

# Awarding Attorney and Expert Witness Fees in Environmental Litigation

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## NOTE

### AWARDING ATTORNEY AND EXPERT WITNESS FEES IN ENVIRONMENTAL LITIGATION

In the United States the successful litigant in a civil action generally must pay for his own lawyer and expert witnesses.<sup>1</sup> The legal fees<sup>2</sup> of the winner are not included in the costs, which are normally taxed against the loser.<sup>3</sup> There are, however, both statutory and judicial exceptions to the general rule,<sup>4</sup> some of which become significant in environmental litigation. Statutes that specifically authorize awards

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<sup>1</sup> This is true for reasonable attorney fees in both federal and state courts. *See* 6 J. MOORE, FEDERAL PRACTICE ¶ 54.71[2], at 1703-04 & n.2 (2d ed. 1972) [hereinafter cited as MOORE]. As for expert witness fees, the general rule applies in federal courts. *See* note 3 *infra*. Some states, however, specifically allow taxation of the winner's expert witness fees and expenses as costs. *See, e.g.*, LA. REV. STAT. ANN. § 13:3666 (1968).

<sup>2</sup> This Note refers to reasonable attorney and expert witness fees collectively as "legal fees" and "litigation expenses." In the context of environmental litigation, the arguments favoring the award of both types of fees are similar.

<sup>3</sup> In federal courts costs are "allowed as of course to the prevailing party unless the court otherwise directs." FED. R. CIV. P. 54(d). In state courts, the same rule generally applies. *See, e.g.*, N.Y. CIV. PRAC. LAW § 8101 (McKinney 1963).

Costs are the administrative expenses produced by the litigation, payable by law as part of the judgment to the court and several of its officers. Items taxable as costs in federal courts include various fees for court clerks, reporters, witnesses, copying, and printing. *See* 28 U.S.C. § 1920 (1970). The maximum allowances for any witness—expert or ordinary—includible as statutory costs are set forth by statute. *See id.* § 1821. The portion of the expert witness fee in excess of these statutory amounts is not specifically defined as includible in costs. A nominal attorney's docket fee (usually \$20) may also be included in statutory costs for payment directly to the winner's attorney. *See id.* §§ 1920(5), 1923. Although this docket fee is actually an attorney fee, it is only a fraction of the real expenses incurred by the winner for his legal representation. In state courts, a correspondingly inadequate substitute for a reasonable attorney fee is often provided. *See, e.g.*, DEL. CODE ANN. tit. 10, § 8710 (1953) (minimal amounts ranging up to \$13.33 for specified legal services); MASS. ANN. LAWS ch. 261, § 23 (1968) (maximum counsel fee of \$2.50). *See also* CONN. GEN. STAT. ANN. § 52-257 (Supp. 1973) (prevailing party receives "by way of indemnity" \$75, with additional allowance in "difficult or extraordinary cases" of \$200).

<sup>4</sup> *See* notes 35-143 and accompanying text *infra*. One major exception arising outside the environmental field involves the situation in which the parties to a contract or lease, as part of their transaction, agree on the allocation of costs, including legal fees, prior to any litigation that may arise. *See* McLaughlin, *The Recovery of Attorney's Fees: A New Method of Financing Legal Services*, 40 *FORDHAM L. REV.* 761, 769-70 (1972). Two other special situations in which the courts have traditionally awarded attorney fees are a wife's action for divorce or separation and cases in which the plaintiff sues to recover his attorney's fees incurred in prior litigation that was necessitated by the wrongdoing of the defendant in the present action. *See, e.g.*, *Artvale, Inc. v. Rugby Fabrics Corp.*, 232 F. Supp. 814, 826 (S.D.N.Y. 1964), *aff'd*, 363 F.2d 1002 (2d Cir. 1966); 5 A. CORBIN, *CONTRACTS* § 1037, at 225-26 (1964).

of reasonable attorney and possibly expert witness fees can be mandatory<sup>5</sup> or discretionary,<sup>6</sup> and always deal with particular areas of litigation such as consumer protection, civil rights, or air pollution.<sup>7</sup> The judicial (or equitable) exceptions to the general rule are the product of the courts' power to fashion a just remedy and embody general principles that apply to widely diverse situations. Although some commentators have urged the abolition of the general rule,<sup>8</sup> the modern judicial approach has been to broaden the application of the equitable exceptions, forging new concepts when necessary to deal with new problems. Court-awarded legal fees are of crucial importance today in the fight to save our environment because no other feasible method exists for ensuring citizen vigilance and public-interest litigation.<sup>9</sup>

## I

### ENVIRONMENTAL LITIGATION

#### A. *Causes of Action*

"Environmental litigation" describes a multitude of actions brought to protect ecological and environmental interests.<sup>10</sup> These

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<sup>5</sup> *E.g.*, Clayton Act, § 4, 15 U.S.C. § 15 (1970); Truth in Lending Act, § 130(a)(2), 15 U.S.C. § 1640(a)(2) (1970); Fair Labor Standards Act, § 16(b), 29 U.S.C. § 216(b) (1970); Consumer Product Safety Act, § 24, 15 U.S.C.A. § 2073 (Supp. 1973). Several of these statutes only require an award of fees to the plaintiff, while others require the award to the prevailing party. For a more extensive listing, see MOORE ¶ 54.71[2].

<sup>6</sup> *See, e.g.*, Securities Act of 1933, § 11(e), 15 U.S.C. § 77k(e) (1970); Securities Exchange Act of 1934, § 9(e), 15 U.S.C. § 78i(e) (1970); Civil Rights Act of 1964, tit. II, § 204(b), 42 U.S.C. § 2000a-3(b) (1970). A court's decision to allocate litigation expenses under a discretionary statute may involve such factors as the losing party's bad faith, the need for deterrence, the value of private enforcement of strong public policies embodied in the statute, and possibly the relative economic status of the parties. *See* notes 35-39 and accompanying text *infra*. These discretionary factors are similar to those that are applicable when a court exercises its equitable powers to award legal fees in the absence of specific statutory authority. Courts have described the criteria for ascertaining appropriate fees for attorneys and expert witnesses. *See, e.g., In re Osofsky*, 50 F.2d 925, 927 (S.D.N.Y. 1931). *See also* MOORE ¶ 54.77[2], at 1715-16; 7A C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1803, at 289-92 (1972). This Note does not discuss these latter criteria, but instead focuses on the factors that should persuade a court initially to exercise its discretion in allowing legal fees as costs.

<sup>7</sup> *See* notes 5-6 *supra* and note 35 *infra*.

<sup>8</sup> *See, e.g.*, 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); Stoebuck, *Counsel Fees Included in Costs: A Logical Development*, 38 U. COLO. L. REV. 202 (1966); Note, *Attorney's Fees: Where Shall the Ultimate Burden Lie?*, 20 VAND. L. REV. 1216 (1967).

<sup>9</sup> *See* text accompanying notes 31-39 *infra*.

<sup>10</sup> One author has divided environmental litigation into three categories: (1) suits in

actions may be founded upon the common law, statutory provisions, or constitutional claims. Tort theories, such as private<sup>11</sup> or public<sup>12</sup> nuisance, trespass,<sup>13</sup> and negligence,<sup>14</sup> as well as strict liability for ultra-hazardous activity<sup>15</sup> and products liability,<sup>16</sup> may be successfully employed. Inverse condemnation actions,<sup>17</sup> based on the fifth amendment, allege an unconstitutional taking, and a constitutional right to a clean environment has been claimed as a "penumbral" right of the fifth, ninth, tenth, and fourteenth amendments.<sup>18</sup> An older yet still compelling theory is based on the public trust doctrine.<sup>19</sup> Actions premised

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which the government is the protector, either as plaintiff or defendant, (2) suits between private parties, and (3) private suits against the government. See Moorman, *A Brief Look at Environmental Causes of Action*, 18 PRAC. LAW. 81, 81-86 (1972). This Note examines cases that fall within the last two categories, especially the public-interest suit against governmental officials and large-scale private polluters.

<sup>11</sup> See, e.g., *McElwain v. Georgia-Pacific Corp.*, 245 Ore. 247, 421 P.2d 957 (1966) (punitive as well as actual damages awarded).

<sup>12</sup> An action for public nuisance by a private citizen requires that the plaintiff have suffered damages qualitatively different from those suffered by the general public, and further requires that the responsible public officials have refused to prosecute the offender. See, e.g., *Hill v. Stokely-Van Camp, Inc.*, 260 Minn. 315, 109 N.W.2d 749 (1961).

<sup>13</sup> See, e.g., *Reynolds Metals Co. v. Martin*, 337 F.2d 780 (9th Cir. 1964).

<sup>14</sup> *Id.*

<sup>15</sup> See, e.g., *Luthringer v. Moore*, 31 Cal.2d 489, 190 P.2d 1 (1948).

<sup>16</sup> See, e.g., *Ricciuti v. Voltarc Tubes, Inc.*, 277 F.2d 809 (2d Cir. 1960). See generally Esposito, *Air and Water Pollution: What To Do While Waiting for Washington*, 5 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 32 (1970).

<sup>17</sup> See, e.g., *Ferguson v. Village of Hamburg*, 272 N.Y. 234, 5 N.E.2d 801 (1936).

<sup>18</sup> See Roberts, *The Right to a Decent Environment; E = MC<sup>2</sup>: Environment Equals Man Times Courts Redoubling Their Efforts*, 55 CORNELL L. REV. 674 (1970); Sive, *The Environment—Is It Protected by the Bill of Rights?*, *Civil Liberties*, April 1970, at 3, col. 1. Whether § 101(c) of the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. § 4331(c) (1970)) recognizes an individual's right to a clean environment has been much debated, especially in light of the changed wording which the congressional conference committee inserted into the version of NEPA first passed by the Senate. Originally, the pertinent language provided that "Congress recognizes that each person has a fundamental and inalienable right to a healthful environment." S. 1075, 91st Cong., 1st Sess. § 101(b) (1969). In presenting the compromise, and adopted, version which noted that "each person should enjoy a healthful environment" (§ 101(c), 42 U.S.C. § 4331(c) (1970)), Senator Henry Jackson stated:

I opposed this change in conference committee because it is my belief that the language of the Senate passed bill reaffirmed what is already the law of this land; namely, that every person does have a fundamental and an inalienable right to a healthful environment. If this is not the law of this land, if an individual in this great country of ours cannot at the present time protect his right and the right of his family to a healthful environment, then it is my view that some fundamental changes are in order.

115 CONG. REC. 40,416 (1969).

<sup>19</sup> See Cohen, *The Constitution, the Public Trust Doctrine, and the Environment*, 1970 UTAH L. REV. 388; Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970). For a discussion of the possible use

on the federal antitrust laws<sup>20</sup> and *qui tam* statutory provisions<sup>21</sup> can also be used to further environmental aims.

Private citizen suits, as authorized by the newer federal environmental laws,<sup>22</sup> may become the most effective weapons in the environmentalist's arsenal of statutory causes of action. Under this new legislation, a private individual with standing, irrespective of the amount in controversy or citizenship of the parties,<sup>23</sup> may bring a civil action in a federal district court against violators of standards or abatement orders issued by the Environmental Protection Agency (EPA).<sup>24</sup> Further, these laws allow suits against the EPA Administrator or other responsible federal officials for failure to perform nondiscretionary duties.<sup>25</sup> Some state legislation goes even further. For example, Michigan's broadly worded environmental protection act<sup>26</sup> allows a person to sue anyone, including the state and its agencies, "for the protection of the air, water and other natural resources and the public trust therein from pollution, impairment or destruction."<sup>27</sup>

### B. *Financing Public-Interest Environmental Litigation*

The arguments favoring court-awarded legal fees in environmental cases are strongest when the action is pursued in the public interest and

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of this theory in conjunction with the equitable fund exception for awards of fees, see notes 82-89 and accompanying text *infra*.

<sup>20</sup> See, e.g., *In re Motor Vehicle Air Pollution Control Equip.*, 52 F.R.D. 398 (C.D. Cal. 1970).

<sup>21</sup> See note 33 *infra*.

<sup>22</sup> See Federal Water Pollution Control Act Amendments of 1972, § 505, 33 U.S.C.A. § 1365 (Supp. 1973); Marine Protection, Research, and Sanctuaries Act of 1972, § 105(g), 33 U.S.C.A. § 1415(g) (Supp. 1973); Clean Air Amendments of 1970, § 304, 42 U.S.C.A. § 1857h-2 (Supp. 1973); Noise Control Act of 1972, § 12, 42 U.S.C.A. § 4911 (Supp. 1973).

<sup>23</sup> In describing the prerequisites for institution of a citizen suit, the Water, Sanctuaries, and Air Acts (*see note 22 supra*) expressly dispense with the amount-in-controversy and citizenship requirements, but the Noise Act only expressly dispenses with the amount-in-controversy prerequisite. See 42 U.S.C.A. § 4911(a) (Supp. 1973).

<sup>24</sup> See note 22 *supra*.

<sup>25</sup> *Id.* It is important to appreciate the somewhat limited scope of the actions Congress has authorized by these citizen suit provisions. The citizen may only seek specific relief against polluters and federal officials. The citizen suit cannot be a free-wheeling attack, but must confine its aims to those of the governing act—compliance with antipollution standards and fulfillment of nondiscretionary duties outlined in the act. These citizen suit provisions, however, put no restriction on the citizen's independent pursuit of his otherwise existing statutory or common law rights of action. See 33 U.S.C.A. §§ 1365(e), 1415(g)(5) (Supp. 1973); 42 U.S.C.A. §§ 1857h-2(e), 4911(e) (Supp. 1973).

<sup>26</sup> Environmental Protection Act of 1970, MICH. STAT. ANN. §§ 14.528(201)-(207) (Supp. 1973).

<sup>27</sup> *Id.* at § 14.528(202)(1).

not for personal gain.<sup>28</sup> The *sine qua non* of public-interest environmental litigation is that it seeks to advance a conservation goal on behalf of the general public. Public-interest environmental litigants usually seek specific relief such as declaratory judgment, injunction, or mandamus. The reasons for this are twofold. First, individual damages are difficult to measure and apportion in a large-scale pollution action brought on behalf of the public.<sup>29</sup> Second, federal class actions for damages present jurisdictional problems which can be obviated only if the numerous class members jointly seek specific relief for their common grievance.<sup>30</sup> These remedies, however, cannot produce a money judgment out of which attorneys and expert witnesses can be paid. The public will surely benefit from an injunction, but it is only the richest of environmentalists and the most dedicated of groups who would, or could, bear the economic brunt of protracted litigation. Thus, the remedies which are most appropriate in public environmental litigation have a dampening effect on the private litigant's enthusiasm for bringing a lawsuit.

Nevertheless, citizen participation in the legal and administrative battle to save the environment is widely acknowledged as desirable and even essential.<sup>31</sup> Neither the class action<sup>32</sup> nor the *qui tam* reward<sup>33</sup>

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<sup>28</sup> "Private-injury" environmentalists can be distinguished from "public-interest" environmentalists. Both types of litigants have environmental interests at stake, but the private-injury plaintiff pursues only his personal, proprietary interests, which are usually protected by the traditional tort actions for trespass, nuisance, and negligence. The "bad faith" equitable exception to the general rule against the award of expenses does have application even in a case strictly limited to private compensation for individual environmental injury (*see* notes 59-60 and accompanying text *infra*), but the public benefit inherent in the public-interest suit is the crux of the equitable fund and private attorney general exceptions as applied to environmental cases. *See* notes 92-99 & 143-48 and accompanying text *infra*.

<sup>29</sup> 7A C. WRIGHT & A. MILLER, *supra* note 6, § 1782, at 113. The concept of large-scale environmental destruction suggests an injury suffered by the public as a whole and not an injury severable into a myriad of small claims. Moreover, environmental injury to an individual may be nearly impossible to assess in realistic economic terms.

<sup>30</sup> *See* note 32 *infra*.

<sup>31</sup> In his August 1971, "Message to the Congress," President Nixon stated:

In the final analysis, the foundation on which environmental progress rests in our society is a responsible and informed citizenry. My confidence that our Nation will meet its environmental problems in the years ahead is based in large measure on my faith in the continued vigilance of American public opinion and in the continued vitality of citizen efforts to protect and improve the environment.

The National Environmental Policy Act has given a new dimension to citizen participation and citizen rights—as is evidenced by the numerous court actions through which individuals and groups have made their voices heard.

7 WEEKLY COMP. OF PRES. DOC. 1132, 1133 (1971).

The President's executive agency charged with monitoring the success of the country's battle against environmental destruction stated in its Second Annual Report:

is as effective in encouraging private involvement in environmental litigation as court-awarded legal fees. Without court-awarded fees for

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Perhaps the most striking recent legal development has been the step-up in citizen "public interest" litigation to halt degradation of the environment. In the face of a history of administrative decisions that ignored environmental impacts and against a tide of legislative delays in developing pollution control law, citizens concluded that they must use the courts to cure the neglect. The citizen litigation has not only challenged specific government and private actions which were environmentally undesirable. It has speeded court definition of what is required of Federal agencies under environmental protection statutes. The suits have forced greater sensitivity in both government and industry to environmental considerations. And they have educated lawmakers and the public to the need for new environmental legislation.

U.S. COUNCIL ON ENVIRONMENTAL QUALITY, ENVIRONMENTAL QUALITY: SECOND ANNUAL REPORT 155-56 (1971).

<sup>32</sup> Class actions under Federal Rule of Civil Procedure 23 have been touted as the ideal weapon for vindicating the rights of numerous "small claim" plaintiffs. See *Eisen v. Carlisle & Jacquelin*, 391 F.2d 555, 560 (2d Cir. 1968). A Rule 23(b)(1) or 23(b)(3) class action can produce a monetary fund from which the attorney's contingent fee can be paid. Such a suit for damages, however, is an unwieldy instrument for affecting social policy, primarily because *Snyder v. Harris*, 394 U.S. 332 (1969), and its progeny have held that each member of the class in a diversity action must meet the federal jurisdictional prerequisite amount of \$10,000. See, e.g., *Zahn v. International Paper Co.*, 469 F.2d 1033 (2d Cir. 1972) (applying *Snyder* requirement to unnamed as well as named members of class); *Potrero Hill Community Action Comm. v. Housing Authority*, 410 F.2d 974 (9th Cir. 1969) (applying *Snyder* to federal question situation). Moreover, the Rule 23(b)(2) class action for declaratory or injunctive relief is naturally adapted to "achieving purposeful social goals or vindicating important individual rights." AMERICAN COLLEGE OF TRIAL LAWYERS, SPECIAL COMMITTEE ON RULE 23 OF THE FEDERAL RULES OF CIVIL PROCEDURE, REPORT AND RECOMMENDATIONS 29 (1972); see 7A C. WRIGHT & A. MILLER, *supra* note 6, § 1782, at 113. In the pre-1966 terminology of Rule 23, such (b) (2) actions are "true" class actions because the class members have "a common and undivided interest" in the environment. See *Pinel v. Pinel*, 240 U.S. 594, 596 (1916). Therefore, under a Rule 23(b)(2) action small claims of injury can be aggregated to meet the \$10,000 minimum jurisdictional amount, thus avoiding the *Snyder* dilemma. However, since the Rule 23(b)(2) action does not result in a money judgment, attorneys will be unwilling and unable to undertake the financial burden of public-interest litigation unless some method of compensation is available. The equitable award of legal fees, in the absence of more specific statutory authority, provides the perfect complement to a Rule 23(b)(2) environmental class action. See AMERICAN COLLEGE OF TRIAL LAWYERS, *supra* at 29. Without this incentive for attorneys, the class action offers no solution to the problem of financing public-interest environmental litigation.

<sup>33</sup> The Refuse Act of 1899 (33 U.S.C. § 411 (1970)), provides a *qui tam* reward. This provision has been mentioned as a possible means of encouraging private watchdog actions against water polluters. See J. BRECHER & M. NESTLE, ENVIRONMENTAL LAW HANDBOOK 228 (1971). In a *qui tam* action, the informer brings a civil action to collect his prescribed portion of a fine assessable against a violator of the criminal statute authorizing the suit. The Refuse Act prescribes criminal penalties of up to \$2,500 for violations of its rather strict pollution control requirements (33 U.S.C. §§ 407, 411 (1970)), specifies that an informer should get one-half of the fine (*id.* § 411), but is silent on the informer's right to institute a *qui tam* action to recover his reward. The authorities are split on whether the informer has such an implied right of action. Compare *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 541 & n.4 (1943), with COMMITTEE ON GOV'T OPS., 91ST CONG., 2D SESS., QUI TAM ACTIONS AND THE 1899 REFUSE ACT: CITIZEN LAWSUITS AGAINST POLLUTERS OF

the private citizen litigating in the public interest, the call for individual citizen participation becomes hollow.<sup>34</sup>

## II

### ENVIRONMENTAL STATUTES ALLOWING FEES

Recently, Congress has enacted environmental statutes which explicitly arm the courts with the discretion to award reasonable attorney and expert witness fees in suits brought by private citizens as authorized by the statutes.<sup>35</sup> Although the scope of these citizen suits is rather narrow,<sup>36</sup> the very existence of such provisions for court-awarded fees is indicative of Congress's recognition of the necessity for citizen participation in this area.<sup>37</sup>

The statutes provide no guidelines to aid a court in reaching its discretionary decision to award fees. Faced with such a decision, a court will undoubtedly consider certain equitable factors which have been developed as a basic common law backdrop to the entire question

THE NATION'S WATERWAYS 22-23 (Comm. Print. 1970). The *qui tam* action, therefore, presents special legal complexities and is limited to water pollution suits. Consequently, the *qui tam* provision has been of little value elsewhere in the war on pollution. See generally Kafin & Needleman, *The Use of Qui Tam Actions to Protect the Environment*, 17 N.Y.L. FORUM 130 (1971). Although the *qui tam* reward is not an improbable tactic for legislatures to use in encouraging citizen vigilance, the concept is largely an anachronism. Under the newer federal environmental laws, Congress has instead pursued the more direct and flexible approach of allowing reasonable attorney and expert witness fees to citizens suing in the public interest. The award of such legal fees is not tied to any prerequisite that a criminal fine be involved.

<sup>34</sup> See *La Raza Unida v. Volpe*, 57 F.R.D. 94, 101 (N.D. Cal. 1972).

<sup>35</sup> See Federal Water Pollution Control Act Amendments of 1972, § 505(d), 33 U.S.C.A. § 1365(d) (Supp. 1973); Marine Protection, Research, and Sanctuaries Act of 1972, § 105(g)(4), 33 U.S.C.A. § 1415(g)(4) (Supp. 1973); Clean Air Amendments of 1970, § 304(d), 42 U.S.C.A. § 1857h-2(d) (Supp. 1973); Noise Control Act, § 12(d), 42 U.S.C.A. § 4911(d) (Supp. 1973).

<sup>36</sup> See note 25 *supra*.

<sup>37</sup> The legislative history of the first of these citizen suit provisions for legal fees provides some insight into congressional motivation. The Senate report on the fees provision emphasized the public service that a private action by an individual litigant would provide:

The Committee has added a key element in providing that the courts may award costs of litigation, including reasonable attorney and expert witness fees, whenever the court determines that such action is in the public interest. . . .

The Courts should recognize that in bringing legitimate actions under this section citizens would be performing a public service and in such instances the courts should award costs of litigation to such party.

S. REP. No. 1196, 91st Cong., 2d Sess. 38 (1970). The drafters intentionally gave the courts authority to award fees to either party in an attempt to discourage bad faith suits but yet allow reimbursement to citizens litigating in good faith. *Id.*

of allocating the costs of litigation. First and most important, the citizen's suit implements a strong public policy favoring protection of the environment. Since encouragement of such suits will usually be to the public's benefit, there is inherent value in shifting the expense of such litigation to those who flout that policy.<sup>38</sup> Second, an award of fees against a private polluter must necessarily have a deterrent effect on other violators of the environmental laws. The presence of the ubiquitous private citizen with power to initiate enforcement proceedings *sua sponte* should generate a healthy respect for the law and the public's right to a decent environment. Third, the private polluter who callously disregards the public's environmental interests is guilty of bad faith and should pay the costs of the litigation necessitated by that disregard for the law and the public.<sup>39</sup> Fourth, when public officials are subject to constant examination in the performance of their non-discretionary duties, government is likely to be more responsive to public needs. Finally, the relative economic positions of the parties must always be at least a tacit consideration in allocating costs. The polluting corporate giant or the government—each with its own staff of attorneys and experts—would be practically immune from suit by a concerned citizen with vastly more limited resources were it not for the equalizing effect of the fee-shifting device. These same equitable factors have compelled the courts to create certain well-defined exceptions that permit fee-shifting even in the absence of specific statutory fee provisions.

### III

#### EQUITABLE EXCEPTIONS

The power of a court to award the expenses of litigation not normally taxable as costs—including reasonable attorney and expert

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<sup>38</sup> The value of the public-interest suit is recognized by many of the federal statutes that allow awards of legal fees as costs. In *Hutchinson v. William C. Barry, Inc.*, 50 F. Supp. 292, 298 (D. Mass 1943), the court described the rationale underlying the mandatory fee-shifting provision in § 16(b) of the Fair Labor Standards Act of 1938 (29 U.S.C. § 216(b) (1970)):

The government has set up a regulatory system for the benefit of persons in the plaintiff's class. To make the regulation effective private suits as well as public prosecutions are permitted. Suits by plaintiffs, if well founded, are in the public interest. Therefore, the cost of prosecuting successful suits should be borne not by those who were victims but by those who have violated the regulations and caused the damage.

<sup>39</sup> An analogous view is that the particular violator is punished if made to pay costs which include the plaintiff's legal fees. This view is by no means unfounded. *See, e.g.*, Comment, *The Allocation of Attorney's Fees After Mills v. Electric Auto-Lite Co.*, 38 U. CHI. L. REV. 316, 318 & n.14 (1971). The more positive view of costs, however, is that they generally are designed to allocate the inevitable expenses fairly between the litigants. *See generally* notes 44-58 & 94 and accompanying text *infra*.

witness fees—is an integral part of the court's equitable power.<sup>40</sup> Because taxation of costs is a procedural matter, this equitable power arguably extends to all civil actions.<sup>41</sup> Normally, a court will award fees to the successful litigant<sup>42</sup> "only in exceptional cases and for dominating reasons of justice."<sup>43</sup> Under this inherent power the courts have developed two major exceptions to the general rule against the award of expenses: the "bad faith" and the "equitable fund" doctrines. Recently, the "private attorney general" exception has also evolved. Its complete judicial acceptance may prove vital in fostering public-interest environmental litigation.

### A. *Bad Faith Exception*

Whenever a party knowingly attempts to avoid his clear legal duties or to harass his adversary without justification, the court may penalize such bad faith by shifting the innocent party's legal expenses to the recalcitrant or harassing adversary.<sup>44</sup> Either the plaintiff or the defendant can be guilty of bad faith and thus be assessed legal fees under this doctrine. In essence, the court views the dispute as entirely unnecessary, the guilty party's bad faith having created the need for the litigation.

In civil rights and school desegregation cases, the courts have

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<sup>40</sup> The language of the Supreme Court in *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161 (1939), leaves no doubt that both attorney and expert witness fees were involved in the Court's discussion of the source of the equitable power to award litigation expenses. The Court was considering "the power of federal courts in equity suits to allow *counsel fees and other expenses entailed by the litigation* not included in the ordinary taxable costs recognized by statute." *Id.* at 164 (emphasis added).

The Court concluded that "[p]lainly the foundation for the historic practice of granting reimbursement for the costs of litigation other than the conventional taxable costs is part of the original authority of the chancellor to do equity in a particular situation." *Id.* at 166 (footnote omitted).

<sup>41</sup> The merger of law and equity in federal and state courts unified the formerly bifurcated rules of procedure. Although a court's power to award actual litigation expenses as costs derives from equity, this power exists today under a procedure which applies uniformly to all civil actions, whether sounding in law or in equity. *See, e.g., Moore* ¶ 54.77[2], at 1712 & n.21. Thus, in environmental litigation, the equitable doctrines favoring awards of attorney and expert witness fees apply to suits in equity for declaratory and injunctive relief and possibly to legal actions for mandamus or damages.

<sup>42</sup> An equitable award of fees may be granted at an interim stage in the litigation (*see Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970)), or even if the plaintiff is only partially successful. *See Long v. Georgia Kraft Co.*, 455 F.2d 331 (5th Cir. 1972) (fees allowed to "losing" plaintiff union that sought to prevent merger of segregated local unions pending institution of protective transitional measures on theory that plaintiff advanced aims of Civil Rights Act of 1964). The action need not be prosecuted to judgment before fees may be awarded because this would discourage proper settlements. *See Levine v. Bradlee*, 378 F.2d 620 (3d Cir. 1967); *Gilson v. Chock Full O'Nuts Corp.*, 331 F.2d 107 (2d Cir. 1964).

<sup>43</sup> *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161, 167 (1939).

<sup>44</sup> *See generally Guardian Trust Co. v. Kansas City S. Ry.*, 28 F.2d 233 (8th Cir. 1928), *rev'd on other grounds*, 281 U.S. 1 (1930).

awarded litigation expenses to plaintiffs who have successfully established a violation of their constitutional rights. When a labor union refused to bargain for its black members, thus forcing them to resort to expensive litigation in defense of their rights, the court held that such "discriminatory and oppressive conduct by a powerful labor organization" justified an award of counsel fees under the bad faith exception.<sup>45</sup> In desegregation cases, bad faith has been found in the conduct of school officials who have resisted compliance with clear judicial directives to dismantle their dual school systems. Thus, in *Monroe v. Board of Commissioners*,<sup>46</sup> school authorities resubmitted a "free-transfer" plan that the Supreme Court had already flatly rejected as constitutionally impermissible.<sup>47</sup> The Sixth Circuit held that the school board's "unreasonable, obdurate obstinacy"<sup>48</sup> warranted court-awarded legal fees for the successful plaintiffs.<sup>49</sup> It is important to emphasize, however, that the bad faith exception can operate against a defendant only if the defendant acts in flagrant violation of clearly established duties.<sup>50</sup>

When a party must institute civil contempt proceedings to preserve and enforce his adjudicated rights, the court may award the deprived party his litigation expenses as part of costs because of the "willfulness inherent in the contemptuous act."<sup>51</sup> Although the legal fees in such cases are usually recovered in equity as costs,<sup>52</sup> the court in bad faith cases may deem the award of such fees an integral part of damages.<sup>53</sup>

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<sup>45</sup> *Rolax v. Atlantic Coast Line R.R.*, 186 F.2d 473, 481 (4th Cir. 1951). See generally *Dyer v. Love*, 307 F. Supp. 974, 984-88 (N.D. Miss. 1969).

<sup>46</sup> 453 F.2d 259 (6th Cir. 1972).

<sup>47</sup> See *Monroe v. Board of Comm'rs*, 391 U.S. 450 (1968).

<sup>48</sup> 453 F.2d at 263.

<sup>49</sup> See also *Cato v. Parham*, 403 F.2d 12, 16 (8th Cir. 1968); *Bradley v. School Bd.*, 345 F.2d 310, 321 (4th Cir. 1963); *Bell v. School Bd.*, 321 F.2d 494, 500 (4th Cir. 1963).

<sup>50</sup> In *Bradley v. School Bd.*, 53 F.R.D. 28, 39 (E.D. Va. 1971), *rev'd*, 472 F.2d 318 (4th Cir. 1972), the district court's award of litigation expenses under the bad faith exception was based on a finding that "the School Board was clearly in default of its constitutional duty." The court of appeals reversed on the facts, finding that the plans for implementing unitary schools to overcome de facto segregation involved unresolved issues such as busing and redistricting, as to which the defendant's duties were unclear in many respects. 472 F.2d at 327. The circuit court also rejected the lower court's use of the private attorney general doctrine as an alternative basis for an equitable award of fees. See note 111 *infra*.

<sup>51</sup> *In re Federal Facilities Realty Trust*, 227 F.2d 657, 658 (7th Cir. 1955). Similarly, in cases of fraud, "if the court finds after a proper hearing that fraud has been practiced upon it, or that the very temple of justice has been defiled, the entire cost of the proceedings could justly be assessed against the guilty parties." *Universal Oil Prods. Co. v. Root Ref. Co.*, 328 U.S. 575, 580, *rehearing denied*, 329 U.S. 823 (1946) (dictum).

<sup>52</sup> See, e.g., *The Apollon*, 22 U.S. (9 Wheat.) 362 (1824).

<sup>53</sup> In an admiralty case, *Vaughan v. Atkinson*, 369 U.S. 527 (1962), the Supreme Court

The bad faith exception can apply equally against a plaintiff. The plaintiff who institutes a groundless, wanton, or malicious lawsuit primarily designed to harass or oppress his adversary may also be guilty of bad faith.<sup>54</sup> In *Gazan v. Vadsco Sales Corp.*,<sup>55</sup> the court described the stockholder's suit for injunction as "without any basis" and brought for "vexatious and oppressive" reasons. Although the court deemed it inappropriate for the plaintiff to pay all of the defendant's \$5,000 in legal expenses incurred on what the court called the plaintiff's "fishing expedition," the court held that the plaintiff "should at least pay for the bait, which is fixed at \$2,000."<sup>56</sup>

The bad faith doctrine is woven into the fee provisions of the newer federal environmental laws and should discourage frivolous citizen suits while simultaneously encouraging good faith actions against polluters and erring government officials.<sup>57</sup> In cases where no statutory award of legal fees is available, the doctrine will come into play only when the "innocent" party's right (plaintiff) or freedom from liability (defendant) is virtually unquestioned and the "guilty" party's

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allowed the libellant, who sought maintenance and cure, to recover fees as a part of compensatory damages. It observed:

[R]espondents were callous in their attitude, making no investigation of libellant's claim and by their silence neither admitting nor denying it. As a result of that recalcitrance, libellant was forced to hire a lawyer and go to court to get what was plainly owed him under laws that are centuries old. The default was willful and persistent. It is difficult to imagine a clearer case of damages suffered for failure to pay maintenance than this one.

*Id.* at 530-31 (footnote omitted).

<sup>54</sup> See, e.g., *In re Swartz*, 130 F.2d 229, 232 (7th Cir. 1942) ("groundless and unwarranted claims causing expense to an estate").

This component of the bad faith doctrine is so well recognized that some states have standing procedural rules on the subject. One such rule provides:

In an action or part of an action, if the court finds that any proceeding was had (1) in bad faith, (2) without substantial justification, or (3) for purposes of delay the court shall require the moving party to pay to the adverse party the amount of the costs thereof and the *reasonable expenses incurred* by the adverse party in opposing such proceeding, *including reasonable attorneys' fees.*

Md. Ct. App. (Civ.) R. 604(b) (emphasis added).

Similarly, the Federal Rules of Civil Procedure provide certain sanctions—orders to pay the opposing party's litigation expenses—against conduct which amounts to bad faith and causes unnecessary expense. The Federal Rules are by no means as sweeping as the bad faith exception, but rather are aimed at specific acts. See, e.g., FED. R. CIV. P. 37(a) ("reasonable expenses incurred" in obtaining order to compel discovery awarded as sanction); FED. R. CIV. P. 37(c) (same award, in proving matter which party failed, without reason, to admit); FED. R. CIV. P. 41(d) (plaintiff asserting previously dismissed claim against same defendant may pay "costs of the action"); FED. R. CIV. P. 68 (offeree not recovering judgment more favorable than rejected offer must pay "costs incurred" after rejection).

<sup>55</sup> 6 F. Supp. 568, 568 (E.D.N.Y. 1934).

<sup>56</sup> *Id.*

<sup>57</sup> See note 37 and accompanying text *supra*.

motives are highly suspect.<sup>58</sup> The bad faith exception may be of use to the environmentalist seeking personal compensation under one of the traditional tort theories.<sup>59</sup> If the defendant—for example, a developer, a public utility, or an industrial corporation—by its polluting activities flagrantly and callously ignores the plaintiff's clear property interests, such conduct may be considered evidence of bad faith.<sup>60</sup> Environmental litigation of wide-scale public benefit, however, usually deals with emerging issues that lack the legal precedents of civil rights and desegregation case law.<sup>61</sup> This increases the difficulty of demonstrating that a party's conduct was so violative of recognized legal standards that it constituted bad faith. Although the bad faith exception may become more viable in future years as environmental law solidifies, presently an award of legal fees to a successful litigant is more likely under the equitable fund or private attorney general theories.

### B. *Equitable Fund Exception*

The equitable fund exception to the general rule against awards of legal fees has two branches: the more traditional, monetary "common fund" doctrine, and the newer, nonmonetary "substantial benefit" variant.

The traditional common fund exception applies whenever a litigant in an individual or a representative capacity creates, preserves, or increases a fund, the pecuniary benefits of which extend to a definite class of persons.<sup>62</sup> In such a situation, the court can order the successful litigant's legal expenses to be paid out of the common fund to prevent unjust enrichment by spreading the cost of the litigation equitably among all of its true beneficiaries.<sup>63</sup> The common fund exception was first set forth in *Trustees v. Greenough*,<sup>64</sup> in which a bondholder's successful action to set aside fraudulent conveyances by the defendant trustees resulted in the recovery of trust assets in which all of the bondholders would share. The Supreme Court held that fairness demanded that the costs as well as the benefits of the litigation be shared

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<sup>58</sup> See notes 44 & 50 and accompanying text *supra*.

<sup>59</sup> See note 28 *supra*.

<sup>60</sup> Although not ruling on an award of legal fees, the court in a pollution case of a decade ago quoted the testimony of an industry official whose indifference to environmental concerns reflected a calculated view of pollution as a mere business expense: "It is cheaper to pay claims than it is to control fluorides." *Reynolds Metals Co. v. Lampert*, 324 F.2d 465, 466 (9th Cir. 1963). *But see* *Boomer v. Atlantic Cement Co.*, 26 N.Y.2d 219, 257 N.E.2d 870, 309 N.Y.S.2d 312 (1970).

<sup>61</sup> See notes 45-50 and accompanying text *supra*.

<sup>62</sup> See MOORE ¶ 54.77[2], at 1705-06.

<sup>63</sup> See text accompanying note 66 *infra*.

<sup>64</sup> 105 U.S. 527 (1882).

by all of the bondholders.<sup>65</sup> To deny the complainant an award out of the recovered fund "would not only be unjust to him, but it would give to the other parties entitled to participate in the benefits of the fund an unfair advantage."<sup>66</sup>

In *Sprague v. Ticonic National Bank*,<sup>67</sup> a bank depositor established a lien on trust deposits in the possession of the bank's receiver. Although the depositor sued as an individual, the stare decisis effect of her successful action assured fourteen other similarly-situated trustees of their right to recover their interests in the bonds held by the defendant.<sup>68</sup> Since the definite class of bank depositors with similar claims received this benefit, the Court concluded that the plaintiff's litigation expenses could be paid out of the common fund, even though that fund was merely protected and not actually paid into court.<sup>69</sup>

The traditional common fund over which the court exercises its jurisdiction always represents a benefit capable of translation into money. Conceptually, however, the fund is the aggregate benefit produced by the litigation, and the court taxes *any* convenient resource jointly owned by the true beneficiaries. Since the court's power to award legal fees is totally independent of the existence of a fund,<sup>70</sup> it is not difficult to understand the judicial development from the monetary common fund theory to the nonmonetary substantial benefit variant. To award fees under the substantial benefit rule, the court must have jurisdiction over some resource which is not at issue in the litigation but which is common to all the beneficiaries.

In *Mills v. Electric Auto-Lite Co.*,<sup>71</sup> the Supreme Court accepted the substantial benefit variant of the equitable fund exception.<sup>72</sup> In *Mills*, a minority shareholder brought a derivative action to dissolve a corporate merger which had been approved by shareholders whose votes were allegedly solicited by a misleading proxy statement made by the management of the merged corporation in violation of section 14(a) of the Securities Exchange Act of 1934.<sup>73</sup> The Court ruled that since

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<sup>65</sup> *Id.* at 532.

<sup>66</sup> *Id.*

<sup>67</sup> 307 U.S. 161 (1939).

<sup>68</sup> *Id.* at 166.

<sup>69</sup> *Id.* at 167.

<sup>70</sup> *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161, 166-67 (1939); *Trustees v. Greenough*, 105 U.S. 527, 532, 537 (1882).

<sup>71</sup> 396 U.S. 375 (1970).

<sup>72</sup> This decision also established the foundation for a bridge from the fund exception to the private attorney general theory. See notes 90-95 and accompanying text *infra*.

<sup>73</sup> 15 U.S.C. § 78n(a) (1970). The plaintiff further relied on SEC Rule 14a-9, which was promulgated under § 14(a) of the Act and which specifically prohibits false or misleading proxy solicitation. See 17 C.F.R. § 240.14a-9 (1972).

the proxy solicitation was necessary to complete the merger and was materially misleading, a cause of action under the Act had been established.<sup>74</sup> However, before remanding the case for consideration of the proper relief, the Court awarded interim attorney fees and litigation expenses to the successful plaintiff.

In dealing with the issue of awarding interim expenses, the *Mills* Court dispensed with two problems of statutory construction raised by the defendant: (1) the argument of *expressio unius est exclusio alterius*,<sup>75</sup> and (2) the related argument that since Congress had detailed all of the remedies available to a plaintiff in the Act and had not mentioned any award of litigation expenses, a court was precluded from making such an equitable award of fees.<sup>76</sup> Noting that the essence of the fund doctrine is to prevent the unjust enrichment of fund beneficiaries at the expense of the plaintiff,<sup>77</sup> the Court emphasized that it could award legal fees whether or not the fund was a pecuniary asset.<sup>78</sup> It endorsed the substantial benefit version of the fund exception as developed by lower courts,<sup>79</sup> holding that an award of fees was appropriate when the fund constituted a nonmonetary benefit to the corporation and its shareholders and the Court had jurisdiction over material (corporate) assets of the fund beneficiaries out of which the award could be paid.<sup>80</sup> In *Mills*, the substantial benefit derived from

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<sup>74</sup> 396 U.S. at 385.

<sup>75</sup> In *Fleischmann Corp. v. Maier Brewing Co.*, 386 U.S. 714 (1967), which arose under § 35 of the Lanham Act (15 U.S.C. § 1117 (1970)), the Court held that "Congress meticulously detailed the remedies available to a plaintiff who proves that his valid trademark has been infringed" (386 U.S. at 719) and thus intended "to mark the boundaries of the power to award monetary relief in cases arising under the Act." *Id.* at 721. The Court in *Mills* found no such detailed scheme of remedies in the Securities Exchange Act and consequently held that the Act was no bar to the courts' exercise of their equitable powers. 396 U.S. at 390-91.

<sup>76</sup> Sections 9(e) and 18(a) of the Act specifically provide for awards of attorney fees, but § 14(a) is silent on the point. See 15 U.S.C. §§ 78i(e), r(a), n(a) (1970). In *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964), the Court found an implied right of action in § 14(a) despite the express provision for prosecution by the SEC in § 27 of the Act. The *Mills* Court found the rationale of that decision equally applicable to an award of attorney fees. See 396 U.S. at 390-91.

<sup>77</sup> 396 U.S. at 392.

<sup>78</sup> "The 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." *Id.*

<sup>79</sup> *Id.* at 395-96.

<sup>80</sup> The Court declared that an equitable award of fees is appropriate to permit reimbursement in cases where the litigation has conferred a *substantial benefit* on the members of an ascertainable class, and where the court's jurisdiction over the subject matter of the suit makes possible an award that will operate to spread the costs proportionately among them.

*Id.* at 393-94 (emphasis added).

the shareholder's derivative suit was "fair and informed corporate suffrage."<sup>81</sup>

The *Mills* equitable fund or substantial benefit exception may provide a means of financing public-interest environmental suits when used in conjunction with the public trust doctrine.<sup>82</sup> Under the public trust doctrine, the government is responsible for preserving public trust property.<sup>83</sup> For purposes of paying litigation expenses, a close analogy can be drawn between the corporation in *Mills* and a state government<sup>84</sup> derelict in its duty to preserve the environment. Similar to litigation that protects corporate democracy for the benefit of shareholders, an action that successfully enjoins public officials who have breached their duties as "public trustees" effectively preserves a non-monetary fund held in public trust—the environment—and thereby substantially benefits the public. In both cases the fund exception requires that the ultimate beneficiaries—the stockholders or the public—share the costs of the successful litigation.<sup>85</sup> In *Mills*, the corporation, as both the real party plaintiff and the nominal defendant, was taxed with the plaintiff's legal fees primarily because it represented the aggregate of those who were directly benefited. In environmental litigation, however, federal and state governments are immune from direct attack and can only be sued indirectly through the fiction of suing their officers and agencies as separate entities.<sup>86</sup> Even then, federal officials are subject only to ordinary costs, although state officials and agencies can be assessed costs that include attorney and expert witness

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<sup>81</sup> *Id.* at 396; *accord*, *Yablonski v. United Mine Workers*, 466 F.2d 424, 429 (D.C. Cir. 1972) (substantial benefit of "greater democracy and fair dealing in internal union affairs" which furthered aims of Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. §§ 401-531 (1970)).

<sup>82</sup> See note 19 and accompanying text *supra*.

<sup>83</sup> Historically, the public trust doctrine has been limited to shorelands, lakes, rivers, streams, and parklands. See Sax, *supra* note 19, at 556. Professor Sax has summarized the key elements of the public trust doctrine as follows:

When a state holds a resource which is available for the free use of the general public, a court will look with considerable skepticism upon any governmental conduct which is calculated either to reallocate that resource to more restricted uses or to subject public uses to the self-interest of private parties.

*Id.* at 490 (emphasis in original). In *Illinois Cent. R.R. v. Illinois*, 146 U.S. 387 (1892), the Supreme Court held that Illinois may not abdicate its legislative authority over navigation on Lake Michigan, because title to its shores and waters is "held in trust for the people of the State that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interferences of private parties." *Id.* at 452.

<sup>84</sup> See text accompanying note 87 *infra*.

<sup>85</sup> See Comment, *supra* note 39, at 329-30.

<sup>86</sup> See note 149 and accompanying text *infra*.

fees.<sup>87</sup> Because the sovereign immunity fiction deems the state official to have acted as an individual,<sup>88</sup> he alone is technically liable for the costs, not the state government. However, the future lies with those forward-looking states that indemnify their officers who are sued for their official conduct.<sup>89</sup> Under such state statutes a court's order for an official to pay costs will mean that the ultimate beneficiaries—the public—will share the burden of the litigation expenses in accord with the substantial benefit-equitable fund doctrine by indirectly financing the indemnification of the officer through their taxes.

### C. *Private Attorney General Exception*

*Mills* actually announced a hybrid doctrine with aspects of both the equitable fund and the private attorney general exceptions. In addition to its substantial benefit rule, the case arguably rests on what one writer has called "a law enforcement-as-benefit rationale."<sup>90</sup> The Court pointed out that private actions brought to vindicate strong public policies<sup>91</sup> have intrinsic value to the public. Not only are the particular shareholders benefited but shareholders everywhere enjoy the fruits of such private law enforcement: "[P]rivate stockholders' actions of this sort 'involve corporate therapeutics,' and furnish a benefit to *all* shareholders by providing an important means of enforcement of the proxy statute."<sup>92</sup>

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<sup>87</sup> See notes 158-61 & 165-78 and accompanying text *infra*. When a federal official who is sued in his official capacity is taxed ordinary costs, the United States pays those costs. See note 158 *infra*.

<sup>88</sup> See note 149 and accompanying text *infra*.

<sup>89</sup> See, e.g., CAL. GOV'T CODE § 825 (West Supp. 1973) (state will pay judgment awarded against public employee sued for "act or omission occurring within the scope of his employment"); N.Y. PUB. OFFICERS LAW § 17(1) (McKinney Supp. 1972) (state will indemnify officer or employee sued while "acting in discharge of his duties and within the scope of his employment"). However, California's indemnification provisions do not extend to the employee guilty of "actual fraud, corruption or actual malice." CAL. GOV'T CODE § 825.6(b) (West Supp. 1973). New York's statute precludes indemnification if the damages resulted from the officer's or the employee's "willful and wrongful act or gross negligence." N.Y. PUB. OFFICERS LAW § 17(1) (McKinney Supp. 1972). See K. DAVIS, ADMINISTRATIVE LAW TEXT § 26.06 (3d ed. 1972).

<sup>90</sup> Comment, *supra* note 39, at 326.

<sup>91</sup> "[T]he 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." 396 U.S. at 396.

<sup>92</sup> *Id.* (footnote omitted, emphasis added). The Court borrowed Professor George Hornstein's characterization—"legal" or "corporate therapeutics"—for the substantial benefit justifying court-awarded fees. See Hornstein, *Legal Therapeutics: The "Salvage" Factor in Counsel Fee Awards*, 69 HARV. L. REV. 658, 659, 662-63 (1956).

The effects of the substantial benefit rule and the private attorney general exception are quite similar; yet, their respective rationales for awarding fees to the plaintiff are fundamentally different. While the substantial benefit rule taxes such fees against the true *beneficiaries* of the action to prevent unjust enrichment, the private attorney general doctrine taxes the *defendant*<sup>93</sup> because the plaintiff has vindicated a strong public policy and thus served the public.<sup>94</sup> Moreover, in public-interest environmental litigation, the fund theory presents conceptual intricacies which are obviated by the more direct approach of the private attorney general concept.<sup>95</sup>

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<sup>93</sup> The fundamental rationale of the fund doctrine is that the party made to pay the litigation expenses is in some sense benefited or enriched by the results of the litigation. In *Mills*, the corporation is said to be enriched by the fulfillment of corporate democracy. The *Mills* Court also pointed to the general benefit to corporate shareholders in having the federal proxy statute enforced. 396 U.S. at 396. This wider public benefit suggests the private attorney general approach: the party made to bear the litigation expenses does not necessarily benefit except as that party may be considered part of the general public which benefits from the private enforcement of strong public policies.

<sup>94</sup> In both the equitable fund and private attorney general cases, the taxation of costs is not intended by the court to be a penalty, but rather an equitable allocation of expenses between both parties. See note 39 *supra*. In *Mills*, the Court emphasized this distinction when it discussed the equitable fund theory:

To award attorneys' fees in such a suit to a plaintiff who has succeeded in establishing a cause of action is not to saddle the unsuccessful party with the expenses but to impose them on the class that has benefited from them and that would have had to pay them had it brought the suit.

396 U.S. at 396-97. In *La Raza Unida v. Volpe*, 57 F.R.D. 94 (N.D. Cal. 1972), the court awarded legal fees under the private attorney general exception and stated:

We cannot emphasize enough that in granting this motion, the purpose is not to saddle the losing party with the financial burden in order to punish him, rather we shift the financial burden in order to effectuate a strong Congressional policy.

*Id.* at 102.

<sup>95</sup> Several courts have noted the confines of the fund theory. In *Bradley v. School Bd.*, 53 F.R.D. 28 (E.D. Va. 1971), Judge Merhige described the attendant limitations of the fund doctrine in public-interest actions:

School desegregation cases, or any suits against governmental bodies, do not fit this fund model without considerable cutting and trimming. This is a class suit to be sure, with class relief, but to say that the plaintiff class will actually in effect pay their attorneys if the School Board is made to pay counsel fees entails a number of unproved assumptions about the extent to which pupils pay for their free public schooling.

*Id.* at 35-36. Likewise, in *La Raza Unida v. Volpe*, 57 F.R.D. 94 (N.D. Cal. 1972), the court noted that since *Mills* extended the fund doctrine to cover nonpecuniary benefits, "it has become exceedingly difficult to trace the benefits of litigation to their ultimate beneficiaries, so as to apportion the attorneys' fees amongst them." *Id.* at 97 (footnote omitted).

Other courts have attempted to apply the fund theory, even though the private attorney general doctrine might have been more appropriate. See, e.g., *Brewer v. School Bd.*, 456 F.2d 943, 951-52 (4th Cir. 1972) ("quasi-application of the 'common fund' doctrine" where "pecuniary benefit to the students," who became entitled to receive free busing

The private attorney general exception was first articulated in cases which sought to eradicate racial discrimination. In *Newman v. Piggie Park Enterprises*,<sup>96</sup> the Supreme Court analyzed the discretionary award provision in Title II of the 1964 Civil Rights Act.<sup>97</sup> The plaintiff in *Piggie Park* had successfully sued to enjoin the defendants from operating racially-discriminatory restaurants. The issue on appeal was whether attorney fees could be awarded *only* if the defendants had defended the action in bad faith. The Supreme Court rejected such a narrow interpretation of the Act and noted that suits under Title II were private in form only:<sup>98</sup> a plaintiff could not recover damages under the statute but must seek an injunction as a “‘private attorney general.’”<sup>99</sup> The Court reasoned that unless the financial burden of vindicating these important public as well as private civil rights was lifted from the plaintiffs, the aims of the Act would be thwarted.<sup>100</sup> It concluded that a private enforcer under Title II should “ordinarily recover an attorney’s fee unless special circumstances would render such an award unjust.”<sup>101</sup>

The view that private suits are necessary to help enforce strong legislative policy and should be encouraged by the equitable award of litigation expenses has received recognition in other civil rights cases under older statutes that are silent on the question of awarding such expenses. *Lee v. Southern Home Sites Corp.*<sup>102</sup> is a landmark case in this area. The plaintiff in *Lee* successfully prosecuted a violation of the Civil Rights Acts of 1866<sup>103</sup> based upon the private right of action implied in that Act and recognized in *Jones v. Alfred H. Mayer Co.*<sup>104</sup> Citing the requirement in *Jones* that the federal courts fashion “an effective equitable remedy”<sup>105</sup> in racial discrimination cases, the Fifth Circuit in *Lee* held that private actions were essential to implement the “strong congressional policy behind the rights” embodied in the

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because of suit, deemed to accrue to school board); *Bright v. Philadelphia-Baltimore-Washington Stock Exch.*, 327 F. Supp. 495, 506 (E.D. Pa. 1971) (violations of Securities Exchange Act enjoined; defendant charged with fees because entire exchange and its members benefited from action).

<sup>96</sup> 390 U.S. 400 (1968).

<sup>97</sup> 42 U.S.C. § 2000a-3(b) (1970) (allows “prevailing party” to recover “reasonable attorney’s fee” at court’s discretion).

<sup>98</sup> 390 U.S. at 401.

<sup>99</sup> *Id.* at 402.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> 444 F.2d 143 (5th Cir. 1971).

<sup>103</sup> 42 U.S.C. § 1982 (1970).

<sup>104</sup> 392 U.S. 409 (1968).

<sup>105</sup> *Id.* at 414 n.13.

Act.<sup>106</sup> An equitable award of attorney fees was therefore considered an appropriate remedy.<sup>107</sup>

In *Sims v. Amos*,<sup>108</sup> a three-judge federal court found the Alabama legislature malapportioned and ordered the plaintiff's plan for single-member legislative districts implemented. The court awarded the plaintiffs their costs of the litigation, including \$14,822.50 in attorney fees, assessable against the defendants.<sup>109</sup> Although the defendants' bad faith was evident,<sup>110</sup> the court made the award under the private attorney general exception. Regardless of the defendants' good or bad faith, the plaintiffs were held to be entitled to attorney fees because they had "benefited their class and ha[d] effectuated a strong congressional policy."<sup>111</sup>

<sup>106</sup> 444 F.2d at 145.

<sup>107</sup> The court in *Lee* substantiated its view that an equitable award was appropriate by referring to the fee provisions in the newer civil rights legislation. *Id.* at 146. This comparative technique is also applicable in environmental cases because the new federal laws have fee provisions (see note 35 and accompanying text *supra*), and many actions arising outside the coverage of these laws can further the same public goals.

Other courts have followed the rationale of *Lee*. See *Cooper v. Allen*, 467 F.2d 836 (5th Cir. 1972) (extends *Lee* to cover 42 U.S.C. § 1981 (1970)); *Knight v. Auciello*, 453 F.2d 852 (1st Cir. 1972) (refusal to lease apartment held violative of 42 U.S.C. § 1982 (1970)); *NAACP v. Allen*, 340 F. Supp. 703 (M.D. Ala. 1972) (racial discrimination in hiring of state police violative of 42 U.S.C. § 1983 (1970)).

<sup>108</sup> 340 F. Supp. 691 (M.D. Ala. 1972).

<sup>109</sup> *Id.* at 695. The defendants were Alabama's Governor, Attorney General, Secretary of State, and certain state legislators.

<sup>110</sup> The court noted that the Alabama legislature had neglected, if not totally disregarded, its duty to reapportion. *Id.* at 693-94.

<sup>111</sup> *Id.* at 694. "Indeed, under such circumstances, the award loses much of its discretionary character and becomes a part of the effective remedy a court should fashion to encourage public-minded suits and to carry out congressional policy." *Id.* (citation omitted).

Recently, in a desegregation case, the Fourth Circuit reversed a lower court's award of litigation expenses which was based alternatively on the private attorney general doctrine and the bad faith exception. See *Bradley v. School Bd.*, 472 F.2d 318, 327-31 (4th Cir. 1972), *rev'g* 53 F.R.D. 28, 41 (E.D. Va. 1971). The upper court also reversed the district court's finding of bad faith. See note 50 *supra*. The court of appeals did not consider the encouragement of private enforcement of public policies a proper judicial function. Otherwise, the court argued, the private attorney general exception would "launch courts upon the difficult and complex task of determining what is public policy, an issue normally reserved for legislative determination." 472 F.2d at 329. Moreover, the court noted, Congress has provided for fee awards in specified cases, and its silence in others is indicative of a desire to exclude the award of fees in such cases. *Id.* at 330.

In rebuttal to *Bradley*, several points are noteworthy. The argument that legislative silence precludes judicial activism was specifically rejected in *Mills*. See note 75 and accompanying text *supra*. The *Bradley* court's philosophy, however, raises the more fundamental issue of the judiciary's proper role in the protection of substantive rights. In the face of legislative inactivity or oversight, judicial activism has often proved vital to the recognition of important rights. In its bold decision in *Brown v. Board of Education*, 347

Use of the private attorney general doctrine should not be limited to civil rights cases. Any area of great public concern should be a possible candidate for application of the doctrine. Commentators have pointed to public-interest environmental litigation as an area of the law fused with strong statutory policy<sup>112</sup> and deserving of treatment under the doctrine.<sup>113</sup> Such an environmental action easily fits the mold established in *Mills*, *Piggie Park*, and *Lee*: the litigating environmentalist who successfully halts some phase of ecological destruction affecting a significant number of people has performed a public service by asserting the environmental rights of that class and of the public at large. The defendants<sup>114</sup> in such actions should shoulder the plaintiff's full litigation expenses because of the importance of implementing policies vital to the health and welfare of all citizens.

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U.S. 483 (1954), the Supreme Court first struck down the invidious discrimination existing in our separate-but-equal schools and thereby implemented the otherwise hollow guarantee of equal protection. When such important rights exist, the courts have a duty to find appropriate remedies that will effectively protect those rights. A right without a practical means of enforcement becomes largely meaningless. See *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968). An award of attorney and expert witness fees is a practical aid in the enforcement of substantive rights.

Certainly the courts' task in determining the proper case for such an award is a difficult one, but to refuse action because there has been no express legislative approval is too simple a solution. A court's categorical refusal to exercise its equitable powers in aid of important substantive rights in appropriate cases suggests an abdication of judicial responsibility. Paradoxically, in *Bradley*, the district court's wisdom of allowing attorney fees was confirmed in 1972 when Congress filled the gap in Title VI of the 1964 Civil Rights Act by passing the Emergency School Aid Act, 20 U.S.C.A. § 1601-19 (Supp. 1973). The new Act specifically authorizes awards of attorney fees in desegregation cases such as *Bradley*. *Id.* § 1617. The Fourth Circuit refused to apply this provision retroactively, even though a cogent dissent by Justice Winter pointed out the reasonableness of such an application. 472 F.2d at 332-39.

The need for the private attorney general exception in certain environmental cases is perhaps even stronger than in the more heavily-legislated field of civil rights. The new federal environmental laws require time to become effective because of the delay necessary before pollution standards can be fully implemented. In the interim, the courts should make use of the private attorney general exception as an aid to the implementation of these strong environmental policies, if only as a stopgap measure. Congress has indicated a feasible method of enforcement which the courts should utilize in making the older, silent environmental laws truly effective.

<sup>112</sup> The cornerstone of American environmental policy is the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-47 (1970).

<sup>113</sup> See McLaughlin, *supra* note 4, at 776; Comment, *supra* note 39, at 329-30.

<sup>114</sup> Public officials as well as private polluters are possible defendants. See text accompanying note 140 *infra*. In taxing private polluters with legal fees, a court must inevitably weigh the interests of the public, whose rights are really at issue, against the individual's ability to pay. The private defendant will probably be a sufficiently large entity able to bear the expenses if the case is deemed to have reached "public-interest" proportions.

## IV

*La Raza Unida v. Volpe*

The first application of the private attorney general exception to environmental litigation appeared in a recent federal case, *La Raza Unida v. Volpe*.<sup>115</sup> In a class action, the plaintiffs won a preliminary injunction<sup>116</sup> against the construction of a California federal highway because the defendants—the state and federal governments<sup>117</sup>—had failed to comply with federal environmental protection and housing assistance laws.<sup>118</sup> These laws required the defendants to make special efforts to preserve parks, wildlife refuges, and historic sites. In addition, the defendants were under a duty to seek feasible and prudent alternatives in planning the highway in order to minimize the hardship to those who would be displaced from their homes by the proposed highway. Although the statutes forming the basis of the plaintiffs' substantive claims were silent concerning fee awards, the *La Raza* court nevertheless held that the plaintiffs were entitled to an award of reasonable attorney and expert witness fees from the state defendants.<sup>119</sup>

In awarding fees under the private attorney general exception,<sup>120</sup> the *La Raza* court cited three factors which governed its decision: "the strength of the Congressional policy, the number of people benefited by the litigants' efforts, and the necessity and financial burden of private enforcement."<sup>121</sup>

#### A. *Strong Public Policy*

In examining the importance of the congressional policies toward environmental protection and housing relocation assistance, the court concluded that "[f]ew public policies are accorded the weight and

<sup>115</sup> 57 F.R.D. 94 (N.D. Cal. 1972).

<sup>116</sup> *La Raza Unida v. Volpe*, 337 F. Supp. 221 (N.D. Cal. 1971).

<sup>117</sup> In addition to the United States Secretary of Transportation, the defendants included the Director of the Federal Division of Engineering, the California Highway Department, the California Department of Public Works, the Chief Highway Engineer for California, and the Mayor and the City Manager of Hayward, California.

<sup>118</sup> See Federal-Aid Highway Act of 1966, § 15(a), 23 U.S.C. § 138 (1970); National Environmental Policy Act of 1969, § 101, 42 U.S.C. § 4331 (1970); Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. §§ 4601-55 (1970); Department of Transportation Act of 1966, § 4(f), 49 U.S.C. § 1653(f) (1970).

<sup>119</sup> 57 F.R.D. at 101-02.

<sup>120</sup> The court also held that an expense award was justified even if the plaintiffs' lawyers had donated their services free of charge or had been paid out of tax-exempt foundation money. *Id.* at 98 n.6; accord, *Miller v. Amusement Enterprises, Inc.*, 426 F.2d 534 (5th Cir. 1970).

<sup>121</sup> 57 F.R.D. at 99.

priority of those present in this lawsuit."<sup>122</sup> Mr. Justice Black's concurring opinion in *Citizens to Preserve Overton Park, Inc. v. Volpe*<sup>123</sup> impressed the *La Raza* court with the importance of judges and public administrators strictly adhering to the standards prescribed by Congress for environmental protection.<sup>124</sup> Moreover, the environmental priorities established by the sweeping language of the National Environmental Policy Act,<sup>125</sup> coupled with the detailed criteria set forth in the more specific statutes for planning highways and assisting dislocatees,<sup>126</sup> compelled the *La Raza* court to recognize "an intense concern by the Congress over the problems of highway displacement and environmental protection."<sup>127</sup>

### B. *Number of People Benefited*

The second factor *La Raza* considered was the number of people benefited by the litigation. Although precise identification of class members is not required under the private attorney general exception,<sup>128</sup> the size of the class is important. Drawing ever widening circles, the court defined the beneficiaries. In its view, approximately 5,000 "displaced persons" benefited directly, while another 200,000 residents of nearby towns "derived substantial benefits" in being assured "that the last remaining parks in southern Alameda County [would] not be destroyed until formal fact-findings and policy determinations [were] made."<sup>129</sup> Moreover, residents of the surrounding San Francisco Bay area benefited indirectly because planning would now be required to minimize the impact of the dislocatees on the crowded housing market.

<sup>122</sup> *Id.*

<sup>123</sup> 401 U.S. 402, 421 (1971) (Black, J., concurring):

That congressional command [23 U.S.C. § 138 (1970)] should not be taken lightly by the Secretary or by this Court. It represents a solemn determination of the highest law-making body of this Nation that the beauty and health-giving facilities of our parks are not to be taken away for public roads without hearings, fact-findings, and policy determinations under the supervision of a Cabinet officer . . . .

<sup>124</sup> *E.g.*, Federal-Aid Highway Act of 1966, § 15(a), 23 U.S.C. § 138 (1970); Department of Transportation Act of 1966, § 4(f), 49 U.S.C. § 1653(f) (1970).

<sup>125</sup> *See* 42 U.S.C. § 4331 (1970).

<sup>126</sup> *See* note 118 *supra*.

<sup>127</sup> 337 F. Supp. at 229; *see* 57 F.R.D. at 99. By awarding the plaintiffs legal fees and thereby encouraging private enforcement of vital public policies, the *La Raza* court arguably was fulfilling its mandate from Congress to give full force to these strong environmental public policies.

<sup>128</sup> The private attorney general doctrine recognizes that the private law enforcer performs a public service whenever the benefited class represents an important segment of the public. *See* note 93 and text accompanying note 94 *supra*. The court in *La Raza* noted that "[w]henever a strong public policy has been effectuated by definition numerous people receive *some* degree of benefit." 57 F.R.D. at 100 n.8 (emphasis in original).

<sup>129</sup> 57 F.R.D. at 100.

Indeed, the court concluded that all Californians benefited by "state therapeutics"<sup>130</sup> and the decision's positive effect on future highway planning. The court recognized that public-oriented actions to save the environment are really "everyone's business"<sup>131</sup> and that "almost all of society is better off when public policies in these areas have been strengthened."<sup>132</sup>

### C. *Necessity and Burden of Private Enforcement*

Finally, *La Raza* evaluated the practical necessity for and financial burden of "private vigilance and enforcement."<sup>133</sup> The court found that public-interest actions by concerned citizens are inherently valuable.<sup>134</sup> Indeed, the court argued that private policing actions become a virtual necessity when the public officials charged with protecting the public's environmental rights ignore their constitutional or statutory duties.<sup>135</sup> *La Raza* advocated a broad judicial policy of fostering such public-interest actions by awarding fees under the private attorney general exception: "Responsible representatives of the public should be encouraged to sue, particularly where governmental entities are involved as defendants."<sup>136</sup> Without the aid of an equitable award of litigation expenses, the average citizen simply is no match for public officials and agencies armed with vastly greater resources and expertise.<sup>137</sup> *La Raza* held that the possibility of an equitable award of fees was necessary not only to motivate other concerned citizens to emulate the plaintiffs' efforts in proper cases but also to avoid effectively penalizing the plaintiffs for prosecuting such civic-minded and widely beneficial litigation.<sup>138</sup>

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<sup>130</sup> *Id.* The court paraphrased Professor Hornstein's term "corporate therapeutics" in describing the statewide benefits that flow from enforcement of strong public-interest legislation. See note 92 *supra*.

<sup>131</sup> 57 F.R.D. at 100. NEPA supports the court on this point. Section 101(c) of NEPA declares that "Congress recognizes that each person should enjoy a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment." 42 U.S.C. § 4331(c) (1970).

<sup>132</sup> 57 F.R.D. at 100 (footnote omitted).

<sup>133</sup> *Id.*

<sup>134</sup> *Id.* at 100-01; see note 31 and accompanying text *supra*.

<sup>135</sup> "The only public entities that might have brought suit in this case were named as defendants in this action and vigorously opposed plaintiffs' contentions. Only a private party could have been expected to bring this litigation . . ." 57 F.R.D. at 101.

<sup>136</sup> *Id.* at 100-01.

<sup>137</sup> In many "public interest" cases only injunctive relief is sought, and the average attorney or litigant must hesitate, if not sludder, at the thought of "taking on" an entity such as the California Department of Highways, with no prospect of financial compensation for the efforts and expenses rendered. The expense of litigation in such a case poses a formidable, if not insurmountable, obstacle.

*Id.* at 101 (footnote omitted).

<sup>138</sup> [A] private party is least able to bear the tremendous economic burdens. To

#### D. *Scope of the Private Attorney General Exception*

*La Raza* establishes the private attorney general exception to the general rule against fee-shifting in the context of a suit against public officials. Although involving the peculiarities of sovereign immunity,<sup>139</sup> *La Raza* also raises the question of whether the private attorney general theory should be limited to public defendants, or should be extended to private defendants as well. *La Raza* in no way suggests that the private attorney general doctrine cannot be applied to private as well as public defendants.<sup>140</sup> To the contrary, there is a close parallel between a private corporate giant and the awesome California Department of Highways. Thus, the implication of *La Raza* is clear. In an environmental suit for specific relief, when the private defendant's economic resources and expertise greatly overshadow the successful private plaintiff's meager funds, an equitable award of the plaintiff's litigation expenses under the private attorney general exception is justified if the benefits of the action extend to a substantial segment of the public.

A comparison of the public trust-equitable fund theory<sup>141</sup> with the private attorney general concept reveals the flexibility of the latter. The fund approach rests on the principle that taxing the government is the fairest way to make the general public—the beneficiaries of the plaintiff's public service—pay its fair share of the litigation expense. Subject to the intricacies of sovereign immunity,<sup>142</sup> the fund theory is viable for public defendants in environmental actions. However, it is useless as a basis for taxing private defendants in such actions because no analogous taxation of the public can be hypothesized. On the other

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force private litigants to bear their own costs here would be tantamount to a penalty, and it seems somewhat inequitable to punish litigants who have policed those charged with implementing and following Congressional mandates. Hence, the fact that only a private party could be reasonably expected to bring this action is one additional factor supporting the awarding of attorneys' fees in this case.

*Id.*

<sup>139</sup> See notes 144-81 and accompanying text *infra*.

<sup>140</sup> The civil rights cases make no distinction between public and private defendants. Compare *Sims v. Amos*, 340 F. Supp. 691 (M.D. Ala. 1972), with *Lee v. Southern Home Sites Corp.*, 444 F.2d 143 (5th Cir. 1971). The *La Raza* court's reliance on these cases (57 F.R.D. at 98-102) suggests a tacit acceptance of this nondistinction between public and private defendants. One may argue, however, that this nondistinction is justified only in civil rights cases because civil rights are more precious than environmental rights; thus, one who violates rights that go to the roots of human dignity must be held to incur an especially great liability. Arguably, however, the large-scale industrial polluter tramples on rights and interests vital to life itself and likewise is obligated not to act so as to deny the public the beauty and benefits of a clean environment.

<sup>141</sup> See notes 82-89 and accompanying text *supra*.

<sup>142</sup> See notes 144-81 *infra*.

hand, the private attorney general theory makes no distinctions between public and private defendants. The defendant simply pays the plaintiff's litigation expenses because, between the two, equity favors the plaintiff as a public servant and law enforcer.<sup>143</sup>

## V

### SOVEREIGN IMMUNITY

In assessing the viability of the equitable doctrines that allow awards of legal fees, the environmental litigant suing a public entity or official must contend with the defense of sovereign immunity. This ancient common law doctrine holds that private individuals cannot sue the state as sovereign in its own<sup>144</sup> courts unless the state waives<sup>145</sup> its inherent immunity from suit. Thus, federal sovereign immunity protects the United States in the federal courts, while state sovereign immunity protects each state in its own courts. Both defenses have been termed "domestic" sovereign immunity.<sup>146</sup> Moreover, each state is constitutionally guaranteed a different type of sovereign immunity by the eleventh amendment—protection from private suit in the federal courts.<sup>147</sup> This latter protection has been called "foreign" sovereign

<sup>143</sup> It would appear to be a prerequisite that the private defendant's conduct be of sufficient magnitude to make the plaintiff's action in halting the pollution a substantial benefit to the public. Cf. notes 114 & 128 *supra*.

<sup>144</sup> Another view of the doctrine is that no sovereign can be sued in any court unless it consents to the suit. Such was the view taken by Alexander Hamilton in 1788, quoted by the Supreme Court in *Hans v. Louisiana*, 134 U.S. 1, 12-13 (1890).

<sup>145</sup> Examples of waiver by the federal sovereign are the citizen suit provisions in the newer federal environmental laws. See note 23 *supra*. A state has been deemed to waive its immunity when it participates in federally controlled activities. See, e.g., *Petty v. Tennessee-Missouri Bridge Comm'n*, 359 U.S. 275, 278-79 (1959). For a discussion of the ramifications of waiver—voluntary or involuntary—see *Citizens Comm. v. Volpe*, 297 F. Supp. 809, 811 (S.D.N.Y. 1969); J. BRECHER & M. NESTLE, *supra* note 33, at 110-11.

<sup>146</sup> The terms "domestic" and "foreign" sovereign immunity are suggested in Scalia, *Sovereign Immunity and Nonstatutory Review of Federal Administrative Action: Some Conclusions from the Public-Lands Cases*, 68 MICH. L. REV. 867, 886 (1970).

<sup>147</sup> The eleventh amendment, by its terms, is confined to suits by citizens of another state:

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.

The Supreme Court has long held that state sovereign immunity protects a state from suits in federal court brought by its own citizens without the state's consent. See *Parden v. Terminal Ry. of Ala. State Docks Dep't*, 377 U.S. 184, 186 (1964); *Hans v. Louisiana*, 134 U.S. 1, 21 (1890). By its interpretative decisions the Court has extended the protection of the eleventh amendment to suits not otherwise covered by the amendment, in effect recog-

immunity<sup>148</sup> to emphasize that the state is not the sovereign in the federal courts. The courts have circumscribed the potentially deleterious effects of both domestic and foreign sovereign immunity through the familiar process of creating judicial exceptions.

Whether the sovereign is a separate entity from its officers and agencies is the crucial, if not sophistical, distinction drawn in the debate over sovereign immunity.<sup>149</sup> If a suit against an officer is held to be a suit against his principal (the sovereign), then the defense—if raised by the defendant—is a complete bar to the action, or, in an eleventh amendment case, completely ousts a federal court of its jurisdiction.<sup>150</sup>

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nizing the states' common law (foreign) sovereign immunity under the rubric of the eleventh amendment. In referring to the concept that consent is the key to a state's waiver of its inherent immunity from suit, the Court has spoken broadly of the eleventh amendment as establishing a personal defense which a state can waive at its pleasure. See *Clark v. Barnard*, 108 U.S. 436, 447 (1883). But the Court has never suggested that a state can confer federal jurisdiction in a suit by citizens of another state merely by consenting to be sued. The eleventh amendment ousts the federal courts of jurisdiction in such cases, whether or not the state has consented, or is deemed to have consented, to suit.

<sup>148</sup> See note 146 *supra*.

<sup>149</sup> K. DAVIS, *supra* note 89, at § 27.04. When an officer of the state is sued for his official acts, the judicially-developed fiction that circumvents sovereign immunity is that he is deemed to have acted as an individual, independently of the state. The officer is "stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct." *Ex parte Young*, 209 U.S. 123, 160 (1908). The fiction is employed only to allow suits in certain situations. See notes 153-56 and accompanying text *infra*. When the fiction is used, a problem arises with regard to the defendant officer's liability for costs. The hypertechnical distinction between suing an officer as an individual for his official acts and suing him as an official for those same acts can lead to different practical results insofar as the effectiveness of a court order requiring a defendant to pay costs.

In the context of environmental litigation, when specific relief is sought, this hyper-technical distinction is irrelevant with regard to the effectiveness of an injunction or mandamus order. But is the officer personally liable for payment of the costs which are taxable as an integral part of that judgment? In the federal situation, the United States apparently pays the ordinary costs for which its officials become liable when sued in their official capacities. See note 158 *infra*. Payment is thus assured. By definition, a state official would appear to be personally liable for costs, which may include substantial legal fees (see notes 169-81 and accompanying text *infra*), if he is successfully sued as an individual, or concurrently as an individual and an official. However, if a state official is sued only as an official or if the complaint is ambiguous as to the capacity in which the official is sued, an order for him to pay costs would be enforceable only out of funds available to him in his official capacity, even though for purposes of circumventing sovereign immunity he is deemed to be personally liable. See, e.g., *United States v. Crawford*, 36 F.R.D. 174, 175 (W.D. La. 1964). If no such funds are available (e.g., if there is no contingency or all-purpose fund available in the official's current operating budget) or authorized, the winner may go unreimbursed. If personal liability for official conduct seems unduly harsh, the problem lies not with the equitable principles governing fee-shifting but rather with the "sophistical and erratic" sovereign immunity morass, which is sorely in need of reform and clarification. See K. DAVIS, *supra* note 89, at § 27.07.

<sup>150</sup> "The general rule is that relief sought nominally against an officer is in fact

Originally, the Supreme Court established for the federal courts the "party of record" test for determining if a private suit against a public official is in effect an action against the sovereign. If the United States or a given state was not mentioned in the pleadings, the action was not barred by either federal domestic or eleventh amendment foreign sovereign immunity.<sup>151</sup> However, to avoid rendering the eleventh amendment meaningless, the Court later retreated from this simplistic position and established the "real party in interest" test, which holds that suing an official in his representative capacity is tantamount to suing the sovereign and thus is not permitted.<sup>152</sup>

Eventually, the Court carved out two basic exceptions to both federal sovereign immunity and eleventh amendment state immunity. An action against an officer (or agency) is permitted if the statute governing the official's actions is unconstitutional,<sup>153</sup> or the official's action or inaction is outside the scope of his constitutional or statutory authority.<sup>154</sup> The rationale underlying both these exceptions is that the officer in both situations acts illegally and without the authority

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against the sovereign if the decree would operate against the latter." *Hawaii v. Gordon*, 373 U.S. 57, 58 (1963).

<sup>151</sup> "In deciding who are parties to the suit, the court will not look beyond the record." *Davis v. Gray*, 83 U.S. (16 Wall.) 203, 220 (1872); see *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824).

<sup>152</sup> [I]t was at one time held that the Eleventh Amendment . . . was applicable only to cases in which the State was named in the record as a party defendant. But later rulings have modified that decision, and held that the amendment applies to any suit brought in name against an officer of the State, when "the State, though not named, is the real party against which the relief is asked, and the judgment will operate."

*Minnesota v. Hitchcock*, 185 U.S. 373, 386 (1902), quoting *Osborn v. United States Bank*, 22 U.S. (9 Wheat.) 738 (1824). One author has noted the frequent confusion between the concept that the state is the real party in interest and the view that the state is an indispensable party to the suit. See *Scalia*, *supra* note 146, at 887 n.89.

<sup>153</sup> See *Ex parte Young*, 209 U.S. 123 (1908) (eleventh amendment immunity denied to state official enforcing allegedly unconstitutional state statute). The unconstitutional acts exception also applies in federal sovereign immunity cases. See, e.g., *Hammer v. Dagenhart*, 247 U.S. 251 (1918).

<sup>154</sup> See *Philadelphia Co. v. Stimson*, 223 U.S. 605 (1912) (federal sovereign immunity denied to federal official alleged to have acted in excess of his statutory authority). Likewise, federal officials acting in excess of constitutional authority can claim no immunity from suit. See, e.g., *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

The ultra vires exception also applies in eleventh amendment cases. See *Worcester County Trust Co. v. Riley*, 302 U.S. 292, 297 (1937):

[G]enerally suits to restrain action of state officials can, consistently with the constitutional prohibition, be prosecuted only when the action sought to be restrained is without the authority of state law or contravenes the statutes or Constitution of the United States. . . . The Eleventh Amendment, which denies to the citizen the right to resort to a federal court to compel or restrain state action, does not preclude suit against a wrongdoer merely because he asserts that his acts are within an official authority which the state does not confer.

of the sovereign.<sup>155</sup> Thus, he is not the sovereign's agent or alter ego and can be sued.<sup>156</sup>

The sovereign immunity defense can arise twice in an environmental suit. First, the defendant official may challenge the court's jurisdiction over the main action by arguing sovereign immunity. Second, even after a proper trial on the substantive issues culminating in a judgment against the defendant, sovereign immunity may bar an award of attorney and expert witness fees in a later stage of the same action or in a separate, collateral action brought to collect fees. The sovereign immunity problems present in this second action can best be discussed in terms of the possible forums and defendants.

## A. Fees in the Federal Courts

### 1. Federal Officials as Defendants

Absent specific statutory authorization such as that found in the citizen suit provisions of the newer federal environmental statutes,<sup>157</sup> reasonable attorney fees cannot be taxed against the United States, its officials or its agencies.<sup>158</sup> Prior to 1966, federal sovereign immunity

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<sup>155</sup> *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949), refined the *ultra vires* category by extending immunity to an official acting within the scope of his authority who makes errors of judgment, even though his conduct may be "tortious under general law." *Id.* at 695.

<sup>156</sup> The sophistry of the sovereign immunity fiction (see note 149 *supra*) is especially evident in the case of an official who carries out his required duties and simply enforces a state statute, which remains the law until overturned by the courts on grounds of unconstitutionality.

In addition to these two major exceptions, certain special areas of federal administrative law have traditionally functioned unhindered by sovereign immunity. Historically, there have been exceptions to the sovereign immunity doctrine in litigation pertaining to public lands, postal administration, and tax disputes. See Scalia, *supra* note 146, at 913-17. For an analysis of the sovereign immunity patchwork of exceptions and recommended reform, see Cramton, *Nonstatutory Review of Federal Administrative Action: The Need for Statutory Reform of Sovereign Immunity, Subject Matter Jurisdiction, and Parties Defendant*, 68 MICH. L. REV. 387 (1970).

Other courts have formulated various distinctions for purposes of circumventing sovereign immunity, ranging from governmental versus non-governmental (a "quagmire that has long plagued the law of municipal corporations," *Indian Towing Co. v. United States*, 350 U.S. 61, 65 (1955)) to ministerial versus discretionary. See *Clackamas County v. McKay*, 219 F.2d 479 (D.C. Cir. 1954), *vacated as moot*, 349 U.S. 909, *rehearing denied*, 349 U.S. 934 (1955). However, a complete survey of the exceptions to sovereign immunity is unnecessary for the purposes of this Note.

<sup>157</sup> See note 35 *supra*.

<sup>158</sup> 28 U.S.C. § 2412 (1970) (emphasis added), *amending* 28 U.S.C. § 2412 (1964), provides in pertinent part:

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 or any agency or official of the United

precluded a federal court from taxing any costs against federal defendants, except as Congress might provide in special situations.<sup>159</sup> In that year, however, Congress partially lifted the immunity bar to allow taxation of ordinary costs,<sup>160</sup> although it specifically proscribed the taxation of "fees and expenses of attorneys" against federal defendants.<sup>161</sup>

Fees paid by a successful plaintiff to his own expert witnesses also are not taxable against federal defendants above the amounts set for ordinary witnesses.<sup>162</sup> The significance of this prohibition is that a plaintiff will be encouraged to join state or private defendants whenever possible in his action in order to provide a possible defendant from whom legal fees can be recovered. If the plaintiff is able to sue only federal defendants but is unable to afford expert witnesses which are essential to his case, he may request the court to exercise its inherent

States acting in his official capacity, in any court having jurisdiction of such action. . . . Payment of a judgment for costs shall be as provided . . . for the payment of judgments against the United States.

<sup>159</sup> See 28 U.S.C. §§ 2412(b)-(c) (1964), as amended, 28 U.S.C. § 2412 (1970) (costs to "prevailing party" in authorized contract actions and to "successful claimant" in authorized tort actions); see also MOORE ¶ 54.75[3.—1].

<sup>160</sup> 28 U.S.C. § 1920 (1970) provides:

A judge or clerk of any court of the United States may tax as costs the following:

- (1) Fees of the clerk and marshal;
- (2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;
- (3) Fees and disbursements for printing and witnesses;
- (4) Fees for exemplification and copies of papers necessarily obtained for use in the case;
- (5) Docket fees under section 1923 of this title.

A bill of costs shall be filed in the case and, upon allowance, included in the judgment or decree.

<sup>161</sup> Act of July 18, 1966, Pub. L. No. 89-507, § 1, 80 Stat. 308, amending 28 U.S.C. § 2412 (1964) (codified at 28 U.S.C. § 2412 (1970)).

<sup>162</sup> The reasoning is as follows: § 2412 (28 U.S.C. §§ 2412(b)-(c) (1970)) only waives the federal sovereign's immunity from paying costs to the extent specified in § 1920. See *id.* § 1920; *cf.* *Cassata v. Federal Sav. & Loan Ins. Corp.*, 445 F.2d 122 (7th Cir. 1971). Section 1920 is cross-referenced to § 1821 which fixes the standard allowances payable out of costs to any witness. See 28 U.S.C. § 1821 (1970). See also note 3 *supra*. Since the Supreme Court had held that an award of fees for expert witnesses could not exceed an award of expenses for ordinary witnesses (see *Henkel v. Chicago, St. P., M. & O. Ry.*, 284 U.S. 444 (1932)), Congress decided that any mention of expert witness fees in the 1966 revision of § 1821 would be simply surplusage. See S. REP. No. 1329, 89th Cong., 2d Sess. 2-3 (1966). Thus, neither attorney nor expert witness fees incurred by the plaintiff can be taxed as costs against a federal defendant absent specific statutory authority.

It is important to distinguish a court-appointed expert witness from an expert witness who is hired independently by one of the litigants. If Congress accepts the Proposed Federal Rule of Evidence 706, then the specific authorization in subsection (b) of the Rule for taxing a federal defendant with the cost of a court-appointed expert witness will override the general provisions of § 2412. See note 164 *infra*.

power to appoint its own expert,<sup>163</sup> though possibly nominated by the plaintiff.<sup>164</sup>

## 2. State Officials as Defendants

The Supreme Court has held that once a federal court has proper jurisdiction over a state, eleventh amendment sovereign immunity does not bar the taxation of costs against that state.<sup>165</sup> If a state official is sued under the unconstitutional or ultra vires exceptions, such official should be deemed an entity separate from his sovereign with no right to claim immunity from costs.<sup>166</sup> The courts, however, have not been unanimous in their assessment of the sovereign immunity problem with reference to state defendants.

The federal district court in *La Raza* found no sovereign immunity obstacle to assessing the state officials and state agencies with equitable, nonstatutory costs.<sup>167</sup> In taxing the state defendants with costs and fees, the court recognized that "the money will come from the state treasury."<sup>168</sup>

The *La Raza* court distinguished<sup>169</sup> the contrary decision in *Sincock v. Obara*,<sup>170</sup> in which it was held that sovereign immunity barred

<sup>163</sup> See *Scott v. Spanjer Bros., Inc.*, 298 F.2d 928 (2d Cir. 1962).

<sup>164</sup> Proposed Federal Rule of Evidence 706 authorizes the court to appoint its own expert (although the parties may be requested to nominate candidates) and to include the expert's fees in the taxable costs of the action. Thus, a defendant could be taxed with the expense of a court-appointed expert under this Rule. See Proposed Fed. R. Evidence 706, printed in 56 F.R.D. 183, 286 (1972).

<sup>165</sup> See *Fairmont Creamery Co. v. Minnesota*, 275 U.S. 70, 73-74 (1927); *Missouri v. Iowa*, 48 U.S. (7 How.) 660, 681 (1849). See also MOORE ¶ 54.76-1.

<sup>166</sup> See note 149 and text accompanying note 155 *supra*.

<sup>167</sup> See 57 F.R.D. at 101-02. California's Chief Highway Engineer was sued "in his individual and representative capacity" (*id.* at 95) for his failure to perform his non-discretionary, statutory duties. Under the ultra vires exception (see note 154 and accompanying text *supra*), he was deemed to be an entity separate from California in both the main action for specific relief and the later action for costs and legal fees. Thus, sovereign immunity was denied to the state official for all purposes.

<sup>168</sup> 57 F.R.D. at 101. The court was pointing to the reality of the situation in California, which has been a national leader in providing indemnification for any State employee who is subjected to litigation "arising out of an act or omission occurring within the scope of his employment." CAL. GOV'T CODE § 825 (West Supp. 1973); see K. DAVIS, *supra* note 89, at § 26.06. The court assumed that California would interpret its requirement of "within the scope of his employment" in a realistic fashion, uninfluenced by mythical sovereign immunity distinctions, which, if followed blindly, would result in personal liability for the officer who was deemed to have acted outside the scope of his authority. Thus, although the officer's activities were ultra vires for purposes of the sovereign immunity fiction in federal court, the state official was truly acting "within the scope of his employment" and should be reimbursed under California law for any costs he is ordered to pay.

<sup>169</sup> 57 F.R.D. at 101 n.11.

<sup>170</sup> 320 F. Supp. 1098 (D. Del. 1970).

an award of reasonable attorney fees in a successful class action that had resulted in the reapportionment of the Delaware General Assembly. When presented with the plaintiff's request for attorney fees, the court in *Sincock* raised the eleventh amendment argument *sua sponte*<sup>171</sup> and dismissed the suit on the basis that Delaware's sovereign immunity ousted the federal court of jurisdiction to make such an award in the absence of express statutory authority.<sup>172</sup> The *Sincock* court recognized the possibility that *Mills* might be authority for an equitable award of fees "if we could hold either the State of Delaware or the individual defendants liable in their representative capacities."<sup>173</sup>

In considering the plaintiff's prayer for an injunction against the enforcement of an unconstitutional election statute, the court in *Sincock* deemed the suit to be against the state officials as individuals in consonance with the *Ex parte Young* exception.<sup>174</sup> However, in considering the plaintiff's request for an award of litigation expenses from the state officials, the court deemed the suit to be against the state. In addition to this double standard, *Sincock* injected further confusion into the sovereign immunity morass by failing to distinguish costs from damages.<sup>175</sup> Although not citing them directly, the court apparently relied on the Supreme Court cases that have barred suits against the state for money damages because "the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration."<sup>176</sup> These damages cases should not preclude a court

<sup>171</sup> *Id.* at 1103 n.10.

<sup>172</sup> *Id.* at 1103-05.

<sup>173</sup> *Id.* at 1104.

<sup>174</sup> 209 U.S. 123 (1908); see note 153 and accompanying text *supra*.

<sup>175</sup> The *Sincock* court noted its inability to find reasoned judicial authority for granting "a money judgment against a State or a state employee." 320 F. Supp. at 1103. This terminology is imprecise and fails to distinguish between a judgment for money damages and one for specific relief. Both kinds of judgments entail court costs, but the latter is not a "money judgment."

<sup>176</sup> *Land v. Dollar*, 330 U.S. 731, 738 (1947). The Supreme Court has also held that when the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants.

*Ford Motor Co. v. Department of Treasury*, 323 U.S. 459, 464 (1945). These cases are not in point because they are premised on the assumption that a sovereign state should not be affronted by being compelled to pay money damages, especially because of the possibility that punitive damages might be sought. The Supreme Court has simply eschewed entering such a sensitive area. In *Sincock*, however, the order to pay costs (including legal fees) would not have been directed at the state treasurer; the defendants individually or representatively would have been liable. If liable individually, the defendants might be reimbursed under state law, as in California or New York. See note 89 *supra*. This would be a matter of internal state policy which would not affect a federal court's power to award costs. If liable representatively, the defendants would pay costs only out of funds

from awarding successful plaintiffs the costs and fees incident to a judgment for specific relief. By enjoining the Delaware officials as individuals and yet simultaneously refusing to recognize them as such for purposes of taxing the costs of the litigation that made the injunction possible, *Sincock* assumed a contradictory stance. The better view is that which flows logically from *Fairmont Creamery v. Minnesota*:<sup>177</sup> once the state or its official is a proper litigant in the federal courts, each is subject to injunction and any costs or legal fees incident thereto.<sup>178</sup>

### B. Fees in State Courts

Many states permit judicial review of administrative actions in their courts under the unconstitutional and ultra vires exceptions, partly because of the influence of the Model State Administrative Procedure Act which embodies both concepts.<sup>179</sup> The Revised Model State Act, adopted in several states,<sup>180</sup> goes further in clearly providing for review of any "violation of constitutional or statutory provisions."<sup>181</sup> These statutes allow private actions against state administrators on principles analogous to those developed in the federal courts. The question of whether state officials may be taxed for the costs of the main action is one of state law. If costs are taxable against such officials, and no direct prohibition against awards of attorney or expert witness fees exists in the state statute governing costs, then the equitable doctrines discussed above are applicable.

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authorized by the state for use in their official capacities. Again, the state itself would not be compelled to pay the costs. See note 149 *supra*.

<sup>177</sup> 275 U.S. 70 (1927); see note 165 and accompanying text *supra*.

<sup>178</sup> In *Amos v. Sims*, 340 F. Supp. 691, 694 n.8 (M.D. Ala. 1972) (reapportionment case where costs and legal fees taxed against state officials), the court stated:

Individuals who, as officers of a state, are clothed with some duty with regard to a law of the state which contravenes the Constitution of the United States, may be restrained by injunction, and in such a case the state has no power to impart to its officers any immunity from such injunction or from its consequences, including the court costs incident thereto.

See also notes 108-11 and accompanying text *supra*.

<sup>179</sup> The original Model State Act authorized the reviewing court to set aside agency action which was, *inter alia*, "in violation of constitutional provisions" or "in excess of the statutory authority or jurisdiction of the agency." See MODEL STATE ADMINISTRATIVE PROCEDURE ACT §§ 12(7)(a), (b) (1946).

Some states still preserve this or similar language in their administrative procedure statutes. See, e.g., MD. ANN. CODE art. 41, §§ 255(g)(1)-(2) (1971); N.C. GEN. STAT. §§ 143-315(1)-(2) (1964); OKLA. STAT. ANN. tit. 75, §§ 322(1)(a)-(b) (1965); WIS. STAT. ANN. §§ 227.20(1)(a)-(b) (1957).

<sup>180</sup> See, e.g., GA. CODE ANN. § 3A-120(h) (Supp. 1972); HAWAII REV. STAT. § 91-14(g) (1968); W. VA. CODE ANN. § 29A-5-4(g) (1971).

<sup>181</sup> REVISED MODEL STATE ADMINISTRATIVE PROCEDURE ACT § 15(g)(1) (1961).

## CONCLUSION

Environmental concern is widespread. Congress, state legislatures, and courts are keenly aware of the paramount importance of protecting our environment. The equitable exceptions favoring court-awarded legal fees continue to be exceptional; not all environmental cases should be considered exceptional as a matter of law. However, because effective environmental protection laws are still developing, these equitable exceptions provide an essential supplement to the statutory fee provisions in encouraging responsible citizens to undertake public-interest environmental litigation.

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