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Recent Developments in Attorneys' Fees

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SPECIAL PROJECT

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I. INTRODUCTION

In recent years, the subject of attorneys' fees has become the focal point of pressures to improve the accessibility of legal services for those unable to pay large fees. Courts, scholars, and special interest groups have examined in detail the relationship between

fees and the ability to assert legal rights. This increased scrutiny has led to the elimination of minimum fee schedules, the criticism of and possible relaxation of restrictions on fee advertising, and the establishment of maximum contingent fee schedules by court rule. Private enforcement of newly enacted federal statutes against private corporations and state governments has created controversy over exceptions to the traditional rule against fee shifting and the scope of the bar of the eleventh amendment. These debates and the decisions accompanying them have important implications for the issue of whether, in a pragmatic sense, private citizens and organizations may be expected to play a major role in enforcing public rights and standards of governmental conduct. This project will consider recent developments in the attorneys' fee area by analyzing the legal background of each problem and the implications of the last year's developments.

II. MINIMUM FEE SCHEDULES AND ANTITRUST LAW

Because minimum fee schedules suggested or promulgated by bar associations restrict competitive pricing in the legal profession, the question whether they violate the antitrust laws has evoked considerable debate and commentary.[1] Opponents of these schedules allege that setting a price floor for legal services constitutes price-fixing, a per se violation of the Sherman Act.[2] Defenders of fee schedules counter with two arguments. First, they contend that a "learned professions" exemption to the antitrust laws exists for the practice of law, because it is not "trade or commerce." Secondly, they argue that the Sherman Act does not apply to fee schedules promulgated by bar associations because the schedules constitute state regulation immune from the proscriptions of the Act. The United States Supreme Court recently laid this controversy to rest in *Goldfarb v. Virginia State Bar*.[3] Rejecting the contentions of the proponents of the schedules, the Court held that minimum fee schedules operate to fix prices in contravention of section 1 of the

1. *See, e.g.*, Arnould & Corley, *Fee Schedules Should Be Abolished*, 57 A.B.A.J. 655 (1971); Ferren & Snyder, *Antitrust and Ethical Aspects of Lawyers' Minimum Fee Schedules*, 7 REAL PROP. PROB. & TR. J. 726 (1972); Comment, *Minimum Fee Schedules as Price-Fixing: A Per Se Violation of the Sherman Act*, 22 AM. U.L. REV. 439 (1973); Comment, *Bar Association Minimum Fee Schedules and the Antitrust Laws*, 1974 DUKE L.J. 1164; Note, *A Critical Analysis of Bar Association Minimum Fee Schedules*, 85 HARV. L. REV. 971 (1972); Comment, *Minimum Fee Schedules: An Antitrust Problem*, 48 TUL. L. REV. 682 (1974).

2. Northern Pac. Ry. Co. v. United States, 356 U.S. 1, 5 (1958).

3. 421 U.S. 773 (1975).

Sherman Act.[4] In resolving the debate, the Court eliminated an artificial price floor for many legal services.

A. Legal Background

(1) The Professions as "Trade or Commerce"

Proponents of minimum fee schedules have contended that the practice of a profession is not "trade or commerce" within the meaning of the Sherman Act.[5] Although the Supreme Court has construed broadly the jurisdictional words "trade or commerce"[6] and has been reluctant to find exceptions,[7] several Court cases have suggested that such an exemption may exist. The origin of the "learned profession" doctrine lies in *Federal Baseball Club v. National League*,[8] a 1922 case in which the Court held professional baseball immune from the antitrust laws. Although baseball was played for profit, the Court reasoned that it did not constitute "trade or commerce" because "personal effort, not related to production, is not a subject of commerce."[9] To support its statement that personal services are not "trades," the Court cited the legal profession as an example: "a firm of lawyers sending out a member to argue a case . . . does not engage in . . . commerce."[10]

The Court also referred to an exemption for professional activities in two later decisions. In the 1931 case of *FTC v. Raladam Co.*,[11] the Federal Trade Commission questioned whether the competitive practices used by medicine sellers violated section 5 of the Federal Trade Commission Act.[12] In dicta the Court noted that the medical profession might be injured by these practices, and distinguished

4. 15 U.S.C. § 1 (1970).

5. Section 1 states that "[e]very contract, combination . . . , or conspiracy, in restraint of *trade or commerce* among the several states . . ." is unlawful. 15 U.S.C. § 1 (1970). (emphasis added)

6. In United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533, 553 (1944), the Court stated that "trade" included "every person engaged in business whose activities might restrain or monopolize commercial intercourse . . ." Similarly, in United States v. National Ass'n of Real Estate Bds., 339 U.S. 485, 491 (1950), the Court declared that "[i]t is in that broad sense that 'trade' is used in the Sherman Act."

7. The Court has declared that "if exceptions are to be written into the Sherman Act, they must come from Congress, not this Court." United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533, 561 (1944).

8. 259 U.S. 200 (1922).

9. *Id.* at 209.

10. *Id.*

11. 283 U.S. 643 (1931).

12. 15 U.S.C. § 45 (1970). The Federal Trade Commission Act is construed *in pari materia* with the Sherman Act. American Cyanimid Co. v. FTC, 363 F.2d 757, 770 (6th Cir. 1966).

vendors from medical practitioners, declaring that the latter "follow a profession and not a trade."[13] A similar dictum appears in the 1932 case of *Atlantic Cleaners & Dyers, Inc. v. United States*,[14] in which the Court held that cleaners and dyers were engaged in a "trade." To support its holding, the Court quoted from an earlier opinion[15] dealing with the broad definition of that term:

> Wherever any occupation, employment, or business is carried on for the purpose of profit, or gain, or a livelihood, not in the liberal arts or in the learned professions, it is constantly called a *trade*.[16]

Apart from the dicta in these cases, the Court has expressed a policy basis for differentiating between business and professional activities. In *Semler v. Oregon State Board of Dental Examiners*[17] the Court upheld a state statute prohibiting advertising by dentists. The Court based its holding upon a state interest in restricting professional advertising. It recognized that competitive activities by professionals might be injurious to the public:

> The community is concerned with the maintenance of professional standards which will insure not only competency in individual practitioners, . . . but against practices which would tend to demoralize the profession by forcing its members into an unseemly rivalry which would enlarge the opportunities of the least scrupulous.[18]

A later case, *United States v. Oregon State Medical Society*,[19] expressed the same policy in holding suppliers of prepaid medical care immune from the Sherman Act. Although the Court did not base its decision upon the "learned profession" dicta in prior cases, its reasoning supported the concept of a professional exemption. Observing that special considerations attach to the physician-patient relationship, the Court declared that "forms of competition usual in the business world may be demoralizing to the ethical standards of a profession."[20]

In subsequent cases the Supreme Court avoided direct evaluation of the question of a "learned profession" exemption, while incidentally placing its existence in substantial doubt. In *American Medical Association v. United States*[21] the defendants were charged

13. 283 U.S. at 653.
14. 286 U.S. 427 (1932).
15. The Schooner Nymph, 18 F. Cas. 506 (No. 10, 388) (C.C.D. Me. 1834).
16. 286 U.S. at 436.
17. 294 U.S. 608 (1935).
18. *Id.* at 612.
19. 343 U.S. 326 (1952).
20. *Id.* at 336.
21. 317 U.S. 519 (1943).

with violating section 3 of the Sherman Act[22] by impeding the development of a prepaid medical group. Although the defendant AMA argued that it was exempt from the antitrust laws because the practice of medicine was not "trade or commerce," the Court declined to rule on the issue. The Court instead found the occupation of the defendants immaterial when they conspired to restrain nonprofessional commerce.[23] In *United States v. National Association of Real Estate Boards*,[24] the Court held that a fee schedule for realtor services violated section 3 of the Sherman Act. In contrast to its statement in *Federal Baseball*,[26] the Court said, "The fact that the business involves the sale of personal services rather than commodities does not take it out of the category of 'trade' . . ."[27] Although the Court reversed its position that all services are exempt from the Act, it again intimated no opinion on the correctness of the application of the term "trade" to the professions.[28] By narrowing the applicability of the possible exemption to professional services, the Court's holding undermines the existence of a "learned profession" exception.[29] Furthermore, a more recent case suggests that such a distinction does not exist. In *United States v. Utah Pharmaceutical Association*,[30] the District Court for the District of Utah held that price schedules for prescription drugs violated section 1 of the Sherman Act. Citing the Supreme Court's decisions in *American Medical Association* and *National Association of Real Estate Boards*, the court declared that simply because goods in commerce are made by persons having a learned profession they are not exempt from antitrust regulation.[31] The Supreme Court affirmed per curiam, perhaps implicitly agreeing that a professional association could act in restraint of trade when engaged in activities related to its own profession.[32]

Although doubt has been cast upon the validity of a complete

22. Section 3 of the Act is substantially similar to § 1, but applies to restraints of trade in the District of Columbia and the territories.

23. 317 U.S. at 528.

24. 339 U.S. 485 (1950).

25. *See* note 22 *supra*.

26. *See* text accompanying notes 8-10 *supra*.

27. 339 U.S. at 490.

28. *Id.* at 492.

29. Comment, *Bar Association Minimum Fee Schedules and the Antitrust Laws*, 1974 DUKE L.J. 1164.

30. 201 F. Supp. 29 (D. Utab), *appeal dismissed*, 306 F.2d 493 (10tb Cir.), *aff'd mem.*, 371 U.S. 24 (1962).

31. 201 F. Supp. at 33.

32. Comment, *supra* note 29, at 1205-06.

learned professions exemption, a partial exemption may exist where anticompetitive activities have a noncommercial purpose. The District of Columbia Circuit Court of Appeals expressed this approach in *Marjorie Webster Junior College, Inc. v. Middle States Association of Colleges and Secondary Schools, Inc.*[33] In that case, a profit-making junior college sought to enjoin enforcement of a rule denying accreditation to schools operated for profit. The plaintiffs argued that the defendant accreditation association's procedures violated section 3 of the Sherman Act. The court, however, found that the defendant's activities were immune from the Act because their purpose was primarily noncommercial.[34] The court reasoned that "the proscriptions of the Sherman Act were 'tailored . . . for the business world,' not for the noncommercial aspects of the liberal arts and learned professions."[35] The decision therefore suggests that while certain commercially oriented anticompetitive practices of professions will be subject to the antitrust laws, other anticompetitive practices may be immune.

(2) State Action Immunity

The Supreme Court first articulated the doctrine of state action immunity in *Parker v. Brown*,[36] in which it held that Congress did not intend that the Sherman Act apply to anticompetitive activities engaged in by the states. In *Parker*, a producer of raisins sought to enjoin enforcement of state-imposed limits on raisin acreage. The Court recognized that had the program been organized and carried out by private persons, an antitrust violation would have occurred, but held that the Act did not forbid a program authorized and directed by a state.[38] The Court noted, however, that this immunity does not extend to all state action: a state cannot authorize private violations of the Act,[39] nor become a mere participant in private action.[40]

Although the Court in *Parker* cited two examples in which the

33. 432 F.2d 650 (D.C. Cir.), *cert. denied*, 400 U.S. 965 (1970).

34. *Id.* at 655.

35. *Id.* at 654.

36. 317 U.S. 341 (1943).

37. ". . . Every *person* who shall make any contract or engage in any combination or conspire with any other *person* or *persons*, to monopolize . . . shall be deemed guilty of a misdemeanor . . ." 15 U.S.C. § 1 (1970). (emphasis added)

38. 317 U.S. at 350.

39. ". . . a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful . . ." *Id.* at 351.

40. *Id.* at 351-52.

state action immunity would not apply, it did not give any practical standards for making a determination; nor have later cases done much to elucidate this murky problem.[41] Lower courts most often seem to use two tests in deciding whether immunity exists. First, many courts examine whether legislative policy mandates the anticompetitive conduct.[42] The rationale behind this judicial inquiry is to prevent immunity for conduct that the state never intended to be immunized.[43] For an activity to receive immunity, the legislature must have expressed its view that competition is undesirable or have enacted a scheme necessitating anticompetitive conduct.[44] The courts generally have applied this standard strictly. For example, in *Travelers Insurance Co. v. Blue Cross of Western Pennsylvania*[45] one insurer sued another for allegedly monopolizing hospital coverage in the state. The defendant argued that it was immune from the antitrust laws because its activities were regulated by the state insurance department pursuant to a legislative enactment. The district court rejected this defense on the ground that the state statute did not specifically sanction the anticompetitive conduct.

The second test used by the courts is whether the state supervises the anticompetitive activity.[46] Generally, for anticompetitive activity to warrant immunity, a state agency must have the power to monitor the practices of the private entities engaged in the activity. This requirement insures continual state involvement in the questioned regulation.[47] The courts have reached divergent views on the requisite amount of state supervision. *Gas Light Co.*

41. In fact, the Court has denied certiorari in a number of cases in which the immunity was raised. *See, e.g.*, Hecht v. Pro-Football, Inc., 444 F.2d 931 (D.C. Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972); Gas Light Co. v. Georgia Power Co., 440 F.2d 1135 (5th Cir. 1971), *cert. denied*, 404 U.S. 1062; George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc., 424 F.2d 25 (1st Cir.), *cert. denied*, 400 U.S. 850 (1970); Allstate Ins. Co. v. Lanier, 361 F.2d 870 (4th Cir.), *cert. denied*, 385 U.S. 930 (1966).

42. *See, e.g.*, George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc., 424 F.2d 25, 30-31 (1st Cir.), *cert. denied*, 400 U.S. 850 (1970); Asheville Bd. of Trade, Inc. v. FTC, 263 F.2d 502, 509 (4th Cir. 1959); Travelers Ins. Co. v. Blue Cross of Western Pennsylvania, 298 F. Supp. 1109, 1111-12 (W.D. Pa. 1969). This criterion apparently is derived from the Court's statement in *Parker* that the program there received "its authority and efficacy from the legislative command of the state." 317 U.S. at 350.

43. *See* Comment, *Antitrust Immunity: State Action Protection Under* Parker v. Brown, 7 U.S.F.L. REV. 453, 477 (1973).

44. Comment, *supra* note 29, at 1164, 1217.

45. 298 F. Supp. 1109 (W.D. Pa. 1969).

46. *See, e.g.*, Goldfarb v. Virginia State Bar, 497 F.2d 1, 6 (4th Cir. 1974); Gas Light Co. v. Georgia Power Co., 440 F.2d 1135, 1140 (5th Cir. 1971); Washington Gas Light Co. v. Virginia Elec. & Power Co., 438 F.2d 248, 251 (4th Cir. 1970); George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc., 424 F.2d 25, 30 (1st Cir.), *cert. denied*, 400 U.S. 850 (1970).

47. Comment, *supra* note 29, at 1220.

v. Georgia Power Co.[48] states the prevailing view. In that case, a natural gas company brought an antitrust suit against certain electric companies whose rates and practices were regulated by the state public service commission. The Fifth Circuit held that anticompetitive activities are immune only if they are subject "to meaningful regulation to the end that they are the result of the considered judgment of the state regulatory authority."[49] The court found the active supervision requirement was met in this case because the state public service commission had held hearings on the very practices in question.[50] The Fourth Circuit took a much different approach in a similar fact situation in *Washington Gas Light Co. v. Virginia Electric & Power Co.*[51] The court in that case examined the regulatory control exercised by the state corporation commission over certain corporate utility activities. Although the plaintiffs argued that the commission had given no affirmative approval to the defendant's activities, the court granted immunity, finding that the commission could have stopped the alleged illegal conduct.[52] By inferring that silence may be interpreted as consent or approval, the court suggested that the supervision requirement may be met so long as anticompetitive activity is theoretically subject to the control of a regulatory body.[53]

B. Goldfarb v. Virginia State Bar

The controversy in *Goldfarb v. Virginia State Bar* arose when plaintiffs contracted to buy a home in Fairfax County, Virginia. The lender financing the purchase required them to obtain title insurance, which necessitated a title examination by a member of the state bar. Because they could not obtain the examination for less than the rate prescribed in the minimum fee schedule published by the Fairfax County Bar Association,[54] the Goldfarbs brought a class action alleging that the schedule, as applied to fees for legal services

48. 440 F.2d 1135 (5th Cir. 1971). *See also* George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc., 424 F.2d 25 (1st Cir.) *cert. denied*, 400 U.S. 850 (1970).

49. 440 F.2d at 1140.

50. *Id.*

51. 438 F.2d 248 (4th Cir. 1970).

52. *Id.* at 252.

53. Comment, *supra* note 43, at 459.

54. In 1962 the State Bar published a minimum-fee-schedule report that listed a series of fees for legal services. The report stated that the fees were not mandatory, and it recommended only that the State Bar consider adopting such a schedule. Shortly thereafter, the County Bar adopted its own fee schedule, and the suggested fees for title examination were virtually identical to those in the State Bar report. 421 U.S. at 777 n.4.

relating to residential real estate transactions, violated the antitrust laws. The Goldfarbs also joined the Virginia State Bar as defendants arguing that its ethical opinions enforced the fee schedule because under them disciplinary action could be brought against lawyers who did not abide by them.[55]

On petition for certiorari, the Supreme Court first found that since the minimum fee schedule set a rigid price floor and was not purely advisory, it constituted price-fixing in direct contravention of section 1[56] of the Sherman Act.[57] Thus, the fee schedule would violate the Act unless they were exempt.

The Court dismissed the defendants' original contention that the legal profession is exempt from the Sherman Act under a "learned profession" doctrine.[58] The Court found no such exception contained in the Act itself and recognized that a heavy presumption exists against implicit exceptions.[59] Although acknowledging that *Federal Baseball*, *Raladam*, and *Atlantic Cleaners & Dyers* had implied that the practice of a learned profession is not "trade or commerce,"[60] the Court recognized that the issue had been expressly left open in *National Association of Real Estate Boards* and *American Medical Association*.[61] Declaring that the nature of an occupation standing alone does not provide immunity from the Sherman Act,[62] the Court then specifically held that the learned professions enjoy no total exclusion from antitrust regulation. The Court did realize that the professions are distinguishable from other business enterprises because of the aspect of public service, but found that no such public interest basis supported minimum fee schedules.[63] With this possible exemption removed, the Court found

55. The Virginia State Bar's most recent ethical opinion on point states that "evidence that an attorney habitually charges less than the suggested minimum fee schedule adopted by his local bar association, raises a presumption that such lawyer is guilty of misconduct . . ." Virginia State Bar Committee on Legal Ethics, Opinion No. 170, May 28, 1971, as cited in 421 U.S. at 777. In fact, the parties stipulated that these opinions are a substantial influencing factor in lawyers' adherence to the fee schedules. 421 U.S. at 778 n.6.

56. 15 U.S.C. § 1 (1970); *see* notes 4, 5, & 37 *supra*.

57. *See* note 3 *supra* and accompanying text.

58. The defendants also contended that the restraints on legal services created by the schedule did not have a sufficient effect on interstate commerce to support jurisdiction under the Sherman Act. The Court, however, concluded that "given the substantial volume of commerce involved and the inseparability of this particular legal service from the interstate aspects of real estate transactions," the schedule sufficiently affected interstate commerce. 421 U.S. at 785.

59. *Id.* at 787; *see* notes 6 & 7 *supra* and accompanying text.

60. 421 U.S. at 786 n.15; *see* text accompanying notes 8-16 *supra*.

61. 421 U.S. at 786 n.15; *see* notes 23 & 28 *supra* and accompanying text.

62. 421 U.S. 787, citing Associated Press v. United States, 326 U.S. 1, 7 (1945).

63. 421 U.S. at 786.

a title examination specifically included in section 1 of the Act as no more than the sale of a service.[64] The Court then declared: "We intimate no view on any other situation than the one with which we are confronted today."[65]

The Court then adopted the standards formulated by some lower courts[66] and held that neither the county nor the state bar association was entitled to state action immunity. In reaching this result, the Court examined the relationship between both bar associations and the State of Virginia. Through its legislature the state had authorized the Virginia Supreme Court to regulate the practice of law.[67] That court had adopted ethical codes dealing in part with fees, but which explicitly directed that lawyers were not to be controlled by fee schedules.[68] The Court then inquired whether state policy mandated the fee schedules, and finding no statute or ethical code that directed a price floor, held this requirement unfulfilled. The Court next considered the supervisory role of the state Supreme Court, noting that it had granted the State Bar the power to issue ethical opinions. Since there was no indication that the state Supreme Court had approved those opinions, particularly the opinion dealing with fee schedules,[69] the Court denied the immunity. The Court therefore concluded that in this case the bar associations had joined in essentially private anticompetitive activities.[70]

C. *Comment*

In finding that minimum fee schedules violated the antitrust laws, the Supreme Court in *Goldfarb* acted consistently with prior authority. The "learned profession" doctrine could not be considered persuasive since it rested on dicta substantially weakened by later cases. The Court wisely struck down the doctrine, because, even assuming that special considerations are involved in professional activities, this does not justify a blanket exemption from antitrust regulation. As two commentators suggest, the self-interest involved in self-regulation, even by professional groups, demands some governmental supervision.[71] The Court also correctly applied

64. 421 U.S. at 787; *see* text accompanying note 29 *supra*.

65. *Id.* at 788 n.17.

66. *See* text accompanying notes 42-53 *supra*.

67. VA. CODE ANN. § 54-48 (1972); Button v. Day, 204 Va. 547, 132 S.E.2d 292 (1963).

68. Rules for Integration of the Virginia State Bar, 171 Va. xvii, xxiii (1938), as cited in 421 U.S. at 789 n.19.

69. *See* note 55 *supra*.

70. 421 U.S. at 791-92.

71. *See* Ferren & Snyder, note 1 *supra*, at 732.

the *Parker* doctrine in finding fee schedules not immune under the state action doctrine, because minimum fees were neither enacted by the State legislature nor adopted by the Virginia Supreme Court. In applying the stricter requirement that such approval be actively manifested rather than inferred from silence,[72] the Court acted consistently with the rationale that express state policy must sanction anticompetitive conduct before a measure warrants exemption.

The Court's abolition of minimum fee schedules seems correct from a policy standpoint as well, because these systems have had an adverse economic impact upon consumer access to the legal services market. Assuming that the demand for legal services is elastic,[73] when lawyers raise their fees to comply with schedules they are likely to reduce the total quantity of services that potential consumers are willing to purchase.[74] Minimum fees inhibit consumers especially with regard to preventive legal services; because higher fees make it less probable that legal counselling will be judged worth its cost, consumers may forego consulting a lawyer until they find themselves in predicaments requiring more expensive patch-up legal assistance.[75] The exceptions to these harmful effects of price-fixing only point out serious inequities. Corporate and wealthy clients remain relatively unaffected by fee schedules because fees in the large commercial practice are generally well above the minimum floor. One may argue that fee schedules also have no effect on the very poor because of the availability of various free legal services. The result is that by setting prices above the market equilibrium, minimum fees have most directly restricted the demand of lower and middle income persons.[76]

The elimination of fee schedules will not alleviate these problems entirely, however, since other anticompetitive regulations also restrict access to legal services. The bar and the courts limit the supply of services by controlling entrance into the profession and defining what tasks can be performed only by duly admitted members. The prohibition of advertising and solicitation similarly decreases demand by denying consumers information about legal serv-

72. *See* text accompanying notes 42-53 *supra*.

73. *See* note 168 *infra* and accompanying text.

74. *See* Note, *A Critical Analysis of Bar Association Minimum Fee Schedules*, 85 HARV. L. REV. 971, 976, 980 (1972).

75. *Id.* at 980; *see* B. CHRISTENSEN, LAWYERS FOR PEOPLE OF MODERATE MEANS 10, 23, 40 (1970) [hereinafter cited as CHRISTENSEN].

76. Ferren & Snyder, *supra* note 1, at 733-34; *see* CHRISTENSEN, *supra* note 75, at 18-39; Note, *supra* note 74, at 980.

ices.[77] The advertising ban especially weakens the effect of *Goldfarb* because the price competition theoretically fostered by the abolition of minimum fees will mean little if consumers have insufficient information about fees to take advantage of it. Therefore, until these restrictions are removed the elimination of fee schedules will have a diluted effect.

The *Goldfarb* decision most likely will not affect the validity of these other anticompetitive restrictions. The Court carefully limited its holding to the invalidation of fee schedules,[78] and its reasoning seems equally limited in application. In dismissing the "learned profession" exemption, the Court held only that the professions enjoy no complete exclusion from the antitrust laws; it also expressly stated that it intimated no opinion concerning the application of the Sherman Act in other contexts where the public interest aspect of a restriction is more readily apparent. Because minimum fees served primarily as a regulation of the business aspects of the profession, *Goldfarb* might be distinguished under the *Marjorie Webster* doctrine[79] as subjecting to the antitrust laws only restrictions with a commercial purpose. The Court might find in a later case that bar admission and advertising restrictions enjoy a closer nexus to the ethical standards of the profession and have an essentially noncommercial purpose. The Court's denial of state action immunity to fee schedules also appears limited to the instant facts. While minimum fees typically have been adopted solely by the bar without state authorization,[80] bar admissions are controlled in each state by statute or court rule.[81] Similarly, the bar's prohibition of advertising and solicitation has been directly adopted by state supreme courts as part of the Code of Professional Responsibility.[82] Since they have been directly compelled by the states, these other restrictions do not suffer the defects that invalidated minimum fee schedules.

III. Fee Advertising and the First Amendment

Because of its impact upon the delivery of legal services, the prohibition of advertising by lawyers[83] has caused increasing first

77. Ferren & Snyder, *supra* note 1, at 733-34.

78. *See* note 65 *supra* and accompanying text.

79. *See* text accompanying notes 33-35 *supra*.

80. *See* Ferren & Snyder, *supra* note 1, at 732.

81. *See* Annot., 144 A.L.R. 150 (1943).

82. ABA Code of Professional Responsibility, Disciplinary Rules 2-101, 2-103 (1975) [hereinafter cited as Disciplinary Rules].

83. Disciplinary Rules 2-101 to 2-105.

amendment controversy[84] centering around the specific restrictions on fee advertising. Defenders of the advertising ban contend that legal advertising receives no first amendment protection because it is freely regulable "commercial speech." Opponents counter that present restrictions on fee advertising infringe upon the rights of consumers to receive information and associate for purposes of obtaining legal services. The controversy has recently fostered litigation and has resulted in bar association proposals to relax the advertising ban. Resolution of the controversy over the legality of advertising restrictions is important to the legal services market, and especially to the consumers who claim direct harm caused by the prohibition.

A. Legal Background

Most commentators trace the origins of the prohibitions on legal advertising to the "fraternal" conditions under which barristers practiced in 19th century England[85] and the historical opposition to "stirring up litigation."[86] Although restrictions upon advertising were first imposed by American bar associations between 1887 and 1906,[87] in 1908 more stringent prohibitions were incorporated into Canon 27 of the Canons of Professional Ethics, which stated that advertisements for professional employment were reprehensible as offending the traditions of the profession.[88] These restrictions arose in response to fears that the profession was becoming excessively commercialized.[89] In 1970 the ABA Code of Professional Re-

84. Restrictions upon professional advertising generally are upheld against due process challenges. *See, e.g.*, North Dakota State Bd. of Pharmacy v. Snyder's Drug Stores, Inc., 414 U.S. 156 (1973); Semler v. Oregon State Bd. of Dental Examiners, 294 U.S. 608 (1935). Similarly, bar association prohibitions upon advertising also appear to fall under the state action immunity to the antitrust laws since they are adopted directly by state supreme courts. *See* text accompanying note 81 *supra*.

85. Lawyers were then members of a select fraternity that worked in a commercial atmosphere. The prohibition of advertising was one of the rules of etiquette important to the profession because competitive conduct was viewed as "ungentlemanly." *See* H. DRINKER, LEGAL ETHICS 210 (1953).

86. *See* P. WINFIELD, HISTORY OF CONSPIRACY AND ABUSE OF LEGAL PROCEDURE 142-45 (1921); Note, *Advertising, Solicitation and the Profession's Duty to Make Legal Counsel Available*, 81 YALE L.J. 1181 (1972).

87. *See* H. DRINKER, LEGAL ETHICS 23 (1953).

88. ABA CANONS OF PROFESSIONAL ETHICS No. 27.

89. One commentator suggests, however, that the Canons may have been used as a means for upper-class metropolitan lawyers to exclude effectively the urban poor, immigrants, and blue-collar workers from the profession. The advertising ban especially was suited to discriminate against lower income lawyers who could not afford to wait passively for clients. *See* J. AUERBACH, UNEQUAL JUSTICE 40-43 (1976).

sponsibility supplanted the Canons, but reaffirmed the advertising ban by prohibiting all forms of "public advertising."[90] Exceptions to the ban are very limited—to professional cards and announcements, stationery letterheads, telephone listings, and certified reputable law lists—and do not include the advertising of attorneys' fees. Bar associations base the current restrictions upon several grounds. First, they argue that forms of competitive advertising necessary to most commercial enterprises would lessen the diguity of the profession. Secondly, members of the profession express concern that open advertising would "stir up" undesirable litigation.[91] Thirdly, it is contended that unrestricted advertising might lead to the neglect of clients' interests.[92] Finally, the bar contends that the advertising ban is necessary to prevent misrepresentation and overreaching by lawyers.[93] Defenders of the bar's position find advertising restrictions consistent with first amendment freedoms of expression under the commercial speech doctrine. The commercial speech doctrine emerged from *Valentine v. Chrestensen*,[94] a 1942 case in which the United States Supreme Court distinguished between "information and opinion" and "purely commercial advertising." Chrestensen sought to enjoin enforcement of a municipal ordinance prohibiting the distribution of advertising handbills on the streets. In reversing a grant of the injunction, the Court found the distribution of Chrestensen's circular to constitute commercial activity unprotected by the first amendment.[95] Later commentators have interpreted the decision as holding that commercial advertising necessarily falls outside the first amendment.[96] Although *Chrestensen*

90. DISCIPLINARY RULE 2-101(B) provides that a lawyer may not publicize the availability of his legal services "through newspaper or magazine advertisements, radio or television announcements, display advertisements in city or telephone directories, or other means of commercial publicity."

91. *See* notes 160-62 *infra* and accompanying text.

92. *See* notes 163 & 164 *infra* and accompanying text.

93. *See* notes 165 & 166 *infra* and accompanying text.

94. 316 U.S. 52 (1942).

95. The Court's holding actually is quite limited. Chrestensen had attempted to avoid the ordinance by appending to his handbill a statement of alleged public interest, and the Court based its holding on this intent. *Id.* at 55. It did not elaborate on the applicability of its decision beyond the situation in which one includes traditionally protected speech on an advertisement solely to avoid regulation of the advertisement. *See* Note, *Commercial Speech—An End in Sight to Chrestensen?*, 23 DEPAUL L. REV. 1258, 1263 (1974).

96. The commercial speech doctrine is based on the Court's statement that:

> . . . the streets are proper places for the exercise of the freedom of communicating information and disseminating opinion and that, though the states and municipalities may appropriately regulate the privilege in the public interest, they may not unduly burden or proscribe its employment in these public thoroughfares. We are equally clear

enunciated no practical standard for determining when speech is considered commercial, the Court in subsequent cases developed a "primary purpose" test that predicated protection on whether commercial gain constituted the chief motivation for the speech.[97]

The primary purpose test proved deficient,[98] however, and the Court replaced it with a standard which inquired whether the content of a challenged advertisement conveyed protected material regardless of the motive behind it. In *New York Times Co. v. Sullivan*[99] the defendants had submitted a partially false advertisement to the *Times* describing Southern civil rights activities, criticizing public authorities of certain Southern communities, and soliciting contributions to the civil rights cause. Sullivan, the Commissioner of Public Affairs of Montgomery, Alabama, brought a libel suit against the *Times* as publishers of the advertisement, contending that the advertisement constituted commercial speech not entitled to first amendment protection. The Court dismissed this argument, holding that although the newspaper had been paid to print the advertisement, the advertisement addressed an issue of public controversy and did not fall within the category of "commercial speech."[100] The Court again utlized the content standard in *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*,[101] in which it held sex-designated help-wanted advertisements unprotected as "classic examples of commercial speech."[102] Finding that the advertisements conveyed no editorial policy of the newspaper, the Court reasoned that they were mere proposals of possible employment more closely resembling the *Chrestensen* circular than the *New York Times* advertisement.[103] The Court indi-

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that the Constitution imposes no such restraint on government as respects *purely commercial advertising.*

316 U.S. at 54 (emphasis added).

97. *See, e.g.*, Breard v. Alexandria, 341 U.S. 622 (1951); Murdock v. Pennsylvania, 319 U.S. 105, 111 (1943); Martin v. City of Struthers, 319 U.S. 141, 142-43 (1943); Jamison v. Texas, 318 U.S. 413, 417 (1943).

98. The "primary purpose" test proved inadequate because of the Court's holdings that even though newspapers, Grosjean v. American Press Co., 297 U.S. 233, 250 (1936), books, Smith v. California, 361 U.S. 147, 150 (1959), and movies, Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 501-02 (1952), are produced for the primary purpose of financial gain, they are not excluded from first amendment protection. *See* Note, note 95 *supra*, at 1266-67.

99. 376 U.S. 254 (1964).

100. The Court found that the advertisement "communicated information, expressed opinion, recited grievances, protested claimed abuses, and sought financial support on behalf of a movement whose existence and objectives are matters of the highest public interest and concern." *Id.* at 266.

101. 413 U.S. 376 (1973).

102. *Id.* at 385.

103. *Id.*

cated, however, that it did not hold that commercial speech warrants no first amendment protection; rather, it expressly left open the issue of first amendment protection where the advertising is not complicated by such illegal activity as sex discrimination. The Court did suggest that the proper approach would involve a weighing of the first amendment interest served by advertising an ordinary commercial proposal against the governmental interest supporting the regulation of that advertising.[104]

The Supreme Court significantly altered the scope of the commercial speech doctrine in *Bigelow v. Virginia*.[105] Bigelow was convicted of publishing newspaper advertisements of abortion services in violation of a state statute. Because the advertisements provided information essential to potential consumers of these services, the case presented an opportunity for the Court to expand upon its statement in *Pittsburgh Press* that commercial advertising may serve protected first amendment interests like those of consumers. Instead of expanding on that statement, the Court relied upon the content standard of the commercial speech doctrine and, finding that the advertisements in question conveyed "factual material of public interest" to persons other than consumers of abortion services,[106] reversed the conviction. Clearly the abortion advertisements in *Bigelow* did not resemble the type of editorial statement validated in *New York Times*[107] and found lacking in *Pittsburgh Press*;[108] rather, any public interest content was only incidental to the primarily commercial content. Thus the *Bigelow* Court apparently extended the content standard to include within the first amendment's protection any advertising containing material of alleged public concern. The probable result is wider first amendment

104. *Id.* at 389.

105. 421 U.S. 809 (1975).

106. The Court stated that:

> The advertisement published in appellant's newspaper did more than simply propose a commercial transaction. . . . Portions of its message, most prominently the lines, "Abortions are now legal in New York. There are no residency requirements," involve the exercise of the freedom of communicating information and disseminating opinion.
>
> Viewed in its entirety, the advertisement conveyed information of potential interest and value to a diverse audience—not only to readers possibly in need of the services offered, but also to those with a general curiosity about, or genuine interest in, the subject matter of the law of another State and its development, and to readers seeking reform in Virginia.

Id. at 822.

107. *See* note 10 *supra* and accompanying text.

108. *See* text accompanying note 13 *supra*.

protection to those conveying information and opinion in the form of advertising.

Although the first amendment has long included the right to disseminate information and opinions, the development of a right to receive these communications is relatively new. Logically, such a right seems grounded in the first amendment, since the freedom of speech would be of little value without a corresponding right to hear the speech.[109] A right to receive information first appeared in *Martin v. Struthers*,[110] in which the Supreme Court invalidated an ordinance that prohibited ringing doorbells or knocking on doors of residences in order to distribute handbills because it violated the freedoms of speech and press. Although concerned with the rights of the distributor in this case, the Court noted in dicta that these rights were complemented by the willing listeners' right to receive the leaflets.[111] The Court subsequently has seemed to recognize a right to receive information in conjunction with the rights of privacy,[112] obscenity,[113] and prisoners.[114] The Supreme Court first directly confronted the right to receive information in *Kleindienst v. Mandel*,[115] in which the Attorney General had refused to issue a visa to Mandel, a Belgian Marxist who sought to enter the country to deliver a series of lectures. Those to whom Mandel intended to speak successfully sought declaratory relief in district court on the ground that the statutes authorizing the Attorney General's actions unconstitutionally abridged the right to receive information.[116] The Supreme Court reversed, holding that the federal government's interest in excluding aliens outweighed the plaintiffs' right to hear Mandel.[117] Since the Court treated the right to receive information as it would have any other first amendment interest by balancing the right against the countervailing governmental interest, *Mandel*

109. *See* Comment, *The Right to Receive and the Commercial Speech Doctrine: New Constitutional Considerations*, 63 GEO. L.J. 775, 777-78 (1975).

110. 319 U.S. 141 (1943).

111. *Id.* at 143.

112. Griswold v. Connecticut, 381 U.S. 479, 482-83 (1965) (statute prohibiting dissemination of information about contraceptives unconstitutional).

113. Stanley v. Georgia, 394 U.S. 557, 564 (1969) (statute prohibiting possession of obscene materials unconstitutional).

114. Saxbe v. Washington Post Co., 417 U.S. 843, 850 (1974); Pell v. Procunier, 417 U.S. 817, 827-28, 834 (1974) (prison rules prohibiting face-to-face interviews between inmates and the press constitutional); Procunier v. Martinez, 416 U.S. 396, 409 (1974) (censorship of prisoners' mail unconstitutional).

115. 408 U.S. 753 (1972).

116. Mandel v. Mitchell, 325 F. Supp. 620, 631 (E.D.N.Y. 1971).

117. 408 U.S. at 769-70.

evidences the Court's willingness to include the right in the first amendment.

Two lower courts have explicitly recognized a first amendment right to receive information. In *Virginia Citizens Consumer Council, Inc. v. State Board of Pharmacy*[118] consumer organizations and individual consumers challenged the constitutionality of a state statute prohibiting licensed pharmacists from publishing or advertising the price of prescription drugs. The state board of pharmacy contended that it could regulate such advertising under the commercial speech doctrine,[119] but the District Court for the Eastern District of Virginia rejected this argument because the rights of consumers, not pharmacists, were being asserted.[120] The court then held that the statute infringed upon consumers' "right to know" the prices of drugs so as to facilitate careful shopping.[121] The Supreme Court has noted jurisdiction to review this decision, and its ultimate result will have great impact upon the development of the right to receive information.[122] A district court in California reached the same result in *Terry v. California State Board of Pharmacy*.[123] After considering claims advanced by the state to justify the restrictions upon prescription drug advertising, such as the likelihood that price information would mislead consumers and lower the standards of the profession, the court held:

> It is clear that the state has legitimate interests in controlling artificial demand for prescription drugs, preventing misleading advertising, maintain-

118. 373 F. Supp. 683 (E.D. Va. 1974), *aff'd*, 96 S.Ct. 1817 (1976).

119. The board based its argument on a prior federal court decision which had upheld the statute. *Id.* at 685; *see* Patterson Drug Co. v. Kingery, 305 F. Supp. 821, 825 (W.D. Va. 1969).

120. Thus, reasoned the court, its action was "not an intrusion upon the State's regulation of pharmacies." 373 F. Supp. at 686.

121. *Id.* at 686-87.

122. 420 U.S. 971 (1975). On May 24, 1976, the Supreme Court affirmed the district court's opinion. 96 S. Ct. 1817 (1976). Relying on *Kleindienst v. Mandel*, the Court initially determined that the plaintiffs had a first amendment right to receive information. Explicitly overruling *Valentine v. Chrestensen*, the Court then found that purely commercial advertising was entitled to first amendment protection. Observing that the advertising bar did not affect professional standards directly, the Court determined that the plaintiff's interest in receiving drug price information outweighed the state's interest in maintaining a high degree of professionalism on the part of licensed pharmacists, and held the statute unconstitutional. In reaching this decision, the Court attempted to limit its impact on bar rules prohibiting fee advertising by noting that states may probibit false or misleading advertising and suggesting in a footnote a distinction between standardized products and professional services. According to the Court, the infinite variety and nature of professional services enhances the possibility for confusion and deception and thus increases the state's interest in prohibiting certain kinds of advertising by lawyers. *Id.* at 1831 n.25.

123. 395 F. Supp. 94 (1975), *aff'd*, 44 U.S.L.W. 3698 (U.S. June 8, 1976).

> ing professional standards, and preventing forgery of prescriptions. Even assuming that this Court found them to be compelling, the statute challenged could not stand because the statute only minimally advances the interests asserted, and in any event does not do so by the means least restrictive of the plaintiffs' burdened First Amendment freedoms.[124]

Thus in situations analogous to the advertising of attorneys' fees, federal courts have utilized the right to receive information to vindicate the interests of consumers in obtaining price information.

Beyond a right possessed by all consumers to receive information, several Supreme Court cases suggest special treatment for consumers of legal services based on a right of association for purposes of obtaining representation. In *NAACP v. Button*[125] the Court struck down a state statute imposing ethical prohibitions on solicitation of suits against segregated school districts, finding that "a State may not, under the guise of prohibiting professional misconduct, ignore constitutional rights."[126] The Court held that the activities of the NAACP, its affiliates, and members were constitutionally protected modes of expression which a state may not prohibit under its power to regulate the legal profession.[127] The Court also ruled in favor of the communication of information on legal services in *Brotherhood of Railroad Trainmen v. Virginia* ex rel. *Virginia State Bar*,[128] in which it declared that the railroad union could advise injured members and their dependents to obtain legal assistance and could recommend specific lawyers. Stressing the legal ignorance of laymen, the Court upheld their right to associate and assist one another to preserve and enforce legal rights.[129] In two later decisions, *UMW, District 12 v. Illinois State Bar Association*[130] and *United Transportation Union v. State Bar*,[131] the Court also upheld union activity aimed at assisting members' assertion of claims. In *United Transportation* the Court, relying on its earlier opinions in *Button* and *Railroad Trainmen*, declared that "collective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the First Amendment."[132]

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124. *Id.* at 106.
125. 371 U.S. 415 (1963).
126. *Id.* at 439.
127. *Id.* at 428-29.
128. 377 U.S. 1 (1964).
129. *Id.* at 7.
130. 389 U.S. 217 (1967). The union had employed a lawyer on a salaried basis to represent workmen's compensation cases.
131. 401 U.S. 576 (1971). The union recommended selected attorneys to represent them in F.E.L.A. damage suits, while limiting the fees that those attorneys could charge such members.
132. *Id.* at 585.

B. Recent Developments

Recently the Justice Department, individual attorneys and consumer groups have filed several suits[133] in state and federal district courts challenging the constitutionality of bar regulations prohibiting fee advertising.[134] In *Consumers Union of United States, Inc. v. ABA*[135] plaintiffs, nonprofit consumer organizations,[136] attempted to publish a directory of all lawyers residing or practicing in Arlington County, Virginia. Since the directory would publish information concerning fees prohibited by Disciplinary Rule 2-102(A)(6) of the ABA and State Bar Codes of Professional Responsibility,[137] plaintiffs sought certification by the ABA.[138] Following assurances that the ABA would disapprove the directory[139] and warnings by the state bar that lawyers allowing themselves to be listed in the directory would face disciplinary proceedings,[140] plaintiffs

133. *See, e.g.*, United States v. ABA, Civil No. 76-1182 (D.D.C., filed June 25, 1976); Person v. Association of the Bar of City of New York, Civil No. 75-6-987 (E.D.N.Y., filed June 23, 1975); Consumers Union of United States, Inc. v. ABA, Civil No. 75-0105-R (E.D. Va., filed Feb. 27, 1975); Consumers Union of United States, Inc. v. State Bar, Civil No. C-75-2385 SC (filed Nov. 13, 1975); Hirschkop v. Virginia State Bar, Civil No. 74-0243 (E.D. Va., filed May 23, 1974).

134. DISCIPLINARY RULES 2-101, 2-102. These rules have been adopted in 49 states.

135. Civil No. 75-0105-R (E.D. Va., filed Feb. 27, 1975).

136. Plaintiffs are Consumers Union, a nonprofit membership consumer organization, and Virginia Citizens Consumer Council, a statewide nonprofit consumer organization.

137. The directory would publish information about the fees and billing practices of individual lawyers. The information on fees would range from the hourly billing rate to the average fee charged for a number of common, relatively routine and uncomplicated legal services such as a change of name, individual bankruptcy, representation of complainant in an uncontested divorce, and closing and settlement of a single-family home. Brief for Plaintiff at 4, Consumers Union of United States, Inc. v. ABA, Civil No. 75-0105-R (E.D. Va., filed Feb. 27, 1975) [hereinafter cited as Plaintiff's Brief].

138. DISCIPLINARY RULE 2-102(A)(6) (as amended Feb. 17, 1976) prohibits lawyers from disseminating information about themselves in "law lists or legal directory" listings other than those permitted by subsection (6), which provides that a law list must be "reputable" and may give "brief biographical and other informative data." Subsection (6) further provides: "The published data may include *only* the following. . . ." (emphasis added). It then lists various categories of information. The State Bar rule is in all material respects identical to the rule promulgated by the ABA. ABA interpretations with respect to compliance with the rule by law lists or directories have been adopted by the State Bar.

139. DISCIPLINARY RULE 2-102(A)(6) provides that certification by the ABA conclusively establishes that a law list is "reputable" and in compliance with ABA rules and standards. While the rule technically does not require certification before publication of a law list, state bars rely on noncertification by the ABA to find legal directories improper. *See* Plaintiff's Brief at 5, 68. Thus few lawyers cooperate with a legal directory that does not have a certificate.

140. After a formal request by a member of the State Bar concerning the appropriateness of allowing herself to be listed in the directory, the Legal Ethics Committee of the State Bar unanimously ruled that since the ABA had not issued a certificate, lawyers listing themselves in the Consumers Union directory would violate DR 2-102(A)(6).

filed suit seeking declaratory and injunctive relief. Plaintiffs alleged that Rule 2-102(A)(6) prevents Arlington County lawyers from providing information to or allowing themselves to be listed in the directory. According to the plaintiffs such a restriction constitutes a prior restraint on the plaintiffs' and its members' first amendment rights to gather, publish, convey, and receive information necessary to secure the most effective and satisfactory legal representation.[141] Following a continuance to allow the ABA to modify its position, arguments were heard on May 18, and a decision is expected shortly.

In response to the *Consumers Union* suit and pressures from the Justice Department,[142] the ABA has begun considering proposals to allow limited fee advertising. In December, 1975, the ABA's Standing Committee on Ethics and Professional Responsibility released a discussion draft of proposed amendments to the Code of Professional Responsibility which would have allowed lawyers and law firms to place certain advertisements in newspapers and on radio and television.[143] The committee's proposals limited information concerning fees to a statement of a standard consultation fee, a range of fees for specific types of legal services, and the availability of credit arrangements.[144] After receiving comments from the bar and public the committee substantially revised its initial proposals. Deferring action on the proposal allowing advertising by individual lawyers, the committee's report to the ABA House of Delegates recommended limited changes in ethical rules[145] to allow bona fide consumer organizations to publish general biographical information, charges for an initial consultation fee and information on the area of law practice concentration.[146] At its February meeting the House of Delegates rejected the standing committee's recommendation by restricting the dissemination of fee information to ABA-certified law lists, legal directories, and the yellow pages of telephone directories.[147] Since most telephone companies disallow pub-

141. Plaintiff's Brief at 10, 12.

142. *See* Address by Joseph Sims, Deputy Assistant Attorney General, Antitrust Division of the U.S. Dept. of Justice, ABA Conference on Lawyer Advertising, December 6, 1975; Address by Bruce B. Wilson, Deputy Assistant Attorney General, Antitrust Division of the U.S. Dept. of Justice, Philadelphia Bar Association Special Briefing Conference on Ethical and Economic Aspects of Legal Fees, December 12, 1975.

143. Discussion Draft, Proposed Amendments to Ethical Considerations and Disciplinary Rules of Canon 2 of the Code of Professional Responsibility, December 6, 1975, at 3.

144. *Id.* at 2, 3.

145. The standing committee's recommendations would have amended DR 2-102(A)(6), 2-105, and EC 2-14.

146. STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY, REPORT TO THE HOUSE OF DELEGATES (1976).

147. ABA Amendments to Canon 2 of the Code of Professional Responsibility Approved by the House of Delegates, Febrnary 17, 1976. Under the amendments the information could

lication of specific price information[148] however, the delegates' substitution of the yellow pages for consumer directories as a permissible media is of limited utility. Because of the inadequacy of the ABA's response,[149] consumer groups and the Justice Department have indicated their intention to press forward with litigation;[150] thus, it appears that the question of restrictions on fee advertising will be resolved by the federal courts.

C. *Comment*

Synthesis of the Supreme Court's first amendment decisions indicates that advertising of attorneys' fees should receive constitutional protection. Because fee advertising would typically contain no editorial statements on issues of public controversy, the commercial speech doctrine as utilized in *New York Times* and *Pittsburgh Press* would not require first amendment protection. Under the relaxed content standard applied in *Bigelow*, however, advertising of attorneys' fees might be protected as conveying factual information of public interest. Given the public's pervasive distrust and

only be published in a format approved by individual bar associations. Several states including Tennessee and Virginia have already rejected the ABA proposals. In recently disapproving a petition by the State Bar to award the Rules of the Supreme Court of Virginia to conform to the ABA standards, the court stated that "the proposed amendments . . . will not serve the best interests of the public or the legal profession." 44 U.S.L.W. 2508 (May 4, 1976).

148. 44 U.S.L.W. 1129 (U.S. Feb. 24, 1976).

149. The California State Bar has taken an alternative approach. The State Board Committee on Professional Responsibility recently approved publication of a proposed program for comment by the bar and public that provides for a two-year study to be conducted by an outside consultant to determine the effects of different kinds of advertising on increasing access to legal services, on the legal system, and on costs to the consumers of legal services. The study would be conducted in four demographically typical counties. During the two-year study period one county would have the Rules of Professional Responsibility that prohibit advertising suspended with federal agencies and the State Bar having jurisdiction over false and misleading advertising. A program of limited advertising would be allowed in a second county. Included would be such proposals as ads in the yellow pages, legal directories and possibly classified sections of newspapers. In a third county, bar associations would be encouraged to publicize lawyer referral services operating in the county. In all other counties the present rules of Professional Responsibility would continue without modification. A fourth demographically typical county among these would be designated as a "control county." Letter from David S. Casey, President of California Bar Association, to all local bar association presidents, March 5, 1976.

150. Wall Street J., Feb. 18, 1976, at 6 col. 2. On June 25, 1976 the Justice Department filed suit against the ABA challenging its prohibition of fee advertising or antitrust and first amendment grounds. In its complaint the Justice Department charges that the advertising prohibition restrains price competition among lawyers and deprives persons needing legal services the opportunity to obtain information about their cost and availability. According to the Justice Department the advertising prohibition also prevents lawyers from making legal services more readily available through the development and advertising of legal clinics and pre-paid legal plans. Shifrin, *U.S. Sues Bar Association on Lawyer Advertising Ban*, Washington Post, June 26, 1976, at 4, col. 1.

misunderstanding of lawyers' fees,[151] recitation of general ranges of fees for various legal services might enlighten consumers about the mechanics of the system of justice. Thus the educational benefits of direct lawyer advertising could extend to many persons other than those presently in need of legal services. Furthermore, the first amendment freedom to communicate necessarily includes fee listing in consumer-promulgated law directories such as the one in issue in *Consumers Union*. These directories do not constitute advertising in the conventional sense, because they seek to list all attorneys, contain no self-laudatory statements, and are not paid for by the lawyers themselves; rather, such directory advertisements are purely informational.

Even if the advertising of attorneys' fees fails to meet the *Bigelow* content standard, the commercial speech doctrine may nonetheless be overridden by the rights of consumers of legal services. The Supreme Court suggested this conclusion in its *Pittsburgh Press* statement that even "ordinary commercial proposals" may serve protected first amendment interests.[152] A policy basis exists for this premise: the states' justification for regulating commercial advertising—the protection of consumers from false and misleading statements—loses much of its force when the consumers themselves assert first amendment rights.[153] The district court in *Virginia Citizens Consumer Council* employed this reasoning in finding that consumers' right to know prescription drug prices outweighed the commercial speech doctrine.[154] Given the similarity of the fact situations, the Supreme Court's imminent decision in *Virginia Citizens Consumer Council* may predict the outcome of the question of legal advertising. Although the latter involves the sale of services rather than goods, this distinction should not be critical to the right to receive issue.

Even assuming, however, that the Court upholds the advertising restrictions in *Virginia Citizens Consumer Council*, the prohibitions on legal advertising still may be challenged due to the special rights accorded to consumers of legal services.[155] *NAACP v. Button* and its progeny establish that group activity for the purposes of obtaining counsel may fall within the shelter of the first amendment as "constitutionally protected modes of expression."[156] Law lists and

151. Studies reveal that many persons believe that lawyers' services are prohibitively expensive, and are also unaware of the need and value of various services. *See* CHRISTENSEN, *supra* note 75; E. KOOS, THE FAMILY AND THE LAW 10 (1949); Comment, *Bar Restrictions on Dissemination of Information About Legal Services*, 22 U.C.L.A.L. REV. 483, 484 (1974).

152. *See* text accompanying note 104 *supra*.

153. *See* Comment, *supra* note 109, at 802.

154. *See* text accompanying notes 119 & 120 *supra*.

155. *See* text accompanying notes 125-32 *supra*.

156. 371 U.S. at 428-29.

directories compiled by consumer groups such as the Consumers Union in Virginia might be considered the product of just activity, and arguably could merit protection under this rationale.

Although the advertising of attorneys' fees appears to fall within the scope of the first amendment, it does not follow that absolute protection is warranted. Rather, determining the constitutionality of an infringement upon first amendment freedoms requires a balancing of the state interests in regulation against the first amendment rights in question.[157] The Supreme Court has viewed such infringements with strict scrutiny, requiring that curtailment of first amendment freedoms be justified as necessary to a compelling state interest.[158] In the context of legal advertising, the states offer several justifications for restricting fee information.[159] First, concern exists that fee advertising would disturb the administration of justice by stirring up litigation.[160] This "floodgates" argument seemingly has been largely refuted by Supreme Court statements that litigation serves social functions rather than having harmful effects.[161] Furthermore, an advertising ban should not discourage legitimate claims merely to prevent frivolous actions.[162] Proponents of the advertising prohibition argue alternatively that by competitively lowering prices and generating more business, fee information would foster neglect of clients' interests. It is equally plausible, however, that these conditions might bring about an increase in efficiency that would in fact aid clients.[163] Nevertheless, even assuming that some clients might be neglected as a consequence, malpractice and disciplinary actions exist as alternatives less restrictive of the rights of consumers.[164] The third and most often cited justification for the current restrictions is that fee information would create excessive competition that would in turn induce fraud, misrepresentation, and overreaching. It does not necessarily follow, however, that legal advertising leads to wholesale public deception; nor does any empirical data support this hypothesis. In fact, it is arguable that lawyers are no more likely than other sellers of goods and services to make false and deceptive state-

157. *See, e.g.*, Konigsberg v. State Bar, 366 U.S. 36 (1961).

158. *See, e.g.*, NAACP v. Button, 371 U.S. 415, 438 (1963).

159. For a comprehensive analysis of the various state justifications for restricting advertising see Comment, *supra* note 151, at 508-15; Note, *supra* note 86, at 1187-91.

160. CHRISTENSEN, *supra* note 75, at 145.

161. *Id.* at 144-45; NAACP V. Button, 371 U.S. 415 (1963); *see* Comment, *supra* note 151, at 511.

162. Comment, *supra* note 151, at 511.

163. R. POSNER, ECONOMIC ANALYSIS OF LAW 347 (1972). Greater volume of business would enable law firms to handle common types of services more efficiently and at lower costs.

164. *See* Comment, *supra* note 42, at 510.

ments.[165] If misrepresentation does occur, less restrictive sanctions exist.[166] Thus, although the states have a compelling interest in protecting their citizens, it appears that advertising of attorneys' fees poses little threat to the public that cannot be prevented by other means. The present restrictions cannot be considered essential or even reasonably related to promotion of this state end.

The countervailing interests of consumers in receiving fee information are perhaps best considered in terms of the harmful effects of the present advertising restrictions.[167] The demand for legal services appears elastic, depending primarily upon the quality of service, its cost and accessibility, and public knowledge and attitudes about the law, lawyers, and their services.[168] Were the public better informed about various services' existence, value, and relative cost, consumer demand would increase, especially for preventive legal services.

The more unfortunate aspect of the public injury occasioned by bans on legal advertising is the inequitable visitation of the injury.[169] Since they are relatively close to the legal profession, corporate and wealthy consumers have sufficient information about the cost of legal services without advertising; low-income persons are similarly less affected because of access to publicized legal services offered by legal clinics and public defenders. Middle-income consumers, however, are not so informed of legal services cost and are not eligible for legal services to the indigent, and therefore bear the greatest burden of ignorance enforced by the restrictions on advertising. Finally, the prohibition of fee advertising may tend to create the evil it is designed to prevent, the overreaching of clients. Consumers who are generally ignorant of fees commonly offered in the marketplace are more likely to agree to fees that are actually excessive. Thus, the restrictions on fee advertising inhibit consumer demand for legal services by denying essential information. It is evident that the consumer interest in obtaining this information far outweighs the state interest in denying it.

Although the present broad restrictions on the advertising of attorneys' fees appear invalid under the first amendment, the regulation of certain forms of fee advertising may be permissible. Despite the commercial speech doctrine, consumer-compiled law lists and some direct lawyer advertising may fall within the first amendment because they convey material of public interest.[170]

165. *See* Plaintiff's Brief at 30.

166. *See* text accompanying note 55 *supra*.

167. CHRISTENSEN, *supra* note 75, at 20-26.

168. Note, *supra* note 86, at 1204.

169. *See, e.g.*, Boddie v. Connecticut, 401 U.S. 371 (1971); Griffin v. Illinois, 351 U.S. 12 (1956); Note, *supra* note 86, at 1181.

170. *See* text following note 151 *supra*.

Where fee information is disseminated in conjunction with competitive and self-laudatory statements, however, it may be unprotected even under the relaxed *Bigelow* content standard, because such advertising would contain superfluous comments which could tend to distort or dilute its informational value.[171] Even if the first amendment does protect this form of advertising, the state interest in preventing it might outweigh the consumer interest in receiving it. Fee information in the context of competitive advertising, especially if communicated in the media, could raise unfounded expectations of what services consumers will receive for their money. Besides presenting dangers of misunderstanding, competitive fee advertising might act as a vehicle for fee misrepresentation where the services offered are unclear. Thus, state regulation of legal advertising could be valid where fee information no longer serves consumers' interests in having objective knowledge with which to make wise decisions.

IV. Maximum Contingent Fees by Court Rule

Courts traditionally have frowned upon contingent fee contracts because they give lawyers a financial interest in the outcome of litigation. It is feared that the lawyer's self-interest in a lawsuit might come between him and his client, not only with respect to the amount of the fee but also with respect to the control of the suit on such questions as whether to accept an offer of settlement.[172] To prevent these possible abuses of the system and the exaction of excessive fees, some courts and legislatures have attempted limited regulation of contingent fee agreements. At present, perhaps the most far-reaching regulation is New Jersey Supreme Court Rule 1:21-7(c). This rule sets a graduated scale of maximum permissible contingent fees in all tort litigation. The New Jersey court upheld the rule in *American Trial Lawyers Association v. New Jersey Supreme Court*,[173] a decision which recognizes a broad judicial power to regulate fees. If the court's reasoning is followed by other courts,[174] the decision may have a profound effect upon the economics of legal services and the ability of persons to gain access to the judicial system.

A. *Legal Background*

Although American courts generally uphold contingent fee con-

171. Memorandum from R. William Ide III to the ABA Standing Committee on Ethics and Professional Responsibility, October 31, 1975.

172. F. MacKinnon, Contingent Fees for Legal Services 5 (1964) [hereinafter cited as MacKinnon].

173. 66 N.J. 258, 330 A.2d 350 (1974).

174. *See* note 221 *infra*.

tracts, two rationales have arisen permitting courts to scrutinize the contracts' validity.[175] The first characterizes the relationship between attorney and client as fiduciary and permits judicial scrutiny of fees on this theory.[176] The second places fee contracts within the courts' disciplinary powers over attorneys practicing before them.[177] Under either theory, the fee must be reasonable. If a court finds a contingent fee oppressive or unconscionable, it will hold the contract unenforceable.[178] Since most courts limit their determinations of reasonableness to the particular factual situation of the case presented, no specific standard for limiting fees has evolved from judicial decisions. Because the courts have declined to condemn any specific percentage as unconscionable per se,[179] this ad hoc analysis has allowed fees as high as fifty percent of recovery.[180]

While most states do not regulate fees in general, many have statutorily restricted fees in specific proceedings.[181] For example, a majority of states regulate contingent fees in workmen's compensation actions, requiring approval of the fee by the compensation board[182] or restricting the fee to a maximum percentage of recovery.[183] Congress has regulated the use of contingent fees in certain actions against the United States.[184] For example, the Federal Tort Claims Act[185] limits contingent fees to twenty-five percent of the administrative settlement after commencement of court proceed-

175. For example, if a contingent fee contract has been obtained by fraud, mistake, or undue influence the contract will be held invalid. S. SPEISER, ATTORNEYS' FEES § 2:9 (1973) [hereinafter cited as SPEISER]. Prohibitions against contingent fee use are also found in specific areas of law practice because of public concern over the interest being litigated, *e.g.*, divorce practice, advocacy before governmental hodies, and criminal practice. MACKINNON, *supra* note 172, at 45-52; SPEISER, *supra*, at §§ 2:4-2:7.

176. MACKINNON, *supra* note 172, at 44; SPEISER, *supra* note 175, at §2:9; *see, e.g.*, Gaffney v. Harmon, 405 Ill. 273, 277, 90 N.E.2d 785, 788 (1950); Hightower v. Detroit Edison Co., 262 Mich. 1, 9, 247 N.W. 97, 99 (1933).

177. MACKINNON, *supra* note 172, at 44-45, 60 n.62; SPEISER, *supra* note 175, at § 2:9; *see, e.g.*, Brillhart v. Hudson, 169 Colo. 329, 334, 455 P.2d 878, 881 (1969).

178. SPEISER, *supra* note 175, at § 2:10.

179. *See* Note, *Contingent Fee Contracts: Validity, Controls, and Enforceability*, 47 IOWA L. REV. 942, 949-50 (1962).

180. *See, e.g.*, Taylor v. Bemiss, 110 U.S. 42 (1884); Hughes v. Eisner, 14 N.J. Super. 58, 81 A.2d 394 (Super. Ct. 1951).

181. See, *e.g.*, MONT. REV. CODES ANN. § 93-8601 (1947) (court administration of fees in probate); NEB. REV. STAT. § 48-646 (1974) (claims filed under unemployment compensation acts); N.Y. JUDICIARY LAW § 474 (McKinney 1968) (prosecuting claims for infants).

182. *See, e.g.*, DEL. CODE ANN. tit. 19, §2126 (1975); IND. STAT. ANN. § 22-3-4-12 (1974); MASS. GEN. LAWS ANN. ch. 152, § 13 (1958).

183. *See, e.g.*, DEL. CODE ANN. tit. 19, §2127 (1975) (thirty percent or $2250, whichever is smaller); KY. REV. STAT. § 342.320 (1972) (twenty percent of amount recovered); MISS. CODE ANN. § 71-3-63 (1972) (twenty-five percent of total recovery).

184. *E.g.*, 22 U.S.C. § 1623(f) (1970) (claims before Foreign Commission; fee limited to ten percent); 25 U.S.C. § 70n (1970) (Indian claims; fee limited to ten percent).

185. 28 U.S.C. § 2671 (1970).

ings or the judgment.[186] The constitutionality of statutes restricting fees has not been challenged.[187]

Courts have always supervised unreasonable contingent fees in individual cases; more recently judicial power to regulate the practice of law has been applied to promulgate rules of general application that regulate contingent fees. An early case, *Shannon v. Cross*,[188] held such a rule unconstitutional. In that 1928 decision, a Michigan circuit court rule required an attorney to stipulate the absence of a contingent fee agreement if his client could not furnish security for costs. Since those persons who were unable to provide security were also most likely to require contingent fee arrangements, the rule effectively prevented the making of these contracts. Holding that only a legislative enactment could limit the parties' freedom to contract, the Michigan Supreme Court held that the rule exceeded the judicial power to regulate practice and procedure.[189] The Supreme Court of Utah took a similar stance in *Thatcher v. Industrial Commission*.[190] Though upholding the constitutionality of a statutory regulation of fees in workmen's compensation cases, the court declared in dicta:

> We are not aware of any power in the judiciary to fix or regulate attorney's fees. We do not think it can be inferred from the power to promulgate rules of practice and procedure nor . . . from the auxiliary power to discipline attorneys as officers of the court for unprofessional conduct.[191]

The court supported its statement by arguing that despite their power to determine whether a fee is reasonable after the fact, the courts may not fix fees before agreement without violating the substantive freedom of contract.[192]

Two more recent cases have upheld judicial authority to establish guidelines for reasonable fees. In the New York decision of *Gair v. Peck*,[193] the graduated scale of fees in question[194] permitted an attorney and his client either to contract according to the limits of the scale or to agree upon a fee no larger than thirty-three and one-

186. 28 U.S.C. § 2678 (1970).

187. *See, e.g.*, Yeiser v. Dysart, 267 U.S. 540, 541 (1925); Frisbie v. United States, 157 U.S. 160, 165 (1895).

188. 245 Mich. 220, 222 N.W. 168 (1928).

189. *Id.* at 222, 222 N.W. at 168.

190. 115 Utah 568, 207 P.2d 178 (1949).

191. *Id.* at 574-75, 207 P.2d at 181.

192. *Id.* at 575, 207 P.2d at 181.

193. 6 N.Y.2d 97, 160 N.E.2d 43, 188 N.Y.S.2d 491 (1959), *cert. denied*, 361 U.S. 374 (1960).

194. N.Y. App. Div. 1st Dep't R.4. The rule applies to personal injury and wrongful death litigation.

third percent.[195] If a larger fee was stipulated, it was subject to subsequent court approval.[196] The New York Court of Appeals held the rule to be a valid exercise of the judiciary's power over attorneys as officers of the court. Finding that the rule was directed at fees the courts would not enforce in any event, the court held that the rule did not violate the freedom of attorneys and their clients to enter contracts.[197] Rather, the court reasoned, the rule served as a device to assist the court in determining whether an excessive charge had occurred. The court argued that the rule did no more than set a burden of proof useful in disciplinary actions by creating a presumption of validity for fees within the schedule and a rebuttable presumption of invalidity for fees exceeding the schedule.[198]

In *Schlesinger v. Teitelbaum*[199] the Third Circuit sustained a local federal district court rule establishing a scale of contingent fees for use in personal injury actions brought by seamen.[200] The rule provided that the court would deem reasonable fees permitted by the schedule, but would hold unreasonable any fee exceeding the schedule unless unusual circumstances justified the higher amount. The District Judge had followed the schedule, stating that it was within his discretion to do so.[201] Holding that the schedule acted as a procedural aid in establishing guidelines for reasonable fees, the

195. Rule 4(b) provides that the following is the schedule of reasonable fees:

(1)

(A) Fifty per cent. on the first one thousand dollars of the sum recovered,

(B) Forty per cent. on the next two thousand dollars of the sum recovered,

(C) Thirty-five per cent. on the next twenty-two thousand dollars of the sum recovered,

(D) Twenty-five per cent. on any amount over twenty-five thousand dollars of the sum recovered; or

(2)

A percentage not exceeding thirty-three and a third per cent. of the sum recovered, if the initial contractual arrangement between the client and the attorneys so provides, in which event the procedure hereinafter provided for making application for additional compensation because of extraordinary circumstances shall not apply.

196. Rule 4(d) provides that:

In the event that claimant's or plaintiff's attorneys believe in good faith that the foregoing schedule (1), because of extraordinary circumstances, will not give them adequate compensation, application for greater compensation may be made upon affidavit . . . to the justice of the trial part to which the action had been sent for trial . . . .

197. N.Y. JUDICIARY LAW § 474 (McKinney 1968) provides that compensation of attorneys is governed by the express or implied agreement of the parties.

198. 6 N.Y.2d at 114, 160 N.E.2d at 53, 188 N.Y.S.2d at 504.

199. 475 F.2d 137 (3d Cir.), *cert. denied*, 414 U.S. 1111 (1973).

200. The schedule provided for a fee of thirty-three and one third percent of the first $10,000 of recovery and twenty-five percent of the next $90,000.

201. 475 F.2d at 139. On appeal the Third Circuit limited its holding solely to the instant facts. *Id.*

Third Circuit Court of Appeals affirmed the rule's use under the court's supervisory power over the members of the bar.[202] Thus, two cases have shown a willingness to permit limited fee regulation by court rule; however, these decisions do not define the extent of this judicial authority.

B. American Trial Lawyers Association v. New Jersey Supreme Court

In 1971, the New Jersey Supreme Court adopted N.J. Sup. Ct. R. 1:21-7 which regulates contingent fee contracts in tort litigation. Rule 1:21-7(c) set up a graduated scale of fee limits, providing:

> In any matter where a client's claim for damages is based upon the alleged tortious conduct of another, . . . , an attorney shall not contract for, or collect a contingent fee in excess of the following limits:
>
> (1) 50% on the first $1000 recovered;
> (2) 40% on the next $2000 recovered;
> (3) 33 1/3 % on the next $47,000 recovered;
> (4) 20% on the next $50,000 recovered;
> (5) 10% on any amount recovered over $100,000; and
> (6) where the amount recovered is for the benefit of an infant or incompetent and the matter is settled without trial the foregoing limits shall apply, except that the fee on any amount recovered up to $50,000 shall not exceed 25%.

Paragraph (e) declares, "Paragraph (c) . . . is intended to fix maximum permissible fees . . . ," but paragraph (f) permits a lawyer at the conclusion of a case to petition the appropriate judge for permission to collect a higher fee.[203] Subsequent to the adoption of Rule 1:21-7(c), members of the New Jersey Bar brought a class action challenging its constitutionality on the ground that it exceeds the scope of the New Jersey Supreme Court's authority over the admission and discipline of attorneys.[204] The Superior Court, Appellate

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202. *Id.* at 141.

203. Rule 1:21-7(f) provides:

> If at the conclusion of a matter an attorney considers the fee permitted by paragraph (c) to be inadequate, an application on written notice to the client may be made to the Assignment Judge for the hearing and determining of a reasonable fee in light of all the circumstances . . . . This rule shall not preclude the exercise of a client's existing right to a court review of the reasonableness of an attorney's fee.

204. Plaintiffs originally brought suit in the United States District Court for New Jersey, alleging that Rule 1:21-7(c) violates both the United States and New Jersey Constitutions. A three-judge court dismissed the claim on grounds of abstention, concluding that the nature of the controversy between the state's highest court and those authorized by that court to practice law required that it be litigated in state courts. American Trial Lawyers Ass'n v. New Jersey Supreme Court, Civil Nos. 64-72 and 142-72 (D.N.J. June 20, 1972). On appeal, the United States Supreme Court reversed the judgment of dismissal and ordered the

Division, upheld the rule as a valid exercise of the judiciary's power to regulate the conduct of the legal profession,[205] and the New Jersey Supreme Court affirmed.[206]

The court first decided that it possessed the constitutional power to adopt Rule 1:21-7(c). The court found that the New Jersey Constitution made the state Supreme Court the exclusive repository of the power to regulate the practice of law:[207]

> The Supreme Court shall make rules governing the administration of all courts in the State and, subject to the law, the practice and procedure in all such courts. The Supreme Court shall have jurisdiction over the admission to the practice of law and the discipline of persons admitted.[208]

The court recognized that because an express delegation of the rule-making power is absent from the second sentence of the quoted paragraph, this power arguably does not extend to the judiciary's disciplinary authority. It reasoned, however, that since its constitutional authority can be extended to the fullest, it is not restricted to acting in adjudicatory proceedings. Rather, the court argued, it possesses the inherent power to act "legislatively" by promulgating rules of general application.[209] To hold otherwise, said the court, would be to invalidate all other rules regulating the professional conduct of attorneys.[210] Then, relying on *Gair* and *Schlesinger*, the court held that this power extended to the adoption of a reasonable rule establishing the limits of permissible fees in tort litigation.[211]

On a second issue the court found that since it had acted legislatively, promulgation of the rule did not require an evidentiary hearing.[212] No interference with the freedom of contract existed, the

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District Court to retain jurisdiction pending the conclusion of state court proceedings. American Trial Lawyers Ass'n v. New Jersey Supreme Court, 409 U.S. 467 (1973).

While the District Court's dismissal was on appeal, plaintiffs filed an appeal in lieu of prerogative writs with the Superior Court of New Jersey, Appellate Division. Finding the appeal non-reviewable, the Appellate Division transferred the case to the Superior Court, Law Division, Middlesex County. The trial court then invalidated Rule 1:21-7(c) on state constitutional grounds. The case then reached the Appellate Division on appeal.

205. 126 N.J. Super. 577 (1974).

206. 66 N.J. 258, 261, 330 A.2d 350, 352 (1974). Since the Appellate Division's more extensive analysis was adopted *in toto* by the Supreme Court, for purposes of this discussion the opinions will be treated together.

207. State v. Rush, 46 N.J. 399, 217 A.2d 441 (1966).

208. N.J. CONST. art. VI, § II.

209. 126 N.J. Super. at 577.

210. *E.g.*, regulating bar examinations and the licensing of attorneys (R. 1:23 to 27); specifying who may practice law and appear in court (R. 1:21-1 to 4); adopting a canon of professional ethics (R. 1:14).

211. 66 N.J. at 264-65, 330 A.2d at 353-54; 126 N.J. Super. at 586-88.

212. 66 N.J. at 265-66, 330 A.2d at 354; 126 N.J. Super. at 588-89.

court reasoned, because attorneys have never had the right to enforce unreasonable fees.[213] Finally, the court found that Rule 1:21-7(c) does not violate equal protection, because a rational basis exists for singling out contingent fee agreements for special treatment. The court argued that they involve unique problems in the attorney-client relationship since they give lawyers an interest in the litigation and establish by contract a method for compensation which bears no relationship either to the effort expended by the attorney or the actual value of his services. The court further held that the rule may validly apply only to tort claims, finding that this is the area in which contingent fee arrangements are most prevalent.[214]

C. *Comment*

Although Rule 1:21-7(c) appears similar to the court rules sustained in *Gair* and *Schlesinger*, closer examination reveals that it is actually quite different. In upholding the constitutionality of Rule 4 under the judiciary's power to discipline attorneys, the New York court regarded it not as a substantive regulation of fees, but as a procedural tool declaring the burden of proof applied in disciplinary hearings. This rule, said the *Gair* court, sets only a schedule of *reasonable* fees, denominating those within it presumptively ethical.[215] Conversely, Rule 1:21-7 explicitly states that paragraph (c) sets a scale of *maximum* fees that holds those above it presumptively unethical.[216] Furthermore, while Rule 4 states that in the alternative the parties may contract for the traditional rate of thirty-three and one-third per cent,[217] Rule 1:21-7 provides for no such possibility. A third difference between the New York and New Jersey rules appears in their procedures for obtaining greater compensation. Rule 4 provides that the parties may contract for a higher fee before or after the institution of a suit, requiring only that a court subsequently approve the fee.[218] Rule 1:21-7(c), however, flatly forbids the making of a contract not in conformity with the schedule, and paragraph (f) only allows the parties to petition for greater compensation after the conclusion of litigation.[219] Similarly, while the New Jersey rule attempts to set maximum limits, the rule at

213. 126 N.J. Super. at 591-92.
214. *Id.* at 592-93.
215. See text accompanying notes 197 & 198 *supra*.
216. *See* text accompanying note 203 *supra*.
217. *See* note 195 *supra*.
218. *See* note 196 *supra* and accompanying text.
219. *See* note 203 *supra* and accompanying text.

issue in *Schlesinger* purported to do no more than announce guidelines in determining fees. In fact, the Third Circuit recognized that the District Judge had followed the rule at his discretion.[220]

This comparison indicates that Rule 1:21-7(c) has a different constitutional basis than the rules upheld in *Gair* and *Schlesinger*. The courts in the latter cases exercised the disciplinary power in conjunction with the judiciary's power to regulate practice and procedure in the courts; their rules are adjudicatory in nature and do not infringe upon the freedom of lawyers to contract apart from the stated schedule. Therefore, these rules arguably do not conflict with the statements in *Shannon* and *Thatcher* that only the legislatures may regulate the rights of attorney and client to contract. Rule 1:21-7(c), however, cannot be sustained under the New Jersey Supreme Court's authority over practice and procedure, for it is not primarily designed to assist the courts in disciplinary hearings. Rather, in restricting the fee that an attorney may originally charge, the rule constitutes a fee-fixing enactment resembling the statutes which limit contingent fees. Thus, in approving the courts' power to modify the substantive law of attorneys' fees, *American Trial Lawyers* confers an authority exceeding the judicial power upheld in *Gair* and *Schlesinger*. Future courts considering the adoption of rules restricting contingent fees may well choose the course set by *American Trial Lawyers*.[221]

The court had a laudable goal in exercising and upholding this expansive authority. By setting limits on permissible contingent fees, Rule 1:21-7(c) will protect potential clients from the exaction of excessive fees. Its graduated scale is especially appropriate for preventing fees far out of proportion to a lawyer's services. Where the judgment or settlement obtained by a client is relatively small but the lawyer still performs substantial services in initiating the litigation, the lawyer's rate may be higher; where the client's recovery is greater but the lawyer's services do not proportionately increase, the permissible rate decreases. Even apart from controlling possible abuses and overreaching, the rule will generally aid the

220. *See* text accompanying notes 201 & 202 *supra*.

221. One such decision appears imminent. The Board of Governors of the Florida Bar has petitioned the Florida Supreme Court to amend its Disciplinary Rules to limit attorneys' contingent fees. The proposal would limit fees to 33 1/3% of the recovery, if a case is settled before a lawsuit begins; 40% of the recovery at the time of trial or if the case is settled after a lawsuit begins; and 45% of the recovery if the trial is appealed or postjudgment proceedings are required. There is also a limitation on that part of any recovery exceeding $500,000 which may be collected at any stage of proceedings. Florida Bar News, October, 1975, at 1, col. 4.

pecuniary interests of clients. Quite simply, the less the fee his lawyer receives, the greater the amount of judgment or settlement a client may retain.

In the aggregate, however, this rate ceiling may harm an even greater number of potential clients. The contingent fee system is a significant feature of the legal services market, because it allows clients to "borrow" a lawyer's services until judgment or settlement.[222] Contingent fees are thus important since they enable impecunious litigants to gain access to the judicial system.[223] If the rate set by a statute or court rule is so low that it will not produce a profit above an attorney's regular hourly rate, it will deter the average lawyer from performing the services affected by the regulation, especially given the risk that the lawyer will not be compensated at all if he does not prevail. Similar business decisions by many lawyers to choose non-affected work might prevent numerous consumers from obtaining competent representation for their cases.[224] Rule 1:21-7(c) is particularly capable of producing this adverse effect. One pair of commentators suggests that the key variables in the degree to which a selective rate ceiling affects the supply of legal services are (1) how low the maximum is set, and (2) the breadth of the regulation's application.[225] Comparison of Rule 1:21-7(c) with the rules sustained in *Gair* and *Schlesinger* indicates that it sets its maximum rates generally lower, and that it is the only rule setting its rate below twenty-five per cent for any portion of recovery.[226] Furthermore, the New Jersey rule applies to a much wider range of litigation in governing all tort claims.[227] Therefore, while protecting th interests of single clients in specific cases, Rule 1:21-7(c) may inhibit consumers' access to legal services to an even greater extent.

222. *See* Schwartz & Mitchell, *An Economic Analysis of the Contingent Fee in Personal-Injury Litigation*, 22 STAN. L. REV. 1125 (1970).

223. *See* SPEISER, note 175 *supra*, at § 213; Brief for Appellants at 31-32, American Trial Lawyers Ass'n v. New Jersey Supreme Court, 66 N.J. 258, 330 A.2d 350 (1974).

224. A Senate Judiciary Committee Report suggests that quality of representation is directly proportionate to the amount of fee charged. In increasing the fees allowed by the Federal Tort Claims Act, 28 U.S.C. § 2678 (1970), Congress relied upon the Committee's statement that higher fees were needed to assure "competent representation." S. REP. No. 1327, 89th Cong., 2d Sess., 2 U.S. CODE CONG. & ADM. NEWS 2515, 2520 (1966).

225. Schwartz & Mitchell, *supra* note 222, at 1144-45.

226. *See* notes 195 & 200 *supra* and accompanying text.

227. *See* notes 194 & 200 *supra* and accompanying text.

V. ATTORNEYS' FEES AND PUBLIC INTEREST LITIGATION—LIMITING ACCESS TO THE COURTS

In recent years there has been a substantial increase in public interest litigation[228] to enforce federal statutory and constitutional rights. The difficulty in financing such litigation, however, threatens to limit its continued growth.[229] Public interest law suits are lengthy and complex and seek nonmonetary relief.[230] Thus many important issues affecting large numbers of people are not litigated because the prospective plaintiffs cannot afford to pay attorneys' fees.[231] Recognizing that the American rule, which denies fees to successful litigants,[232] acts as an economic bar to such suits[233] federal courts developed a "private attorney general" exception and granted counsel fees to litigants vindicating important public policies.[234] However, this development, which promised to overcome the serious financial obstacles to public interest litigation[235] and to ensure equal access to the courts for plaintiffs of moderate or limited means,[236] was abruptly halted by the Supreme Court's recent holding in *Alyeska Pipeline Service Co. v. Wilderness Society*.[237] That

228. While public interest litigation is difficult to define, one commentator has noted three characteristics which differentiate it from most lawsuits. First, the issues involved are currently regarded as being of extreme importance. Their significance may be inferred from recent congressional legislation, their fundamental nature or specific protection by the Constitution. Secondly, the final judgment will affect not only the plaintiffs, but a substantial number of other individuals as well. Finally, public interest litigation is brought by a private plaintiff rather than by a government agency. Nussbaum, *Attorney's Fees in Public Interest Litigation*, 48 N.Y.U. L. REV. 301, 304-05 (1973) [hereinafter cited as Nussbaum].

229. *See* LaRaza Unida v. Volpe, 57 F.R.D. 94, 101 (N.D. Cal. 1972), *aff'd*, 488 F.2d 559 (9th Cir. 1973); *cert. denied*, 417 U.S. 968 (1974); *Hearings on Attorney's Fees Before the Subcomm. on Representation of Citizen Interests Before the Senate Comm. on the Judiciary*, 93d Cong., 1st Sess. 800-01 (1973) [hereinafter cited as *Hearings*].

230. Most public interest lawsuits do not seek damages out of which fees could be paid. *See, e.g.*, Sims v. Amos, 340 F. Supp. 691 (M.D. Ala.), *aff'd mem.*, 409 U.S. 942 (1972) (legislative reapportionment).

231. *See* Nussbaum, *supra* note 228, at 331; *Hearings*, *supra* note 229, at 801.

232. *See* C. MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES §§ 60-71 (1935); SPEISER, *supra* note 175, at § 12:3.

233. *See* Note, *Private Attorney General Fees Emerge from the Wilderness*, 43 FORDHAM L. REV. 258, 271 (1974); Comment, *The Discretionary Award of Attorney's Fees by the Federal Courts: Selective Deviation From the No-Fee Rule and the Regrettably Brief Life of the Private Attorney General Doctrine*, 36 OHIO ST. L.J. 588, 613 (1975) [hereinafter cited as *Discretionary Award*].

234. *See* Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400 (1968) (per curiam); Dawson, *Lawyers and Involuntary Clients in Public Interest Litigation*, 88 HARV. L. REV. 849, 888-89 (1975) [hereinafter cited as Dawson].

235. *See* Nussbaum, *supra* note 228, at 311.

236. *See* Comment, *Court Awarded Attorney's Fees and Equal Access to the Courts*, 122 U. PA. L. REV. 636, 655-56 (1974) [hereinafter cited as *Equal Access*].

237. 421 U.S. 240 (1975).

case held that in the absence of statutory authorization federal courts lack the power to award attorney fees under the private attorney general rationale.

A. Legal Background

Although English courts have taxed unsuccessful litigants with costs for centuries,[238] American courts developed the rule that attorneys' fees in federal civil cases ordinarily are not recoverable in the absence of specific statutory authority.[239] In disallowing the award of attorneys' fees the United States Supreme Court recognized as early as 1796 that "the general practice of the United States is in oposition [*sic*] to [fee shifting] and even if that practice were not strictly correct in principle, it is entitled to the respect of the court, till it is changed, or modified by statute."[240] The practice in federal courts was to follow the state rules governing awards of counsel fees until 1853[241] when, as a response to the lack of uniformity and awards of large fees, Congress enacted legislation expressly limiting the amount of counsel fees collectible from the losing party in federal civil courts to a nominal docket fee.[242] Whether this docketing

238. At very early common law costs were not allowed. By 1278, however, the courts of England were authorized to award counsel fees to successful plaintiffs in litigation. Statute of Gloucester, 6 Edw. 1, c. 1 (1278). Since 1607 English courts have been empowered to award counsel fees to defendants in all actions wbere such awards might be made to plaintiffs. Statute of Westminster, 4 Jac. 1, c. 3 (1607). The award of costs was left entirely to the discretion of the courts by the Supreme Court of Judicature Acts of 1873 and 1875. *See* Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 717 (1967); 2 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I 595 (1895); Goodhart, *Costs*, 38 YALE L.J. 849, 854-60 (1929) [hereinafter cited as Goodhart].

239. *See* note 232 *supra*. All other major nations award attorney fees to the prevailing party. *See* Nussbaum, *supra* note 228, at 311 n.31; *Equal Access*, *supra* note 236, at 639. For tbeories on wby the unique American rule developed see Ehrenzweig, *Reimbursement of Counsel Fees and the Great Society*, 54 CALIF. L. REV. 792, 798-99 (1966); *Discretionary Award*, *supra* note 233, at 593-95; Note, *Attorney's Fees: Where Shall the Ultimate Burden Lie?*, 20 VAND. L. REV. 1216, 1218-21 (1967).

240. Arcambel v. Wiseman, 3 U.S. (3 Dall.) 306 (1796). The Supreme Court has consistently adhered to the American rule. *See* F.D. Rich Co. v. United States *ex rel.* Industrial Lumber Co., 417 U.S. 116 (1974); Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714 (1967); Stewart v. Sonneborn, 98 U.S. 187 (1878); Flanders v. Tweed, 82 U.S. (15 Wall.) 450 (1872); Oelrichs v. Spain, 82 U.S. (15 Wall.) 211 (1872); Day v. Woodworth, 54 U.S. (13 How.) 362 (1851).

241. During the first years of the federal court system, Congress provided through legislation that the federal courts were to follow the practice of the states in which they were located in awarding attorney fees. Federal Judiciary Act of September 24, 1789, ch. 20, § 35, 1 Stat. 73. Altbough this legislation had expired by 1800, federal courts continued to defer to state rules until 1853. *See* LAW, THE JURISDICTION AND POWERS OF THE UNITED STATES COURTS 279 (1852); 2 J. STREET, FEDERAL EQUITY PRACTICE § 1986 at 1188-89 (1909).

242. Act of 1853, ch. 80, 10 Stat. 161. Subsequent revisions resulted in the present

fees statute precluded the award of all fees not enumerated caused considerable judicial controversy. In *The Baltimore* the Supreme Court reversed a $500 counsel allowance, holding that the docketing fees statute prohibited the assessment of all attorney fees against the opposite party "except the costs and fees therein described and enumerated."[243] The Court held in *Trustees v. Greenough*, however, that the statute does not prevent federal equity courts from awarding attorneys' fees when considerations of justice so dictate.[244] Subsequent revision of the docketing fees statute has not significantly altered it,[245] nor has the judicial controversy over its effect subsided. Compounding the statutory interpretation problem, Congress has enacted legislation precluding the taxing of counsel fees against the United States.[246]

While both Congress and the federal courts have long recognized the rule against fee shifting as the prevailing American rule,[247] a number of exceptions have developed in response to widespread criticism of it.[248] Several congressional enactments contain provi-

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codified version which is not significantly different from the 1853 version:

> Attorney's and proctor's docket fees in courts of the United States may be taxed as costs as follows:
>
> $20 on trial or final hearing (including a default judgment whether entered hy the court or by the clerk) in civil, criminal, or admiralty cases, except that in cases of admiralty and maritime jurisdiction where the libellant recovers less than $50 the proctor's docket fee shall be $10;
>
> $20 in admiralty appeals involving not over $1,000;
>
> $50 in admiralty appeals involving not over $5,000;
>
> $100 in admiralty appeals involving more than $5,000;
>
> $5 on discontinuance of a civil action;
>
> $5 on motion for judgment and other proceedings or recognizances;
>
> $2.50 for each deposition admitted in evidence.

28 U.S.C. § 1923(a) (1970).

243. 75 U.S. (8 Wall.) 377, 392 (1869); *see* Flanders v. Tweed, 82 U.S. (15 Wall.) 450, 452-53 (1872). *See also In re* Paschal, 77 U.S. (10 Wall.) 483, 493-94 (1870).

244. 105 U.S. 527, 535-36 (1881); *see* Vaughan v. Atkinson, 369 U.S. 527, 530 (1962); Sprague v. Ticonic Nat'l Bank, 307 U.S. 161, 164 (1939).

245. *See* note 242 *supra.*

246. 28 U.S.C. § 2412 (1970).

247. The rationale used by the federal courts in upholding the American rule is fourfold. (1) It is unfair to penalize a party that has elected to prosecute or defend a suit in good faith. Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 718 (1967). (2) The granting of counsel fees would deter those plaintiffs fearful of incurring additional costs should they be unsuccessful. *Id.* (3) The additional court time and expense involved in determining such fees would pose substantial burdens for judicial administration. *Id.* (4) Courts are concerned that court ordered fees might threaten the principle of independent advocacy; lawyers might improperly defend their clients while attempting to appease the judge. F.D. Rich Co. v. United States *ex. rel.* Industrial Lumber Co., 417 U.S. 116 (1974); *see* Note, *supra* note 233, at 259.

248. *See* Ehrenzweig, *supra* note 239; Goodhart, *supra* note 238; Kuenzel, *The Attorney's Fee: Why Not a Cost of Litigation*, 49 IOWA L. REV. 75 (1963); Mause, *Winner Takes*

sions mandating a reasonable award of counsel fees to the prevailing litigant.[249] Other federal statutes authorize the federal courts to use their own discretion in allowing attorneys' fees to the successful party.[250] Judicially created exceptions to the prevailing American rule based on "the historic jurisdiction of the federal courts"[251] are sanctioned "when overriding considerations of justice seem to compel such a result."[252] This inherent equitable power of the federal courts is responsible for three major nonstatutory exceptions to the American rule. First, federal equity courts have awarded attorneys' fees to litigants whose opponents have pursued the litigation "in bad faith, vexatiously, wantonly or for oppressive reasons."[253] While the rationale for the bad faith exception was originally primarily punitive,[254] courts have recently expanded this exception in civil rights cases by finding "bad faith" when a clearly defined right exists and judicial assistance is needed in securing it.[255] A second

All: A Re-Examination of the Indemnity System, 55 IOWA L. REV. 26 (1969); McCormick, *Counsel Fees and Other Expenses of Litigation as an Element of Damages*, 15 MINN. L. REV. 619 (1931); McLaughlin, *The Recovery of Attorney's Fees: A New Method of Financing Legal Services*, 40 FORDHAM L. REV. 761 (1972); Stirling, *Attorney's Fees: Who Should Bear the Burden?*, 41 CAL. ST. B.J. 874 (1966); Stoebuck, *Counsel Fees Included in Costs: A Logical Development*, 38 U. COLO. L. REV. 202 (1966); Note, *Attorney's Fees*, 43 MISS. L.J. 238 (1972); *Discretionary Award*, *supra* note 233; Note, *Attorney's Fees as an Element of Damages*, 15 U. CINN. L. REV. 313 (1941); *Equal Access*, *supra* note 236; Note, *supra* note 239; Note, *Distribution of Legal Expense Among Litigants*, 49 YALE L.J. 699 (1940).

249. *See, e.g.*, Packers and Stockyards Act, 7 U.S.C. 210(f) (1970); Perishable Agricultural Commodities Act, 7 U.S.C. § 499(g)(b) (1970); Agricultural Fair Practices Act of 1967, 7 U.S.C. § 2305(a) (1970); Clayton Act, 15 U.S.C. § 15 (1970); Truth in Lending Act, 15 U.S.C. § 1640(a)(2) (1970); Fair Labor Standards Act, 29 U.S.C. § 216(b) (1970); Railway Labor Act, 45 U.S.C. § 153(p) (1970); Merchant Marine Act of 1936, 46 U.S.C. § 1227 (1970); Communications Act of 1934, 47 U.S.C. § 206 (1970); Interstate Commerce Act, 49 U.S.C. § 16(2) (1970).

250. *See, e.g.*, Securities Act of 1933, 15 U.S.C. § 77(k)(e) (1970); Trust Indenture Act, 15 U.S.C. § 77(www)(a) (1970); Securities Exchange Act of 1934, 15 U.S.C. § 78(j)(e), 78r(a) (1970); Copyright Act, 17 U.S.C. § 116 (1970); Labor Management Reporting and Disclosure Act, 29 U.S.C. § 501(b) (1970); Patent Act, 35 U.S.C. § 285 (1970); Clean Air Amendments of 1970, 42 U.S.C. § 1857n-2(d); Civil Rights Act of 1964, 42 U.S.C. § 2000(a)-(3)(b), (e)-(5)(k) (1970); Fair Housing Act of 1968, 42 U.S.C. § 3612(c) (1970); Noise Control Act of 1972, 42 U.S.C. § 4911(d).

251. Sprague v. Ticonic Nat'l Bank, 307 U.S. 161, 164 (1939); *see* 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).

252. Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 718 (1967).

253. Vaughan v. Atkinson, 369 U.S. 527, 530 (1962); *see* Dawson, *supra* note 234, at 890 & n.155.

254. Hall v. Cole, 412 U.S. 1, 5 (1973).

255. *See, e.g.*, Bell v. School Bd., 321 F.2d 494 (4th Cir. 1963); Cato v. Parham, 293 F. Supp. 1375 (E.D. Ark.), *aff'd*, 403 F.2d 12 (8th Cir. 1968). *See also* Dawson, *supra* note 234, at 894; Note, *Awarding Attorneys' Fees to the "Private Attorney General": Judicial Green Light to Private Litigation in the Public Interest*, 24 HASTINGS L.J. 733, 737-39 (1973); *Discretionary Award*, *supra* note 233, at 607-08; *Equal Access*, *supra* note 236, at 660-61.

exception is the common fund doctrine, which applies whenever a litigant has secured or protected a fund in which others have a beneficial interest.[256] In such a situation federal courts have held that the other beneficiaries must share counsel fees.[257] Recently, courts have expanded this exception by eliminating the necessity of an actual fund,[258] holding that a substantial common benefit to an ascertainable class of persons is sufficient to warrant the award of attorneys' fees.[259] The third and most recent exception to the American rule was the private attorney general rationale. Under this exception litigants enforcing and vindicating significant public policies through private litigation are granted reasonable attorneys' fees. This exception is based on the recognition by federal courts that the expense of litigation is often an insurmountable obstacle to the private enforcement of important public policies.[260]

The seminal decision in the development of the private attorney general rationale was *Newman v. Piggie Park Enterprises, Inc.*,[261] a successful class action brought under Title II of the Civil Rights Act of 1964[262] to enjoin racial discrimination in restaurants. Although Title II authorized courts to use discretion in awarding attorneys' fees the Supreme Court rejected a restrictive interpretation of the provision limiting awards to cases involving bad faith. Instead the Court found that Congress enacted the provision to encourage the private enforcement of an important public policy. The Court held that the plaintiff was entitled to an award of counsel fees since in obtaining the injunction he was acting "not for himself alone but also as a 'private attorney general,' vindicating a policy Congress considered of the highest priority."[263] If successful plaintiffs were routinely forced to bear their own attorneys' fees, the Court reasoned few parties could afford to advance the public interest.[264] The Court expanded the *Piggie Park* rationale in *Mills v.*

256. Sprague v. Ticonic Nat'l Bank, 307 U.S. 161, 166 (1939); Trustees v. Greenough, 105 U.S. 527 (1881). *See generally* Dawson, *Lawyers and Involuntary Clients: Attorney Fees from Funds*, 87 HARV. L. REV. 1597 (1974).

257. *Id.*

258. Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1970); Bosch v. Meeker Cooperative Light & Power Ass'n, 257 Minn. 362, 101 N.W.2d 423 (1960).

259. *Id. See generally* Comment, *Attorneys' Fees: What Constitutes a "Benefit" Sufficient to Award Fees From Third Party Beneficiaries*, 1972 WASH. U.L.Q. 271.

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

261. 390 U.S. 400 (1968).

262. 42 U.S.C. § 2000a-3(a) (1970).

263. 390 U.S. at 402.

264. *Id.*

Electric Auto-Lite Co.,[265] a case brought by minority shareholders charging violation of federal proxy regulations.[266] Although the federal statute was silent concerning attorneys' fees, the Court awarded counsel fees on the basis of both the common benefit doctrine[267] and the private attorney general rationale. Finding private litigation essential to the enforcement of fair corporate suffrage, the Court reasoned that plaintiffs were entitled to an award of fees since "private 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."[268] In *Hall v. Cole*[269] a union member sued his union under the free speech provisions of the Labor Management Reporting and Disclosure Act.[270] The Court held that it was within the equitable power of the federal courts to grant attorneys' fees against the union since the plaintiff had conferred a substantial benefit on all the members of the union by vindicating their free speech interests.[271] Considered together, *Piggie Park*, *Mills*, and *Hall* stood for the proposition that federal equity courts have the power in the absence of statutory authorization to award counsel fees to private litigants vindicating a significant public policy.[272]

In recent years the private attorney general rationale has emerged as the major exception to the American rule. After *Piggie Park* and *Mills*, lower federal courts awarded counsel fees in an increasingly wider range of public interest cases,[273] but with no spe-

265. 396 U.S. 375 (1970). For a good discussion of the *Mills* opinion see Note, *Allocation of Attorney's Fees After* Mills v. Electric Auto-Lite Co., 38 U. CHI. L. REV. 316 (1971).

266. Securities Exchange Act of 1934, 15 U.S.C. § 7(aa) (1970).

267. *See* note 259 *supra* and accompanying text.

268. 396 U.S. at 396. *See* Note, *Awarding Attorney and Expert Witness Fees in Environmental Litigation*, 58 CORNELL L. REV. 1222, 1237 (1973); 38 U. CHI. L. REV., *supra* note 265, at 333; *Equal Access*, *supra* note 236, at 662-75. *See generally* Hornstein, *Legal Therapeutics: The "Salvage" Factor in Counsel Fee Awards*, 69 HARV. L. REV. 658 (1956).

269. 412 U.S. 1 (1973).

270. 29 U.S.C. § 411(a)(2) (1970).

271. 412 U.S. at 8.

272. Nussbaum, *supra* note 228, at 321.

273. *See, e.g.*, Souza v. Travisono, 512 F.2d 1137 (1st Cir. 1975) (protection of prisoners' constitutional right of meaningful access to the courts); Brandenburger v. Thompson, 494 F.2d 885 (9th Cir. 1974) (welfare benefits discrimination action under 42 U.S.C. § 1983 (1970)); Fairley v. Patterson, 493 F.2d 598 (5th Cir. 1974) (reapportionment suit under Voting Rights Act of 1965); Lee v. Southern Home Sites Corp., 444 F.2d 143 (5th Cir. 1971) (housing discrimination action under 42 U.S.C. § 1982 (1970)); Calnetics Corp. v. Volkswagen of America, Inc., 353 F. Supp. 1219 (C.D. Cal. 1973) (private antitrust suit seeking injunctive relief); Stanford Daily v. Zurcher, 353 F. Supp. 124 (1972) (fourth amendment rights against illegal search and seizure); Wyatt v. Stickney, 344 F. Supp. 373 (M.D. Ala. 1972), *aff'd in part sub nom.* Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974) (protection of mentally

cific guidelines, they were unable to establish uniformity as to the scope of the exception.[274] At least one federal circuit refused to adopt the private attorney general exception altogether.[275] Despite the confusion and conflict surrounding the application of the doctrine, commentators predicted that the exception would eventually result in the demise of the restrictive American rule against fee shifting.[276] Given the conflict in the lower federal courts over its application, it seemed inevitable that the Supreme Court would grant certiorari to determine the legitimacy of the private attorney general rationale in the absence of statutory authorization.

B. Alyeska Pipeline Service Co. v. Wilderness Society

Environmental concerns about the possible adverse effects of the trans-Alaska oil pipeline provided the Court with the opportunity to determine the question. In March, 1970, three private environmental interest groups[277] brought suit to enjoin the Secretary of the Interior from issuing permits required for construction of the pipeline.[278] The United States District Court for the District of Columbia

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retarded patients' right to adequate care and treatment in state hospitals); NAACP v. Allen, 340 F. Supp. 703 (M.D. Ala. 1972) (employment discrimination action under 42 U.S.C. § 1983 (1970)); La Raza Unida v. Volpe, 57 F.R.D. 94 (N.D. Cal. 1972), *aff'd*, 488 F.2d 559 (9th Cir. 1973), *cert. denied*, 417 U.S. 968 (1974) (environmental protection and relocation of persons displaced by highway project); *see* Dawson, *supra* note 234, at 888-907; Nussbaum, *supra* note 228, at 321-30; *Equal Access*, *supra* note 236, at 655-70.

274. *See, e.g.*, Wilderness Soc'y v. Morton, 495 F.2d 1026 (D.C. Cir. 1974) (en banc), *rev'd sub nom.* Alyeska Pipeline Service Co. v. Wilderness Soc'y, 421 U.S. 240 (1975) (balance of equities in favor of an award to plaintiff); Brandenburger v. Thompson, 494 F.2d 885 (9th Cir. 1974) (award of attorneys' fees should be made to a litigant who furthers the interests of a significant class of persons by effectuating a strong congressional policy); Natural Resources Defense Council, Inc. v. EPA, 484 F.2d 1331 (1st Cir. 1973) (when private litigation vindicates a significant public policy, and, at the same time, creates a widespread benefit, policy favors awarding attorneys' fees against a party who exists to serve or represents the interests of all those benefitted).

One leading decision suggested three criteria to be used in awarding fees under the private attorney general theory: (1) enforcement of a strong congressional policy; (2) benefits a large class of people; (3) necessity and financial burden of private enforcement make award essential. La Raza Unida v. Volpe, 57 F.R.D. 94, 99-100 (N.D. Cal. 1972), *aff'd*, 488 F.2d 559 (9th Cir. 1973), *cert. denied*, 417 U.S. 968 (1974).

275. Bradley v. School Bd., 472 F.2d 318, 327-31 (1972), *vacated on other grounds*, 416 U.S. 696 (1974).

276. *See* McLaughlin, *supra* note 248; *Discretionary Award*, *supra* note 233.

277. Plaintiffs were the Wilderness Society, Environmental Defense Fund, Inc., and Friends of the Earth.

278. In June, 1969, the Trans-Alaska Pipeline System, formed by Atlantic Richfield Co., Humble Oil and Refining Co. and British Petroleum Corp., submitted an application for a right-of-way for construction of an oil pipeline that would transport oil from the North Slope of Alaska along federally owned land. An amended application was filed in December, 1969, requesting additional right-of-way and land use permits. After the Secretary of the

granted a preliminary injunction.[279] Subsequently, defendant, a private pipeline company,[280] was permitted to intervene.[281] After further consideration the district court dissolved the preliminary injunction, denied a permanent injunction and dismissed the complaint.[282] On appeal, the Court of Appeals for the District of Columbia reversed, holding that construction of the pipeline would violate federal law.[283] Following congressional enactment of legislation permitting construction of the pipeline,[284] plaintiffs filed a request for an award of attorneys' fees, contending that counsel fees should be assessed against the defendant in federal cases initiated by a plaintiff acting as a private attorney general vindicating important public interests. Defendant argued that, absent specific statutory authority, federal courts are not free to fashion a private attorney general exception to the prevailing American rule which holds that each litigant must pay his own attorney fees. Rejecting defendant's argument, the Court of Appeals ruled that since plaintiffs had acted to vindicate "important statutory rights of all citizens . . ." they were entitled to recover reasonable attorney fees.[285] The Su-

Interior indicated that approval of the pipeline would be forthcoming, plaintiffs filed suit in March, 1970. For a discussion of the events surrounding this litigation see Dominick & Brody, *The Alaska Pipeline:* Wilderness Society v. Morton *and the Trans-Alaska Pipeline Authorization Act*, 23 AM. U. L. REV. 337 (1973).

279. Wilderness Soc'y v. Hickel, 325 F. Supp. 422 (D.D.C. 1970). The District Court granted the preliminary injunction in April, 1970, on the grounds that the right-of-way was in violation of the Mineral Leasing Act of 1920, 30 U.S.C. § 185 (1970), and for noncompliance with the National Environmental Policy Act of 1969, 42 U.S.C. § 4321 (1970).

280. Defendant is Alyeska Pipeline Service Co. Alyeska replaced the Trans-Alaska Pipeline System in 1970. Alyeska is owned by ARCO Pipeline Co., Inc., Sohio Pipeline Co., Humble Pipeline Co., Mobil Pipeline Co., Phillips Petroleum Co., Amerada Hess Corp., and Union Oil Co. of Calif.

281. The State of Alaska was also permitted to intervene as a defendant. The interventions occurred in September, 1971.

282. The decision is not reported. *See* Wilderness Soc'y v. Morton, 479 F.2d 842, 851 (D.C. Cir.) (en banc), *cert. denied*, 411 U.S. 917 (1973). The dismissal occurred after the Interior Department released an environmental impact statement study on the pipeline and announced that the permits would be granted to Alyeska.

283. 479 F.2d 842 (D.C. Cir. 1973) (en banc). The decision, in February, 1973, was based solely on the Mineral Leasing Act of 1920, 30 U.S.C. § 185 (1970).

284. Act of Nov. 16, 1973, Pub. L. No. 93-153, 87 Stat. 576 (codified in scattered sections of 15 & 44 U.S.C.). The legislation also imposed stringent liability standards on Alyeska and required it to pay for administrative costs and land acquisition. *See* Alyeska Pipeline Co. v. Wilderness Soc'y 421 U.S. 240, 285 (Marshall, J., dissenting).

285. Wilderness Soc'y v. Morton, 495 F.2d 1026 (D.C. Cir. 1974) (en banc). The court of appeals ruled that Alyeska must pay one-half of plaintiffs' attorneys' fees. But the court ruled that 28 U.S.C. § 2412 (1970) prohibited taxing fees against the Department of the Interior and held that it would be inappropriate to burden the State of Alaska with any part on the award since it had intervened voluntarily to present a different version of the public interest implications of the trans-Alaska pipeline.

preme Court reversed in an opinion by Justice White.[286] Instead of merely finding the private attorney general exception inapplicable on the facts,[287] the Court held that in the absence of statutory authorization federal courts lack power to award attorneys' fees on a private attorney general theory.

Relying primarily on the *The Baltimore*,[288] the Court initially determined that the docketing fees statute[289] was intended to limit the award of counsel fees to specified sums. While recognizing that the language of the original act that "no other compensation shall be taxed and allowed" has been deleted,[290] the Court asserted that the "general statutory rule" established in 1853 was carried forward by successor provisions[291] that limit awards of counsel fees to nominal statutory amounts.[292] The Court acknowledged that the fee statutes allow the federal courts, in the exercise of their inherent equitable power, to award counsel fees in bad faith and common fund situations. According to the Court, however, the award of fees in these situations, unlike under the private attorney general theory, does not conflict with the language and policy of the fee statutes.[293] Although the Court noted that Congress has specifically authorized the award of attorneys' fees in various statutes and has elected to rely on private enforcement through litigation, the Court could discern no congressional grant of authority to the federal courts to discard the traditional rule against nonstatutory allowances to the prevailing party and award counsel fees to private attorneys general

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On the basis for determining the fee award, the court observed: "The fee should represent the reasonable value of the services rendered, taking into account all the surrounding circumstances, including, but not limited to, the time and labor required on the case, the benefit to the public, the skill demanded by the novelty or complexity of the issues, and the incentive factor." 495 F.2d at 1036. The plaintiffs' bill of costs included 4,455 hours of attorneys' time spent on the litigation.

286. Chief Justice Burger and Justices Stewart, Blackmun, and Rehnquist joined in Justice White's opinion. Justices Brennan and Marshall wrote dissenting opinions. Justices Douglas and Powell did not participate in the decision.

287. The dissents in the Court of Appeals accepted the private attorney general rationale but argued that it did not apply in this case since the plaintiffs had not prevailed on the merits and did not confer a discernible, undisputed public benefit. 495 F.2d at 1043 (Wilkey, J., dissenting).

288. *See* note 243 *supra* and accompanying text.

289. *See* note 242 *supra* and accompanying text.

290. 421 U.S. at 256-57 n.29. The language was deleted when the fees provision was revised and codified in the 1948 Code. *See* Act of June 25, 1948, ch. 123, 62 Stat. 955-56 (enacting 28 U.S.C. §§ 1920, 1923).

291. The current provisions are 28 U.S.C. §§ 1920, 1923 (1970).

292. 421 U.S. at 255-57.

293. *Id.* at 257-60.

vindicating important public policies.[294] Furthermore, the Court observed, adoption of the private attorney general theory would force the courts either to "pick and choose" among various claims or fashion a "drastic" exception under which fees would be awarded in any successful action brought under a federal statute.[295] Finally, noting that the federal government is statutorily immune from fee awards,[296] the Court questioned the fairness and rationality of awards against private parties, since one of the main functions of a private attorney general is to force federal officials to comply with statutory provisions.[297] Given the statutory embodiment of the American rule in the fee statutes and positing the inability of the courts in the absence of legislative guidance to distinguish between "important" and "unimportant" public policies, the Court concluded that the decision to institute a private attorney general exception to the prevailing American rule is a policy matter for Congress rather than the federal courts and that the award of counsel fees to the instant plaintiffs must be reversed.

Writing in dissent, Justice Marshall[298] was unable to discern any basis in prior Supreme Court decisions for holding that the docketing fees statute represents a statutory embodiment of the American rule and operates as a general bar to fee shifting.[299] Drawing on a long line of Supreme Court precedent, he found that the award of attorneys' fees is "not strictly a matter of statutory construction but has an independent basis in the equitable powers of the courts."[300] While acknowledging that the majority's concern

294. *Id.* at 260-63.

295. *Id.* at 269. *See id.* at 264 n.39, 266. Although numerous commentators have criticized the American rule, the Court declared that the rule is "deeply rooted in our history and in congressional policy; and it is not for us to invade the legislature's province. . . ." *Id.* at 270-71 & n.45.

296. *See* 28 U.S.C. § 2412 (1970).

297. *See* 421 U.S. at 265-68.

298. Justice Brennan filed a very brief dissenting opinion agreeing with Justice Marshall that the federal courts have the power to award attorneys' fees on a private attorney general rationale, and expressly adopting the reasoning of the court of appeals in the conclusion that this was an appropriate case for the exercise of that power. *See* 421 U.S. at 271-72 (Brennan, J., dissenting).

299. Marshall analyzed the decisions in Trustees v. Greenough, 105 U.S. 527 (1881), Sprague v. Ticonic Nat'l Bank, 307 U.S. 161 (1939), and Vaughan v. Atkinson, 369 U.S. 527 (1962), and found no indication in any of the opinions that 28 U.S.C. § 1923 embodied the American rule or that it barred all other fee shifting. Marshall also pointed out that in *Fleischmann Distilling Corp. v. Maier Brewing Co.*, the Court treated § 1923 not as a statutory embodiment of the American rule, but "as a general exception to the American rule." 386 U.S. at 718 n.11.

300. 421 U.S. at 274 (Marshall, J., dissenting). Justice Marshall also argued that the current fee statute should not be read as if the language of the 1853 Act indicating the

with the lack of meaningful standards was legitimate, Marshall suggested that the federal courts had already developed adequate criteria for applying the exception.[301] According to Marshall attorneys' fees should be placed upon the defendant if:

> . . . (1) the important right being protected is one actually or necessarily shared by the general public or some class thereof; (2) the plaintiff's pecuniary interest in the outcome, if any, would not normally justify incurring the cost of counsel; (3) shifting that cost to the defendant would effectively place it on a class that benefits from the litigation.[302]

Marshall concluded that the criteria were met in the instant case and that attorneys' fees should be awarded to plaintiffs under the private attorney general rationale.[303]

C. *Comment*

As Justice Marshall effectively demonstrated[304] the Court's statutory analysis is unconvincing. The Court insisted that the docketing fees statute represents a general statutory embodiment of the American rule limiting the award of counsel fees to amounts enumerated, but it failed to distinguish the *Greenough* line of cases which has consistently interpreted the statute to allow additional fee shifting.[305] Furthermore, the Court adopted a narrow view of the independent power of equitable courts, which as the dissent points out, is unsupported by prior case law.[306] The majority opinion misread *Mills*, *Hall* and other cases which clearly asserted the independent equitable power of the federal courts to award attorney fees "when the interests of justice so require."[307] Although the Court recognized that the federal judiciary retains the inherent equitable power to award counsel fees in bad faith and common fund situations, it failed to articulate a principled basis for refusing to recognize that power under the private attorney general rationale. While the common fund and private attorney general exceptions may be distinguished in that the former does not necessarily involve assessment of fees against an opposing party, the bad faith and private

exclusivity of the statutory compensation were still included. *Id.* at 278-81 (Marshall, J., dissenting).

301. *Id.* at 284.

302. *Id.* at 285.

303. *See id.* at 285-88.

304. *See id.* at 274-82 (Marshall, J., dissenting).

305. *See* note 244 *supra* and cases cited therein.

306. *See* notes 251, 252, 299 *supra* and accompanying text.

307. Hall v. Cole, 412 U.S. 1, 4-5 (1973), quoting Sprague v. Ticonic Nat'l Bank, 307 U.S. at 166; Mills v. Electric Auto-Lite Co., 396 U.S. at 391-92.

attorney general exceptions cannot be distinguished on that ground. The majority's argument that congressional authorization of fee awards in some statutes shows a congressional intent to preclude awards in others also is not convincing. In awarding attorneys' fees under statutes silent about counsel fees in previous cases the Court held that congressional silence did not imply an intent to preclude equitable fee awards unless the statute in question specifies remedies in great detail.[308] The Court correctly pointed out that the private attorney general rationale is seriously weakened by the federal statute precluding the award of fees against the federal government,[309] but as the dissent argued the majority failed to explain why this necessitates complete abandonment of the private attorney general exception.[310]

In addition to highlighting the weakness of the Court's statutory analysis, the dissenting opinion appears to answer adequately the majority's concerns about the manageability and fairness of a judicially created private attorney general exception. Rather than focusing on the relative merits of the policies involved, Marshall's suggested criteria emphasize the need to provide access to the courts for normally unrepresented interests so that federal courts are informed fully of the consequences of available choices and have a sound basis for making decisions.[311] Under Marshall's test awards would be granted to any party vindicating a federal statutory or constitutional provision[312] where the fee ultimately could be shifted by the losing defendant to the general public who are the beneficiaries of the litigation.[313] This "public benefit" approach eliminates the problem of judges' making awards based on their subjective determination of the importance of the policies vindicated, ensures that defendants are not deterred from advancing their interests in court, and obviates the fairness problem of imposing costs on losing defendants who differ greatly in their forms of misconduct, degrees of

308. *See* Mills v. Electric Auto-Lite Co., 396 U.S. at 390-91, *distinguishing* Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714 (1967).

309. *See* note 296 *supra* and accompanying text.

310. 421 U.S. at 282 n.6 (Marshall, J., dissenting).

311. *See* Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1756-60, 1768 n.468 (1975), Note, *supra* note 233, at 267. The opinion in the court of appeals appears to be based in part on this interest-representation rationale. 495 U.S. at 1030-31.

312. 421 U.S. at 285 (Marshall, J., dissenting).

313. *Id.* at 285, 288. *See* Comment, *Liability for Attorney's Fees in the Federal Courts—The Private Attorney General Exception*, 16 B.C. IND. & COM. L. REV. 201, 212-13 (1975).

fault, and ability to pay.[314] While such an approach poses problems of "nuisance" suits brought to enforce relatively unimportant statutory provisions,[315] these problems have not proved to be an insuperable barrier to the recent expansion of standing by the Court.[316] Moreover, federal courts possess ample discretionary powers to deny fees where the litigation is clearly frivolous or intended to harass the defendant.[317] Finally, by awarding fees to representatives of such interests, the courts would be continuing their special concern for the rights of those who are not adequately represented in the other branches of government.[318]

Even assuming that Marshall's test does not fully meet the majority's concerns, the Court would have retained the private attorney general rationale by limiting its application to cases involving constitutional rights.[319] Since constitutional rights are clearly of the "highest priority" such an approach would eliminate concerns about the propriety of judicial policy-making.[320] Further, it would limit the courts to deciding questions in which they have an independent and legitimate concern. Finally, it would appear desirable to encourage vindication of constitutional rights, even at the expense of other social values.[321]

In the absence of future congressional legislation providing for the award of attorneys' fees in a broad range of cases, the Court's decision effectively curtails public interest litigation in the federal courts.[322] As the Court itself recognized in *Piggie Park*, without the

314. *See* Dawson, *supra* note 234, at 902-05.

315. *See* 24 HASTINGS L.J., *supra* note 255, at 756; Note, *supra* note 265, at 334.

316. *See, e.g.*, United States v. Students Challenging Regulatory Agency Procedures, 412 U.S. 669 (1973); Office of Communication of United Church of Christ v. FCC, 359 F.2d 994, 1005 (D.C. Cir. 1966).

317. *See* Natural Resources Defense Council, Inc. v. EPA, 484 F.2d 1331 (1st Cir. 1973); Nussbaum, *supra* note 228, at 333 n.146; Note, *supra* note 233, at 270. Moreover, federal courts also possess discretionary powers to keep frivolous or nuisance litigation out of court. For example, a suit can be dismissed for lack of standing if the plaintiffs are not "representative" or "responsible" individuals or groups. *See id.*

318. Professor Bickel characterized this widely shared perception as the Supreme Court's "function of guarding the elemental integrity of a system in which all groups have access to political power . . . ." A. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS 86 (1970).

319. *See* Falcon, *Award of Attorneys' Fees in Civil Rights and Constitutional Litigation*, 33 MD. L. REV. 380, 415-16 (1973).

320. *Id.* at 416.

321. It is generally considered that constitutional rights stand somewhat above the ordinary balancing process among competing social policies. *See, e.g.*, Shapiro v. Thompson, 394 U.S. 618, 627-33 (1969). *See generally* Note, *Specifying the Procedures Required by Due Process: Toward Limits on the Use of Interest Balancing*, 88 HARV. L. REV. 1510 (1975).

322. While the Court approved the common benefit and bad faith exceptions and thus

private attorney general exception, the prohibitive cost of attorneys' fees would in most instances effectively discourage public interest litigation.[323] Public interest suits are complex, time-consuming, and expensive. Furthermore, such litigation seeks only injunctive and declaratory relief, not damages. Therefore, rarely will an individual—even a wealthy individual—be willing to institute litigation to vindicate important public rights.[324] Lack of funds, an overwhelming caseload, and government restrictions prevent Legal Services from providing even a partial answer to the problem.[325] Thus, in most cases involving major litigation the foundation-funded public interest firm provides the only realistic source of representation.[326] However, such support is inadequate to fund continuous major litigation,[327] is declining, and cannot be expected to continue indefinitely.[328]

Following the Court's decision any solution to the problem of financing public interest litigation in the federal courts will necessarily come from Congress. Since *Alyeska* Congress has introduced a number of bills on the general subject of attorneys' fee awards.[329] Most of the proposals adopt a statute-by-statute approach limiting award of fees to certain areas of the law such as antitrust or civil rights.[330] A more desirable approach, however, would be the enactment of a comprehensive statute awarding attorneys' fees to plain-

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left open the possibility of judicial fee shifting in the absence of statutory authorization, it placed some restrictions on their application. Finding litigation which benefited the general public "ill suit[ed]" to the common benefit rationale, the Court restricted the exception to cases where the beneficiaries are "[few] in number and easily identifiable;" the benefits "traced with some accuracy;" and the costs "shifted with some exactitude [as] to those benefiting." 421 U.S. at 265 n.39. By limiting the bad faith exception to cases involving "vexatious" or "oppressive" conduct by the losing party, the Court disapproved of federal court cases finding "bad faith" merely on the basis of a clearly defined and established right and a need for judicial assistance in rescuing that right. 421 U.S. at 258-59. Thus, it appears that the Court would hold these exceptions applicable in relatively few cases.

323. 390 U.S. at 402; *see* Note, *Federal Funds for Public Interest Law: Plausibility, Politics and Past History*, 13 ARIZ. L. REV. 932 (1971); *Hearings*, *supra* note 229, at 861.

324. *See* NAACP v. Allen, 340 F. Supp. 703, 710 (M.D. Ala. 1972), *aff'd*, 493 F.2d 614 (5th Cir. 1974); *Hearings*, *supra* note 229, at 789, 801.

325. *See* Nussbaum, *supra* note 228 at 306-07; Note, *supra* note 230, at 269; *Hearings*, *supra* note 229, at 800-01, 847.

326. *See Hearings*, *supra* note 229, at 842.

327. *Id.*

328. *See Hearings on Attorneys Fees Before the Subcomm. on Courts, Civil Liberties and the Administration of Justice of the House Comm. on the Judiciary*, 94th Cong., 1st Sess. (1975) (testimony of Reuben B. Robertson) [hereinafter cited as *Hearings on Attorneys Fees*]; *Hearings*, *supra* note 229, at 1244 (statement of Barry Chase).

329. *See, e.g.*, S. 2278, 2871, 94th Cong., 1st Sess. (1975); H.R. 8219, 8220, 8221, 8368, 8532, 8742, 8743, 9093 and 9552, 94th Cong., 1st Sess. (1975).

330. *See, e.g.*, H.R. 8219, 94th Cong., 1st Sess. (1975) authorizing fee awards to successful litigants in actions under the Clayton Act, 15 U.S.C. § 12 (1970); S. 2278, 94th Cong., 1st

tiffs vindicating any federal statutory or constitutional provision.[331] Such an approach would ensure effective private enforcement of other important federal rights and equal access to the courts for persons of moderate or limited means.[332] In addition, since most public interest suits are brought to enforce statutory obligations of the federal government, fees should be awarded against the government as well as private parties.[333] Finally, since the complexity of public interest litigation requires the employment of numerous expert witnesses and the use of technical studies,[334] Congress should enact legislation awarding all reasonable costs of litigation as well as attorney fees.[335] Legislation providing for attorneys' fees and other reasonable costs would overturn the Supreme Court's ill-considered decision in *Alyeska*, overcome the serious financial obstacles to public interest litigation, and ensure equal access to the courts for persons seeking to enforce important federal policies.

VI. ATTORNEYS' FEES AND THE ELEVENTH AMENDMENT

Much public interest litigation is brought to enforce federal law against state officials.[336] Recognizing that the limited resources of most plaintiffs[337] and the nonmonetary nature of the relief obtained[338] make financing such litigation difficult, federal courts

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Sess. (1975) authorizing fee awards to successful litigants in actions under 42 U.S.C. §§ 1981-83, 1985-86 (1970), and Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d to d-6 (1970).

331. *See* S. 2871, 94th Cong., 1st Sess. (1975); H.R. 8221, 8742, 94th Cong., 1st Sess. (1975); *Hearings on Attorneys Fees, supra* note 328 (testimony of Bruce J. Terris).

332. *See Equal Access, supra* note 236, at 678-79; *Hearings on Attorneys Fees, supra* note 328.

333. *See Hearings on Attorneys Fees, supra* note 328 (testimony of John Ferren).

334. *See* S. 2871, 94th Cong., 1st Sess. (1975); *Hearings on Attorneys Fees, supra* note 328 (testimony of John Ferren).

335. *Id.* Senators Edward M. Kennedy (D-Mass.) and Charles Mathias (R-Md.) have recently introduced S. 2715, which would amend Chapter 5 of Title 5, United States Code (Administrative Procedure Act) to permit awards of reasonable attorneys' fees and other expenses for public participation in proceedings before Federal agencies, and for other purposes. Hearings have been held on the proposal, and Congress is expected to act on it during the present session.

336. *See* Note, *A Practical View of the Eleventh Amendment—Lower Court Interpretations and the Supreme Court's Reaction*, 61 GEO. L.J. 1473-74 & n.5 (1973).

337. Many public interest suits against state officials are brought by individuals employed by or receiving benefits from the state. *See, e.g.*, Fitzpatrick v. Bitzer, 519 F.2d 559 (2d Cir.), *cert. granted*, 423 U.S. 1031 (1975) (state employees); Souza v. Travisono, 512 F.2d 1137 (1st Cir. 1975) (prison inmates); Brandenburger v. Thompson, 494 F.2d 885 (9th Cir. 1974) (welfare recipients); Wyatt v. Stickney, 344 F. Supp. 373 (M.D. Ala. 1972), *aff'd in part sub nom.* Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974) (mentally retarded patients). In any case most individual plaintiffs cannot match the resources which state governments can devote to litigation. *See* Note, *Attorneys' Fees and the Eleventh Amendment*, 88 HARV. L. REV. 1875 n.1 (1975).

338. Most public interests suits against states seek declaratory and injunctive relief, not monetary relief out of which fees could be paid. *See, e.g.*, Sims v. Amos, 340 F. Supp. 691

awarded attorneys' fees from state funds in a wide range of cases.[339] The Supreme Court's recent holding in *Edelman v. Jordan*[340] that the eleventh amendment bars retroactive payments out of state funds has, however, greatly slowed this trend. Interpreting *Edelman* as barring all monetary awards[341] or as prohibiting retroactive payments resembling damages,[342] three federal circuits have disallowed counsel fee awards. Viewing the decision as allowing orders requiring state expenditures incidental[343] or necessarily related[344] to securing or implementing permissible injunctive relief, four federal circuits have upheld the power of the federal judiciary to award fees. Recognizing this conflict the Supreme Court recently granted certiorari to determine the propriety of fee awards against state officers in their official capacity.[345]

A. Legal Background

The eleventh amendment[346] was enacted in 1798[347] to overrule

(M.D. Ala., *aff'd mem.* 409 U.S. 942 (1972) (reapportionment). Even if monetary relief is sought, the eleventh amendment bars such relief in almost all cases. *See* Edelman v. Jordan, 415 U.S. 651 (1974) and text accompanying notes 378-90 *infra*.

339. *See, e.g.*, Gates v. Collier, 489 F.2d 298 (1973), *rehearing en banc granted*, 500 F.2d 1382 (1974), *remanded*, 522 F.2d 81 (5th Cir. 1975), *aff'd*, 44 U.S.L.W. 2405 (N.D. Miss. Feb. 3, 1976) (prison reform); La Raza Unida v. Volpe, 57 F.R.D. 94 (N.D. Cal. 1972), *aff'd*, 488 F.2d 559 (9th Cir. 1973) (environmental protection); Sims v. Amos, 340 F. Supp. 691 (M.D. Ala.), *aff'd mem.* 409 U.S. 942 (1972) (reapportionment).

340. 415 U.S. 651 (1974).

341. Skehan v. Board of Trustees, 501 F.2d 31, 42 & n.7 (3d Cir. 1974) (dictum), *vacated on other grounds*, 421 U.S. 983 (1975); San Antonio Conserv. Soc'y v. Texas Highway Dept., 496 F.2d 1017, *rehearing en banc granted*, 496 F.2d at 1026 (1974), *cert. denied*, 420 U.S. 926, *aff'd* 519 F.2d 1372 (5th Cir. 1975).

342. Jordan v. Gilligan, 500 F.2d 701 (6th Cir. 1974), *cert. denied*, 421 U.S. 991 (1975).

343. Hutchinson v. Lake Oswego School Dist. No. 7, 519 F.2d 961, 967 & n.8 (9th Cir. 1975) (dictum); Thonen v. Jenkins, 517 F.2d 3, 8 (4th Cir. 1975); Souza v. Travisono, 512 F.2d 1137, 1139 (1st Cir. 1975).

344. Class v. Norton, 505 F.2d 123, 127 (2d Cir. 1974).

345. Fitzpatrick v. Bitzer, 519 F.2d 559 (2d Cir. 1975), *cert. granted*, 423 U.S. 1031 (1975). While *Alyeska* prevents attorneys' fee awards under the private attorney general rationale in the absence of statutory authorization, such awards remain permissible under numerous federal statutes allowing or requiring fee awards to be made. In addition, it is likely that Congress will enact legislation giving federal courts greater authority to award counsel fees. *See* notes 329-35 *supra* and accompanying text. Thus the question on whether fees may be awarded from state funds remains important.

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

347. The necessary ratifications were actually accomplished by February 7, 1795, when North Carolina ratified, but several of the states were slow to notify the federal government of their action. Thus the eleventh amendment was ratified by three-fourths of the states less

the Supreme Court's holding in *Chisholm v. Georgia*[348] that a state was subject to suit in federal court by a citizen of another state.[349] The rapid adoption of the amendment by the states was prompted both by apprehension that creditors might use federal courts to collect large outstanding debts[350] and to recover lands confiscated or placed in the public domain by legislative fiat[351] and by fear that allowing individuals to bring suits in federal court would improperly limit the states' sovereignty and independence within the federal system.[352] Although the eleventh amendment does not expressly provide that a state cannot be sued by its own citizens in federal court, the Court found in *Hans v. Louisiana*[353] that in adopting Article III of the Constitution the framers intended to preserve the states' common law immunity.[354] The Court held, therefore, that states are immune from all suits by individuals in federal court. Realizing that some form of legal redress was necessary to prevent obstruction of federal law and the violation of constitutional rights of private persons, the Court held in a 1908 case, *Ex parte Young*,[355] that state officials might be enjoined from enforcing an unconstitutional state law. The Court reasoned that an officer acting under an unconstitutional state statute loses his status as a representative of the state

than two years after the *Chisholm* decision. *See* C. JACOBS, THE ELEVENTH AMENDMENT AND SOVEREIGN IMMUNITY 59 (1972) [hereinafter cited as JACOBS]; Mathis, *The Eleventh Amendment: Adoption and Interpretation*, 2 GA. L. REV. 207, 228 (1968) [hereinafter cited as Mathis].

348. 2 U.S. (2 Dall.) 419 (1793).

349. The case involved a liability incurred by the state during the Revolutionary War. *See* Mathis, *supra* note 347, at 217-24.

350. C. WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 99 (rev. ed. 1937) [hereinafter cited as WARREN]; *see* Mathis, *supra* note 347, at 228. *But see* JACOBS, *supra* note 347, at 69-74.

351. WARREN, *supra* note 350, at 99; JACOBS, *supra* note 347, at 57-64. Pending in federal courts at the time the amendment was passed were several important suits seeking compensation from states for the repudiation of earlier land grants and for the confiscation of Loyalist property. *See* JACOBS, *supra*, *discussing* Hollingsworth v. Virginia, 3 U.S. (3 Dall.) 378 (1798) (repudiated land grant); Vassall v. Massachusetts (unreported Supreme Court case) (confiscation of Loyalist property); Moultrie v. Georgia (unreported Supreme Court case) (repudiated land sale).

352. Spencer Roane argued that the amendment had been adopted "because the states claimed to be *sovereign* and independent States . . . ." C. HAINES, THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT AND POLITICS 1789-1835 at 441 (1944). *See also* JACOBS, *supra* note 347, at 69, 71.

353. 134 U.S. 1 (1890).

354. *Id.* at 12-14; *see* Edelman v. Jordan, 415 U.S. 651, 660-61 n.9 (1974); Mathis, *supra* note 347, at 232; Note, *Edelman v. Jordan: A New Stage in Eleventh Amendment Evolution*, 50 NOTRE DAME LAW. 496, 498 (1975); Note, *Private Suits Against States in Federal Courts*, 33 U. CHI. L. REV. 331, 334 (1966).

355. 209 U.S. 123 (1908).

and becomes liable as an individual for the consequences of his conduct.[356] By creating the fiction that it was restraining the individual rather than the state[357] the Court attempted to maintain the necessary balance between the eleventh and fourteenth amendments.[358] The scope of the eleventh amendment was further limited in *Fairmont Creamery Co. v. Minnesota*.[359] In upholding its power to tax costs against a state appearing before it to oppose a criminal appeal, the Court reasoned that although costs cannot be taxed against a sovereign without its consent the state necessarily loses some of its sovereignty when it becomes a party to litigation before the Supreme Court.[360] If the Court has jurisdiction to hear the case, it is within the "inherent authority of the Court in the orderly administration of justice" to award costs.[361] The Court was, however, unwilling to extend *Ex parte Young* and *Fairmont Creamery* to compel state officers to pay damages or make equitable restitution with state funds. In *Ford Motor Co. v. Department of Treasury*[362] the Court found that, in suits to recover funds from a state treasury, the state was the "real party in interest," and held that the eleventh amendment barred the actions.[363]

The power of the federal courts to award attorneys' fees from state funds was first considered by the Supreme Court in the 1972 case of *Amos v. Sims*.[364] In *Sims*, a three-judge district court awarded attorney fees out of state funds to plaintiffs, who had won a case seeking reapportionment of the state legislature. The district court answered eleventh amendment objections in a footnote by finding that the state cannot immunize its officials from paying the expenses, including attorneys' fees, incurred in obtaining permissible injunctive relief.[365] On appeal, the Supreme Court summarily affirmed[366] over the defendant's objection that the district court

356. *Id.* at 159-60.

357. *See* Davis, *Suing the Government by Falsely Pretending to Sue an Officer*, 29 U. CHI. L. REV. 435, 437 (1962).

358. *See* C. WRIGHT, HANDBOOK ON THE LAW OF FEDERAL COURTS § 48 at 186 (2d ed. 1970). The *Young* Court created the fiction of individual restraint in order to avoid deciding whether the adoption of the fourteenth amendment altered or limited the effect of the eleventh. 209 U.S. at 150.

359. 275 U.S. 70 (1927).

260. *Id.* at 74.

261. *Id.*

262. 323 U.S. 459 (1945).

363. *Id.* at 464. *See* Kennecott Copper Corp. v. State Tax Comm'n, 327 U.S. 573 (1946); Great Northern Life Ins. Co. v. Read, 322 U.S. 47 (1944).

364. 409 U.S. 942, *aff'g mem.* 340 F. Supp. 691 (M.D. Ala. 1972).

365. 340 F. Supp. at 694 n.8.

366. 409 U.S. 942, *aff'g mem.* 340 F. Supp. 691 (M.D. Ala. 1972).

lacked jurisdiction to enter a monetary award against the state.[367]

Following *Amos v. Sims*, federal courts awarded counsel fees out of state funds in a wide range of cases.[368] In *La Raza Unida v. Volpe*,[369] a federal district court awarded attorneys' fees to plaintiffs who had successfully brought suit to enjoin construction of a state highway project in violation of federal regulations.[370] Relying on *Fairmont* and *Sims*, the court reasoned that jurisdiction over the main action enabled it to award attorneys' fees as a necessary expense of litigation.[371] The Fifth Circuit expanded the *Sims* rationale in *Gates v. Collier*.[372] In *Gates*, plaintiffs brought suit challenging the mistreatment of prisoners at the state penitentiary.[373] After granting declaratory and injunctive relief the district court abandoned the *Young* fiction of individual liability and awarded attorneys' fees against state officers in their official capacities.[374] On appeal, the Fifth Circuit affirmed.[375] Reasoning that fee awards, unlike damages, are an "integral part" of permissible equitable relief and a necessary incentive device to encourage private enforcement of federal statutory and constitutional rights, they concluded that the eleventh amendment does not bar the award of counsel fees paid from the state treasury.[376]

The Supreme Court's recent decision in *Edelman v. Jordan*[377] has, however, created considerable doubt as to the power of federal courts to award attorney fees from state funds. In *Edelman*, plaintiff[378] brought a class action suit under the Civil Rights Act of 1964[379]

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367. *See* Brief for Appellant at 17, Amos v. Sims, 409 U.S. 942 (1972); the jurisdictional argument of the *Sims* defendants is quoted in Gates v. Collier, 489 F.2d 298 (5th Cir. 1973), *petition for rehearing granted*, 500 F.2d 1382 (5th Cir. 1974), *remanded*, 522 F.2d 81 (5th Cir. 1975), *aff'd*, 44 U.S.L.W. 2405 (N.D. Miss. Feb. 2, 1976).

368. *See* note 339 *supra*.

369. 57 F.R.D. 94 (N.D. Cal. 1972), *aff'd*, 488 F.2d 559 (9th Cir. 1973).

370. National Environmental Policy Act of 1969, 42 U.S.C. § 4331 (1970); Department of Transportation Act of 1966, 49 U.S.C. § 1653(f) (1970).

371. 57 F.R.D. at 101 n.11.

372. 489 F.2d 298 (5th Cir. 1973), *petition for rehearing granted*, 500 F.2d 1382 (5th Cir. 1974), *remanded*, 522 F.2d 81 (5th Cir. 1975), *aff'd*, 44 U.S.L.W. 2405 (N.D. Miss. Feb. 2, 1976).

373. 349 F. Supp. 881 (N.D. Miss. 1972).

374. 489 F.2d at 300.

375. *Id.* at 298.

376. *Id.* at 302-03.

377. 415 U.S. 651 (1974).

378. John Jordan was an applicant under the program. After a four-month delay in the processing of his application he brought suit.

379. 42 U.S.C. § 1983 (1970) under which the action was brought provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, or any State or Territory, subjects, or causes to be subjected, any citizen of the United

to compel state officials administering the federal-state program of Aid to the Aged, Blind, and Disabled to follow federal time limits in processing applications and granting benefits and to release benefits wrongfully withheld.[380] The district court granted the relief.[381] The Court of Appeals rejected the defendants' argument that the eleventh amendment barred the award of retroactive benefits and affirmed.[382] The Supreme Court reversed in a five-four decision.[383] While approving the grant of prospective injunctive relief against state officers, the Court held that the eleventh amendment bars an award of retroactive welfare benefits because of its resemblance to a "monetary award against the State itself."[384]

In refusing to extend the principle of *Ex parte Young* to equitable relief requiring payment of state funds, the Court acknowledged that orders entered in recent cases had considerable impact on state treasuries.[385] According to the Court, however, such financial consequences were the result of "necessary . . . compliance in the future with a substantive federal-question determination" and thus an "ancillary effect" permissible under *Ex parte Young*.[386] The financial consequences of retroactive relief, on the other hand, resulted from efforts by state officials to compensate for past violations.[387] Finding retroactive payments indistinguishable from an award of damages, the Court concluded that such relief is barred by the eleventh amendment.[388]

States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

380. Regulations promulgated by the Department of Health, Education, and Welfare (HEW) provided that benefits were required to begin after a prescribed period following submission of a qualifying application. 45 C.F.R. § 206.10(a)(3) (1973), *promulgated under* Social Security Act, 42 U.S.C. §§ 1381-85 (1970), superseded Pub. L. No. 92-603, § 301, 86 Stat. 1478 (effective Jan. 1, 1974). The Illinois Department of Public Aid, however, authorized payments only after applications had been approved, even if the approval occurred after the expiration of the applicable HEW time limit. *See* 415 U.S. at 655 n.4 quoting Categorical Assistance Manual of the Illinois Department of Public Aid § 8225.1.

381. Jordan v. Weaver, Civil No. 71-c70 (N.D. Ill. 1972).

382. 472 F.2d 985 (7th Cir. 1973).

383. Chief Justice Burger and Justices Stewart, White, and Powell joined in Justice Rehnquist's opinion. Justices Douglas and Brennan wrote dissenting opinions. Justice Marshall dissented in an opinion in which Justice Blackmun joined.

384. 415 U.S. at 665.

385. *See* Graham v. Richardson, 403 U.S. 365 (1971); Goldberg v. Kelly, 397 U.S. 254 (1970).

386. 415 U.S. at 668.

387. *Id.* at 668-69.

388. *Id.* at 669. In a footnote the Court suggested an alternative basis for its distinction between retrospective and prospective payments. The Court asserted that a retrospective

Although *Edelman* did not mention *Amos v. Sims* or refer to attorneys' fees, some federal courts have interpreted the decision as barring fee awards from state funds.[389] Other federal courts have granted counsel fees but have been unable to agree on a theory justifying such awards.[390] Recognizing the confusion in the lower federal courts as to whether and under what circumstances fees may be awarded out of state funds, the Supreme Court recently agreed to review the Second Circuit's decision in *Fitzpatrick v. Bitzer*.[391]

B. *Fitzpatrick v. Bitzer*

Plaintiffs[392] brought a class action suit under Title VII of the 1964 Civil Rights Act[393] seeking declaratory and injunctive relief, retroactive benefits and attorneys' fees from defendant state officials[394] enforcing allegedly sexually discriminatory provisions of the state employees retirement act.[395] The district court granted the injunctive relief but, interpreting *Edelman* as barring all retroactive money judgments from state funds, denied the plaintiffs' request for retroactive retirement benefits and attorneys' fees.[396] On appeal, the Second Circuit affirmed the denial of the back pay claim but reversed the bar of attorneys' fees.[397]

Relying on *Ford Motor Co. v. Department of the Treasury*[398] the

award from state funds would have a greater immediate financial impact than future payments and thus would constitute a greater interference with the state's financial stability. *Id.* at 666 n.11.

389. *See, e.g.*, Skehan v. Board of Trustees, 501 F.2d 31 (3d Cir. 1974), *vacated on other grounds*, 421 U.S. 983 (1975); San Antonio Conserv. Soc'y v. Texas Highway Dep't, 496 F.2d 1017, *rehearing en banc granted*, 496 F.2d at 1026 (5th Cir. 1974), *cert. denied*, 420 U.S. 926, *aff'd*, 519 F.2d 1372 (5th Cir. 1975).

390. *Compare, e.g.*, Thonen v. Jenkins, 517 F.2d 3 (4th Cir. 1975) (once federal court has jurisdiction it has power to award attorney fees as incident of hearing) *with* Class v. Norton, 505 F.2d 123 (2d Cir. 1974) (fee awards permissible since necessary to ensure future compliance with federal law).

391. 519 F.2d 559 (2d Cir. 1975), *cert. granted*, 423 U.S. 1031 (1975).

392. Plaintiffs were retired male employees of the state of Connecticut and members of the State Employees' Retirement System, a retirement benefit plan established by the State Employees Retirement Act, CONN. GEN. STAT. §§ 5-152 to 5-192 (1958). 519 F.2d at 561.

393. 42 U.S.C. § 2000e (1970), *as amended*, Pub. L. No. 92-261, 86 Stat. 103 (1972).

394. Defendants were the state treasurer, state comptroller, and the chairman of the State Employees' Retirement Commission. 519 F.2d at 561.

395. Plaintiffs objected to §§ 5-162, 5-163, & 5-166, which granted women employees having 25 or more years of state service the right to retire with full pension rights five years earlier than similarly-situated men and provided rate differentials favoring female over male employees who retired with less than 25 years of service. *Id.* at 561.

396. Fitzpatrick v. Bitzer, 390 F. Supp. 278, 288-90 (D. Conn. 1974).

397. 519 F.2d at 563.

398. 323 U.S. 459 (1945).

court initially determined that the eleventh amendment bars suits brought primarily to recover money from the state.[399] Interpreting *Edelman* as foreclosing retroactive payments of monetary damages from state funds, the court found judgments requiring public expenditures in connection with efforts to obtain or implement injunctive relief against the state permissible as having merely an "ancillary effect on the state treasury."[400] Distinguishing attorneys' fee awards from impermissible relief against the state, the court noted that claims for fee awards are not the essence of the lawsuit. Having jurisdiction over the main action for injunctive relief, the court determined that fees, like costs, may be assessed as incidental to a prospective order.[401] Referring to a previous decision[402] the court then suggested a second basis for its holding. Observing that it was necessary for the plaintiff to incur counsel fees to invoke the court's power to enjoin future illegal conduct by state officials the court found that fee awards represent a cost of obtaining prospective relief.[403] Given the limited resources of most plaintiffs seeking injunctive relief against state officers, the court reasoned that fee awards are a necessary and substantial incentive for future enforcement of federal law.[404] Moreover, the court asserted that such awards serve as an effective deterrent to future violations.[405] Finding attorneys' fees both ancillary and prospective within *Edelman*'s meaning, the court concluded that fee awards are not within the bar of the eleventh amendment.

C. *Comment*

In approving attorneys' fee awards from state funds, *Fitzpatrick* expands federal judicial power over state governments. In *Edelman* the Supreme Court approved indirect financial consequences to state treasuries necessarily resulting from future compliance with federal court decrees.[406] Fee awards, on the other hand,

399. 519 F.2d at 564.

400. *Id.* quoting Edelman v. Jordan, 415 U.S. 651, 668 (1974).

401. 519 F.2d at 571. *See* Thonen v. Jenkins, 517 F.2d 3, 8 (4th Cir. 1975); Souza v. Travisono, 512 F.2d 1137, 1139 (1st Cir. 1975); Class v. Norton, 505 F.2d 123, 126 (2d Cir. 1974); Jordan v. Fusari, 496 F.2d 646, 650 (2d Cir. 1974).

402. Class v. Norton, 505 F.2d 123 (2d Cir. 1974).

403. *See id.* at 127; Rodriguez v. Swank, 496 F.2d 1110, 1113 (7th Cir. 1974); Note, *supra* note 337, at 1893-94.

404. 519 F.2d at 571. *See* Downs v. Department of Pub. Welfare, 65 F.R.D. 557, 561 (E.D. Pa. 1974).

405. 519 F.2d at 571. *See* Class v. Norton, 505 F.2d at 127; Gates v. Collier, 44 U.S.L.W. 2405, 2406 (N.D. Miss. Feb. 3, 1976).

406. 415 U.S. at 668.

represent direct payments from state funds to reimburse litigants for expenses resulting from defendant officials' past actions. Thus, fee awards are not permissible "ancillary effects" on the state treasury within the meaning of *Edelman v. Jordan.*

While *Edelman* does not mandate fee awards, such relief seems consistent with the overall prospective thrust of that decision. In disallowing the payment of wrongfully withheld welfare benefits, the *Edelman* Court noted that such relief was retroactive and unnecessary to protect the federal courts' ability to require future state compliance.[407] Fee awards are prospective both in purpose and general effect. Under the private attorney general and bad faith rationales federal courts award fees to encourage future enforcement and deter future violations of federal law.[408] Thus, fee awards, which *Fitzpatrick* correctly characterized as a cost of obtaining future compliance, seem permissible. Moreover, such awards do not seem to be the kind of retroactive relief barred by *Edelman.* There the Supreme Court found the relief sought to closely resemble damages.[409] Fee awards differ from damages in several respects. First, rather than compensating plaintiffs for the past breach of a legal duty by state officials, fees reimburse the cost of obtaining a remedy. Second, the amount of such an award is generally not large enough to seriously disrupt the state treasury.[410] Finally, such awards may be "tailored" to alleviate the fiscal impact on the state's budgeting process.[411]

In reviewing the Second Circuit's allowance of attorneys' fee awards from state funds, the Supreme Court should consider modification of the test employed in *Edelman.* Given the ambiguous nature of attorney fees and the need for flexibility to accommodate the competing policies of the eleventh amendment and *Ex parte Young,* a mechanical prospective-retroactive or injunctive-monetary test seems inappropriate.[412] A better approach would be one which balances the importance of fee awards to the enforcement of federal statutes and vindication of constitutional rights against undue federal involvement in legitimate state activities and disrup-

407. *Id. See* Note, *supra* note 337, at 1881.

408. *See* notes 253-59 *supra* and accompanying text.

409. 415 U.S. at 666 n.11, 668.

410. *See* Newman v. Alabama, 522 F.2d 71, 75-76 (5th Cir. 1975) (Gewin, J., dissenting); Note, *supra* note 337, at 1895-96 & n.126.

411. In *Edelman* the Supreme Court noted the possibility that an award might be tailored but chose not to consider alternatives to the award before it. 415 U.S. at 665.

412. *See* Downs v. Department of Pub. Welfare, 65 F.R.D. 557, 561 (E.D. Pa. 1974).

tion of state finances. Applying such a test to counsel fees the Court should initially note that the inability of most individuals to finance litigation against state governments and the unavailability of retroactive benefits make fee awards necessary to effectuate future state compliance with the requirements of federal law.[413] While fee awards may be recovered from state officials in their personal capacities,[414] recent court decisions have required a showing of bad faith[415] or even malicious conduct[416] by defendant officials to justify such awards. Thus, fee awards from state officers as individuals are seldom possible. Moreover, such awards do not unacceptably increase federal judicial power over state programs. The fiscal burdens on state treasuries entailed in judicial orders requiring prospective payments can clearly be greater than those caused by attorneys' fee awards.[417] Further, fee awards would ensure equal access to the courts for persons seeking vindication of important federal rights. While the Court has been unwilling to characterize access as a fundamental right,[418] it has employed stricter scrutiny when restrictions limiting access to the courts have prevented the securing of such rights.[419] Since most suits seeking injunctive relief against state officers involve issues fundamental in nature or rights specifically protected by the Constitution, it would seem that the Court should require a strong interest by the states in prohibiting fee awards. Since fee awards would not seriously disrupt state activities and programs, it appears that the states lack sufficiently important interest to bar such relief. Thus, after balancing the competing interests involved it would seem that the Court should affirm *Fitzpatrick* and uphold the power of the federal judiciary to award attorneys' fees.

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413. *See* 415 U.S. at 691 (Marshall, J., dissenting); Note, *The Outlook for Welfare Litigation in the Federal Courts:* Hagans v. Lavine & Edelman v. Jordan, 60 CORNELL L. REV. 897, 907-08 (1975).

414. *See* Wood v. Strickland, 420 U.S. 308 (1975); Scheuer v. Rhodes, 416 U.S. 232 (1974).

415. Skehan v. Board of Trustees, 501 F.2d 31, 43-44 & n.7 (3d Cir. 1974), *vacated on other grounds*, 421 U.S. 983 (1975).

416. Class v. Norton, 505 F.2d 123, 127-28 (2d Cir. 1974).

417. *See* Gates v. Collier, 44 U.S.L.W. 2405 (N.D. Miss. Feb. 3, 1976); Note, *Edelman v. Jordan: A New Stage in Eleventh Amendment Evolution*, 50 NOTRE DAME LAW. 496, 501-02 (1975).

418. United States v. Kras, 409 U.S. 434 (1973). *But see* Note, *Free Access to the Civil Courts as a Fundamental Constitutional Right: The Waiving of Filing Fees for Indigents*, 8 NEW ENGLAND L. REV. 275, 302 (1973).

419. *See* Goodpaster, *The Integration of Equal Protection, Due Process Standards, and the Indigent's Right of Free Access to the Courts*, 56 IOWA L. REV. 223, 253-54 (1970).

VII. Conclusion

Faced with increasing demand for legal services at reasonable cost and the need for private enforcement of legal rights, the judiciary has expressed concern over the regulation of attorneys' fees. In recent litigation, the courts have attempted to balance the interests of consumers in obtaining legal services against countervailing ethical and social interests. In declining to exempt minimum fee schedules from the antitrust laws, the *Goldfarb* Court found that the public interest in preventing unethical competitive practices did not justify the greater consumer harm generated by price-fixing. Current litigation concerning legal fee advertising indicates that the rights of consumers to receive information must be balanced against the states' need to prevent fraud, misrepresentation, client neglect, and other unethical practices. Careful balancing of these considerations indicates that the interests of consumers should ultimately prevail, at least to the extent of limited fee advertising in legal directories published by consumer organizations. In *American Trial Lawyers* the New Jersey court upheld its schedule of maximum contingent fees by finding that any possible infringement upon the access of litigants to the judicial system was outweighed by the clients' needs for protection from excessive fees. While the *Alyeska* Court recognized the importance of fee shifting in the vindication of federal statutory rights, it felt that fee awards were inappropriate due to the inability of the federal judiciary to articulate an objective standard. Finally, in viewing fee shifting as necessary to insure future state compliance with federal law, federal courts have awarded fees from state funds despite objections that such awards impair state sovereignty and disrupt state finances.

These developments have important implications for the powers of the judiciary. In establishing a schedule of maximum contingent fees, the court in *American Trial Lawyers* exercised a legislative function which it found inherent in its supervisory power over the conduct of attorneys. However, by refusing to shift fees under the private attorney general rationale, the *Alyeska* Court expressly declined to recognize a judicial power to act legislatively. While these decisions appear inconsistent, they can perhaps be reconciled. The regulation of contingent fees upheld by the New Jersey court more closely resembles an exercise of the traditional judicial power over attorney discipline; furthermore, since the disciplinary power is vested solely in the courts, a quasi-legislative court rule does not usurp the province of the legislature. The award of fees in public interest litigation under the private attorney general rationale, how-

ever, arguably requires a subjective evaluation on the part of judges to distinguish important rights from less important ones and thereby invites encroachment upon the legislative branch. While the courts appear unwilling to assume a purely legislative function, a synthesis of these cases perhaps shows a trend in the courts to expand judicial authority where the object of regulation is an independent legitimate concern of the judiciary.

Furthermore, these developments portend greater regulation of the legal profession by the federal courts. Traditionally, the practice of law has been controlled by state supreme courts in conjunction with the organized bar. However, faced with the reluctance of these bodies to institute needed reforms, the federal courts have evidenced an increased willingness to intervene. In *Goldfarb* the United States Supreme Court invalidated under the federal antitrust laws minimum fee schedules promulgated without state approval. In pending litigation concerning legal advertising, the federal courts appear likely to use the first amendment to strike down bar restrictions approved by state supreme courts. Thus relying upon jurisdiction conferred by the federal constitution and statutes, the federal judiciary seems to be establishing standards for the regulation of the legal profession previously vested in the states. While the import of this trend is not yet clear, federal courts in future cases might use other federal limitations such as due process and equal protection, to scrutinize other state regulation of the practice of law.

Finally, these developments portend siguificant changes in the delivery of legal services. The elimination of minimum fee schedules and relaxation of restrictions on fee advertising appear likely to reduce legal costs and expenses through price competition. The dissemination of fee information also seems likely to enhance public knowledge of and thus increase consumer demand for legal services. These changes promise to generate structural change within the profession and lead to increased efficiency and economy in the provision of legal services. Increased demand will permit small firms to undertake a wider range of services and to develop economies of scale through greater specialization and use of paraprofessionals. Competitive pressures may create new types of firms such as legal clinics which are able to initiate more efficient procedures which would result in better service at lower cost. While the implications of these developments remain unclear, they promise to close the gap between the need and availability of legal services, provide equal

access to the courts for low and middle income consumers, and thus make equal justice under law a practical reality.

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