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Alyeska Pipeline Service Co. v. The Wilderness Society

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INTRODUCTION

The legal system of the United States has traditionally refused to award attorney's fees to the successful litigant.[1] In fact, our court system may be unique among the nations of the world in its failure to grant legal fees to the successful party.[2] However, federal courts, endowed with those equitable powers possessed by the English Chancery, have formulated several exceptions to the general rule.[3]

With the advent and expansion of what is widely referred to as public interest litigation, lower federal courts indulged in the exercise of their equitable powers to fashion an exception to the general rule when a private party acts as a private attorney general by forcing compliance with the law for the common benefit of the public.[4]

In the recent case of *Alyeska Pipeline Service Co. v. The Wilderness Society*,[5] the United States Supreme Court has taken steps to abort the application of this concept. Not only did the Court refuse to grant attorney's fees to the plaintiff, but the broad language of the opinion suggests a reversion to the more stringent fee denying rules.

BACKGROUND

Lately we have witnessed the growth of a body of law widely referred to as public interest litigation. At the outset let us consider the elements of public interest litigation. First, the issues of a public interest suit are regarded as extremely important. They are considered important because they have been the subject of recent legislative and public concern,

1. *See* Fleischmann Distilling Corp. v. Maier Brewing Corp., 386 U.S. 717 (1967).

2. *See* Ehrenzweig, *Reimbursement of Counsel Fees and the Great Society*, 54 CALIF. L. REV. 792, 793 (1966).

3. For a complete examination of this equitable power to grant costs, *see* Guardian Trust Co. v. Kansas City Southern Ry. Co., 28 F.2d 233, 240 (8th Cir. 1968), *rev'd, on other grounds*, 281 U.S. 1 (1929).

4. *See* Souza v. Travisono, 512 F.2d 1137 (1st Cir. 1975); Hoitt v. Vitek, 495 F.2d 219 (1st Cir. 1974); Knight v. Auciello, 453 F.2d 852 (1st Cir. 1972); Cornist v. Richland Parish, 495 F.2d 189 (5th Cir. 1974); Fairley v. Patterson, 493 F.2d 598 (5th Cir. 1974); Cooper v. Allen, 467 F.2d 836 (5th Cir. 1972); Lee v. Southern Home Sites Corp., 444 F.2d 143 (5th Cir. 1971); Taylor v. Perini, 503 F.2d 899 (6th Cir. 1974); Morales v. Hanes, 486 F.2d 880 (7th Cir. 1973); Donahue v. Staunton, 471 F.2d 475 (7th Cir. 1972); *cert. denied*, 410 U.S. 955 (1973); Fowler v. Schwarzwalder, 498 F.2d 143 (8th Cir. 1974); Brandenburger v. Thompson, 494 F.2d 885 (9th Cir. 1974); La Raza Unida v. Volpe, 57 F.R.D. 94 (N.D. Cal. 1972). The Fourth Circuit Court of Appeals has refused to adopt the private attorney general rule, *See* Bradley v. City of Richmond, 472 F.2d 318, 327-331 (4th Cir. 1972), *vacated on other grounds*, 416 U.S. 696 (1974).

5. 421 U.S. 240 (1975).

as in environmental or consumer protection suits. The issues may be important because they go to the very essence of life, for instance suits regarding the right to welfare benefits or to have an abortion or the issue might involve a constitutionally protected right such as freedom of speech.[6]

Second, a final judgment in a public interest suit will not just affect the person or persons who brought the action; rather, its impact will be broad. It will affect large numbers of citizens.[7]

Third, a public interest suit is brought by a private party as opposed to a governmental agent. The party may be an individual, a group or an organization. What really matters is that the plaintiff is not under a legal obligation to bring the suit.[8] He is acting privately in the public's interest.

We may surmise, then, that the *sine qua non* of public interest litigation is that it seeks to advance a particular goal on behalf of the general public. Public interest litigants usually seek to achieve this by seeking such specific relief as a declaratory judgment, an injunction or a writ of mandamus. These remedies, however, cannot produce a money judgment out of which an attorney's fee can be paid. Thus, private attorneys are disinclined to take public interest suits.[9] Nevertheless, citizen participation in legal and administrative battles such as *Alyeska* is acknowledged as desirable and even essential.[10] Concomitant with this acknowledgment lower federal courts adopted an attitude which enhanced private citizen access to courts by alleviating the burden of attorney's fees.

The courts realized that a single individual or small group of individuals would rarely have the money necessary to stop discrimination or pollution or violation of civil rights. As a result they acted to make attorney's fees ". . . part of the effective remedy a court should fashion to encourage public-minded suits."[11]

Federal courts have always had the equitable power to award attorney's fees without specific statutory authorization,[12] but they rarely used that power, and when they did it was usually as a punitive measure against a defendant who had acted in obvious bad faith[13] or in commercial cases, where the plaintiff's action resulted in a monetary recovery for the benefit of an ascertainable class as well as for himself.[14]

6. *See* Nussbaum, *Attorney's Fees in Public Interest Litigation*, 48 N.Y.U.L. REV. 301, 304 (1973).
7. *Id.* at 305.
8. *Id.*
9. *Id.* at 309-10.
10. *See* La Raza Unida v. Volpe, 57 F.R.D. 94, 101 (N.D. Cal. 1972).
11. Sims v. Amos, 340 F. Supp. 691, 694 (1972).
12. *See* Sprague v. Ticonic Nat. Bank, 307 U.S. 161 (1939).
13. *See* Toledo Scale Co. v. Computing Scale Co., 261 U.S. 399 (1923).
14. *See* Trustees v. Greenough, 105 U.S. 527 (1882).

A 1968 civil rights case, *Newman v. Piggie Park Enterprises, Inc.*[15] is generally regarded as the seminal decision in the trend of awarding attorney's fees in a broader range of cases.[16] The *Piggie Park* case arose under Title II of the Civil Rights Act of 1964,[17] which provides that, *inter alia*, ". . . the court in its discretion may allow the prevailing party a reasonable attorney's fee."[18]

The Court of Appeals for the Fourth Circuit, on remand, instructed the district court to exercise its discretion on the basis of ". . . whether any of the numerous defenses interposed by defendants were presented for purposes of delay and not in good faith."[19] The Court of Appeals' interpretation of the statute fit very neatly with the traditional use by federal courts of their equity power in awarding attorney's fees.[20]

The Supreme Court rejected this narrow view in holding that a litigant who is successful in a Title II suit is entitled to recover attorney's fees as a matter of course unless special circumstances warrant otherwise.[21]

The *Piggie Park* decision is regarded as important for two reasons.[22] First, it is regarded as having indicated a shift from the position the Court had seemingly assumed only a year before in *Fleischmann Distilling Corp. v. Maier Brewing Co.*,[23] a case involving attorney's fees in a trademark infringement case brought under the Landham Act.[24] The Supreme Court refused to allow attorney's fees in the *Fleischmann* case, since Congress had prescribed intricate and explicit remedies for aggrieved parties under the Act. Relevant portions of that Act provided for injunctive relief, compensatory recovery measured by the profit accrued to the defendant by virtue of his infringement, the costs of the action, and damages which may be trebled in appropriate circumstances.[25] In addition, the Court found that the legislative history of the Landham Act did not demonstrate a congressional intent to provide for attorney's fees.[26]

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15. 390 U.S. 400 (1968) (*Per Curiam*).
16. *See* Nussbaum, *Attorney's Fees in Public Interest Litigation*, 48 N.Y.U.L. REV. 301 (1973); Comment, *The Allocation of Attorney's Fees After Mills v. Electric Auto-Lite Co.*, 38 U. CHI. L. REV. 316 (1971); Note, *Awarding Attorney's and Expert Witness Fees in Environmental Litigation*, 58 CORNELL L. REV. 1222, 1239; 40 FORDHAM L. REV. 714 (1972).
17. 42 U.S.C. § 2000a(c)(2) (1964), prohibiting discrimination in restaurants affecting interstate commerce.
18. 42 U.S.C. § 2000a-3(b) (1964).
19. 377 F.2d 433, 437 (4th Cir. 1967), *modified*, 390 U.S. 400 (1968).
20. *See* F.D. Rich Co. v. U.S., 417 U.S. 116, 128 (1974).
21. 390 U.S. at 401-02.
22. *See* Nussbaum, *supra* note 11, at 319.
23. 386 U.S. 714 (1967).
24. 15 U.S.C. § 1051-1127 (1970).
25. 386 U.S. at 719.
26. *Id.* at 721.

On the other hand, Title II does not provide for such a broad range of remedies; an aggrieved party cannot even recover damages.[27] Therefore, to justify an award of fees, a plaintiff who obtains an injunction under Title II is deemed to be vindicating a high priority national purpose.[28] The Supreme Court regarded the counsel fee provision as an effort by Congress to assure compliance with the Civil Rights Act.[29]

Second, *Piggie Park* is regarded as having broadened the permissible scope of fee granting by interpreting a discretionary provision for attorney's fees as a virtual command to award fees to a successful plaintiff who brings suit to protect a public interest, thereby signaling a move by the court to a more liberal position.[30]

This new view was reiterated by the Supreme Court in *Northcross v. Memphis Board of Education.*[31] The case involved a suit to desegregate the public schools of Memphis, Tennessee. The Sixth Circuit Court of Appeals denied the petitioner's motion for an award of attorney's fees in the suit brought under section 718 of the Emergency School Aid Act of 1972.[32] The discretionary language in that section is the same wording as found in Title II of the 1964 Civil Rights Act, which the Supreme Court had interpreted in *Piggie Park* to be a virtual command to award fees to successful plaintiffs.[33] The Court in *Northcross* found that the plaintiffs in school desegregation cases brought under the Emergency School Aid Act, like plaintiffs in Title II cases, act as "private attorney generals." Therefore, as in *Piggie Park*, the Court ruled that they be awarded attorney's fees unless special circumstances would render such an award unjust.[34]

Following *Piggie Park* and *Northcross*, the lower federal courts had shown a marked propensity to award fees in a wide range of public interest cases. For example, in litigation involving prisoner's rights,[35] housing discrimination,[36] teacher dismissal,[37] legislative apportion-

27. 390 U.S. at 402.
28. *Id.* at 402.
29. *Id.* at 401.
30. Nussbaum, *supra* at 319-20.
31. 412 U.S. 427 (1973).
32. 86 Stat. 235.
33. 390 U.S. 402.
34. 412 U.S. at 428.
35. Souza v. Travisono, 512 F.2d 1137 (1st Cir. 1975). The action in *Souza* was brought under 42 U.S.C. § 1983, which does not have a fee provision and was brought to protect prisoner's due process right of access to courts, including access to law agents of attorneys; *accord*, Hoitt v. Vitek, 495 F.2d 219 (1st Cir. 1974).
36. Knight v. Auciello, 453 F.2d 853 (1st Cir. 1972). Plaintiffs invoked 42 U.S.C. § 1982. In granting counsel fees, the court stated at 853: ". . . If a defendant may feel that the cost of litigation . . . may mean that the chances of suit being brought, or continued in the face of opposition, will be small, there will be little brake upon deliberate wrongdoing. In such instances public policy may suggest an award of costs that

ment,[38] environmental protection and housing assistance,[39] first amendment rights,[40] lower federal courts awarded fees without express congressional authorization. In *Alyeska* the Supreme Court was squarely confronted with the issue of whether this liberalism of the federal courts should be curtailed or encouraged.

ALYESKA

Alyeska's judicial history began with *The Wilderness Society v. Hickel*[41] where conservationists obtained a preliminary injunction against the Secretary of the Interior's granting of rights-of-way requested by the oil companies for construction of the Alaskan oil pipeline over federal lands. However, when the hearing for the permanent injunction came before the U.S. District Court, the court dissolved the preliminary injunction, denied a permanent injunction and dismissed the complaint.[42] The Court of Appeals for the District of Columbia reversed the district court's ruling, basing its decision on a literal reading of the statute, its legislative history, and the established construction of the administrative regulations in the Mineral Leasing Act.[43] That was followed by a petition for certiorari and denial thereof,[44] thus leaving intact the court's decision that the statutory maximum right-of-way width was in fact a bar to pipeline construction.

Wilderness Society, the appellant, subsequently requested an award of expenses and attorney's fees related to the litigation they successfully prosecuted to bar construction of the trans-Alaska pipeline.[45] The court found that the appellant's case was not one that fit in either of the historic exceptions to the American rule denying fees to the successful litigant.[46] The court then considered a third class of cases in which the interests of justice required fee shifting where the plaintiffs acted as a "private attorney general", vindicating a policy that Congress considered of the highest priority.[47] The court found that the suit at bar had "great

will remove the burden from the shoulders of the plaintiff seeking to vindicate the public right."

37. Cornist v. Richland Parish School Board, 495 F.2d 189 (5th Cir. 1974).
38. Fairley v. Patterson, 493 F.2d 598 (5th Cir. 1974).
39. La Raza Unida v. Volpe, 57 F.R.D. 94 (N.D. Cal. 1972).
40. Donahue v. Staunton, 471 F.2d 475 (7th Cir. 1972).
41. Wilderness Society v. Hickel, 325 F. Supp. 422 (D.D.C. 1970).
42. That decision was unreported. *See* Dominick, *The Alaskan Pipeline: Wilderness Society v. Morton and the Trans-Alaskan Pipeline Authorization Act*, 23 AMERICAN UNIV. L. REV. 343, n.12 (1973).
43. Wilderness Society v. Morton, 479 F.2d 842, 847 (D.C. Cir. 1973); *cert. denied*, 411 U.S. 917 (1973).
44. Morton v. Wilderness Society, 411 U.S. 917 (1973).
45. Wilderness Society v. Morton, 495 F.2d 1026 (D.C. Cir. 1974).
46. *Id.* at 1029.
47. *Id.*

therapeutic value," in that as a result thereby Congress made several amendments of the Mineral Leasing Act,[48] and the suit was instrumental in the Department of Interior's compliance with the National Environmental Policy Act.[49] The suit also helped to bring to Congressional attention the major issue raised—the relative merits of a trans-Canadian versus a trans-Alaskan route.[50] In sum, the plaintiffs had acted as private attorney generals, ensuring the proper functioning of the government and advancing and protecting substantial public interests.[51]

On appeal to the U.S. Supreme Court the request for fees was summarily denied in a pointedly constrained opinion. The request, on its face, did not appear to present major problems. Concededly, the action had been brought under the statutory authority of acts that were completely silent on the question of fees, but the Court had recently decided in *Mills v. Electric Auto-Lite Co.*[52] that it could not read congressional silence as an intent to circumscribe the court's power to grant appropriate remedies.[53] In fact, the Court seemed secure in regard to its authority to transgress the traditional rule. The sense of authority stemmed from the fact that the judiciary and the legislature have acted as co-equals in fashioning exceptions to the traditional American rule,[54] the judiciary's authority to do so resulting from ". . . the original authority of the Chancellor to do equity in a particular situation."[55]

In contrast with *Mills*, the Court in *Alyeska* chose to interpret congressional silence as a prohibition, instead of an authorization to the Court to decide the fee issue.[56]

The Court made constant reference to the need for legislative guidelines and the lack of legislative authority for the judiciary to act in this area,[57] which is completely out of character when viewed along side the language of the *Mills* decision and similar holdings.

The Court admitted that there are other judicially created exceptions to the traditional attorney's fee rule, but none were applicable to the factual situation in *Alyeska*.[58] Further, since Congress had acted to make provision for fees under selected statutes,[59] the Court felt that it would be a usurpation of power for the Supreme Court and lower

48. *Id.* at 1033.
49. *Id.* at 1034.
50. *Id.* at 1035.
51. *Id.* at 1036.
52. 396 U.S. 375 (1970).
53. For an analysis of the *Mills* decision see 38 U. CHI. L. REV. 316 (1971).
54. *Id.* at 391-92.
55. *Id.* at 393, *citing* Sprague v. Ticonic Nat. Bank, 307 U.S. 161, 166 (1939).
56. 421 U.S. 240, 263-64.
57. *Id.* at 247-62.
58. *Id.* at 258-59.
59. *Id.* at 260.

federal courts to become involved in matters of this nature, stating that ". . . it is not for us to invade the legislature's province by redistributing litigation costs in the manner suggested by respondents and followed by the courts of appeals."[60]

In short, the Court completely acquiesced to Congress in the matter of attorney's fees. It admonished lower federal courts for the use of their traditional powers to do justice through equity and certainly reduced the effective use of the private attorney general rule to award fees.

IMPLICATIONS OF ALYESKA

Alyeska is an affirmation of the *Fleischmann* dicta that ordinarily attorney's fees are not recoverable absent a statute or enforceable contract providing therefor.[61] The decision has put a chill on the post-*Piggie Park* fee shifting trend. As such, it should result in a reduction of the number of public interest and civil rights cases brought in federal forums.[62]

In that the private attorney general concept is no longer available to them, federal courts are now locked into the traditional formulas and will have to revert to the process of scrutinizing each factual situation for the elements necessary to trigger fee transfer under the prior theories.

Since the Supreme Court exhibited reluctance in its refusal to recognize that *Alyeska* may well have fit under one of the traditional fee shifting theories,[63] it is questionable whether the theories are flexible enough to encompass public interest suits.

In contradistinction, nothing in the facts of *Mills* justified granting fees under any of the traditional exceptions to the fee rule. Fee recovery in a stockholder's suit was normally accomplished under a "fund" rationale.[64] But in *Mills* no monetary recovery was sought; therefore, there was no fund out of which attorney's fees could be paid. The Court had to use its imagination in order to justify the award of attorney's fees. It found that a private stockholder bringing actions of the type in *Mills* furnishes a public benefit to all stockholders—a common benefit rationale which is a spinoff from the common fund theory enunciated in *Greenough*.[65] In sum, the Court awarded attorney's fees for acting as a "private attorney general" in the public's interest.

60. *Id.* at 271.
61. 386 U.S. at 717.
62. For instance 42 U.S.C. §§ 1981, 1982 and 1983 have no fee provisions. Lower federal courts, however, had been allowing attorney's fees in suits brought under these sections. *See* Lee v. Southern Home Site, 444 F.2d 143 (5th Cir. 1971); 40 FORDHAM L. REV. 714 (1972).
63. 421 U.S. at 284-87 (Marshall, J., dissenting).
64. *See* Trustees v. Greenough, 105 U.S. 527 (1888).
65. 396 U.S. 396.

In a similar manner, the reasons that justify an award of attorney's fees in shareholder derivative suits where there is no monetary recovery, are applicable to public interest litigation as well. Just as the minority shareholder cannot eliminate improper actions by the corporation's directors and officers by simply exercising this right to vote, so too, for the private citizen[66] ". . . litigation may well be the sole practical avenue open . . . to petition for redress of grievances."[67]

In both cases the aggrieved plaintiff bears all or almost all of the burden of litigation, even though the benefits of the suit flow not just to him but to a broad class, i.e., the general public or the shareholders. Therefore it is only just that the plaintiff should receive fair and equitable compensation from the class he represents. In the derivative suit this is accomplished indirectly by taxing the corporation instead of taxing each individual shareholder. The principle is equally applicable where the corporation is a defendant in a public interest suit. Where the government is a defendant, the entire public can be made to share the successful plaintiff's burden by an award of attorney's fees.[68]

CONCLUSION

Certainly the *Alyeska* decision indicates a lessening of commitment by the Supreme Court toward public interest litigation and the demise of the private attorney general concept as a tool of federal courts. Since the Court has shown its insensitivity to the principle that attorney's fees should be awarded to successful private plaintiffs who help to effectuate important public policies by securing through litigation benefits that inure to the class or group they represent, successful plaintiffs will be able to recover attorney's fees only in the most egregious kind of cases.

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66. Nussbaum, *supra* at 334.
67. NAACP v. Button, 371 U.S. 415, 430 (1963).
68. Nussbaum, *supra* at 334.

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