Washington Law Review

Volume 60 | Number 2

4-1-1985

Implementing the Incentive Purpose of the Private Attorney General Exception—Miotke v. City of Spokane, 101 Wn. 2d 307, 678 P.2d 803 (1984)

Jim Oesterle

IMPLEMENTING THE INCENTIVE PURPOSE OF THE PRIVATE ATTORNEY GENERAL EXCEPTION—*Miotke v. City of Spokane*, 101 Wn. 2d 307, 678 P.2d 803 (1984).

In *Miotke v. City of Spokane*,[1] the Washington Supreme Court for the first time adopted the private attorney general doctrine as a basis for awarding attorneys' fees. The plaintiffs in *Miotke* had obtained injunctive relief and damages for the defendant's discharge of raw sewage into the Spokane River.[2] Adopting a three part standard for the private attorney general doctrine,[3] the supreme court awarded the plaintiffs attorneys' fees as part of the costs incurred during the injunction phase of the litigation. The court held that attorneys' fees should be awarded because the plaintiffs (1) incurred considerable economic expenses, (2) effectuated an important legislative policy, and (3) benefited a large class of persons.[4]

The purpose of the private attorney general exception is to encourage individuals to pursue lawsuits for the public benefit. The criteria adopted by

1. 101 Wn. 2d 307, 340–41, 678 P.2d 803, 821–22 (1984) (the five-to-four ruling on the attorneys' fees issue included a strong dissent by Justice Dolliver in which each of the criteria adopted by the majority was challenged).

2. On March 28, 1973, the Washington State Department of Ecology (DOE) directed the City of Spokane to modify its sewage treatment plant. *Id.* at 312, 678 P.2d at 807. The best alternative was to convert the existing primary treatment facility to a secondary treatment facility. Construction plans indicated that a temporary bypass of the entire treatment plant would be necessary to complete the upgrading. *Id.* at 314–15, 678 P.2d at 808.

The city sought the necessary waste discharge permit from the State DOE because of the anticipated discharge of raw sewage. *Id.* at 313, 678 P.2d at 807. A Waste Discharge Permit was obtained in November 1973. It required the city to obtain a new permit whenever it expected an increase in discharge. On October 3, 1975, the DOE issued an order permitting the city to discharge raw sewage into the Spokane River for a period of three to ten days. *Id.* at 315, 678 P.2d at 808. A new Waste Discharge Permit was not obtained. The actual bypass lasted approximately three and a half days, resulting in an estimated discharge of one hundred million gallons of raw, untreated sewage. *Id.*

The plaintiffs sought a permanent injunction on October 14, 1975, against all further bypasses and a declaratory judgment that the city's actions were wrongful and illegal. *Id.* at 315–16, 678 P.2d 808. On January 31, 1977, the superior court issued an order enjoining future bypasses of untreated sewage into the Spokane River. *Id.* at 317, 678 P.2d at 809. The plaintiffs subsequently prevailed on the claim for damages and were awarded $245,000. Included was an award of attorneys' fees for $88,500 based generally on equitable powers. The attorneys' fee award was based on fees incurred only in the injunction phase of the litigation. *Id.* at 320, 678 P.2d at 811.

The action was appealed to the Washington State Court of Appeals, which certified it to the Washington Supreme Court. The supreme court affirmed the trial court, but based the award of attorneys' fees more specifically on the private attorney general theory. *Id.* at 340–41, 678 P.2d at 821.

3. The court applied the standard that it had previously set forth, but not adopted, in Public Util. Dist. No. 1 v. Kottsick, 86 Wn. 2d 388, 392, 545 P.2d 1, 4 (1976). 101 Wn. 2d at 340–41, 678 P.2d at 821. As stated in *Kottsick*, the "doctrine provides that a private attorney general may be awarded attorney fees whenever the successful litigant (1) incurs considerable economic expense, (2) to effectuate an important legislative policy, (3) which benefits a large class of people." *Kottsick*, 86 Wn. 2d at 392, 545 P.2d at 4.

4. *Miotke*, 101 Wn. 2d at 341, 678 P.2d at 822.

the court in *Miotke* fail to implement the incentive purpose of the private attorney general doctrine because they do not include an assessment of a litigant's motivations in bringing a suit. As a result, future application of the *Miotke* standard will lead to fee shifting even when a plaintiff is motivated by private, not public, interests.

Courts and the legislature[5] should clarify the criteria under which the exception should be applied and adopt an appropriate procedure to apply the criteria. This Note proposes both selective criteria and a procedure designed to implement the unique purpose of the private attorney general exception. The Note first describes the development of the private attorney general exception in both federal and state courts, and then traces the development of equitable exceptions in Washington. The analysis begins by identifying and comparing the purposes of the private attorney general, common fund, and substantial benefit exceptions, and critiques the ability of the *Miotke* standard to implement the purpose of the private attorney general exception. The analysis then proposes more discriminating criteria and a procedural approach that effectively applies the private attorney general exception. Finally, the proposed criteria and procedures are applied to *Miotke* to demonstrate how the court could have reached a more equitable result.

I. LEGAL BACKGROUND

A. *The American Rule and the Development of the Private Attorney General Exception*

The general rule in the United States is not to include attorneys' fees as an element of the costs awarded to a successful litigant.[6] Courts have

5. The Washington State Senate has considered adopting a version of the private attorney general doctrine but to date has not done so. On January 14, 1983, the following provision was introduced as Senate Bill No. 3130:

> There is added to chapter 4.84 RCW a new section to read as follows:
>
> Notwithstanding any other provision of chapter 4.84 RCW, reasonable attorneys' fees may be awarded to a party by the court if that party has successfully brought an action challenging the expenditure of public funds made pursuant to patently unconstitutional legislative or administrative actions, or has successfully brought an action on behalf of a large, ascertainable group of people to further an important public policy, and the appropriate official or agency has refused to maintain such an action.

S.B. 3130, 48th Leg., Reg. Sess., 1983 Wash. Laws 127.

The proposed addition was considered by the Senate Judiciary Committee. The Committee subsequently replaced the proposed addition with a provision directing the law revision commission to analyze and evaluate the issues involved in enacting legislation to allow attorneys' fees to a prevailing party who acts as a private attorney general. The commission was to have reported its findings and recommendations to the legislature prior to January 1, 1984. S.B. 3130, 48th Leg., Reg. Sess., 1983 Wash. Laws 127. However, no commission report was made prior to the January 1, 1984, deadline.

6. Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714 (1967). The *Fleischmann*

developed equitable doctrines as exceptions to this rule.[7] The equitable doctrines most commonly cited are the common fund,[8] substantial benefit,[9] and bad faith exceptions.[10] The private attorney general exception has only recently been recognized.

Courts formulated the private attorney general exception to encourage private parties to bring actions that would advance the public interest.[11] Courts first emphasized the role of "private litigation as a means of securing broad compliance with the law,"[12] and later as a means of implementing important public policies.[13] Federal courts proceeded to apply the excep-

---

Court listed three reasons for the rule. First, "since litigation is at best uncertain one should not be penalized for merely defending or prosecuting a lawsuit . . . ." *Id.* at 718. Second, by awarding attorneys' fees to prevailing parties, "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." *Id.* And, finally, "the time, expense, and difficulties of proof inherent in litigating the question of what constitutes reasonable attorneys' fees would pose substantial burdens for judicial administration." *Id.* For a thorough discussion of the development of the rule, see Comment, *Court Awarded Attorneys' Fees and Equal Access to the Courts*, 122 U. PA. L. REV. 636, 666–674 (1974).

7. For one of the earlier applications of an equitable doctrine, see Sprague v. Ticonic Nat'l Bank, 307 U.S. 161, 164–65 (1939) (bank depositor established lien on trust deposits in possession of bank's receiver, thereby protecting interests of similarly situated trustees). The exceptions have been justified as appropriate exercises of the courts' equity powers. *Id.* at 165.

8. The common fund exception was developed to permit an award of fees to a litigant who successfully created or protected a monetary fund held in common with other persons. The exception was first exercised in Trustees of the Internal Improvement Fund v. Greenough, 105 U.S. 527, 532 (1882). *See also infra* note 33 and accompanying text.

9. The substantial benefit exception is commonly viewed as an outgrowth of the common fund exception; in some jurisdictions the two have not been distingiushed. The Supreme Court extended the common fund exception to incorporate situations in which, although no fund was created or protected to which fees could be charged, a substantial benefit was conferred on an ascertainable class of persons. *See* Hall v. Cole, 412 U.S. 1, 5–7 (1973); Mills v. Electric Auto-Lite Co., 396 U.S. 375, 389–97 (1970).

The substantial benefit exception "permits the award of fees when the litigant, proceeding in a representative capacity, obtains a decision resulting in the conferral of a 'substantial benefit' of a pecuniary or nonpecuniary nature." Serrano v. Priest, 20 Cal. 3d 25, 38, 569 P.2d 1303, 1309, 141 Cal. Rptr. 315, 321 (1977); *see also* Hall v. Cole, 412 U.S. at 8–9.

10. The bad faith exception is exercised to punish litigants who engage in fraudulent, groundless, oppressive, or vexatious conduct. *See, e.g.*, F.D. Rich Co. v. United States *ex rel.* Industrial Lumber Co., 417 U.S. 116, 129 (1974). *See generally* Comment, *Attorneys' Fees and the Federal Bad Faith Exception*, HASTINGS L.J. 319 (1977).

11. *See, e.g.*, Newman v. Piggie Park Enters., 390 U.S. 400 (1968). The plaintiff in *Newman* had successfully enjoined the defendants from operating racially discriminatory restaurants. In granting an award of attorneys' fees the court reasoned that when a plaintiff

> obtains an injunction, he does so not for himself alone but also as a "private attorney general," vindicating a policy that Congress considered of the highest priority. If successful plaintiffs were routinely forced to bear their own attorneys' fees, few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the federal courts.

Id. at 402.

12. *Id.* at 401.

13. Expansion of the private attorney general exception occurred following the Fifth Circuit Court of Appeals' ruling in Lee v. Southern Home Sites Corp., 444 F.2d 143 (5th Cir. 1971). In *Lee* the court

tion in a growing number of "public interest" actions.[14]

The development of the private attorney general exception in federal courts came to an abrupt halt in *Alyeska Pipeline Service Co. v. Wilderness Society.*[15] The Supreme Court refused to extend its equitable powers to apply the private attorney general exception without congressional authorization.[16] In particular, the Court noted the problems inherent in judicial determinations of whether a particular public policy is important enough to justify awarding attorneys' fees.[17]

The Supreme Court's pronouncement in *Alyeska* did not preclude states from developing the private attorney general exception.[18] The California Supreme Court adopted the exception in 1977,[19] and four days later the California legislature codified the holding.[20] Until *Miotke,* no other state had adopted the exception.[21]

B. Equitable Exceptions to the American Rule in Washington

The Washington Supreme Court's adoption of the private attorney general exception in *Miotke* was not a predictable extension of the court's prior

awarded fees based on the private attorney general exception despite the absence of any fee provision in the applicable statute. The court held that the award was essential to facilitate the "strong congressional policy behind the rights . . . ." *Id.* at 145.

Following *Lee,* the private attorney general exception was applied to actions concerning the rights of mentally handicapped patients, Wyatt v. Stickney, 344 F. Supp. 387, 394 (M.D. Ala. 1972), *aff'd in part sub nom.* Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974); legislative reapportionment, Sims v. Amos, 340 F. Supp. 691, 694 (M.D. Ala. 1972), *aff'd,* 409 U.S. 942 (1972); racial discrimination, Fowler v. Schwarzwalder, 498 F.2d 143, 146 (8th Cir. 1974); and environmental protection, La Raza Unida v. Volpe, 57 F.R.D. 94, 101 (N.D. Cal. 1972). *But see* Bradley v. School Bd., 472 F.2d 318, 327–31 (4th Cir. 1972), a desegragation case in which the Fourth Circuit reversed a lower court's award of fees based alternatively on the private attorney general exception and the bad faith exception. The court did not consider the encouragement of private enforcement of public policies a proper judicial function.

14. Note, *Attorneys' Fees—Public Interest Law—Beyond* Alyeska: *Creating a Workable Private Attorney General Exception,* 51 WASH. L. REV. 1047, 1050 (1976).

15. 421 U.S. 240 (1975).

16. *Id.* at 263–69.

17. *Id.* at 264.

18. *Id.* at 259 n.31. The Court in *Alyeska* contemplated state divergence by stating that federal courts should continue applying state law on attorneys' fees when ruling in diversity cases. The California Supreme Court relied on this language to declare that the *Alyeska* ruling did not preclude adoption of the private attorney general exception in litigation under state law.

19. Serrano v. Priest, 20 Cal. 3d 25, 48, 569 P.2d 1303, 1315, 141 Cal. Rptr. 315, 327 (1977).

20. A.B. 1310, an act to add § 1021.5 to the Code of Civil Procedure, relating to attorneys' fees, ch. 1197, 1977 Cal. Stats. (codified at CAL. CIV. PROC. CODE § 1021.5 (West 1980)).

21. Without some statutory basis, state courts appear reluctant to adopt additional exceptions to the American rule. *See* Consumers League of Nev. v. Southwest Gas Corp., 576 P.2d 737, 740 (Nev. 1978); Shelby County Comm'n v. Smith, 372 So. 2d 1092, 1096–1097 (Ala. 1979); City of Chicago v. Ill. Fair Employment Practices Comm'n, 34 Ill. App. 3d 114, 339 N.E.2d 260, 262 (1975), *aff'd,* 65 Ill. 3d 108, 357 N.E.2d 1154, 1156 (1976); *see also* County of Ada v. Red Steer Drive-Ins of Nev., Inc., 101 Idaho 94, 609 P.2d 161, 167–68 (Idaho 1980) (acknowledging the exception but not explicitly adopting it).

application of its equitable fee shifting powers. Prior to *Miotke*, the Washington courts had adopted the bad faith,[22] common fund,[23] and substantial benefit[24] exceptions to the American rule. In addition, in *Weiss v. Bruno*,[25] the Washington Supreme Court formulated a novel constitutional principle exception based on a very restricted set of criteria.[26] Although these developments may suggest that the Washington judiciary has taken a liberal stance towards equitable exceptions,[27] its application of these exceptions indicates otherwise. Rulings clarifying the *Weiss* holding reveal that the court has been reluctant to exercise its equitable fee shifting powers.[28] Since

22. *See, e.g.*, Seals v. Seals, 22 Wn. App. 652, 658, 590 P.2d 1301, 1305 (1979).

23. *See* Baker v. Seattle-Tacoma Power Co., 61 Wash. 578, 588, 112 P. 647, 651 (1911).

24. Peoples Nat'l Bank v. Jarvis, 58 Wn. 2d 627, 631–32, 364 P.2d 436, 439–40 (1961), has been cited for application of the common fund exception but should be cited as the origin of the substantial benefit exception. *See, eg.*, Crane Towing, Inc. v. Gorton, 89 Wn. 2d 161, 176, 570 P.2d 428, 437 (1977). The court in *Peoples Nat'l Bank* applied the common fund exception to an action in which an attorney had benefited from a trust. No common fund was created, but doctrinal rigidity forced the court to base the award of attorneys' fees on the common fund exception, an existing equitable exception. Subsequent cases recognized the distinction and developed the substantial benefit exception. *See, e.g.*, Grein v. Cavano, 61 Wn. 2d 498, 506–08, 379 P.2d 209, 214–15 (1963) (common fund not created, but since ascertainable class benefited, fees were awarded).

25. 83 Wn. 2d 911, 523 P.2d 915 (1974).

26. The court in *Weiss* derived the constitutional principle exception from the common fund exception. The court was unable to apply either the common fund or the substantial benefits exceptions without violating prior judicial applications. The constitutional principle exception allows an award of attorneys' fees under the following criteria: "(1) a successful suit brought by petitioners (2) challenging the expenditure of public funds (3) made pursuant to patently unconstitutional legislative and administrative actions (4) following a refusal by the appropriate official and agency to maintain such a challenge." *Weiss*, 83 Wn. 2d at 914, 523 P.2d at 917.

The plaintiff in *Weiss* was awarded attorneys' fees for successfully challenging a patently unconstitutional statute that had provided for the disbursement of public funds as financial aid to students attending private schools. The suit was held to be necessary because "it [was] clear that none of the officials or agencies involved had challenged or were going to challenge the constitutionality of the legislative acts . . . ." *Id.* at 914, 523 P.2d at 917.

The *Weiss* court did acknowledge the then expanding development of the private attorney general doctrine in the federal courts. *Id.* at 913, 523 P.2d at 916. However, in a footnote the court noted that "[i]n light of our result herein, we deem it unnecesary to adopt the private attorney general theory in this case." *Id.* at 913 n.1, 523 P.2d at 916 n.1.

27. *See* Note, *supra* note 14, at 1064.

28. The court's consideration of the constitutional principle exception in *Public Util. Dist. No. 1 v. Kottsick* highlights the extremely narrow circumstances to which the criteria will apply. In *Kottsick*, the court considered the constitutional principle along with both the common fund and substantial benefit exceptions. 86 Wn. 2d at 388, 390–91, 545 P.2d 1, 4 (1976) The plaintiff's request for an award of attorneys' fees was denied following the court's ruling that the defendant had failed to comply with the State Environmental Policy Act in a condemnation action. The court denied fees under the constitutional principle exception because the plaintiff met only the first criterion of the four part exception. The second criterion was not met because the action did not stop, but only suspended the disbursement of public funds. The third criterion was not met because the action challenged a statutory provision, not the required constitutional principle. Finally, the appellants failed to request the appropriate agency or official to maintain the suit on their behalf. *Id.* at 389–92, 545 P.2d at 3–4. The court's reluctance to

the *Weiss* decision and until *Miotke*, the court has provided little indication that further exceptions to the American rule would be adopted.[29]

II. ANALYSIS

The supreme court's unexpected adoption of the private attorney general exception contains strikingly little discussion of why and how the exception should apply. The decision merely identifies criteria for a private attorney general fee award and applies them to the facts.[30] The court does not discuss its reasons for adopting the criteria and, more importantly, its reasons for adopting the exception itself. Specifically, the court does not explain how the adopted criteria address the incentive purpose of the private attorney general exception. As a result, the decision fails to provide adequate guidance for future application of the exception. Judicial application of the exception without a more thorough analysis will be confusing and burdensome for lower courts.

This uncertainty can be mitigated by legislative enactment of a private attorney general exception statute.[31] Predictability would be greatly enhanced if the legislature would more clearly define how the exception should apply. Courts, too, can aid in clarifying when and how the exception applies by refining the criteria established in *Miotke*. Both legislators and judges should consider the unique purpose of the private attorney general exception to insure that the standards adopted implement that purpose.

A. Purposes of the Equitable Exceptions to the American Rule

The primary purpose of the common fund, substantial benefit, and private attorney general exceptions to the American rule is to effect equity

extend the constitutional principle exception to include the unstatutory conduct in *Kottsick* highlights the extremely narrow circumstances to which the criteria apply.

In addition to the court's reluctance to expand the constitutional principle exception, it has demonstrated reluctance to apply the exception even as originally set forth. The court denied the appellants' request for an award of attorneys' fees in Crane Towing, Inc. v. Gorton, 89 Wn. 2d 161, 570 P.2d 428 (1977), an action challenging the constitutionality of a statute. The trial court ruled the statute unconstitutional but denied the plaintiffs' request for attorneys' fees. The state supreme court purported to apply the constitutional principle exception as formulated in *Weiss*. The court's discussion focused on the common fund exception however, and did not consider any of the criteria set forth in *Weiss*. The court denied an award of attorneys' fees because no common fund had been created.

The court's reasoning in *Crane* is inconsistent with the result reached in *Weiss*. In *Weiss*, the court ruled that no common fund was necessary under the constitutional principle exception. Yet in *Crane* the absence of a fund was determinative in denying the appellants' request for attorneys' fees. *See id.* at 177, 570 P.2d at 437.

29. *Contra* Note, *supra* note 14, at 1064.

30. *See* Miotke v. City of Spokane, 101 Wn. 2d 307, 340–41, 678 P.2d 803, 821–22 (1984).

31. *See generally* Hermann & Hoffman, *Financing Public Interest Litigation in State Court: A Proposal for Legislative Action*, 63 CORNELL L. REV. 173 (1978) (proposes a broad private attorney general exception statute that focuses principally on the financial interests of the litigants).

between the parties.[32] Each exception has a unique secondary purpose, however, that suggests the circumstances to which the exception should apply. Differences between the secondary purposes of the exceptions dictate that different standards apply.

1. The Common Fund and Substantial Benefit Exceptions

The secondary purpose of the common fund exception is restitution from the benefited fund.[33] An equitable result is reached when the beneficiaries of the fund are directed to compensate the litigants. Courts apply the exception only when a common fund, from which an award can be made, has been protected or created.

The secondary purpose of the substantial benefit exception is to prevent the unjust enrichment of those who benefit by successful litigants' actions.[34] Equity is accomplished when courts spread the costs of litigation among those who benefit, even though no fund exists against which to charge the fees.[35] Courts apply the exception only when there is an ascertainable class of beneficiaries.[36] This assures that only those unjustly enriched are charged with the costs of the litigation. When the size of the class defies definition, equitable cost-spreading principles cannot be applied.

The secondary purposes of the common fund and substantial benefit exceptions have a mutual characteristic. Both exceptions depend upon a

32. The Supreme Court in Sprague v. Ticonic Nat'l Bank, 307 U.S. 161, 164 (1939), discussed the source of courts' equitable power to award litigation expenses, including both attorney and expert witness fees. The Court noted that "[p]lainly the foundation for the historic practice of granting reimbursement for the costs of litigation other than the conventional taxable costs is part of the original authority of the chancellor to do equity in a particular situation." *Id.* at 166 (footnote omitted).

Under the private attorney general exception the plaintiff represents the interests of the public. Equity is effected when the defendant compensates the plaintiff for expenses incurred in protecting a public right or policy.

33. The common fund theory was originally applied by the Supreme Court in Trustees in the Internal Improvement Fund v. Greenough, 105 U.S. 527 (1882), to allow the plaintiff to collect for his efforts in preserving the fund. "[W]here one of many parties having a common interest in a trust fund, at his own expense takes proper proceedings to save it from destruction and to restore it to the purposes of the trust, he is entitled to re-imbursement . . . ." *Id.* at 532–33.

34. Because of the similarities between the common fund and substantial benefit exceptions, the two are commonly characterized as one exception. Unfortunately, this characterization obscures the purposes unique to each exception. *See, e.g.*, Note, *Awards of Attorney's Fees in Environmental Litigation: Citizen Suits and the "Appropriate" Standard*, 18 GA. L. REV. 307, 314 (1984).

The Supreme Court explained the secondary purpose of the substantial benefit exception in Boeing Co. v. Van Gemert, 444 U.S. 472, 478 (1980), "[t]he doctrine rests on the perception that persons who obtain the benefit of a lawsuit without contributing to its cost are unjustly enriched at the successful litigant's expense."

35. *See* Note, *Awards of Attorneys' Fees to Unsuccessful Environmental Litigants*, 96 HARV. L. REV. 677, 683 (1983).

36. *See Van Gemert*, 444 U.S. at 479.

particular result. A court can apply the common fund exception to make restitution only when a litigant is successful in creating or protecting a common fund.[37] A court can apply the substantial benefit exception to prevent unjust enrichment only when a litigant has successfully conferred a benefit to an ascertainable class of persons.[38] A litigant therefore has no basis for expecting an award of attorneys' fees under either exception until a particular final judgment is rendered.

2. *Purpose and Application of the Private Attorney General Exception*

The secondary purpose of the private attorney general exception is to provide a potential litigant an incentive to vindicate an important right or policy.[39] An award of attorneys' fees is intended to do more than compensate the litigant for bringing an action that benefits a large class of persons. The exception is intended to encourage those litigants who are motivated by the possibility of benefiting others.[40]

Unlike the common fund and substantial benefit exceptions, application of the private attorney general exception should not depend upon a particular result. An award of attorneys' fees pursuant to the private attorney general exception should neither represent a reward to the successful litigant, nor a penalty to the accused wrongdoer. Rather, it should represent compensation to a plaintiff motivated by public benefit.

The criteria used to define the appropriate circumstances for applying the private attorney general exception should reflect its incentive purpose. The criteria should require that an award of attorneys' fees is necessary to encourage the litigation. Also, the criteria should not focus the attention of the court on the results of the litigation. The purpose of the exception is to provide an incentive prior to a ruling on the merits.[41]

B. *A Proposed Standard to Implement the Purpose of the Private Attorney General Exception*

The three part standard for the private attorney general exception adopted by the Washington Supreme Court in *Miotke* fails to implement adequately the incentive purpose of the exception. First, the criteria do not consider the plaintiff's motives for initiating the action. Second, the criteria focus the

37. *See supra* note 8.
38. *See supra* note 9.
39. *See* Note, *supra* note 35, at 679–81.
40. Rowe, Jr., *The Legal Theory of Attorney Fee Shifting: A Critical Overview*, 1982 DUKE L.J. 651, 662.
41. *See infra* note 55 and accompanying text.

attention of the court on the products of the litigation rather than the litigant's motives. Substantive changes in the criteria and a procedural modification in the way they are applied are necessary if Washington courts are to implement the incentive purpose.

1. Criteria for Application of the Private Attorney General Exception

Criteria proposed by other courts and legal commentators have carefully identified the appropriate circumstances for applying the private attorney general exception.[42] The first two criteria applied by the Washington Supreme Court in *Miotke* are essentially identical to two of the three criteria generally accepted by courts and commentators. First, the action must be brought to vindicate an important right or policy.[43] The court must assess whether the right or policy is significant enough to warrant an award of attorneys' fees.[44] Second, the action must purport to provide a significant benefit to a large class of persons.[45]

42. The California Supreme Court in Serrano v. Priest, 20 Cal. 3d 25, 569 P.2d 1303, 1314, 141 Cal. Rptr. 315, 325 (1977), adopted the following criteria in applying the private attorney general exception: "(1) the strength or societal importance of the public policy vindicated by the litigation, (2) the necessity for private enforcement and the magnitude of the resultant burden on the plaintiff, (3) the number of people standing to benefit from the decision." *See also Alyeska*, 421 U.S. at 284–85 (Marshall, J., dissenting). Justice Marshall, in his dissent in *Alyeska* suggested the following criteria:

> The reasonable cost of the plaintiff's representation 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; and (3) shifting that cost to the defendant would effectively place it on a class that benefits from the litigation.

See also Note, *supra* note 14, at 1058–63 (discussion of the criteria proposed by Justice Marshall); Comment, *supra* note 6, at 666–74.

43. The subjectivity of the first criterion limits its usefulness. First, ruling on the importance of rights and policies is necessarily a subjective process. Courts possess no defined hierarchy of social values on which to base a determination of importance. Second, judicial assessment of the importance of matters of public policy violates the separation of powers ideal. *Alyeska*, 421 U.S. at 269. The judicial process lacks the requisite level of public input that justifies policy determinations. *See* Bradley v. School Bd., 472 F.2d 318, 329 (4th Cir. 1972) (rejecting private attorney general exception in part because "it will launch courts upon the difficult and complex task of determining what is public policy, an issue normally reserved for legislative determination"). *But see*, Note, *Awarding Attorneys' Fees to the "Private Attorney General": Judicial Green Light to Private Litigation in the Public Interest*, 24 HASTINGS L.J. 733, 767–68 (1973).

44. *See* Marini v. Municipal Court, 99 Cal. App. 3d 829, 160 Cal. Rptr. 465, 470 (1979) (an award of attorneys' fees under the private attorney general exception was denied because a constitutional principle—local pre-emption of a state drunk driving program—was vindicated only in a broad and theoretical sense and did not directly benefit others); Bruno v. Bell, 91 Cal. App. 3d 776, 154 Cal. Rptr. 435, 441 (1979) (despite the plaintiff's successful action declaring a section of the state highway code to be unconstitutional, an award of attorneys' fees was denied in part because the benefit only extended to individuals with land adjacent to public highways).

45. The second criterion shares the subjectivity that characterizes the first criterion. A court must make a subjective assessment to find a benefit to be significant and the class size to be large enough. *See* Woodland Hills Residents Ass'n, Inc. v. City Council of Los Angeles, 23 Cal. 3d 917, 593 P.2d 200, 154 Cal. Rptr. 503, 515 (1979).

The *Miotke* court, however, failed to apply adequately the most important criterion. The ultimate criterion is that the private enforcement of the public right or policy be necessary and burdensome. This criterion is satisfied only when a litigant proves these two elements. To prove the necessity element, a litigant must establish that it is impossible for a public entity to bring the same action, or, if it is possible, that there was a delay in bringing the action that resulted in a violation or endangerment of the important right or policy.[46] To prove the burden element, the plaintiff must establish that the expenses of the litigation are disproportionately greater than the expected benefits to the litigant of maintaining the action.[47] The burden element is not met when benefits to the litigant are equivalent to or greater than expected expenses.[48]

The necessity and burden elements are "at the heart of the private attorney general doctrine."[49] Determining the necessity and burden of private enforcement provides the most accurate picture of whether an award of attorneys' fees is necessary to motivate potential litigants. Analysis of the burden element forces the court to determine whether an award of attorneys' fees is required to encourage the litigant to maintain the action. When expected benefits of litigation to an individual litigant are greater than expected expenses, a court award of attorneys' fees probably will not affect whether the action will be maintained.

The necessity element insures that the private attorney general exception encourages litigation only as a complainant's final recourse.[50] A private action is not the only means of vindicating an important right or policy. If a plaintiff could have avoided the action by pursuing administrative remedies or informal settlement procedures, the plaintiff has not met the necessity element. In addition, a private action is not necessary when the "public" attorney general could have brought the action, unless there has been unreasonable delay.[51]

The necessity and burden criterion supplies a crucial factor that is missing from the private attorney general exception standard established in

46. Comment, *Private Attorney General in California—An Evolution of the Species*, 18 SAN DIEGO L. REV. 843, 856 (1981).

47. *See* Hoffman, *supra* note 31, at 195.

48. *See* County of Inyo v. City of Los Angeles, 78 Cal. App. 3d 82, 144 Cal. Rptr. 71 (1978) (plaintiff's request for award of attorneys' fees denied because plaintiff failed to show that expense of maintaining action was greater than benefits it received).

49. McDermott & Rothschild, *The Supreme Court of California 1976–77—Forward: The Private Attorney General Rule and Public Interest Litigation in California, 66 CALIF. L. REV. 138, 149 (1978).*

50. *Id.* at 149–50.

51. *See* Daniels v. McKinney, 146 Cal. App. 3d 42, 193 Cal. Rptr. 842, 848 (1983) (prisoners' organization granted award of attorneys' fees because public defender would not have brought same action).

Miotke. In *Miotke*, the court instead considered as a third criterion whether the litigant had incurred considerable expenses in maintaining the action.[52] This assessment failed to address the purpose of the private attorney general exception. When the court looked at the expenses incurred it saw only half of the picture. A litigant who incurs considerable expense does not necessarily require a fee award as incentive to maintain the action. To complete the picture, the court should have compared the plaintiff's attorneys' fees expense to their anticipated benefit. This comparison would have revealed whether the litigant was motivated by public or private considerations.

2. *A Procedural Approach to Implement the Incentive Purpose of the Private Attorney General Exception*

Establishing criteria for the private attorney general exception is only the first step toward implementing the incentive purpose of the exception. To improve the court's ability to assess the litigant's motivations, the courts or the legislature should modify the procedural approach used by the supreme court in *Miotke* to apply the exception. Specifically, a procedure should be adopted that shifts the court's attention away from the results of the litigation.

Presently, a court considers a litigant's request for an award of attorneys' fees only after it renders final judgment. This procedure is adequate if the award is based on either the common fund or substantial benefit exceptions, which depend on the results of the litigation.[53] A court may shift fees inappropriately, however, if it uses the post-trial award procedure to apply the private attorney general exception. If the court waits until the litigation is over, it will be influenced by the results of the litigation rather than the litigant's motivations in bringing the action.

A court should decide whether or not a litigant is motivated by personal interests[54] before it renders judgment. Courts should use a procedure that determines the applicability of the exception before the trial stage of the litigation begins. Litigants should include in their complaint a request for attorneys' fees under the private attorney general exception. In addition, litigants should include evidence of their compliance with each of the three criteria set forth above. Following an opportunity for the defendant to respond, courts could then make a pre-trial determination whether the

52. 101 Wn. 2d at 340, 678 P.2d at 821.

53. *See supra* notes 33–38 and accompanying text.

54. The determination of motivation is an objective one, based on an assessment of the burden of the litigation on the plaintiff. *See supra* notes 46–49 and accompanying text. Courts can use available cost projections to make objective assessments of the plaintiff's costs and benefits.

private attorney general exception is applicable.[55] If it is applicable, the court could "certify" the action as appropriate for the private attorney general exception. An actual award of fees would depend on the outcome of the litigation.[56]

Judicial certification at the beginning of a lawsuit that the action warrants an award of attorneys' fees insures that the incentive purpose of the private attorney general exception is realized. From the plaintiff's perspective, certification would assist in deciding whether to maintain the action. A court's denial of certification would force the plaintiff to reconsider whether the burdens of continuing the action are proportionate to the expected benefits. If the burdens exceed the benefits, the plaintiff may drop the action.

Pre-trial certification would put the defendant on notice that, should the plaintiff prevail, the defendant will have to pay the plaintiff's attorneys' fees. The consequences of this notice are several. First, notice may cause the defendant to take corrective measures or adopt new procedures that would eliminate the need for further litigation. Second, it would encourage the settlement of actions that the defendant decides can not be successfully defended. Finally, it would reduce spurious defenses and delay tactics that only serve to prolong the litigation and increase fees.

Applying the previously proposed criteria in a pre-trial certification procedure would lead to realization of the incentive purpose of the private attorney general exception and enhance the litigant's ability to predict whether an award of fees will be forthcoming. Moreover, improving predictability mitigates the unpredictability caused by the subjectivity of the criteria discussed above. This is accomplished by giving notice to the parties of the exception's applicability as early in the litigation process as possible.

C. Application of the Proposed Criteria and Procedures to Miotke

Application of the previously proposed criteria and procedure would have led to a more equitable result in *Miotke*. Even though the plaintiff's

55. The proposed procedure is similar to the present procedure used to certify a class action. WASH. CIVIL RULE 23(c)(1) (1967) provides that:

> As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

56. Traditionally, an award of attorneys' fees has been considered when the litigant prevails in the action. *See* Mills v. Electric Auto-Lite Co., 396 U.S. 375, 396 (1970). It is uncertain, however, whether a party may "prevail" within the context of an attorneys' fees exception without obtaining a favorable court judgment. *See Daniels*, 146 Cal. App. 3d at 55, 193 Cal. Rptr. at 848 (inquiry should focus on condition that plaintiffs sought to change, with "[t]he critical fact [being] the impact of the action, not the manner of its resolution").

case satisfied the first two criteria as applied by the court, the plaintiffs probably would have been unable to demonstrate compliance with the burden element of the proposed necessity and burden criterion. Therefore, there would have been no attorneys' fees awarded based on the proposed private attorney general exception.

The court properly ruled that the plaintiffs in *Miotke* met the first criterion by seeking vindication of an important right or policy. The riparian landowners in *Miotke* sought to prevent the City of Spokane from continuing to discharge raw sewage into the Spokane River while treatment facilities were being upgraded.[57] Prior discharges had produced damaging consequences to the river and its users.[58] Cessation of the discharges reinforced the "important legislative policy of SEPA [State Environmental Policy Act] and other environmental legislation of [the] state"[59] by eliminating a source of pollution.

The court also properly ruled that the plaintiffs met the second criterion. Vindication of the threatened environmental policies conferred a significant benefit on a large class of persons. Curtailing the discharges would have "benefited not only plaintiffs, but all those who live, work, or play on or near the river."[60]

Had the court applied the necessity and burden criterion, it probably would have ruled that the plaintiffs in *Miotke* also satisfied the necessity element. The immediate attainment of injunctive relief was necessary to prevent further damage to the river.[61] Negotiation and settlement options were of no utility. In addition, the state's position as co-defendant prevented a similar action from being brought by the "public" attorney general. Private enforcement was necessary.

However, the plaintiffs in *Miotke* probably could not have proven compliance with the burden element of the third criterion in a pre-trial determination procedure. It is likely that before trial the expected expenses to maintain the injunction action were less than the expected personal benefits. As riparian landowners, the plaintiffs had great personal interest in securing an injunction. All of the affected properties had been "developed . . . specifically for the enjoyment of a lakefront lifestyle."[62] Presumably, endangerment of that lifestyle, not an overriding interest to vindicate an important right or policy, motivated the plaintiffs to bring the injunction

57. 101 Wn. 2d at 315–16, 678 P.2d at 808–09.
58. *Id.* at 319, 678 P.2d at 810.
59. *Id.* at 341, 678 P.2d at 822.
60. *Id.*
61. *Id.* at 317, 678 P.2d at 809.
62. *Id.* at 318–19, 678 P.2d at 810.

action. From the property owners' perspective, the public benefits of their actions were probably residual.

The proposed pre-trial certification procedure would have confirmed whether the landowners were motivated by strong personal interests. Denial of pre-trial certification may not have resulted in abandonment of the action. As the dissent noted, each landowner's share of the legal expenses was relatively small.[63] If it can be assumed that the expected expenses at the pre-trial stage incurred in *Miotke* were directly related to the actual expenses,[64] it could be argued that the expected benefits of the injunction were proportional to these expenses. Pre-trial determination would have revealed this.

III. CONCLUSION

The Washington Supreme Court's adoption of the private attorney general exception is a dramatic step toward increased fee shifting. Unfortunately, the court gave inadequate guidance for applying the exception in the future. Both the significance of the ruling and the lack of direction suggest that the legislature and the courts should act to provide a workable private attorney general exception. Legislative efforts must be directed towards developing a standard that correctly identifies the circumstances in which the exception should apply and devising a pre-trial procedure that implements the incentive purpose of the exception. Courts should similarly clarify the appropriate circumstances to which the *Miotke* ruling should apply.

Jim Oesterle

63. *Id.* at 343, 678 P.2d at 823 (Dolliver, J., dissenting). Justice Dolliver divided the $88,500 award of attorneys' fees between the ten plaintiffs (nine families plus an environmental association) to reach the conclusion that each plaintiff "incurred" $8,850 in legal fees. He then compared the expense to the $245,000 damage award and suggested that a considerable economic expense may not have been incurred as the majority held. *Id.*

64. It would be inappropriate to relate the actual expenses to the plaintiffs' anticipated benefits. However, assuming that the legal fees were reasonable, the anticipated benefits to each litigant were likely much greater than the projected costs of maintaining the action.