. 792 (1966). Tort recoveries, however, provide a fund from which fees can be paid, whereas many civil rights actions result only in injunctive relief.

Compare Fort v. White, 530 F.2d 1113 (2d Cir. 1976) *with* Jeanty v. McKey & Poague, Inc., 496 F.2d 1119 (7th Cir. 1974). The Second Circuit in *Fort* declined to apply the *Newman-Northcross* standard to Title VIII of the Civil Rights Act of 1968, 42 U.S.C. § 3612(c)(1970), which provides for fair housing. The Second Circuit noted that one reason for application of a near mandatory standard in *Newman* and *Northcross* was that those statutes did not allow damage recoveries. Title VIII, however, provides for both compensatory and punitive damages. 42 U.S.C. § 3612(c)(1970). Since the Title VIII fee provision expressly conditions fee awards upon the financial inability of the plaintiff to bear the fees himself, the court determined that Congress intended to limit fee awards under the statute. In *Jeanty*, however, the Seventh Circuit applied the *Newman-Northcross* standard to Title VIII to encourage private enforcement of the statute. The court also remanded the case for a reconsideration of the trial court's refusal to award punitive damages. 496 F.2d at 1121-22.

Congress, however, clearly intended that successful civil rights plaintiffs recover fees regardless of any damages recovered. H.R. REP., *supra* note 22, at 9. The House committee said that civil rights plaintiffs should be afforded the same conconsideration given antitrust plaintiffs, who always recover fees in addition to treble damages. *Id.*

[93] H.R. REP., supra note 22, at 8-9. In suits under 42 U.S.C. § 1983, damages are not recoverable from state officials acting in their official capacities. Edelman v. Jordan, 415 U.S. 651 (1974). In addition, state officials sued in their personal capacities are protected by a qualified discretionary immunity. Wood v. Strickland, 420 U.S. 308 (1975).

[94] Carrion v. Yeshiva Univ., 535 F.2d 722 (2d Cir. 1976); Wright v. Stone Container Corp., 524 F.2d 1058 (8th Cir. 1975); United States Steel Corp. v. United States, 519 F.2d 359 (3d Cir. 1975); Richardson v. Hotel Corp. of America, 332 F. Supp. 519 (E.D. La. 1971); S. REP., *supra* note 9, at 5; Walker, *Title VII: Complaint and Enforcement*

complaints based on unsettled legal principles will be less likely to bring suit if they will be forced to pay their opponent's counsel fees upon failure of their "test case."[95] Therefore, in order to facilitate litigation, courts will award attorneys' fees to prevailing defendants only in those instances in which the plaintiff has shown bad faith.[96] This approach deters plaintiffs who would bring lawsuits that are clearly unfounded or litigated merely for purposes of harrassment and embarrassment.[97] Thus, fee awards to prevailing defendants will be limited to exceptional cases to promote congressional intent to afford civil rights plaintiffs every opportunity to protect their rights.[98]

The trial judge must also exercise his discretion under the Act to determine the state of the proceedings at which fees should be awarded. The Act provides for fee awards to the "prevailing" party without specifying the degree of finality required before fees may be granted.[99] Postponement of fee awards until final resolution of all issues in court could place a heavy economic burden upon plaintiffs involved in protracted litigation and frustrate the purposes of the Act.[100] The Supreme Court noted in *Bradley v. School Board*[101] that courts should use a pragmatic approach to the problem of finality, awarding fees incident to the "entry of any order that determines

---

Procedures and Relief and Remedies, 7 B.C. IND. & COM. L. REV. 495, 506 (1966); Comment, *Title VII, Civil Rights Act of 1964: Standards for Award of Attorney's Fees to Prevailing Defendants*, 1976 WIS. L. REV. 207.

[95] Mause, *Winner Takes All: A Re-examination of the Idemnity System*, 55 IOWA L. REV. 26, 41 (1969).

[96] *See, e.g.*, Carrion v. Yeshiva Univ., 535 F.2d 722 (2d Cir. 1976). Plaintiff brought an unsuccessful employment discrimination suit under Title VII, 42 U.S.C. § 2000e (1970). The plaintiff lost an earlier state action based on the same acts complained of in this suit. The federal district court found that the plaintiff perjured herself and attempted to obtain false testimony from two of her employees, 535 F.2d at 728. The court of appeals affirmed the lower court, finding that the suit "was motivated by malice and vindictiveness and that it was without merit." *Id.* at 728. The defendant university recovered $5000 in attorneys' fees.

[97] *See* note 92 *supra*.

[98] The Report of the House Judiciary Committee noted that much of the litigation covered by the Act would proceed against governmental bodies or officials. These defendants have resources, including the plaintiff's tax dollars, superior to those of civil rights plaintiffs. The Committee reported that awarding fees to public defendants in these suits "would further widen the gap between citizens and government officials." H.R. REP., *supra* note 22, at 7. In addition, awarding fees to plaintiffs who prevail over state defendants is not barred by eleventh amendment principals of state sovereign immunity. *Id.*; *see* text accompanying notes 114-128 *infra*.

[99] Pub. L. No. 94-559, 90 Stat. 2641 (to be codified in 42 U.S.C. § 1988). *See* text accompanying note 71 *supra*.

[100] H.R. REP., *supra* note 22, at 8.

[101] 416 U.S. 696 (1974).

substantial rights of the parties."[102] A court should have the discretion to award fees to a party who prevails on any significant matter that reasonably can be treated as a distinct element in the course of the litigation,[103] regardless of the final outcome of the lawsuit.[104] In addition, prevailing plaintiffs should recover fees even though they have not prevailed in court on the merits of the case, but have obtained a consent decree[105] or informal relief.[106]

---

[102] *Id.* at 722 n.28.

[103] *Bradley* involved a fee award in a school desegregation case. The fee provision of the Emergency School Aid Act of 1972, 42 U.S.C. § 1617 (Supp. V 1975), stipulates that fees are to be awarded to prevailing plaintiffs "upon the entry of a final order." *See* note 87 *supra*. In order to award fees under the statute, therefore, a court must determine whether its order is "final" and whether the plaintiff has "prevailed."

In *Bradley*, the Court noted that in a school desegregation case many final orders will issue during the years in which the desegregation plan is in effect. "To delay a fee award until the entire litigation is concluded would work substantial hardship on plaintiffs and their counsel, and discourage the institution of actions despite the clear congressional intent to the contrary. . . ." 416 U.S. at 723. As a result, the Court awarded fees despite its acknowledgement that the litigation was not yet complete.

Neither party in *Bradley* contested the finality of the court order within the meaning of the statute; therefore, the Court did not discuss extensively the stages of litigation at which fees could be awarded. The Court did note, however, that "the entry of any order that determines substantial rights of the parties may be an appropriate occasion upon which to consider the propriety of an award of counsel fees . . . *Id.* at 723 n.8. In Johnson v. Combs, 471 F.2d 84 (5th Cir. 1972), *cert. denied*, 413 U.S. 922 (1973), the Fifth Circuit defined finality under the statute in terms of 28 U.S.C. § 1291 (1970). That statute limits circuit court jurisdiction to final decisions of the district courts.

Since the Civil Rights Attorneys' Fees Awards Act does not require entry of a final order before fees can be awarded, a party need only "prevail" in order to recover fees. Thus, an award of fees under the Act would be appropriate when a party has prevailed upon a significant matter, even though the matter may not be appealable under 28 U.S.C. § 1291. In Van Hoomissen v. Xerox Corp., 503 F.2d 1131 (9th Cir. 1974), the court awarded fees to Xerox incidental to an interlocutory appeal. The suit involved employment discrimination under Title VII. The EEOC was denied permission to intervene on one of two issues of its complaint. Permission was denied on appeal, and the court of appeals awarded fees to Xerox, saying only that the appeal was "sufficiently significant and discrete to be treated as a separate unit." *Id.* at 1133.

[104] S. REP., *supra* note 9, at 5.

[105] *See, e.g.*, Parker v. Matthews, 411 F. Supp. 1059 (D.D.C. 1976). The parties settled an employment discrimination suit and the court issued a consent decree. The parties could not agree, however, on attorneys' fees. The plaintiff moved for a fee award in her favor, and the court granted the motion. The court held that even though the parties had settled out of court, the plaintiff was a "prevailing" party within the meaning of Title VII, since she had been successful on the principal issue of discrimination. 411 F. Supp. at 1064. *See also* Incarcerated Men of Allen County Jail v. Fair, 507 F.2d 281 (6th Cir. 1974); ASPIRA of New York, Inc. v. Board of Educ., 65 F.R.D. 541 (S.D.N.Y. 1975).

One element vital to encouraging private civil rights suits is assurance that fees awarded to prevailing plaintiffs will be adequate.[107] Generally, a court's discretionary determination of the amount of fee awards is reviewable only for abuse of discretion.[108] American courts exercise this discretion by considering a variety of factors affecting attorney compensation,[109] focusing principally on the time spent by an attorney on a case, the reputation of the lawyer, the value of the benefit sought, the difficulty of the questions involved, and the customary fee for similar services in that locality.[110] These factors are difficult to quantify, and their primary value may lie only in retrospective justification of an award.[111] Nevertheless, trial judges should attempt to award fees in a manner consistent with the policy of the Act. In order to attract competent counsel to civil rights litigation, fees in those cases should approximate fees recovered in other areas of the law.[112] Private vindication of civil rights will be promoted by a judicial discretionary standard that does not penalize financially an attorney who devotes his time to civil rights cases.[113]

---

[106] *See, e.g.*, Brown v. Gaston County Dyeing Mach. Co., 457 F.2d 1377 (4th Cir.), *cert. denied*, 409 U.S. 982 (1972), where the plaintiff succeeded in an employment discrimination suit. Since the employer already had taken steps to correct the abuses, the court of appeals declined to issue an injunction. Instead, the court remanded to the district court to hold the case on its docket for a reasonable time in the event that an injunction should become necessary. The court awarded attorneys' fees despite the fact that no injunction had been issued. *Id.* at 1383.

In Kopet v. Esquire Realty Co., 523 F.2d 1005 (2d Cir. 1975), two counts of a complaint for securities law violations were dismissed for lack of pendent jurisdiction. Nevertheless information obtained by discovery undertaken pursuant to those counts formed the basis of subsequent action. The court awarded the plaintiff fees for the two dismissed counts.

[107] *See generally* Nussbaum, *Attorneys' Fees in Public Interest Litigation*, 48 N.Y.U.L. REV. 301 (1973); Sitkin & Kline, *Financing Public Interest Litigation*, 13 ARIZ. L. REV. 823 (1971).

[108] Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974).

[109] Theories of fee awards utilizing a fixed percentage of damages as the sole determinant of the fee have been used by courts. *See* Note, *Attorneys' Fees in Individual and Class Action Antitrust Litigation*, 60 CALIF. L. REV. 1656, 1662 (1972). This method of determining fees clearly is inapplicable where the plaintiff seeks only injunctive relief. Although straight hourly compensation is used by some courts to award fees, most courts treat time expended as only one factor to be considered. *Id.* at 1665-66.

[110] *See, e.g.*, Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974); ABA CODE OF PROFESSIONAL RESPONSIBILITY, D.R. 2-106; *see generally* 1 S. SPEISER, ATTORNEYS' FEES, 293-330 (1973).

[111] Note, *Attorneys' Fees in Individual and Class Action Antitrust Litigation*, 60 CALIF. L. REV. 1656 (1972).

[112] H.R. REP., *supra* note 22, at 9.

[113] *Id.*

A substantial number of these cases will proceed against state officials. State officials acting in their official capacities are subject to suit under 42 U.S.C. § 1983 for violation of civil rights "under color of any statute . . . of any State."[114] Since the Act provides attorneys fees in suits under § 1983, plaintiffs who prevail in such actions will recover fees which ultimately must be paid from state funds. The eleventh amendment,[115] however, and the principles of sovereign immunity included within that amendment,[116] bar imposition of monetary liability in the form of damages upon state treasuries.[117] Nonetheless, Congress clearly possesses the authority to authorize attorneys' fee awards in suits against state officials.[118] The enforcement provisions of the fourteenth amendment empower Congress to utilize measures reasonably adapted to protect fourteenth amendment rights, even though such measures abrogate a State's sovereign immunity.[119] Congress plainly intended the Civil Rights Attorneys'

---

[114] 42 U.S.C. § 1983 (1970). *See* Monroe v. Pape, 365 U.S. 167 (1961), which sustained the constitutionality of § 1983 against a claim of state sovereign immunity. The Court held that § 1983 was an effective enforcement of the fourteenth amendment.

[115] U.S. CONST. Amend. XI provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

[116] The Supreme Court has interpreted the eleventh amendment to extend to the traditional limits of the common law sovereign immunity doctrine, which provides that a State cannot be sued by anyone without its consent. *See, e.g,* Hans v. Louisiana, 134 U.S. 1 (1890), where the Court interpreted the eleventh amendment to bar a suit brought against a State by a citizen of the same State. In *Ex parte* New York, 256 U.S. 490 (1921), the Court prohibited suit against a State in admiralty, even though the amendment mentions only law and equity. *See* cases collected at CONGRESSIONAL RESEARCH SERVICE, THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION, S. DOC. NO. 92-82, 92d Cong., 2d Sess. 1277 (1973).

[117] Edelman v. Jordan, 415 U.S. 651 (1974). In *Edelman,* plaintiff brought suit to enjoin Illinois' Director of Aid to the Aged, Blind, and Disabled from failing to comply with federal time limits for processing applications for benefits, 45 C.F.R. § 206.10(a)(3)(1976). The complaint asked that the Director be ordered to return to the members of plaintiff's class all benefits wrongfully withheld. 415 U.S. at 656. The Court enjoined the wrongful conduct, but refused to award damages. A prospective injunction obtained against state officials is clearly consistent with the holding of *Ex parte* Young, 209 U.S. 123 (1908), which authorized federal suits for injunctive relief against state officials who exceeded their authority. An award of damages, however, could impair the fiscal integrity of state governments, and therefore is barred by the eleventh amendment. Ford Motor Co. v. Department of Treasury, 323 U.S. 459 (1945). Thus, the effect of *Edelman* is to bar retroactive damage awards under § 1983, while allowing suits for prospective injunctive relief.

[118] Fitzpatrick v. Bitzer, 96 S. Ct. 2666 (1976).

[119] *Id.* at 2671.

Fees Awards Act to apply to state defendants.[120]

In *Fitzpatrick v. Bitzer*[121] the Supreme Court upheld an award of attorneys' fees against a state official under Title VII.[122] The Court ruled that the protection of the eleventh amendment is limited by congressional authority to enforce the fourteenth amendment.[123] Thus, Congress may choose to enforce the civil rights guaranteed by the fourteenth amendment by using the device of attorneys' fees to encourage private litigation.[124] Measures taken to enforce the fourteenth amendment are not subject to the defense of sovereign immunity, since the states voluntarily surrendered their sovereign rights when they ratified the amendment.[125] Therefore, the Court held that the attorney's fee provisions of Title VII apply to state officials.[126] Since the 1976 Attorneys' Fees Act is designed to effect enforcement of fourteenth amendment rights,[127] a statutory fee award under § 1983

---

[120] S. REP., *supra* note 9, at 5. The Senate Report stated:

> in such cases it is intended that the attorneys' fees, like other items of costs, will be collected either directly from the official, in his official capacity, from funds of his agency or under his control, or from the State or local government (whether or not the agency or government is a named party).

Id.

[121] 96 S. Ct. 2666 (1976). Plaintiff sued to enjoin the director of Connecticut's state employees retirement plan from discriminating against men in awarding benefits. *Id.* Title VII prohibits sexual discrimination in distribution of employee compensation. 42 U.S.C. § 2000e-2(a)(1970). The statute provides for awards of attorneys' fees to prevailing parties in language virtually identical to that of the Act. 42 U.S.C. § 2000e-5(k)(1970).

[122] 96 S. Ct. at 2671. *See also* Oliver v. Board of Educ., 45 U.S.L.W. 2262 (W.D. Mich. Nov. 5, 1976). In *Oliver* the trial court held on the basis of Fitzpatrick v. Bitzer, 96 S. Ct. 2666 (1976), that the attorneys' fees provisions of the Emergency School Aid Act of 1972, 20 U.S.C. § 1617 (Supp. V 1975), apply to state officials acting within their official capacities. 45 U.S.L.W. at 2262.

[123] *Id.* The Court quoted extensively from *Ex parte* Virginia, 100 U.S. 339 (1880), in which the Court ruled that:

> [t]he prohibitions of the Fourteenth Amendment are directed to the States, and they are to a degree restrictions of State power. It is these which Congress is empowered to enforce, and to enforce against State action, however put forth, whether that action be executive, legislative, or judicial. Such enforcement is no invasion of State sovereignty. No law can be, which the people of the States have, by the Constitution of the United States, empowered Congress to enact.

Id. at 346, *quoted at* 96 S. Ct. 2670.

[124] 96 S. Ct. at 2671.

[125] *Id.*

[126] 96 S. Ct. at 2671-72.

[127] S. REP., *supra* note 9, at 5.

should not be barred by the eleventh amendment.[128]

The Civil Rights Attorneys' Fees Awards Act of 1976, coupled with a comprehensive body of case law dealing with similar statutes, provides a strong incentive for private enforcement of civil rights. The Act represents another in a long series of equitable and statutory deviations from the traditional American rule that each litigant must bear the burden of attorneys' fees. That burden falls hard upon the victims of civil rights violations. The very discrimination of which the plaintiff complains often deprives him of the earning power necessary to finance costly litigation challenging that discrimination.[129] Thus, Congress has shifted attorneys' fees to those responsible for that discrimination. While the outcome clashes with the American rule of attorneys' fees, it is consistent with American notions of equality before the law.

SCOTT HAMILTON

---

[128] After Edelman v. Jordan, 415 U.S. 651 (1974), a split developed among the circuits regarding whether fee awards based only upon the courts' equitable powers and not authorized by statute could be made under § 1983 in the face of the eleventh amendment. *Compare* Bond v. Stanton, 528 F.2d 688 (7th Cir.), *vacated*, 45 U.S.L.W. 3394 (U.S. Nov. 30, 1976), *and* Thonen v. Jenkins, 517 F.2d 3 (4th Cir. 1975), *and* Souza v. Travisono, 512 F.2d 1137 (1st Cir.), vacated 423 U.S. 809 (1975), *and* Jordan v. Fusari, 496 F.2d 646 (2d Cir. 1974); *with* Taylor v. Perini, 503 F.2d 899 (6th Cir. 1974), *vacated*, 421 U.S. 982 (1975), *and* Jordan v. Gilligan, 500 F.2d 701 (6th Cir. 1974), *cert. denied*, 421 U.S. 991 (1975), *and* Named Individual Members of San Antonio Conservation Soc'y v. Texas Highway Dep't, 496 F.2d 1017 (5th Cir. 1974), *cert. denied*, 420 U.S. 926 (1975). *See generally* Note, *Attorneys' Fees and the Eleventh Amendment*, 88 HARV. L. REV. 1875 (1975).

The Seventh Circuit, in Skehan v. Board of Trustees of Bloomsburg State College, No. 76-1613 (7th Cir. June 21, 1976) (en banc), *cert. denied*, 45 U.S.L.W. 3400 (U.S. Nov. 30, 1976), held that the eleventh amendment bars recovery of fees from a State when the award is based on pre-litigation obstinacy. Nevertheless, the court approved fee awards based on bad faith conduct occurring after initiation of the lawsuit. No. 76-1613 at 9.

The Supreme Court granted certiorari on the question of equitable fee awards against state officials in Bond v. Stanton, 528 F.2d 688 (7th Cir.), *cert. granted*, 96 S. Ct. 2224 (1976), but later vacated the circuit court decision and remanded for consideration in light of the new Attorneys' Fees Act. 45 U.S.L.W. 3400 (U.S. Nov. 30, 1976). On remand, the question of retroactive application of the Act becomes an issue. The Act seems clearly applicable to *Bond*. In Bradley v. School Bd., 416 U.S. 696 (1974), the Supreme Court faced a similar situation with regard to an award of fees under 20 U.S.C. § 1617. That provision of the Emergency School Aid Act of 1972 had been passed after *Bradley* was decided at the district court level. The Supreme Court held that the fee provision was retroactice, and remanded for an award of fees incurred before enactment of the statute. The Court declared that "a court is to apply the law in effect as of the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." *Id.* at 711.

[129] *Attorneys' Fees in Civil Rights Litigation*, *supra* note 29.