Attorneys' Fees—Awards of Attorneys' Fees Are Not Permissible Under a Non-Statutory Private Attorney General Doctrine. *Alyeska Pipeline Service Co. v. Wilderness Society*, 95 S. Ct. 1612 (1975).

After discovery of oil on the North Slope of Alaska in 1968, environmental groups brought suit in 1970 to enjoin the Secretary of the Interior from issuing permits necessary to begin construction of the trans-Alaskan pipeline.[1] The grounds for the suit were that the right-of-way provisions of the Mineral Leasing Act of 1920[2] and the environmental impact study requirements of the National Environmental Policy Act[3] would be violated by the issuance of the permits. After the district court denied a permanent injunction, the Court of Appeals for the District of Columbia reversed the district court's action and granted the injunction.[4] In response to the permanent injunction granted by the court of appeals, Congress passed specific legislation allowing construction of the pipeline to begin.[5] With the merits of the litigation terminated by this congressional action, the court of appeals thereafter considered the environmentalists' request for an award of attorneys' fees.[6] In ordering the district court to award reasonable fees for the 4,455 hours[7] of attorneys' time that had been accumulated over the more than 3 years of litigation, the court of appeals held that such an award could properly be granted under a non-statutory private attorney general doctrine.[8] On review before the United States Supreme Court, the judgment of the court of appeals was reversed.[9] The Supreme Court held that only Congress, and not the federal courts, has the power

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1. Wilderness Soc'y v. Hickel, 325 F. Supp. 422 (D.D.C. 1970). For an exhaustive discussion and chronology of the events surrounding, and the ramifications of, the litigation and subsequent legislation, see Domimick & Brody, *The Alaska Pipeline: Wilderness Society v. Morton and the Trans-Alaska Pipeline Authorization Act*, 23 Am. U.L. Rev. 337 (1973).
2. Wilderness Soc'y v. Hickel, 325 F. Supp. 422, 424 (D.D.C. 1970).
3. *Id.*
4. Wilderness Soc'y v. Morton, 479 F.2d 842 (D.C. Cir.) (en banc), *cert. denied*, 411 U.S. 917 (1973). The style of the case was changed as a result of the resignation of Mr. Hickel and the subsequent appointment of Mr. Morton to the office of Secretary of the Interior.
5. Trans-Alaskan Pipeline Authorization Act, 43 U.S.C.A. §§ 1651 *et seq.* (Supp. 1975).
6. 495 F.2d 1026 (D.C. Cir. 1974).
7. See note 64 *infra*.
8. Wilderness Soc'y v. Morton, 495 F.2d 1026 (D.C. Cir. 1974). In an almost identical fact situation, the Fifth Circuit declined to follow the D.C. Circuit and refused to allow an award of attorneys' fees. Sierra Club v. Lynn, 502 F.2d 43 (5th Cir. 1974).
9. Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 95 S. Ct. 1612 (1975). The style of the case was changed due to the intervention of the Alyeska Pipeline Service Co.

to authorize an award of attorneys' fees under a private attorney general doctrine.[10]

After a review of the facts and history of the *Alyeska* litigation, the Court recognized the "American rule" regarding attorneys' fees. This rule states that in the absence of statutory authorization the prevailing party normally is not entitled to an award of attorneys' fees from the losing litigant.[11] The Court then proceeded through a comprehensive analysis of the fee-bill statute, an act specifying the nature and amount of the items taxable as costs in the federal courts.[12] It next recognized that the exceptions to the American rule, the bad faith and common fund doctrines, were allowable through construction of the fee-bill statute.[13] Although the original fee-bill statute had been revised and codified, the Court noted that Congress had not retracted, repealed, or modified the limitations of the taxable costs contained in the fee-bill statute.[14] Nor had Congress granted the Judiciary the power to allow fees whenever the courts might deem them warranted.[15]

In support of its holding that the federal courts do not have the power to award fees under a non-statutory private attorney general doctrine, the Court expressed several reasons why a contrary holding would be unwise. The Court believed that the widespread application of a non-statutory private attorney general doctrine would pose severe problems of manageability for the courts.[16] Furthermore, the Court noted that if, as argued by the environmentalists, one of the main functions of the non-statutory private attorney general doctrine was to call public officials to account and to insist that they enforce the law, an award of attorneys' fees against the government

10. *Id.* at 1627. The Court recognized but did not decide that an award of attorneys' fees by a federal court against a state government would raise a question concerning its permissibility under the eleventh amendment, a question on which the lower courts are divided. *Id.* at 1627 n.44. This issue will not be explored in this case note.

11. The United States may be the only nation in the world that does not normally grant attorneys' fees to the prevailing party. *See* Ehrenzweig, *Reimbursement of Counsel Fees and the Great Society*, 54 CALIF. L. REV. 792, 793 (1966) [hereinafter cited as Ehrenzweig].

12. Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 95 S. Ct. 1612, 1618-21 (1975).

13. *Id.* at 1621-23.

14. *Id.* at 1623.

15. *Id.*

16. *Id.* at 1625. The Court asked rhetorical questions to raise the issue of manageability:

> Moreover, should courts, if they were to embark on the course urged by respondents, opt for awards to the prevailing party, whether plaintiff or defendant, or only to the prevailing plaintiff? Should awards be discretionary or mandatory? Would there be a presumption operating for or against them in the ordinary case?

would be an appropriate and rational application of the doctrine.[17] Such an award would, however, contravene a federal statute[18] that expressly prohibits awards of fees against the United States except as otherwise provided by statute. The Court believed that the federal courts should not purport to adopt on their own initiative a rule awarding attorneys' fees based on the private attorney general doctrine when such a judicial rule would operate only against private parties and not against the government.[19]

In concluding its opinion, the majority refused to assess the merits of the American rule.[20] The Court did recognize, however, that the rule is and has been the subject of substantial criticism.[21] The Court also recognized that the encouragement of private enforcement of public policy has been viewed as desirable.[22] It emphasized, however, that the American rule is deeply rooted in the nation's history and congressional policy and that the courts should not invade the legislature's province by redistributing litigation costs in the manner suggested by the court of appeals.[23]

Although he relied on the same authority cited by the majority, the dissenting Justice Marshall construed the cases and the fee-bill statute differently. Justice Marshall believed that the majority's construction of the fee-bill statute as a restraint on the courts' inherent equitable power to assess attorneys' fees was improper.[24] After concluding that the courts do have an inherent equitable power to award fees when the interests of justice so require, Justice Marshall suggested a three-pronged test for solving the problems of manageability that were of concern to the majority.[25]

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17. *Id.* at 1626.

18. 28 U.S.C. § 2412 (1970). *See* Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 95 S. Ct. at 1626 n.42, for the legislative history.

19. Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 95 S. Ct. 1612, 1627 (1975).

20. *Id.* at 1628.

21. *Id.* For an excellent collection of legal commentary critical of the American rule, see *id.* at 1628 n.45.

22. *Id.* at 1628.

23. *Id.*

24. *Id.* at 1630.

25. Justice Marshall would award attorneys' fees to the plaintiff if:

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

Id. at 1635. The majority opined that Justice Marshall's test "emasculated the theory" and is nothing more than an expanded version of the common fund doctrine. *Id.* at 1625 n.39.

At common law, the costs of maintaining a lawsuit were not allowed to the prevailing party.[26] For centuries, however, England has had statutes authorizing the courts to award costs, including attorneys' fees to the prevailing litigant.[27] As evidenced by the American rule, this development has not been followed in the United States.

In the early years of the federal court system, the courts were directed by Congress to follow the procedure for assessment of costs and attorneys' fees practiced by the courts of the state in which the federal courts were located.[28] The disparity of awards and the abuse that resulted from the use of state procedures prompted Congress in 1853 to enact a fee-bill statute that specified the nature and amount of the items taxable as costs in federal courts.[29] The relevant language of the fee-bill statute provided:

> That in lieu of the compensation now allowed by law to attorneys . . . the following and no other compensation shall be taxed and allowed. But this act shall not be construed to prohibit attorneys . . . from charging to and receiving from their clients . . . such reasonable compensation for their services, in addition to the taxable costs, as may be in accordance with general usage in their respective States, or may be agreed upon . . . .
> *Fees of Attorneys* . . . , In a trial before a jury, in civil and criminal causes, or before referees, or before a final hearing in equity or admiralty, a docket fee of [list of specific sums].[30]

Congress' intent to control attorneys' fees allowable to the prevailing litigant through the original fee-bill statute was repeatedly enforced by the Supreme Court.[31] This general statutory regulation of costs and fees has been revised and codified without any apparent

26. *Id.* at 1616.

27. Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 717 (1967). *See generally* McCORMICK, HANDBOOK ON THE LAW OF DAMAGES, 234-36 (1935); Goodhart, *Costs*, 38 YALE L.J. 849 (1929).

28. For a discussion and an exhaustive legislative history, see Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 95 S. Ct. 1612, 1617 n.19.

29. Act of Feb. 26, 1853, ch.80, 10 Stat. 161 [hereinafter referred to as the fee-bill statute]. For an exhaustive analysis of the legislative history of the fee-bill statute and its revisions, see Alyeska Pipeline Serv. Co. v. Wilkerness Soc'y, 95 S. Ct. 1612, 1620-21 nn. 26-29.

30. Act of Feb. 26, 1853, ch.80, 10 Stat. 161.

31. Flanders v. Tweed, 82 U.S. (15 Wall.) 450 (1872); The Baltimore, 75 U.S. (8 Wall.) 377 (1869). *See also In re* Paschal, 77 U.S. (10 Wall.) 483 (1870).

intent to change the limitations on awards of fees in federal courts.[32]

Although the federal courts have recognized that the American rule generally prohibits awards of attorneys' fees to the prevailing party except as allowed by statute,[33] the courts have developed three exceptions to that rule. The first exception, one universally recognized by the courts, is the bad faith doctrine. Under this doctrine, the courts have awarded fees in situations in which the plaintiff was forced to initiate a civil contempt proceeding in order to enforce a prior judgment.[34] In addition, the power to award fees when either party has acted "vexatiously, wantonly, or for oppressive reasons"[35] has been recognized. Awards under this exception have been justified as an exercise of the courts' inherent equitable power to assess punitive damages.[36] Because the bad faith exception is punitive in nature, however, the courts have avoided its widespread application.[37]

The second major exception to the American rule is the common fund doctrine. This exception is founded on the theory of an implied agency relationship between the plaintiff and the beneficiaries of the litigation.[38] The beneficiaries are considered "owners" of the fund created or preserved by the plaintiff's suit. An award of

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32. Although in its present form, 28 U.S.C. §§ 1920 & 1923, the fee-bill statute is worded considerably differently from the original, there was no intent to change its meaning. For an exhaustive analysis of this wording change, see Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 95 S. Ct. 1612, 1621 n.29 (1975).

33. The fee-bill statute includes specific dollar amounts allowable as taxable items of cost. In addition, Congress has made specific provisions for shifting attorneys' fees under selected statutes granting or protecting particular federal rights. For an extensive list of statutes with provisions authorizing fee-shifting in suits brought under those statutes, see *id.* at 1623 n.33. Discussion and analysis of fee-shifting in state courts was not at issue in *Alyeska* and will not be considered in this case note.

34. *See, e.g.*, Toledo Scale Co. v. Computing Scale Co., 261 U.S. 399 (1923); First Nat'l Bank v. Dunham, 471 F.2d 712 (8th Cir. 1973); *accord*, Lichtenstein v. Lichtenstein, 481 F.2d 682 (3d Cir. 1973), *cert. denied*, 414 U.S. 1144 (1974).

35. Hall v. Cole, 412 U.S. 1, 5 (1973), *quoting* 6J. MOORE, FEDERAL PRACTICE ¶ 54.77[2], at 1709 (2d ed. 1972).

36. *See, e.g.*, Vaughan v. Atkinson, 369 U.S. 527, 530-31 (1962); Bell v. School Bd., 321 F.2d 494, 500 (4th Cir. 1963). *See generally* Note, *Awards of Attorney's Fees to Legal Aid Offices*, 87 HARV. L. REV. 411, 418-19 (1973).

37. *See* Comment, *Court Awarded Attorney's Fees and Equal Access to the Courts*, 122 U. PA. L. REV. 636, 645 (1974). The courts appear to be more willing to award fees under the bad faith exception in cases involving racial discrimination. *See, e.g.*, Fairley v. Patterson, 493 F.2d 598, 606 (5th Cir. 1974); Cato v. Parham, 403 F.2d 12, 16 (8th Cir. 1968). *See also* Note, *Allowance of Attorney Fees in Civil Rights Litigation Where the Action is not Based on a Statute Providing for an Award of Attorney Fees*, 41 U. CIN. L. REV. 405 (1972).

38. Trustees v. Greenough, 105 U.S. 527, 532-37 (1881).

fees to the plaintiff out of the fund merely spreads the costs of litigation among the beneficiaries, and their unjust enrichment is thus avoided.[39] The essential elements for an award of attorneys' fees under the common fund doctrine are (1) an ascertainable class of beneficiaries[40] and (2) a source of funds common to the class from which the award can be made.[41]

The common fund exception was first established in *Trustees v. Greenough*.[42] To allow this exception, the *Greenough* court construed the fee-bill statute[43] to regulate only those fees and costs that are strictly taxable between "party and party," that is, between plaintiff and defendant, and not to regulate the arrangement of fees between attorney and client.[44] The opinion contained certain "equity power" language that indicated that the fee-bill statute did not interfere with a court's equitable power to assess the costs of litigation.[45] This "equity power" language was qualified, however, by other language that limited the court's equitable power to assess trial costs to "cases of administration of funds under its control, to make such allowance to the parties out of the fund as justice and equity may require."[46]

Although the *Greenough* opinion was based on a construction of the fee-bill statute and referred to equity power in qualified terms, subsequent common fund cases seized upon the "equity power" language, but did not emphasize the qualifying language, to justify awards of attorneys' fees. Thus, the common fund exception was expanded in *Sprague v. Ticonic National Bank*[47] to allow an award of fees to a plaintiff who did not purport to represent other similarly interested parties. No fund in which others could automatically participate was created, but nevertheless, a benefit was conferred on the other interested parties. The benefit was the effect that stare decisis would have on subsequent suits against the same defendant.[48] The Supreme Court spoke of equity power in unqualified

39. *See generally* Dawson, *Lawyers and Involuntary Clients: Attorney Fees from Funds*, 87 HARV. L. REV. 1597 (1974).

40. Hall v. Cole, 412 U.S. 1, 15 (1973).

41. Mills v. Electric-Auto Lite Co., 396 U.S. 375, 396-97 (1970).

42. 105 U.S. 527 (1881).

43. See text accompanying note 30 *supra*.

44. 105 U.S. at 535-36.

45. *Id.*

46. *Id.*

47. 307 U.S. 161 (1939).

48. *Id.* at 166.

language and reasoned that an award of fees was justified as an exercise of the "original authority of the chancellor to do equity in a particular situation."[49]

In *Mills v. Electric-Auto Lite Co.*,[50] the Supreme Court further expanded the common fund doctrine to allow an award of attorneys' fees in a case in which the plaintiffs' stockholder derivative suit presumably conferred a non-monetary benefit upon the corporation.[51] The award of fees was made from the corporate treasury which was a "fund" common to the corporate stockholders, the class that benefitted from the litigation.[52] The Court relied heavily on the "equity power" language in *Sprague* to hold that the absence of a fund created by the litigation did not interfere with the "power of equity in doing justice as between party and beneficiary."[53]

Another example of the expansion of the commom fund exception is found in *Hall v. Cole*.[54] After recognizing the American rule, the Supreme Court in *Hall* cited the "equity power" language of *Sprague* and *Mills* and held that the courts do not hestitate to exercise this inherent equitable power whenever the interests of justice so require.[55] The *Hall* Court thus expanded the common fund exception by allowing an award of fees to a union member whose successful suit secured his right of free speech and thereby removed the chill cast upon the free speech rights of other union members. The Court held that the payment of fees from the union treasury simply shifted the costs to the other union members, the class that benefitted from the litigation.[56]

In addition to the bad faith and common fund exceptions created by the Supreme Court, the lower federal courts formulated the non-statutory private attorney general doctrine as a third exception to the American rule of normally denying attorneys' fees to the prevailing party.[57] The non-statutory private attorney general doctrine is to be distinguished from the private attorney general doc-

49. *Id.*
50. 396 U.S. 375 (1970).
51. *Id.* at 392, 395.
52. *Id.* at 395-97.
53. *Id.* at 393.
54. 412 U.S. 1 (1973).
55. *Id.* at 5.
56. *Id.* at 9.
57. Fowler v. Schwarzwalder, 498 F.2d 143 (8th Cir. 1974). For an extensive list of other lower federal courts in which the non-statutory private attorney general doctrine was applied, see Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 95 S. Ct. 1612, 1628 n.46.

trine. The latter is a doctrine in which awards of attorneys' fees to successful plaintiffs are expressly authorized by a provision in the legislation that created or preserved the federal right upon which the suit was brought.[58] The rationale behind the private attorney general doctrine is that if the individual is able to recover his attorneys' fees, private litigation vindicating a strong Congressional policy will be encouraged.[59] Using the same policy argument of encouraging private enforcement of public policy, the lower federal courts shifted fees in cases in which there was no statutory authorization and thus created the non-statutory private attorney general doctrine.[60] The lower courts that used the non-statutory private attorney general doctrine as a basis for fee shifting justified their action as an exercise of their "equitable power to grant such fees."[61] Although the non-statutory private attorney general doctrine was relied upon relatively frequently by lower federal courts, the validity of the doctrine had not been squarely confronted by the Supreme Court before the *Alyeska* decision.[62]

In holding that the non-statutory private attorney general exception to the American rule could not be judicially created, the *Alyeska* Court agreed with the *Greenough* holding that the fee-bill statute was intended to regulate awards of attorneys' fees only between "party and party."[63] On the facts of the *Alyeska* case, the award made by the court of appeals was clearly between "party and party."[64] Therefore, given the fact that the fee-bill statute should have regulated any shifting of fees in this case, the use of the non-statutory private attorney general doctrine to shift attorneys' fees between the parties in *Alyeska* was clearly prohibited.

Despite this prohibition of the non-statutory private attorney general exception, a basis does seem to have existed for its development and use in the lower federal courts.[65] This basis was the wide-

58. Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 95 S. Ct. 1612, 1623-24 (1975).
59. *Id.* at 1624.
60. See note 57 *supra*.
61. Fowler v. Schwarzwalder, 498 F.2d 143, 144 (8th Cir. 1974).
62. The Court had twice before declined to decide the validity of the non-statutory private attorney general doctrine. F.D. Rich Co. v. Industrial Lumber Co., 417 U.S. 116, 130 (1974); Hall v. Cole, 412 U.S. 1, 5-6 n.7 (1973).
63. Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 95 S. Ct. 1612, 1621-22 n.30 (1975).
64. The court of appeals had ordered the defendant, Alyeska Pipeline Service Co., to pay to the plaintiff environmental groups reasonable attorneys' fees in the amount that would have been determined by the district court on remand. The plaintiffs' bill of costs included 4,455 hours of attorneys' time. *Id.* at 1615-16 nn.13 & 17.
65. See note 57 *supra*.

spread use of broad "equity power" language in the opinions of bad faith and common fund cases in which fee-shifting was justified as an exercise of a limited equity power.

Prior to 1853, the federal courts did have what could be termed a total equity power over the shifting of costs and fees.[66] The passage of the fee-bill statute[67] divested the courts of their equitable power to shift fees between "party and party," but did not affect their equitable power to shift fees under the bad faith or common fund exceptions to the American rule because neither of these work to shift fees between parties.[68] The courts thus retained a limited equitable power over the shifting of costs and fees. The *Greenough* decision recognized this distinction between a total equity power and a limited equity power when it used "equity power" language limited to the common fund situation.[69] Subsequent cases in the evolution of the bad faith and common fund exceptions, however, justified fee-shifting with "equity power" language that failed to emphasize the limits on that equity power. After many years, the distinction between a total and limited equity power seems to have been forgotten. The unqualified "equity power" language of the more recent bad faith and common fund cases misled the lower federal courts into believing they possessed a total equity power over fee-shifting and thus could use this power to assess fees in a non-statutory private attorney general situation.[70]

Although the *Alyeska* Court properly held that the non-statutory private attorney general doctrine was an unauthorized exercise of the courts' equity powers, it failed to give clear guidelines for what, if any, other exceptions could be judicially created through the exercise of equity power that the courts retain. The Court justi-

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66. Act of Aug. 23, 1842, ch.188, § 7, 5 Stat. 518. The federal courts, however, took no action under this statutory authorization and continued to follow the procedures of the state where the federal court was located until the fee-bill statute of 1853 superseded all prior legislation. Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 95 S. Ct. 1612, 1618 (1975).

67. See text accompanying note 30 *supra*, and the *Greenough* construction in text accompanying notes 44 & 63 *supra*.

68. See text accompanying notes 73-76 *infra*.

69. See text accompanying note 46 *supra*.

70. Another factor that encouraged the lower federal courts to create a non-statutory private attorney general exception was the Supreme Court's liberal construction and application of a statutory private attorney general doctrine in Newman v. Piggie Park Enterprises, 390 U.S. 400 (1968). The *Newman* Court held that fees should be granted unless exceptional circumstances existed, although the statute simply allowed the courts to exercise their discretion. *See* Comment, *Private Attorney General Fees Emerge from the Wilderness*, 43 FORD. L. REV. 258, 261-62 (1974).

fied the bad faith and common fund cases by simply stating: "These exceptions are unquestionably assertions of inherent power in the courts to allow attorneys' fees in particular situations, unless forbidden by Congress, but none of the exceptions is involved here."[71] This statement somewhat qualifies the courts' power to assess attorneys' fees by the reference to "in particular situations." But when coupled with the Court's citation of previous fee-shifting cases in which unqualified "equity power" language was used, the statement might be read as lending support to the broad unqualified language contained in those prior opinions that indicated a total, rather than a limited, equity power over fee-shifting. Thus, when the Court proceeded to hold the non-statutory private attorney general doctrine beyond the courts' equity power, it appears to have created an inconsistency. This apparent inconsistency is what prompted the dissenting Justice Marshall's comment that the Court was willing to "tolerate the 'equitable' exceptions to its analysis not because they can be squared with it but because they are now too well established to be casually dispensed with."[72]

Upon closer scrutiny, however, the seeming inconsistency can be resolved. Because the fee-bill statute regulates only "party and party" fee-shifting,[73] nothing in it can be fairly construed to regulate the courts' power to assess punitive damages, of which attorneys' fees are a permissible element in a bad faith situation.[74] In addition, because the second sentence of the fee-bill statute left charges between attorney and client unregulated,[75] the courts are free to exercise their remaining equity power to imply an agency relationship between the plaintiff and the beneficiaries of his suit to award fees out of a common fund to prevent unjust enrichment of the beneficiaries.[76] Thus, the bad faith and common fund, exceptions can be justified as legitimate exercises of the courts' equity power without a holding that the power is a total one over fee-shifting. Rather than distinguishing between a total and limited equity power and thus resolving the apparent inconsistency, the Court was content to say that the two recognized exceptions were not involved.[77] The Court

71. 95 S. Ct. 1612, 1622.

72. *Id.* at 1631-32.

73. See text accompanying notes 44 & 63 *supra*.

74. *See generally* Sankin v. 5410 Conn. Ave. Corp., 281 F. Supp. 524, 568 (D.D.C. 1968), *aff'd.*, Benn v. Sankin, 410 F.2d 1060 (D.C. Cir. 1969), *cert. denied*, 396 U.S. 1041 (1970).

75. See text accompanying note 30 *supra*.

76. See text accompanying note 39 *supra*.

77. See text accompanying note 71 *supra*.

thus failed to give express guidelines on the extent of the equity power courts have retained over fee-shifting.

Although the Court failed to give express guidelines on the extent of the courts' remaining equity power over fee-shifting, it is difficult to conceive of a factual situation that could justify another judicially created exception to the American rule of normally denying attorneys' fees to the prevailing litigant. Most litigation does not fall within the bad faith or common fund situations, and thus any fee-shifting would truly be between "party and party" and therefore prohibited by the fee-bill statute.

Depending on one's view of the merits of the American rule, *Alyeska Pipeline Service Co. v. Wilderness Society*[78] could be characterized as a decision with an undesirable but legally-compelled result. Many policy reasons indicate that the result may be undesirable.[79] For example, the decision will deter similar suits to force governmental compliance with the law when the law sought to be enforced does not provide expressly for an award of attorneys' fees to the successful plaintiff.[80] Furthermore, private enforcement of public policy is a desirable supplement to the efforts of the often under-staffed and sometimes politically motivated attorney general's office.[81] These policy arguments, however, should now be directed toward Congress to urge passage of legislation that would perhaps provide for a more general and flexible private attorney general doctrine.[82]

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78. 95 S. Ct. 1612 (1975).

79. *See generally id.* at 1628 n.45 (articles cited).

80. This was one of the primary factors that motivated the court of appeals to make the award of attorneys' fees in favor of the environmentalists. 495 F.2d at 1036.

81. Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 95 S. Ct. 1612, 1624 (1975).

82. Congress is aware of the criticism of the American rule in general and recently conducted hearings to "ascertain whether 'fee-shifting' affords representation to otherwise unrepresented interests, whether some restriction or encouragement of the development is needed, and what place, if any, there is for legislation in this area." *Hearings before the Subcomm. on Representation of Citizens' Interests of the Senate Comm. on the Judiciary, First Session on the Effect of Legal Fees on the Adequacy of Representation*, 93d Cong., 1st Sess., pt. III, at 788 (1973) (Sen. Tunney).