Reimbursement for Attorneys' Fees from the Beneficiaries of Representative Litigation

Minn. L. Rev. Editorial Board

Follow this and additional works at: https://scholarship.law.umn.edu/mlr
Part of the Law Commons

Recommended Citation
https://scholarship.law.umn.edu/mlr/3048

This Article is brought to you for free and open access by the University of Minnesota Law School. It has been accepted for inclusion in Minnesota Law Review collection by an authorized administrator of the Scholarship Repository. For more information, please contact lenzx009@umn.edu.
Note: Reimbursement for Attorneys' Fees From the Beneficiaries of Representative Litigation

I. INTRODUCTION

In 1875 Francis Vose, a bondholder whose successful litigation had prevented the dissipation of the real estate pledged to his bonds, filed a petition for the expenses of his litigation, including the fees of his attorneys.¹ A century later courts are still wrestling with the basic question presented by Vose's petition: when should attorneys' fees² be awarded in representative litigation? This Note will review the criteria which the courts have developed and will propose a refinement to overcome difficulties encountered in the application of those criteria. "Representative litigation" will include all legal services which, if successful—whether by final judgment, administrative adjudication, settlement or otherwise—directly benefit an ascertainable class of people,³ as did the services employed by Francis Vose.⁴ Although similar issues have confronted state courts,⁵ this Note will be primarily concerned with the development of federal law in the federal courts.

The basic American attitude toward attorneys' fees is unique. The rule in England,⁶ and apparently throughout the

² Throughout this Note the term "attorneys' fees" includes items which are analytically equivalent, such as fees of investigators and expert witnesses. See, e.g., id. at 530 (investigators); Monaghan v. Hill, 140 F.2d 31, 34-35 (9th Cir. 1944) (expert witnesses).
³ See text accompanying note 77 infra. Cf. Nussbaum, Attorney's Fees in Public Interest Litigation, 48 N.Y.U.L. Rev. 301, 304-05 (1973) (defining "public interest litigation") [hereinafter cited as Nussbaum]. Throughout this Note the word "class" refers to the beneficiaries of any proceeding, unless the context indicates that it is used in its technical "class action" sense. See FED. R. CIV. P. 23.
⁴ See text accompanying notes 16-21 infra.
⁵ See, e.g., Annots., 38 A.L.R.3d 1384 (1971); 9 A.L.R.2d 1132 (1950); Nussbaum, supra note 3, at 314 & n.48, 315 n.51.
⁶ The English court rules provide that "[o]n the taxation of a solicitor's bill to his own client . . . all costs shall be allowed except in so far as they are of an unreasonable amount or have been unreasonably incurred." RULES OF THE SUPREME COURT, ORDER 52, Rule 29(1). The general rule is that all such taxable costs "follow the event." Id., at Rule 3(2). See The Solicitors Act 1957, 5 & 6 Eliz. 2, c. 27, § 69 (taxation of bills on application of party chargeable or solicitor). See also Stoebuck, Counsel Fees Included in Costs: A Logical Development, 38 U. Colo. L. Rev. 202, 204-07 (1966); Goodhart, Costs, 38 YALE L.J. 849, 856-58 (1929).
rest of the world,\textsuperscript{7} is that in any action the prevailing party may ordinarily recover attorneys' fees from his unsuccessful adversary. Although this rule was transplanted to colonial America,\textsuperscript{8} it was subsequently abandoned in favor of the practice that each litigant must bear the burden of his own representation.\textsuperscript{9}

In the federal courts this practice was tentatively recognized in 1796, when the Supreme Court acknowledged that "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."\textsuperscript{10} From this modest beginning the practice evidently increased in dignity with the passage of time, for by 1872 the Court was confident that "the principle of disallowance rests on a solid foundation, and . . . the opposite rule is forbidden by the analogies of the law and sound public policy."\textsuperscript{11} In 1960 Judge Friendly reviewed both the judicial history of this principle and its underlying public policies and concluded:

\begin{quote}
[T]he American practice of generally not including counsel fees in costs was a deliberate departure from the English practice, stemming initially from the colonies' distrust of lawyers and continued because of a belief that the English system favored the wealthy and unduly penalized the losing party.\textsuperscript{12}
\end{quote}

The Supreme Court employed similar language in 1967 to reaffirm the validity of the American practice.\textsuperscript{13} Speaking for the Court, Chief Justice Warren observed that "the poor might be unjustly discouraged from instituting actions to vindicate their rights if the penalty for losing included the fees of their opponents' counsel."\textsuperscript{14}

\begin{enumerate}
\item See Nussbaum, supra note 3, at 311-12 & n.31; Ehrenzweig, Reimbursement of Counsel Fees and the Great Society, 54 Cal. L. Rev. 792 (1966).
\item See McCormick, Counsel Fees and Other Expenses of Litigation as an Element of Damages, 15 Minn. L. Rev. 619, 620 (1931).
\item Id. See also Nussbaum, supra note 3, at 312-13.
\item Arcambel v. Wiseman, 3 U.S. (3 Dall.) 306 (1796).
\item Oelrichs v. Spain, 82 U.S. (15 Wall.) 211, 231 (1872).
\item Conte v. Flota Mercante Del Estado, 277 F.2d 664, 672 (2d Cir. 1960). The American practice, however, has been vigorously attacked upon the very same ground. One advocate of a return to the English rule has observed "[i]n sorrow and in anger—and in hope" that the American practice "is not founded on some age-old principle of the common law or a peculiar psychology of the American people; but . . . is the result of a more or less accidental statutory history." Ehrenzweig, supra note 7, at 792, 798. See also Goodhart, supra note 6, at 874-76; McCormick, supra note 8, at 638-43.
\item Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714 (1967).
\item Id. at 718.
\end{enumerate}
II. THE DEVELOPMENT OF A RULE OF REIMBURSEMENT IN REPRESENTATIVE LITIGATION

While the American practice of disallowing attorneys' fees was increasing in dignity and judicial favor, it was also accumulating qualifications and refinements. In the context of representative litigation, these qualifications and refinements originated with the Supreme Court's approval of the award of attorneys' fees to Francis Vose in Trustees v. Greenough. Vose was a large holder of bonds of the Florida Railroad Company. On behalf of himself and the other bondholders, he filed a bill against the trustees for a "fund" of over ten million acres of state-owned lands, pledged for the payment of interest on the bonds and installments of a sinking fund for meeting the principal. The bill alleged that the trustees had refused to meet the obligations of interest and installments and had dissipated the fund through fraudulent conveyances at nominal prices. After the trustees had been replaced by the court and a large portion of the fund had been preserved for the benefit of the bondholders, Vose petitioned for reimbursement from the fund for his expenses in the successful litigation. The circuit court granted the petition, and the Supreme Court affirmed, likening Vose to a trustee, who is entitled to reimbursement for the reasonable expenses of preserving the trust. In support of that analogy, the Court observed first that Vose had represented all other bondholders in the action and, second, that he had

15. See generally Annot., 8 L. Ed. 2d 894 (1963). Judicial refinement of the practice has been accompanied by congressional provision for "fee shifting" in certain remedial statutes. See note 91 infra.
17. Id. at 532-33. The Court said that "if the complainant is not a trustee, he has at least acted the part of a trustee in relation to the common interest." Id. at 532. However, in reversing the circuit court's order to the extent it included reimbursement for Vose's personal services and expenses, the Court distinguished him from a trustee and preferred to treat him as an ordinary creditor:

Where an allowance is made to trustees for their personal services, it is made with a view to secure greater activity and diligence in the performance of the trust, and to induce persons of reliable character and business capacity to accept the office of trustees. These considerations have no application to the case of a creditor seeking his rights in a judicial proceeding. It would present too great a temptation to parties to intermeddle in the management of valuable property or funds in which they have only the interest of creditors, and that perhaps only to a small amount, if they could calculate upon the allowance of a salary for their time and of having all their private expenses paid.

Id. at 537-38.
18. "[T]he bill was filed not only in behalf of the complainant
brought into court a fund from which all bondholders received a benefit.19 The Court concluded:

[The other bondholders] ought to contribute their due proportion of the expenses which [Vose] has fairly incurred. To make them a charge upon the fund is the most equitable way of securing such contribution.20

Thus it might be said that Vose's reimbursement was not so much an exception to the American practice of charging attorneys' fees to each litigant as it was an application of the broader principle that attorneys' fees ought to be borne by the persons directly benefiting from the litigation, whether or not they are joined as parties.21 The circumstances in which such reimbursement is appropriate have been delineated by the subsequent judicial refinement of the three factors identified by the Greenough court: (1) a procedural context in which an action is brought on behalf of others besides the litigant himself; (2) a substantive context in which those others are benefited by the action; and (3) a practical context in which reimbursement can conveniently flow from the beneficiaries to the litigant.

A. The Procedural Context: The Form of the Litigation

Although it antedated the Federal Rules of Civil Procedure, Greenough was an example of a representative or class action—a suit by a creditor on behalf of himself and other creditors similarly situated.22 Reimbursement for attorneys' fees has subsequently been allowed for other litigation initiated expressly as class suits or other representative actions. These actions have included taxpayers' suits,23 utility rate refund suits,24 suits himself, but in behalf of the other bondholders having an equal interest in the fund . . . ." Id. at 532.

19. [T]he bill sought to rescue that fund from waste and destruction arising from the neglect and misconduct of the trustees, and to bring it into court for administration according to the purposes of the trust: and where all this has been done . . . the other bondholders have come in and participated in the benefits resulting from his proceedings. . . .

20. Id.


against the United States on behalf of local governments or Indian tribes, suits on behalf of employees to recover back wages, civil antitrust suits, and shareholders' derivative suits.

In *Sprague v. Ticonic National Bank* the Supreme Court recognized the propriety in certain circumstances of allowing reimbursement for attorneys' fees beyond the formal limits of a class suit or other representative action. In that case the bank had set aside certain bonds as security for fifteen trusts under its management. When the bank became insolvent, the petitioner, a beneficiary of one of the trusts, established her claim to a lien on the proceeds of the bonds. Although she had not purported to represent a class, the petitioner subsequently sought reimbursement for "reasonable counsel fees and litigation expenses to be paid out of the proceeds of the bonds," on the ground that "she had established as a matter of law the right to recovery in relation to fourteen trusts in situations like her own." The Court directed that her petition be entertained, stating:

> [W]hen such a fund is for all practical purposes created for the benefit of others, the formalities of the litigation—the absence of an avowed class suit or the creation of a fund, as it were, through *stare decisis* rather than through a decree—hardly touch the power of equity in doing justice as between a party and the beneficiaries of his litigation.

---

33. *Id.* at 167. However, in view of the interests of other creditors in the insolvent bank's limited assets, the Court strictly confined its opinion to the district court's power to entertain the petition, refusing to express a view on the merits of the claim for fees. The Court warned that "such allowances are appropriate only in exceptional cases and for dominating reasons of justice." *Id.* Despite these words of caution reimbursement was ultimately awarded by the lower courts. *Sprague v. Ticonic Nat'l Bank*, 110 F.2d 174 (1st Cir. 1940).
Since this Supreme Court decision, lower courts have freely awarded reimbursement of attorneys' fees, notwithstanding the plaintiff's failure to bring a strictly representative action.84 The ingredient common to these cases has been successful litigation, conducted by the plaintiff, but accruing to the benefit of nonparticipants who could have brought the action themselves.

B. THE SUBSTANTIVE CONTEXT: THE NATURE OF THE BENEFIT

The type of nonparticipant benefit which will support an award of attorneys' fees has been the subject of considerable litigation. The earliest decisions required such benefit to be reflected in a specific fund. Subsequent decisions recognized monetary benefit apart from a specific fund, while the current approach is to require only a "substantial" benefit, even if it is not measured in monetary terms.

In the early case of Trustees v. Greenough attorneys' fees were reimbursed from a fund brought into court for proper administration.85 The practice was extended three years later to a lien on property not specifically brought under the management of the court.86 Both decisions involved the preservation of a fund to which the nonparticipating beneficiaries had monetary claims—a rather objective example of benefit. An award of attorneys' fees from either fund was equivalent to a proportionate contribution from the beneficiaries to the expenses of realizing the benefit.87 The doctrine supporting reimbursement in such cases has thus become known as the "equitable fund"88 or "common fund"89 doctrine, and it has been applied to both the creation and the preservation of monetary funds.


35. See note 19 supra.


37. See text accompanying note 20 supra.


Recent decisions have relaxed the requirement of a specific connection between the "fund" and the beneficiaries, such as a trust or a lien. Much of this development has occurred within the context of shareholders' derivative suits in the Second Circuit. In two cases the "fund" consisted merely of a judgment for the "short-swing" profits recovered for the corporation against officers and directors who had engaged in "insider" securities transactions prohibited by section 16(b) of the Securities Exchange Act of 1934. In a subsequent case there was no identifiable fund at all; instead, the corporation had simply been relieved of its obligation to issue a quantity of stock at 60 percent of its market value under a stock option plan. When the plan was successfully challenged under section 10(b) of the Securities Exchange Act, no affirmative benefit was realized, but some monetary loss was avoided. In all three of these cases the complaining shareholders' attorneys' fees were assessed generally against the corporation benefited by the suit, and not specifically against a separate fund.

The same court which relaxed the requirement that the monetary benefit to a corporation be reflected in a specific fund had previously expressed dissatisfaction with the requirement that the benefit even be measurable in monetary terms. In Schechtman v. Wolfson the Court of Appeals for the Second Circuit considered the reimbursement of attorneys' fees in a derivative action aimed at interlocking directorates. Despite the absence of a benefit expressed in monetary terms, the court rejected as "foolish" the suggestion that federal law would authorize such suits but deny reimbursement for the attorneys' fees. (7th Cir.), cert. denied, 307 U.S. 648 (1939) (fund for refund of utility overcharges).

42. Blau v. Rayette-Faberge, Inc., 389 F.2d 469 (2d Cir. 1968); Gibson v. Chock Full O'Nuts Corp., 331 F.2d 107 (2d Cir. 1964).
45. The challenge was successful in that the corporation's board of directors mooted the action by cancelling the stock option plan when it appeared to be doomed. See text accompanying notes 123-129 infra. 279 F. Supp. at 809-10.
47. The court recognized that the monetary detriment of the stock option plan might have been partially offset by its incentive benefit. However, in view of the illegality of the plan's ratification, the court assumed that the offset would have been inadequate and that some monetary detriment would have remained. 279 F. Supp. at 809-10.
48. 244 F.2d 537 (2d Cir. 1957).
fees without which the suits would virtually never be brought. 50 Although such strong assertions would seemingly support the award of attorneys' fees, they remained dicta. Reimbursement was denied on the ground that the plaintiff had not demonstrated that the benefit to the corporation had been "substantial." 51

The Schechtman dictum was developed into a forthright holding, not by the federal courts, but by the Supreme Court of Minnesota in the leading case 52 of Bosch v. Meeker Cooperative Light & Power Association. 53 In that case a shareholder had obtained a determination that a purported election of corporate directors had been illegal. 54 His subsequent petition for attorneys' fees was denied by the trial court on the ground that his action had not resulted in pecuniary benefit to the corporation. The supreme court reversed, stating that a finding of substantial benefit to the corporation and its shareholders would support the award of reasonable attorneys' fees, whether or not the benefit was pecuniary. 55 The court said:

Where an action by the stockholder results in a substantial benefit to a corporation he should recover his costs and expenses . . . . [A] substantial benefit must be something more than technical in its consequence and be one that accomplishes a result which corrects or prevents an abuse which would be prejudicial to the rights and interests of the corporation or affect the enjoyment or protection of an essential right to the stockholder's interest. 56

This language was adopted by the United States Supreme Court in Mills v. Electric Auto-Lite Co., 57 a case hailed for its impact on the traditional practices respecting attorneys' fees. 58 Shareholders of Electric Auto-Lite sought to set aside a merger,
alleging that its ratification had been obtained in violation of section 14(a) of the Securities Exchange Act of 1934® and the proxy rules thereunder.® The district court entered an interlocutory summary judgment for the plaintiffs on the issue of liability,⁶¹ and the court of appeals reversed.⁶² Upholding the district court, the Supreme Court held that the proxy violations established a cause of action⁶³ and remanded the case for further proceedings on the issue of relief.⁶⁴ Since the issue of liability had been resolved in favor of the petitioning shareholders, the Court held that they were entitled to interim reimbursement for their attorneys’ fees.⁶⁵

Mills represented the confluence of two streams of judicial thought. One stream involved the evolution of the old “equitable fund” into the concept of substantial benefit articulated in Bosch. Although unable to express the proxy violations in strictly monetary terms,⁶⁶ the Mills Court permitted reimbursement of fees, by restating the equitable fund doctrine in terms of substantial benefit:

Other cases have departed further from the traditional metes and bounds of the doctrine, to permit reimbursement in cases where the litigation has conferred a substantial benefit on the members of an ascertainable class, and where the court’s jurisdiction over the subject matter of the suit makes possible an award that will operate to spread the costs proportionately among them.⁶⁷

The other stream contributing to the Mills decision emanated from a line of cases encouraging litigation by “private attorneys-general.” The expression was used as early as 1943 to describe persons explicitly given standing by Congress “to institute a proceeding . . . to vindicate the public interest.”⁶⁸ The concept was implicit in a variety of subsequent cases recognizing private causes of action under federal statutes, including the securities legislation which has been a frequent subject of class

60. SEC Reg. 14a-9, 17 C.F.R. § 240.14a-9 (1973) (false or misleading statements).
64. Id. at 386-389, 397.
65. Id. at 399-97.
66. See id. at 396.
and derivative suits. In 1968 the expression was invoked to support reimbursement of attorneys' fees in civil rights litigation. Two years later, the Mills Court reflected the influence of the private attorney-general concept:

[T]he stress placed by Congress on the importance of fair and informed corporate suffrage leads to the conclusion that, in vindicating the statutory policy, petitioners have rendered a substantial service to the corporation and its shareholders. . . .

[Mills] has been cited to support reimbursement of attorneys' fees in litigation vindicating a number of statutory and constitutional policies. In addition to corporate suffrage, fair legislative apportionment.


70. Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400, 402 & n.3 (1968) (per curiam). Piggie Park was a class action under section 204(a) of the Civil Rights Act of 1964, 42 U.S.C. § 2000a-3(a) (1970), to enjoin racial discrimination at five drive-in restaurants and a sandwich shop. The Act provided that "the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs . . . " 42 U.S.C. § 2000a-3(b) (1970). The Court rejected a subjective standard of delay or bad faith and held that the congressional intent "to encourage individuals injured by racial discrimination to seek judicial relief" dictated an award of fees to every successful attorney, "unless special circumstances would render such an award unjust." 390 U.S. at 402. In the wake of Piggie Park, recovery of attorneys' fees from the defendant has become the general rule in racial discrimination litigation. See Cooper v. Allen, 467 F.2d 838 (5th Cir. 1972); Lee v. Southern Home Sites Corp., 444 F.2d 143 (5th Cir. 1971); Note, Awarding of Attorneys' Fees in School Desegregation Cases: Demise of the Bad-Faith Standard, 39 BROOKLYN L. REV. 371 (1972); Note, Allowance of Attorney Fees in Civil Rights Litigation Where the Action is not Based on a Statute Providing for an Award of Attorney Fees, 41 U. CHI. L. REV. 405 (1972); cf. Brewer v. School Bd., 456 F.2d 943 (4th Cir.), cert. denied, 409 U.S. 892 (1972) (equitable fund created by a racial discrimination suit). See also Nussbaum, supra note 3, at 318-31 (discussing the principle described as the "Piggie Park-Mills doctrine").


72. E.g., Swanson v. American Consumers Indus., Inc, 475 F.2d 518 (7th Cir. 1973) (action by a minority shareholder to rescind a corporate reorganization).

73. E.g., Hall v. Cole, 412 U.S. 1 (1973) (suit for reinstatement of an expelled union member); Yablonski v. United Mine Workers, 468 F.2d 424 (D.C. Cir. 1972), cert. denied, 412 U.S. 918 (1973) (four suits by a candidate for union office to compel compliance with the Labor
ment and environmental protection. In the recent environmental case of *La Raza Unida v. Volpe*, the court summarized the dual common fund/private attorney-general rationale of *Mills*:

*Mills* extended the scope of the common-fund justification for the awarding of fees by holding that no pecuniary benefit need be demonstrated. . . .

. . . . The rule briefly stated is that whenever there is nothing in a statutory scheme which might be interpreted as precluding it, a private attorney-general should be awarded attorneys’ fees when he has effectuated a strong Congressional policy which has benefited a large class of people, and where further the necessity and financial burden of private enforcement are such as to make the award essential.

It is the requirement of a benefit to “a large class of people” which distinguishes the *Mills* result from a wholesale adoption of the English rule on attorneys’ fees. Several cases decided before *Mills* illustrate the confusion which can develop when this requirement is overlooked. In 1941, for example, the Court of Appeals for the Seventh Circuit approved the award of attorneys’ fees in a trademark infringement suit, despite the failure of the litigation to directly benefit a class. This decision precipitated a flurry of similar decisions, citing and being cited by one another. Finally, in *Fleischmann Distilling Corporation v. Maier Brewing Company*, the Supreme Court held that attorneys’ fees could not be reimbursed in trademark cases, observing that “none of the considerations which supported the [equitable fund doctrine] are present here.” The significance

74. E.g., Sims v. Amos, 340 F. Supp. 691 (M.D. Ala. 1972) (suit by voters against state officials to impose a plan of legislative reapportionment).
76. *Id*. This was a suit only for injunctive relief, which under the pre-*Mills* common fund doctrine had been held inadequate to support reimbursement of attorneys’ fees. Decorative Stone Co. v. Building Trades Council, 23 F.2d 428 (2d Cir. 1928).
77. 57 F.R.D. at 97-98.
78. See note 6 supra.
80. The decisions are ably discussed in *Maier Brewing Co. v. Fleischmann Distilling Corp.*, 359 F.2d 156, 161-63 (9th Cir. 1966), aff’d, 386 U.S. 714 (1967).
81. 386 U.S. 714 (1967).
82. *Id.* at 720, citing *Sprague v. Ticonic Nat’l Bank*, 307 U.S. 161 (1939), discussed in text accompanying notes 30-33 supra.
of that observation has escaped some observers, however, and Fleischmann has been criticized as a “stunning step backward” to a position which required a “marked change” before attorneys’ fees could be awarded one year later in civil rights litigation. Actually, since there was no class involved in Fleischmann (only the owner of the trademark rights in question) the Court’s holding is thoroughly consistent with even the most recent summary of the Mills rule, and it remains a reasonable limitation on the reimbursement of attorneys’ fees.

C. The Practical Context: The Effect of Reimbursement

The third factor in any decision to order reimbursement of attorneys’ fees is the practical question whether the cost can be conveniently assessed to the beneficiaries. The objective of the original equitable fund doctrine was to achieve a proportionate allocation among the beneficiaries, and the substantial benefit refinement did not alter this objective. Consequently, proper application of the doctrine should result in the distribution of the burden proportionately among the beneficiaries. Since no court has attempted to tax nonparticipating beneficiaries directly, reimbursement is available only from the parties to the litigation. When a fund is created or preserved, the fund can be invaded to reimburse attorneys, and the pro rata invasion of the interests of the beneficiaries produces exactly the desired result. When a fund is not involved, however, it has been necessary to find another source for reimbursement, and the usual practice has been to shift that burden directly to the defendant. This practice recognizes the defendant’s rep-
resentative character, which enables it to pass its liability for the plaintiff's attorneys' fees to the actual beneficiaries of the legal services. In a shareholders' derivative or representative action, for example, payment of fees by the corporation is absorbed by shareholders' equity and thus in effect is a pro rata payment by the shareholders themselves, the beneficiaries of the action. Similarly, a union, sued by one of its members in a representative capacity, can pass the burden for the plaintiff's attorneys' fees to its members through the collection of dues, while a government agency can achieve a comparable result through taxation.

The environmental case of *La Raza Unida v. Volpe* offers one of the few opinions which specifically recognizes the objective of distributing costs in representative litigation. Considering the question of substantial benefit, the court found benefit conferred on successively wider classes of citizens—from "5000 people about to be uprooted from their homes" to "200,000 residents of Hayward, Union City, and Fremont" to "all Californians" to "almost all of society." The court observed that the award of attorneys' fees against the highway department, public works department and chief highway engineer of the state would be absorbed by the taxpayers and thus would "serve the . . . objective of . . . matching, to the extent that the Court's jurisdiction over the matter makes possible, the costs and the benefits of

---


95. 57 F.R.D. 94 (N.D. Cal. 1972).

96. *Id.* at 100.
In other words, since all California taxpayers benefited from the attorneys' efforts, all California taxpayers would be required to contribute proportionately to their reimbursement. The court employed an award of fees against the state agencies to achieve this proportionate contribution.

A century of litigation has thus honed and refined the rule of Trustees v. Greenough. The formalities of a strictly representative action are no longer essential. Moreover, the benefit required to support reimbursement need not be measurable in monetary terms. Finally, because the refined application of the rule does not always produce a convenient fund, the defendant is called upon with increasing regularity to bear the burden of the plaintiff's attorneys' fees directly, often as a representative of the ultimate beneficiaries.

III. DIFFICULT APPLICATIONS OF THE MODERN RULE

A. CREDITING THE PROPER PARTY: THE "BUT FOR" TEST

It is not always easy to apply the general principles underlying the reimbursement of attorneys' fees for legal services which produce a substantial benefit for a class. In the simple case the attorneys for the plaintiffs pursue litigation to a successful conclusion in court and recover their fees pro rata from the beneficiaries through either a common fund or a representative defendant. In the more complicated case, it may not be obvious that the benefit is produced by the efforts of such attorneys alone, and the court must determine whether the attorneys have earned reimbursement by causing the benefit. In making this determination, one court recently employed a "but for" test: reimbursement was denied because it was not shown that the benefit would have been lost "but for" the services of the petitioning attorneys. Although not often recognized in those express terms, this test has been implicitly used in a variety of contexts to compare the contribution of the petitioning attorneys with the contributions from other sources. These
sources have included the counsel representing other plaintiffs, the government agency responsible for the subject matter, the defendant itself and other intervening causes.

1. Action of Other Counsel

When several attorneys or groups of attorneys represent plaintiffs in the same case, and it is appropriate to award attorneys' fees, the general solution is to apportion fees among them.100 The decisions in complex cases have frequently departed from this solution in form but not in principle.101 For example, in the Plumbing Fixture Antitrust Cases,102 some 370 actions were consolidated pursuant to multidistrict litigation procedures,103 and the plaintiffs from one of the actions were appointed “Class Representatives.”104 Subsequently a fund was created for the satisfaction of various claims, and at least twelve groups of plaintiffs' attorneys from the several consolidated actions petitioned that fees be awarded from the fund.105 The petitions of all but the designated representative attorneys were denied.106 The designated attorneys were awarded fees from the fund in general,107 but not from the portion thereof assigned to the claims of the plaintiffs represented by the other attorneys.108 In other words, the vesting of certain attorneys with

100. See, e.g., Perkins v. Standard Oil Co., 474 F.2d 549, 553-54 & n.7 (9th Cir.), cert. denied, 412 U.S. 940 (1973).
101. See note 110 and accompanying text infra.
104. Id. at 1080.
105. See id. at 1081.
106. Id. at 1092-96. One of the disappointed groups of attorneys successfully appealed. See note 111 infra.
107. Id. at 1086-87. In reversing on this issue, the court of appeals recognized the propriety of awarding fees to the petitioners from the portion of the fund involved. Reversal was based on the district court's failure to hold an evidentiary hearing before determining the amount of the award, and the case was remanded for such a hearing. Lindy Bros. Builders v. American Radiator & Standard Sanitary Corp., 487 F.2d 161, 169-70 (3d Cir. 1973).
a recognized representative status limited reimbursement for the other attorneys to the terms of their individual contracts with their clients. Conversely, the reimbursement of the representative attorneys beyond the terms of their individual contracts was limited to that portion of the fund allocated to beneficiaries which had not participated in the suit. Viewed in these terms, it is apparent that each beneficiary bore a proportionate burden of the fees of only one group of attorneys: the participating plaintiffs paid their own attorneys, while the nonparticipating beneficiaries "paid" the additional compensation of the attorneys for the "Class Representatives." The symmetry of this result appears consistent with the basic objectives of the reimbursement rule, which seeks to match the benefit and the expenses of the litigation.

2. Action of a Government Agency

When reimbursement of attorneys' fees is sought for representation before a government agency, or when the subject of a court proceeding is within the cognizance of a government agency, there is a possibility that the efforts of a private attorney merely duplicate the activity of the agency and produce no benefit that the agency alone could not have ensured. In such a case, application of a "but for" standard might result in the attorney's being "characterized as a mere volunteer who aids a public body or trust in the performance of their official duties on behalf of a certain class, but who is not entitled to compensation." This problem was illustrated in Edison Light &
Power Co. v. Pennsylvania Public Utility Commission.\textsuperscript{113} In that case a merger of a railroad with its wholly owned subsidiary, a public utility, had been opposed by a small group of consumers. Ultimately the merger was prevented, the utility's rate structure was found to be excessive, and a schedule of greatly reduced rates was adopted.\textsuperscript{114} The attorneys representing the consumer group sought reimbursement for their efforts, claiming that they had bestowed a benefit on all consumers. The court denied their petitions on the ground that throughout the proceedings . . . the entire body of consumers was represented by the Public Utility Commission, its legal staff, and the Attorney General of Pennsylvania. Or, if a technical representation—the relation of attorney and client—did not exist, at least these officers assumed, in accordance with the law and the policy of the state, the duty of protecting the consuming public's interests; and there is no suggestion that there was any negligence, inefficiency, or want of fidelity on their part which required their efforts to be supplemented by the attorneys representing the petitioners.\textsuperscript{115}

The converse of this holding was suggested by Schechtman v. Wolfson,\textsuperscript{116} in which a shareholder's prosecution of a derivative action had resulted in the resignation of the offending corporate directors. Taking an approach similar to Edison, the district court denied reimbursement because the plaintiff "could have obtained for [the corporation] gratuitously from the [Federal Trade] Commission everything for which he now asks [the corporation] to reimburse his attorneys."\textsuperscript{117} The court of appeals rejected this argument, observing that "[t]here is nothing in the statute which restricts remedy against interlocking directorates to action by the Commission."\textsuperscript{118} In response to the suggestion that the shareholder should have invoked the aid of the Federal Trade Commission, the court added that "[i]t seems well known that the Commission has found little occasion, and perhaps little incentive, to take action in the premises . . . ."\textsuperscript{119}

\begin{footnotes}
\item 113. 34 F. Supp. 939 (E.D. Pa. 1940), aff'd per curiam, 119 F.2d 779 (3d Cir. 1941).
\item 116. 244 F.2d 537 (2d Cir. 1957).
\item 118. Schechtman v. Wolfson, 244 F.2d 537, 539 (2d Cir. 1957).
\item 119. Id. See also Dolgow v. Anderson, 43 F.R.D. 472, 483 (E.D.N.Y. 1968) ("Because of budgetary limitations and alternative demands on available manpower, the [Securities and Exchange] Commission cannot fully investigate or take action in every case of possible violation.").
\end{footnotes}
However, as the Schechtman court’s innovative “substantial benefit” test remained dicta, so did its evaluation of the Commission’s effectiveness. Attorneys’ fees were denied on other grounds.

Thus attorneys have been denied reimbursement for merely duplicating or paralleling the effective activity of a government agency. Moreover, subject possibly to the Schechtman dicta, reimbursement may be denied even where the agency does not act if the court finds that the agency’s inaction is due to the petitioner’s failure to seek an administrative remedy.

3. Action of the Defendant

The action of the defendant can also detract from the claims of the plaintiffs’ attorneys that they have caused a beneficial result. First, the defendant may render the plaintiffs’ cause of action moot by unilaterally taking the action demanded or rescinding the action challenged. Second, the defendant may assume the cause of action as a plaintiff in its own right. Finally, in cooperation with the plaintiffs’ attorneys, the defendant may agree to a settlement of the action. In any case, the plaintiffs’ attorneys are prevented from pursuing the issues to final judgment. This raises the question of whether they are nevertheless entitled to reimbursement for their efforts to that point. When this question is analyzed with reference to the “but for” standard, the dispositive issue becomes whether the defendant’s salutary action would have occurred “but for” the pressure exerted by the plaintiffs’ attorneys.

It may become unnecessary for the plaintiffs to pursue a cause of action to final judgment because the defendant takes unilateral action to correct the condition complained of. Although it may be appropriate to dismiss such a case as moot, a cause of action for reimbursement of attorneys’ fees may survive. This result was illustrated by the 1968 case of Globus, Inc. v. Jaroff, a shareholders’ derivative action to set aside a stock option plan allegedly ratified in violation of Section 10(b) of the Securities Exchange Act of 1934 and the regu-

120. See text accompanying note 51 supra.
121. Schechtman v. Wolfson, 244 F.2d 537, 540 (2d Cir. 1957).
The plaintiff's motion for summary judgment was denied without prejudice to its renewal after certain additional facts had been obtained. The court thereupon dismissed the action as moot, but concluded that "defendants' cancellation after plaintiff had prosecuted its action to the brink of success provides a sufficient basis for an inference that the cancellation was in fact due to plaintiff's efforts."

Accordingly, reimbursement for attorneys' fees was authorized, although the success was achieved short of a final judgment.

A second method by which a defendant can undermine the benefit produced by the plaintiffs' attorneys is simply to assume the prosecution of the plaintiffs' cause of action. An action which is derivative as well as representative seeks to enforce a right which properly should have been asserted by the corporation or association itself. Therefore it is possible for the attorneys of would-be plaintiffs to prepare or prosecute a derivative action, only to have it supplanted by a primary action brought by the corporation or association. Although ordinarily the plaintiffs' attorneys are not entitled to fees for benefits resulting from the action of the corporation's own counsel, exceptions have been recognized where that action is induced by the threat of litigation.

An example of such an exception is *Gilson v. Chock Full O'Nuts Corp.* in which a shareholder's attorney prepared

---

128. Id. at 810.
129. Id. See also Parham v. Southwestern Bell Tel. Co., 433 F.2d 421, 429 (8th Cir. 1970) (injunctive relief in a civil rights action denied in view of the defendant's "tremendous" voluntary progress, but attorneys' fees awarded in recognition of the suit's effect as a "catalyst"); Blau v. Rayette-Faberge, Inc., 389 F.2d 469, 470-71 (2d Cir. 1968), discussed in text accompanying notes 140-42 infra.
132. 331 F.2d 107 (2d Cir. 1964) (en banc). See also Comment, 64 Colum. L. Rev. 1343 (1964).
a complaint seeking to recover for the corporation profits allegedly made by certain officers and directors on “short-swing” transactions proscribed by section 16(b) of the Securities Exchange Act of 1934.133 The day before he intended to file his complaint, he was advised that the corporation had sued the officers and directors in its own right.134 Considering his subsequent claim for fees, the court acknowledged that attorneys’ fees should not be awarded merely for bringing a claim to the attention of the corporation135 nor for furnishing “watch-dog” services after the corporation’s action had commenced.136 Nevertheless, the court held that the attorney’s services in preparing the complaint were sufficient to merit reimbursement.

In reaching this result, the court stressed both the expressed attitude of the corporation and the timing of its eventual suit. The shareholder’s attorney had advised the corporation of the details of the alleged illegal transactions, but was informed that the corporation’s “preliminary investigation indicates that there has not been any violation by the individuals named . . . .”137 The attorney had also warned the corporation of the two-year statute of limitations, but he was advised of the corporation’s suit only two days before much of the cause of action would have been barred.138 The court held that under these circumstances it was “surely not unreasonable[ly]” to draft a complaint, and on that basis reimbursement was authorized.139

Four years later, the same court of appeals extended the Gilson exception to an almost identical case, in which the shareholder’s intention to file a complaint had been frustrated not by the corporation’s lawsuit but by the offending officer’s payment to the corporation of the “short-swing” profits due it.140 In terms suggesting the “but for” test, the court concluded that “the corporation would most probably have done nothing at all about [its officer’s] trading activities had [the shareholder’s attorney] not investigated on [the shareholder’s] behalf.”141 Reimbursement for the attorney’s fee was therefore allowed.142

134. 331 F.2d at 110.
135. Id. at 109.
136. Id. at 110.
137. Id.
138. Id.
139. Id.
141. Id. at 472.
A third development by which the objectives of litigation may be satisfied short of final judgment is a settlement negotiated by the parties. In such cases attorneys' fees have generally been awarded, notwithstanding the participation of the defendant's counsel in the creation of the benefit. For example, the Plumbing Fixture Antitrust Cases resulted in a settlement, not a judgment, but compensation for fees was nevertheless authorized. The most recent plumbing fixture litigation reveals the basis for distinguishing a settlement from unilateral action by the defendants: not only did the petitioning attorneys actively contribute to every stage of the settlement negotiations, but these negotiations were conducted under the full supervision of the court. Thus the approval of the settlement actually recognized the causal relationship between the petitioning attorneys' actions and the benefit to the represented classes.

4. Other Intervening Causes

When less typical events interrupt litigation and obscure the causal relationship between the efforts of the plaintiffs' attorneys and the ultimate benefit, the "but for" test is still applicable. An example of such an atypical development is furnished by Lafferty v. Humphrey. The appellant attorneys had succeeded in establishing a duty on the part of the United States Government to distribute certain funds to several Oregon counties. Before the allocation of liability between the Departments of Interior and Agriculture and the allocation of the

144. See note 102 supra.
benefit among the counties could be litigated, Congress had dictated a solution, the respective departments had complied, and the Supreme Court had ordered the case dismissed as moot. Reversing the district court's subsequent denial of attorneys' fees, the court of appeals concluded that, despite this considerable intervention, it would have been "little more than a play on words" to say that the appellants' efforts had not been the cause of the benefit to the Oregon counties.

Thus in a number of contexts a "but for" test has been invoked to deny reimbursement for attorneys' fees sought for efforts not considered crucial to the creation of a benefit. On other occasions an award of fees has survived the test when the attorneys' efforts were reasonably motivated by the exigencies of the case and were at least catalytic of the beneficial result.

B. CHARGING THE PROPER PARTY: THE "MATCHING" TEST

While the issue of crediting the proper attorneys for the creation of a benefit has been litigated in a number of factual settings, the issue of charging the proper party has generally been relegated to a secondary status. In La Raza Unida v. Volpe, for example, while the court recognized the "objective of . . . matching . . . the costs and the benefits of litigation," it gave no indication that failure to satisfy a "matching" test would be dispositive. Indeed, the court itself treated "matching" as merely "[an]other objective," the satisfaction of which made "more appealing" a holding already founded on "a sufficient basis." Thus, even in the absence of any "matching" ingredient, the court was evidently prepared to award

158. Id. at 101.
159. Id.
160. But see text accompanying notes 214-16 infra.
attorneys' fees upon that "sufficient basis." Such a result was not reached, however, because the representative character of the governmental defendants fortuitously produced the "more appealing" "matching" result. The "matching" issue can be similarly avoided wherever the defendant's representative character enables it to pass the burden of reimbursement to the actual beneficiaries of the litigation. Moreover, the issue can be avoided even when it is the plaintiff which has the ability to pass expenses to the beneficiaries—such as a government agency suing on behalf of its constituents, either as parens patriae or as a representative of a class. In such a case the plaintiff itself could allocate the cost of the litigation among the benefited citizens by taxation, and no other provision for fees would be necessary.

It may be expected that the continued expansion of public interest litigation will combine with liberalized rules of standing to produce a representative suit which involves no participating party with the ability to pass the costs of the litigation to the true beneficiaries. The "matching" issue then could not be avoided, and such an alignment of parties could necessitate either the denial of fees despite the creation of a benefit or the award of fees despite the absence of "matching."

IV. A NEW APPROACH

A. POLICY OBJECTIVES

In the judicial development of criteria for the reimbursement of attorneys' fees, certain policy objectives have been consistently recognized, and these objectives should continue to be controlling in any new approach. First, there are the ultimate objectives of public policy articulated in acts of Congress, includ-

161. See text accompanying notes 92-97 supra.
162. See text accompanying notes 88-94 supra.
165. For example, section 204(b) of the Civil Rights Act of 1964, 42 U.S.C. § 2000a-3(b) (1970), authorizes the reimbursement of the plaintiff's attorneys' fees, except when the plaintiff is the United States. See Nussbaum, supra note 3, at 301-03.
ing those acts under which representative actions have frequently been brought, such as the securities\textsuperscript{169} and antitrust\textsuperscript{170} statutes. In \textit{Mills v. Electric Auto-Lite Company},\textsuperscript{171} for example, the Court relied upon "the stress placed by Congress on the importance of fair and informed corporate suffrage."\textsuperscript{172} Second, there are the objectives of vindicating important principles of the common law. These principles are often related to acts of Congress, as illustrated in the \textit{Mills} Court's discussion of "the common-law fraud test of whether the injured party relied on the misrepresentation."\textsuperscript{173} Third, there is the objective of encouraging private enforcement of congressional and common-law policies. For example, the Supreme Court has observed that "[p]rivate enforcement of the proxy rules provides a necessary supplement to [Securities and Exchange] Commission action,"\textsuperscript{174} and that "private antitrust litigation is one of the surest weapons for effective enforcement of the antitrust laws."\textsuperscript{175} Finally, the reliance on private enforcement suggests the subordinate objective of affording judicial economy through the encouragement of consolidation\textsuperscript{176} and private settlement.\textsuperscript{177}

While pursuing the positive objectives of representative litigation, any new approach must also avoid certain difficulties. First, there is the hazard of promoting conflict within the plaintiff class itself. A liberal allowance of attorneys' fees might foster "an unseemly race to the courthouse among lawyers who represent different members of the class and wish to acquire

\textsuperscript{169} E.g., \textit{Mills v. Electric Auto-Lite Co.}, 396 U.S. 375 (1970); \textit{Swanson v. American Consumers Indus., Inc.}, 475 F.2d 516 (7th Cir. 1973).

\textsuperscript{170} E.g., the Plumbing Fixture Antitrust Cases. See note 102 supra. See also cases cited notes 73–75 supra.

\textsuperscript{171} 396 U.S. 375 (1970).

\textsuperscript{172} Id. at 396. See also Nussbaum, supra note 3, at 304 ("issues . . . currently regarded as being of extreme importance . . . [and which] have been the recent subject of considerable legislative and public concern"); \textit{Note, Awarding Attorney and Expert Witness Fees in Environmental Litigation}, 58 \textit{Cornell L. Rev.} 1222, 1241 (1973) ("[a]ny area of great public concern").


\textsuperscript{177} \textit{See generally Dole}, supra note 143.
representative and lead counsel status." The potential magnitude of this problem was illustrated in the Plumbing Fixture Antitrust Cases; in the first round of litigation on the subject of fees, the attorneys for the designated "Class Representatives" were awarded over one million dollars from the settlement fund, while eleven other groups of plaintiffs' attorneys were limited to recovery under their private fee arrangements with their clients. Second, there is the persistent problem of "strike suits." As early as 1882, in Trustees v. Greenough, the Court was careful to avoid "too great a temptation to parties to intermeddle in the management of valuable property or funds . . . ." More recently one court has described the temptation under modern securities legislation as "an open invitation" to strike suits. The court observed pessimistically that "apparently [Congress] regards public policy against proved and repeated violations of fiduciary responsibility by corporate officers at the expense of the public more detrimental to public good than the violation of generally accepted ethics by attorneys." Finally, there is the problem that representative litigation is frequently unmanageable. For example, Chief Judge Lumbard

179. See note 102 and accompanying text supra.
181. Id. at 1092-96. But see note 111 supra.
182. A "strike suit" has been defined as a shareholders' derivative action initiated "with the hope of winning large attorney's fees or private settlements, and with no intention of benefiting the corporation on behalf of which suit is theoretically brought." Note, Security for Expenses Litigation—Summary, Analysis, and Critique, 52 Colum. L. Rev. 267 (1952). Reviewing the history of shareholders' derivative suits, the Supreme Court has observed that

[s]uits sometimes were brought not to redress real wrongs, but to realize upon their nuisance value. They were bought off by secret settlements in which any wrongs to the general body of share owners were compounded by the suing stockholder, who was mollified by payments from corporate assets. These litigations were aptly characterized in professional slang as "strike suits."

186. See Miller, Problems in Administering Judicial Relief in Class
described the celebrated case of *Eisen v. Carlisle & Jacquelin* as a "Frankenstein monster posing as a class action." Although in the early round of that litigation the majority provisionally permitted the action to be maintained, they recognized that the encouragement of such litigation by the award of attorneys' fees contributed to the problem of unmanageability. The court acknowledged that unreasonably complicated suits "are not likely to benefit anyone but the lawyers who bring them." These three hazards of representative litigation have been best summarized in the warning that "[t]he class action device must be protected against the taint that it is . . . promoted by attorneys who simply are seeking fat fees . . . ."

**B. A "REASONABLENESS" STANDARD**

To answer the question of who should be reimbursed for attorneys' fees, courts have developed a "but for" test to determine, either explicitly or implicitly, whether the petitioning attorneys have *earned* reimbursement. Because the strict application of this test has left worthwhile legal services uncompensated, the test should be replaced with a more flexible standard of "reasonableness," and attorneys' fees should be awarded for "reasonable" legal services.

"Reasonableness" is a finding of fact that nonparticipating beneficiaries from whom reimbursement is sought would have been "reasonable" to employ such legal services, had the choice been a product of their consensus. The court's application of this standard will resemble an inquiry into the motives for

---


187. 391 F.2d 555 (2d Cir. 1968).

188. Id. at 572 (Lumbard, C.J., dissenting).


190. C. WRIGHT & A. MILLER, supra note 178. See also *Simon, supra* note 186, at 35 ("[t]he spectacle of lawyers reaping enormous profits from lawsuits which do not benefit their clients").

191. See Part III supra.


193. The "reasonableness" standard would not apply where there is no ascertainable class of beneficiaries. See text accompanying notes 214-16 infra.
which an individual resorts to legal action and an appraisal of the "reasonableness" of those motives. The question becomes simply whether, in view of the expense involved, such action is initiated with a "reasonable" expectation of improving or preserving the individual's wealth, status, privileges or repose.\textsuperscript{194} The same question may be asked of a class allegedly benefited by the efforts of the petitioning attorneys. Viewing the class as a single person, the court may compare the total benefit with the total expense and the risk of failure, and ask whether the employment of the legal services would have been a "reasonable" decision for the "person" to have made.\textsuperscript{195} If so, then reimbursement should be awarded from the class.

Both the need for a more flexible approach and the application of the "reasonableness" standard may be illustrated by reference to a recent case, generated when a registered closed-end investment company applied to the Securities and Exchange Commission for permission to absorb its 91 percent-owned subsidiary under section 17 of the Investment Company Act of 1940.\textsuperscript{196} The owners of about two percent of the stock in the subsidiary corporation, who had been offered $275 per share for their interests, retained attorneys when they were notified of the pending SEC hearings. During the proceedings, allegedly because of the efforts of these attorneys, the parent corporation successively raised its offer to $375, \$575 and $650 per share and eventually withdrew the merger proposal, more than two years after it had been submitted. The minority shareholders sued both corporations, the sole shareholder of the parent corporation and three other minority shareholders of the subsidiary corporation, demanding in short "[t]hat the appropriate combination of defendants . . . make appropriate payments . . . to [the plaintiffs' attorneys]."\textsuperscript{197}

The court upheld the dismissal of the suit for attorneys' fees\textsuperscript{198} on the ground that the Securities and Exchange Com-

\begin{itemize}
\item \textsuperscript{195} Cf. Gilson v. Chock Full O'Nuts Corp., 331 F.2d 107, 110 (2d Cir. 1964) (en banc), quoted in text accompanying note 139 supra.
\item \textsuperscript{196} 15 U.S.C. § 80a-17 (1970).
\item \textsuperscript{197} Grace v. Ludwig, 484 F.2d 1262, 1265 (2d Cir. 1973).
\item \textsuperscript{198} Without issuing a formal opinion, the district judge had stated that "no one is interested in my views on this subject but is interested in getting to the Court of Appeals. . . . I don't see anything further to be gained by discussion here or by my writing an opinion. The less I say the quicker you can get before the Court of Appeals." Id. n.3.
\end{itemize}
mission would have disapproved such an unfair merger on its own initiative, even without the assistance of the plaintiffs' attorneys. While this appears to be a correct application of the "but for" test, the case requires a more flexible standard. Although a mere claim "for a fair and reasonable attorney's fee of ten million dollars" is by no means conclusive of the value of the legal services, it does appear that the plaintiffs' attorneys had expended considerable effort during the protracted SEC proceedings. It also appears that the subsidiary corporation in general, and its minority shareholders in particular, had benefited from the modifications and ultimate abandonment of the merger proposal. Applying a standard of "reasonableness," the court could have held that the employment of legal services had been "reasonable," in view of the benefit which those services were expected to provide. Indeed, the participating

199. The court employed a "but for" test:
We cannot accept . . . the premise that but for [the plaintiffs' attorneys'] intervention the SEC would have approved as "fair and reasonable" the initial offer of [the parent corporation]. If [the attorneys] had never appeared how can we properly assume that the SEC would have been so totally supine or so derelict as to give its approval to a price which plaintiffs urge was not merely unconscionably low but was in fact the product of a deception and fraud practiced by [the defendants]? . . .

Assuming that [the plaintiffs' attorneys] did pull the "laboring" in the proceeding before the SEC, it was in the interest of a substantial minority stockholder and it was the basis for a not insignificant fee. The fact that the SEC permitted admittedly able and persistent counsel to man the oars does not at all establish that the vessel would have otherwise foundered. Id. at 1268-69. Cf. Edison Light & Power Co. v. Pennsylvania Pub. Util. Comm'n, 34 F. Supp. 939, 942 (E.D. Pa. 1940), aff'd per curiam, 119 F.2d 779 (3d Cir. 1941), quoted in text accompanying note 115 supra.

200. There was precedent in the same court of appeals to suggest a "reasonableness" standard. See Gilson v. Chock Full O'Nuts Corp., 331 F.2d 107, 110 (2d Cir. 1964) (en banc), quoted in text accompanying note 139 supra.

201. Grace v. Ludwig, 484 F.2d 1262, 1265 (2d Cir. 1973).

202. Since the proceedings had only maintained the status quo, the court concluded that the plaintiffs had "realistically conferred no benefit at all" upon the subsidiary corporation. Id. at 1270. But as early as 1960 the "substantial benefit" principle of reimbursement was held to be invoked by "a result which corrects or prevents an abuse." Bosch v. Meeker Coop. Light & Power Ass'n, 257 Minn. 362, 366, 101 N.W.2d 423, 427 (1960) (emphasis added), quoted in Mills v. Electric Auto-Lite Co., 396 U.S. 375, 396 (1970) and in text accompanying note 56 supra. See text accompanying note 194 supra.

intervenors had evidently considered the employment of legal services a "reasonable" measure to defend their interests, for as of the date of the action they had paid the "not insignificant fee"\textsuperscript{204} of some $150,000.\textsuperscript{205} This commitment of funds by the owners of two percent of the stock in the subsidiary corporation is compelling evidence that all the minority shareholders were threatened by the merger proposal, and that it would have been "reasonable" for the shareholders to have employed counsel by consensus.\textsuperscript{206} Accordingly, the subsidiary corporation, as the representative of its shareholders, should have been required to compensate the plaintiffs' attorneys for opposing the merger. Thus under the proposed "reasonableness" standard reimbursement should generally be awarded for "reasonable" legal services, notwithstanding failure to satisfy a strict "but for" test.

The award of attorneys' fees is an exercise of a court's equitable power,\textsuperscript{207} and the trial court will therefore ordinarily be reversed only for an abuse of discretion.\textsuperscript{208} Consequently, abandonment of the "but for" test in favor of a more flexible "reasonableness" standard might be expected to discourage uniformity or foster wholesale fee-shifting, as under the English rule which has been rejected in America.\textsuperscript{209} There are, however, certain limitations on reimbursement which would survive such a substitution of tests. First, reimbursement of fees should be awarded only for services which pursue objectives of major importance—normally those expressed in or related to a federal statute.\textsuperscript{210} Where a statute precludes reimbursement or imposes

\textsuperscript{204} Grace v. Ludwig, 484 F.2d 1262, 1269 (2d Cir. 1973). See note 199 supra.
\textsuperscript{205} Id. at 1265.
\textsuperscript{206} It would not have been realistic to expect the shareholders of the subsidiary corporation to resist the merger by consensus, since 91 percent of the stock was owned by the principal defendant, whose technical loss as a shareholder would have been more than compensated by its gain as the surviving corporation. See id. at 1264-65. Indeed, this prospect of gain was so substantial that it generated the allegations that the defendants had been guilty of "deception and fraud." Id. at 1268; see note 199 supra. In such a case, the "reasonableness" standard must be applied to the threat of injury to the interests of the shareholders in general, without regard for the adverse interest of the wrongdoer among them.
\textsuperscript{207} See Guardian Trust Co. v. Kansas City S. Ry., 28 F.2d 233, 234-46 (8th Cir. 1928), rev'd on other grounds, 281 U.S. 1 (1929).
\textsuperscript{209} See Part I supra.
\textsuperscript{210} See text accompanying notes 169-75 supra.
conditions thereon, the statute must control. Second, reimbursement should be ordered only for legal services which prove successful, notwithstanding the "reasonableness" of the attempt. Third, courts should continue to view "strike suits" with disfavor, and a showing of an attorney's misconduct should continue to be relevant to the award of fees. Finally, the "reasonableness" standard should apply only when a class of nonparticipants is benefited. Since the rationale of the "reasonableness" standard is that the class would "reasonably" have employed certain services itself, the standard is applicable only where the class would bear the burden of a reimbursement award. In other words, the test of "matching . . . the costs and the benefits of litigation," suggested incidentally in _La Raza Unida v. Volpe_, should be applied carefully as a natural limit on reimbursement in every case.


213. See _Blau v. Rayette-Faberge, Inc._, 389 F.2d 469, 473 (2d Cir. 1968); _Magida v. Continental Can Co._, 231 F.2d 843, 848 (2d Cir.), cert. denied, 331 U.S. 972 (1956). The Federal Rules of Civil Procedure provide safeguards against "strike suits." A shareholders' derivative action may not be maintained unless the complaint "allege[s] with particularity the efforts, if any, made by the plaintiff to obtain the action he desires from the directors or comparable authority and, if necessary, from the shareholders or members, and the reasons for his failure to obtain the action or for not making the effort." _Fed. R. Civ. P. 23_. Cf. section 16(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78p (b) (1970) (shareholders' derivative action to recover "shortswing" profits barred unless "the issuer shall fail or refuse to bring such suit within sixty days after request or shall fail diligently to prosecute the same thereafter"). Neither a class action nor a derivative action may be dismissed or compromised without appropriate notice and the approval of the court. _Fed. R. Civ. P. 23(e), 23.1_.


215. 57 F.R.D. 94, 101 (N.D. Cal. 1972), discussed in text accompanying notes 95-97 supra. The test would not be satisfied, for example, in a suit by a private conservation
V. CONCLUSION

Attorneys' fees present problems which are extremely practical and not easily subjected to theoretical analysis. Any general principle or standard for reimbursement must be applied with discretion and flexibility. If the policies underlying the "reasonableness" standard are always recognized as paramount to the mechanics of its application, the standard may indeed afford the necessary flexibility. In this way, courts can ensure that attorneys are compensated for properly pursuing legal rights or defenses, but not rewarded for unethical or frivolous practices.

---
