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## The Supreme Court of California 1976-1977

### Foreword: The Private Attorney General Rule and Public Interest Litigation in California

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California public interest lawyers, who last year won two significant victories expanding their right to recover attorneys' fees, are now beginning to assess whether that right can be translated into money in the bank. During the space of four days in October, the California Supreme Court decided *Serrano v. Priest (Serrano III)*<sup>1</sup> and Governor Brown signed into law Assembly Bill 1310, which added section 1021.5 to the Code of Civil Procedure.<sup>2</sup> *Serrano III* established that plaintiffs acting as private attorneys general could recover attorneys' fees for vindicating important constitutional rights. Section 1021.5, while less heralded than *Serrano III*, provided a similar and perhaps broader basis for the recovery of attorneys' fees.

Taken together, *Serrano III* and section 1021.5 have created exciting possibilities for public interest law in California.<sup>3</sup> Recovery of substantial

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1. 20 Cal. 3d 25, 569 P.2d 1303, 141 Cal. Rptr. 315 (1977).

2. An act to add Section 1021.5 to the Code of Civil Procedure, relating to attorneys' fees, ch. 1197, 1977 Cal. Stats. (codified in CAL. CIV. PROC. CODE § 1021.5 (West Supp. 1978)).

3. This Foreword will not attempt a comprehensive definition of the terms "public interest law" and "public interest law firm." "Public interest law firms" is used to indicate firms that were established in order to represent interests not often represented in the legal process, and that are funded by charitable contributions or by the government, rather than by

attorneys' fees may enable public interest lawyers to engage in worthwhile litigation that otherwise would have been too costly, and may thus help strengthen legislative and constitutional policies in civil rights, environmental law, and other areas. Young lawyers who heretofore have seen no practical alternative to private commercial practice may now find expanded employment opportunities in the public interest field.

But neither *Serrano III* nor the new statute will necessarily lead to such progressive results. Both the decision and the legislation have left significant issues unresolved. The resolution of these issues by the courts will determine whether the private attorney general rule remains an abstract right or becomes a practical benefit to public interest law. After describing the background of *Serrano III* and section 1021.5, this Foreword examines three major sets of issues arising under them—when plaintiffs' counsel should be entitled to attorneys' fees under the private attorney general theory, the amount of such fees, and the collection of the fees. Although no one thesis is possible for such disparate topics, running throughout this Foreword is the idea that facilitating substantial fee awards in public interest litigation is necessary to continue and expand such litigation.<sup>4</sup>

## I. Background of *Serrano III* and Section 1021.5

### a. The Prior Law

California, like most other jurisdictions in the United States, has followed the so-called American Rule,<sup>5</sup> which bars the party who prevails in litigation from recovering the cost of attorneys' fees from the losing party.<sup>6</sup>

fee-paying clients. Included within the term are legal services law offices, which are funded by the federal Legal Services Corporation exclusively to provide representation for poor people. See 42 U.S.C. §§ 2996a-2996l (Supp. V 1975). This definition is not intended to slight the efforts of those private attorneys who often take cases on a pro bono basis or to imply that public interest law firms have a monopoly on what serves the public interest.

4. In asserting this point, the authors, one the executive director of the Western Center on Law and Poverty, and the other a staff attorney there, do not pretend to be disinterested objective observers.

5. See, e.g., *Hall v. Cole*, 412 U.S. 1, 4 (1972). For discussion and criticism of the American Rule see Ehrenzweig, *Reimbursement of Counsel Fees and the Great Society*, 54 CALIF. L. REV. 792 (1966); Kunzel, *The Attorney's Fee: Why Not a Cost of Litigation?*, 49 IOWA L. REV. (1963); McCormick, *Counsel Fees and Other Expenses of Litigation as an Element of Damages*, 15 MINN. L. REV. 619 (1931); McLaughlin, *The Recovery of Attorney's Fees: A New Method of Financing Legal Services*, 40 FORDHAM L. REV. 761 (1972); Comment, *Court Awarded Attorney's Fees and Equal Access to the Courts*, 122 U. PA. L. REV. 636 (1974) [hereinafter cited as Comment, *Equal Access*].

A discussion of both the American Rule and the contrary English Rule, which provides for the award of attorney's fees to the prevailing party in all litigation, can be found in Goodhart, *Costs*, 38 YALE L.J. 849 (1929).

6. The American Rule is codified in California by CAL. CIV. PROC. CODE § 1021 (West 1955). For an extensive review of the legislative history of § 1021, see Ehrenzweig, *Shall Counsel Fees Be Allowed?*, 26 CAL. ST. B.J. 107 (1951).

Prior to *Serrano III*, California courts had recognized two major equitable exceptions to the American Rule, the common fund and substantial benefit theories.<sup>7</sup> Both exceptions are based on a policy of avoiding unjust enrichment. Under the common fund principle, when the plaintiff's action creates or preserves a specific fund and nonparties are entitled to a share of that fund, the plaintiff may recover attorneys' fees from the fund.<sup>8</sup> The substantial benefit principle allows recovery of counsel fees from the beneficiary of a plaintiff's suit when the plaintiff, acting in a representative capacity, confers a substantial benefit, either pecuniary or nonpecuniary, on a defendant or third party.<sup>9</sup>

Aside from these two discretionary exceptions and limited statutory exceptions in certain areas of law,<sup>10</sup> the American Rule has prevailed in California.<sup>11</sup> Moreover, in *Alyeska Pipeline Co. v. Wilderness Society*,<sup>12</sup> the United States Supreme Court held that litigants in federal courts were not entitled to recover counsel fees under the private attorney general theory.<sup>13</sup> With their access to fees thus limited, public interest firms, particularly those not subsidized by the federal government, faced particularly severe funding problems.<sup>14</sup> If public interest law were to remain an important force

7. See *D'Amico v. Board of Medical Examiners*, 11 Cal. 3d 1, 25, 520 P.2d 10, 27-28, 112 Cal. Rptr. 786, 803-04 (1974).

8. *Estate of Stauffer*, 53 Cal. 2d 124, 132, 346 P.2d 748, 752-53 (1959).

9. *Serrano III*, 20 Cal. 3d at 38, 569 P.2d at 1309, 141 Cal. Rptr. at 321.

10. See, e.g., CAL. CIV. PROC. CODE § 836 (West 1955) (prevailing defendant may recover up to \$100 in defamation case); *Id.* § 1031 (West Supp. 1977) (counsel fees recoverable in wage claim cases not to exceed 20 percent of the wage recovery); CAL. WELF. & INST. CODE § 10962 (West 1972) (welfare applicants who successfully challenge adverse decisions may recover fees in certain kinds of proceedings).

11. Federal courts recognize another exception to the American Rule, the "bad faith" doctrine, under which fees may be awarded to a successful party whose opponent has acted "in bad faith, vexatiously, wantonly, or for oppressive reasons." *F. D. Rich Co. v. Industrial Lumber Co.*, 417 U.S. 116, 129 (1974). See *Alyeska Pipeline Co. v. Wilderness Soc.*, 421 U.S. 240, 259 (1975). Although the rule was rejected by the court of appeal in *Young v. Redman*, 55 Cal. App. 3d 827, 838-39, 128 Cal. Rptr. 86, 93-94 (2d Dist. 1976), the issue has since been raised again in the court of appeal. See Supplemental Opening Brief re Attorneys' Fees for Plaintiff and Appellant, at 2, *Muniz v. Murphy*, Civ. No. 48202 (Cal. Ct. App., 2d Dist., filed May 7, 1976). For a discussion of the impact of *Serrano III* on the bad faith exception, see text accompanying notes 83-86 *infra*.

12. 421 U.S. 240 (1975).

13. Some federal statutes provide for exceptions to the American Rule. The most important of these, the Civil Rights Attorney's Fees Award Act of 1976, 42 U.S.C.A. 1988 (West Supp. 1977), was passed in response to *Alyeska*. It allows a court to award reasonable attorneys' fees to a prevailing party in federal civil rights litigation or to the prevailing defendant in an action brought by the Internal Revenue Service. Other federal statutory exceptions to the American Rule are collected in *Alyeska*, 421 U.S. at 260 n.33, 261 nn.34 & 35, and in *Berger*, *Court Awarded Attorneys' Fees: What is "Reasonable"?*, 126 U. PA. L. REV. 281, 303 n.104 (1977).

14. See Application of Center for Law in the Public Interest for Leave to File Brief as Amicus Curiae and Brief of Center for Law in the Public Interest as Amicus Curiae in Support of Plaintiffs and Respondents at 4, *Serrano III*, 20 Cal. 3d 25, 569 P.2d 1303, 141 Cal. Rptr. 315 (1977). The brief stated that the Center, one of a group of public interest firms founded by the Ford Foundation, had recently received a "terminal" grant from the foundation, based on the

in California, it clearly needed judicial or legislative help. It got both in *Serrano III* and section 1021.5.

*b. Serrano III and the Private Attorney General Rule*

*Serrano III* arose out of litigation brought in 1968 charging that the California school financing system unconstitutionally conditioned educational quality on school district property wealth. In *Serrano I*,<sup>15</sup> the California Supreme Court reversed a trial court judgment sustaining a demurrer, and ruled that plaintiffs would prevail if they could prove their factual allegations at trial. After lengthy proceedings, the trial court ruled in favor of plaintiffs on the merits, and awarded \$800,000 to plaintiffs' counsel.<sup>16</sup> The supreme court in *Serrano II* affirmed the trial court's ruling on the merits, and reserved jurisdiction to decide the attorneys' fees question.<sup>17</sup>

In *Serrano III*, the supreme court affirmed the trial court judgment awarding fees under the private attorney general theory.<sup>18</sup> Initially, the court declared that the *Alyeska* decision did not prevent adoption of the private attorney general rule for state court litigation.<sup>19</sup> *Alyeska* itself contemplated state divergence when it stated that federal courts should continue to apply state law on attorneys' fees when ruling in diversity cases.<sup>20</sup> In addition, the supreme court's departure from *Alyeska* reflects the contrasting role of state and federal courts. Whereas federal district courts are courts of limited jurisdiction with power that can be circumscribed by Congress,<sup>21</sup> California superior and appellate courts are courts of general jurisdiction with equitable powers derived from the state constitution and from common law.<sup>22</sup> Thus the *Serrano* court did not feel bound by the constraints that led the *Alyeska* court to make its restrictive decision.<sup>23</sup>

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assumption that the Center would be able to win attorneys' fees. Uncertainty about that prospect forced the Center to cut back staffing.

15. *Serrano v. Priest*, 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971).

16. Plaintiffs were represented by the Western Center on Law and Poverty, Inc. and Public Advocates, Inc. Both are public interest firms and are not permitted to accept fees from clients. Public Advocates is supported by charitable contributions; the Western Center is funded by the federal Legal Services Corporation.

17. *Serrano v. Priest*, 18 Cal. 3d 728, 557 P.2d 929, 135 Cal. Rptr. 345 (1976).

18. The court rejected the argument that plaintiffs' counsel should have been awarded fees under the common fund and substantial benefit theories as well. 20 Cal. 3d at 35-42, 569 P.2d at 1307-12, 141 Cal. Rptr. at 318-24.

19. 20 Cal. 3d at 43, 569 P.2d at 1312, 141 Cal. Rptr. at 324. This position is analogous to and consistent with the supreme court's frequent reading of provisions of the California Constitution as providing more expansive rights than similar sections of the federal charter. See *People v. Brisendine*, 13 Cal. 3d 528, 548-52, 531 P.2d 1099, 1111-15, 119 Cal. Rptr. 315, 327-31 (1975).

20. 421 U.S. at 259 n.31.

21. *Moro v. Telemundo Incorporado*, 387 F. Supp. 920, 923 (D.P.R. 1974).

22. *Tulare Irr. Dist. v. Superior Court*, 197 Cal. 649, 660, 242 P. 725, 730 (1925).

23. *Alyeska* rests in part on a dubious construction of an 1853 federal statute governing the award of costs in federal courts. 421 U.S. at 251-71.

After discussing *Alyeska*, the court then stated that three factors were important in determining entitlement of fees under the private attorney general theory:<sup>24</sup>

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.<sup>25</sup>

In a very brief discussion, the court cited trial court findings to demonstrate the need for private enforcement in *Serrano* and the magnitude of the class standing to benefit from the decision. Thus the court concluded that the *Serrano* litigation met the latter two criteria, but gave no hint on how to apply them in future cases.

Even on the first factor—the importance of the right vindicated by the suit—the decision was less than illuminating. The court acknowledged the criticism, voiced in both *Alyeska*<sup>26</sup> and in Justice Richardson's dissent,<sup>27</sup> that courts may be intruding on the legislative function by deciding which societal policies are important and which are not.<sup>28</sup> The majority concluded, however, that this problem did not arise in litigation based on the California Constitution. Accordingly, the court determined that cases based on state constitutional rights, such as *Serrano* was,<sup>29</sup> satisfied the first criterion, but left for future decision whether counsel fees could be recovered in litigation upholding an important statutory policy.<sup>30</sup>

### c. Section 1021.5 of the Code of Civil Procedure

Four days before *Serrano III* was announced, Governor Brown signed Assembly Bill 1310, enacting Code of Civil Procedure section 1021.5, a statute which may ultimately prove more significant than the supreme court opinion. The legislation provides that a court may award attorneys' fees when litigation has resulted in "the enforcement of an important right

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24. The court's only explanation of its reasons for adopting the private attorney general theory was a summary of plaintiff's arguments in favor of it. 20 Cal. 3d at 44, 569 P.2d at 1313, 141 Cal. Rptr. at 325. Similarly, the only statement about the three factors used in determining entitlement to fees was that these factors have been used by courts granting fees to private attorneys general. *Id.* at 44-45, 569 P.2d at 1314, 141 Cal. Rptr. at 325. *See also id.* at 46 n.18, 569 P.2d at 1315 n.18, 141 Cal. Rptr. at 326 n.18. This three-pronged test apparently was first formulated in *La Raza Unida v. Volpe*, 57 F.R.D. 94 (N.D. Cal. 1972). *See Comment, Equal Access*, *supra* note 5, at 666-70.

25. 20 Cal. 3d at 45, 569 P.2d at 1314, 141 Cal. Rptr. at 325.

26. 421 U.S. at 269.

27. 20 Cal. 3d at 51-52, 569 P.2d at 1318-19, 141 Cal. Rptr. at 330.

28. *Id.* at 43-44, 569 P.2d at 1313, 141 Cal. Rptr. at 324-25.

29. The *Serrano II* outcome was based on the equal protection clauses of the California Constitution, CAL. CONST. art. 4, § 16 (1966, amended 1974), and art. 1, § 7 (added 1974).

30. 20 Cal. 3d at 46-47, 569 P.2d at 1315, 141 Cal. Rptr. at 326-27.

affecting the public interest," if "a significant benefit, whether pecuniary or non-pecuniary, has been conferred on the general public or a large class of persons," and "the necessity and financial burden of private enforcement are such as to make an award appropriate."<sup>31</sup> Significantly, the section does not state that the "important right affecting the public interest" must be a constitutional right. The other two criteria essentially parallel the latter two factors of the *Serrano III* test.<sup>32</sup>

Thus, both *Serrano III* and section 1021.5 articulate a broad exception to the American Rule for public interest litigation. Yet the judicial opinion and the legislation left unresolved as many questions as they answered. We turn now to some of those questions.

## II. Entitlement to Attorneys' Fees

The two unresolved "entitlement" issues concern the construction of the criteria for recovery of fees articulated in *Serrano III* and Code of Civil Procedure section 1021.5 and the identity of the persons who should pay and receive attorneys' fees awards.

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31. CAL. CIV. PROC. CODE § 1021.5 (West Supp. 1978). The statute also conditions payment of fees on the eventuality that "such fees should not in the interest of justice be paid out of the recovery, if any," thus leaving open the possibility that even in cases in which damages are awarded to a plaintiff the plaintiff may recover attorneys' fees. Since the typical litigation brought by a public interest firm asks for injunctive and declaratory relief, rather than damages, see note 67 *infra*, this Foreword will focus on the criteria set out in the text.

32. Section 1021.5 will probably be applied in cases arising prior to the act's effective date of January 1, 1978 but not yet decided at that time. Procedural statutes generally apply to all pending cases. See *United States v. Alabama*, 362 U.S. 602, 604 (1960). Both state and federal courts have followed this rule in awarding attorneys' fees. See, e.g., *Bradley v. School Bd.*, 416 U.S. 696, 711 (1974) (upholding an award of attorneys' fees on the ground that they were authorized by a statute passed while the case was pending on appeal); *Wade v. Mississippi Coop. Extension Serv.*, 424 F. Supp. 1242, 1252-53 (N.D. Miss. 1976) (relying on *Bradley* and legislative history in holding that the Civil Rights Attorney's Fees Award Act of 1976, 42 U.S.C.A. 1988 (West Supp. 1977), applies retroactively to pending cases); *Olson v. Hickman*, 25 Cal. App. 3d 920, 922, 102 Cal. Rptr. 248, 249 (3d Dist. 1972) (statute providing for fee recovery held applicable to case pending on appeal when statute was enacted); *Coast Bank v. Holmes*, 19 Cal. App. 3d 581, 594-95, 97 Cal. Rptr. 30, 37-38 (4th Dist. 1971) (statute providing for awards of attorneys' fees in certain kinds of contract cases held applicable to contracts existing at time legislation was enacted).

The court in *Bradley* based its decision on the principle that "a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." 416 U.S. at 711. There is no statutory directive or legislative history indicating that § 1021.5 should not apply to cases pending when it was enacted. Whether manifest injustice would be caused by such an application must be determined on a case-by-case basis.

If, however, the statute is held not to apply to pending litigation initiated prior to its effective date, courts in such cases could still apply their equitable powers under *Serrano III* to award attorneys' fees based on enforcement of statutory policy. See text accompanying notes 33 & 37-43 *infra*.

a. *Construction of the Criteria*

*Serrano III* and the new statute state very similar but not identical sets of criteria for determining entitlement to attorneys' fees in public interest cases. An initial question therefore arises concerning what happens should the opinion and the statute conflict. The courts should resolve this issue by making an award when either set of standards provides for entitlement to counsel fees in a particular case. In cases in which the statute fails to provide for recovery, courts may apply the rationale of *Serrano III* to fashion their own equitable exception. Conversely, courts are not free to disregard an express legislative determination that fees should be paid in a particular type of case.<sup>33</sup> Thus, where *Serrano III* and the statute disagree on whether an application for counsel fees is appropriate, the court should apply the more liberal law. The remaining construction questions concern the content of these two three-pronged tests.

1. *Importance of the Interest Vindicated.* Both *Serrano III* and the statute require that for plaintiffs to recover fees their litigation must vindicate important societal interests.<sup>34</sup> Although this promises to be the most hotly litigated of the three factors, some questions concerning the requirement appear to have been decided already. First, *Serrano III* prohibits courts from picking and choosing among state constitutional provisions: any constitutional litigation may qualify for an award of attorneys' fees, provided the other two criteria are met.<sup>35</sup> Second, although *Serrano III* created doubt whether plaintiffs could recover under the private attorney general rule when vindicating statutory rights,<sup>36</sup> section 1021.5 has apparently resolved that doubt. The statute speaks of "the enforcement of an important right affecting the public interest," but does not require that the right be constitutional. Thus in all cases in which the statute applies, courts may consider awards of attorneys' fees to plaintiffs who have vindicated important statutory rights.<sup>37</sup>

While the resolution of these two issues provides a useful starting point for examining the criterion of the importance of the interest vindicated,

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33. See, e.g., *Trout v. Carleson*, 37 Cal. App. 3d 337, 112 Cal. Rptr. 282 (4th Dist. 1974) (applying CAL. WELF. & INST. CODE § 10962 (West 1972)).

34. References to plaintiffs' litigation are not meant to exclude defendants from the class of potential recipients of attorneys' fees awards. Some defendants, in fact, should qualify for such awards. See text accompanying notes 103-109 *infra*. Plaintiffs, however, will constitute the majority of the recipients; thus the text refers to "plaintiffs" for convenience.

35. 20 Cal. 3d at 46 n.18, 569 P.2d at 1315 n.18, 141 Cal. Rptr. at 326 n.18.

36. *Id.* at 45-46, 569 P.2d at 1314-15, 141 Cal. Rptr. at 326.

37. This is consistent with the pre-*Alyeska* federal court decisions awarding fees on the private attorney general theory. Indeed, the first factor considered in awarding fees was "the strength of the Congressional policy" vindicated by the underlying litigation. *La Raza Unida v. Volpe*, 57 F.R.D. 94, 99 (N.D. Cal. 1972) (emphasis added).



several important questions remain unanswered. Because the statute may not provide a basis for an award in a given case,<sup>38</sup> whether *Serrano III* encompasses the vindication of important statutory rights remains a viable question. An additional question is whether a plaintiff in state court may recover attorneys' fees for litigation that vindicates a right derived from the United States Constitution or from a federal statute. Finally, the question arises whether the private attorney general theory should extend to the vindication of common law rights in private litigation. The suggested resolution of these questions supports an expansive view of what rights have sufficient importance to meet the first factor. This approach is based in part on the authors' belief that the second and third criteria—the necessity of private enforcement and the number of people standing to benefit—better define what is important in public interest law and will provide meaningful standards on which courts may rely to shape the contours of the private attorney general rule.

*Does Serrano III extend to cases vindicating statutory rights?* Even if section 1021.5 is held to be inapplicable to a given case,<sup>39</sup> fees may be recoverable under *Serrano III* despite the fact that the right vindicated is statutory rather than constitutional. The private attorney general concept rests on the notion that important societal rights can be protected best by encouraging litigation brought by private citizens. To make the availability of fee awards turn on the distinction between statutes and the Constitution is to imply that all constitutional rights are more important than all statutory ones. Although that conclusion may have some validity on the federal level,<sup>40</sup> it makes little sense when discussing the California Constitution. The state charter, which the supreme court has labeled "compendious, comprehensive, and distinctly mutable,"<sup>41</sup> actually resembles a complex statutory compilation. One cannot reasonably argue, for example, that the statutory right to freedom from racial discrimination in buying a home<sup>42</sup> should be protected with less diligence than the constitutional right of the Huntington Library and Art Gallery to a tax exemption.<sup>43</sup> The distinction between statutory and state constitutional litigation cannot be justified on the importance of the rights involved. The best solution, as will be argued below,<sup>44</sup> is to treat the vindication of all statutory policies as important

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38. It is possible, though unlikely, that the statute will be held inapplicable to suits filed before its effective date. See note 32 *supra*. In addition, the statute permits fee awards to be assessed only against parties to the litigation. In certain cases, however, it may be desirable for a nonparty, the state, to pay the prevailing party's litigation costs; a judgment against the state will be possible only under *Serrano III*. See text accompanying notes 87 to 101 *infra*.

39. See note 38 *supra*.

40. See, e.g., Note, *Awards of Attorneys' Fees Under Private Attorney General Rationale*, 89 HARV. L. REV. 170, 181 n.73 (1975) [hereinafter cited as Note, *Attorneys' Fees*].

41. *Serrano II*, 18 Cal. 3d 728, 767, 557 P.2d 929, 952, 135 Cal. Rptr. 345, 368 (1976).

42. CAL. HEALTH & SAFETY CODE § 35700 (West Supp. 1977).

43. CAL. CONST. art. 20, § 2 (added 1974, renumbered 1976).

44. See text accompanying notes 73-79 *infra*.

enough to warrant fee awards, provided the other two criteria are met.<sup>45</sup>

*Should the California private attorney general rule extend to the vindication of federal constitutional and statutory rights?* Both section 1021.5 and *Serrano III* can be construed to allow California courts to award attorneys' fees in litigation vindicating important federal constitutional and statutory rights. As courts of general jurisdiction with broad equitable powers, California state courts have the power to enforce federal law<sup>46</sup> and the obligation to safeguard federal rights with the same diligence with which they protect state rights.<sup>47</sup> And in enforcing federal rights, state courts are free to apply their own procedural rules.<sup>48</sup> The California private attorney general rule, whether derived from the statute or the courts' inherent equitable powers under *Serrano III*, is unquestionably procedural, and hence is applicable in litigation brought in the California courts under either federal statutes or the United States Constitution.

That the enforcement of important federal constitutional rights can justify awarding attorneys' fees follows directly from the logic of *Serrano III*, for the reasoning that led the *Serrano* court to reject *Alyeska's* analysis applies with equal if not greater force to cases involving federal constitutional rights. Judicial evaluation of the importance of rights under any constitution does not carry the danger of conflict with the legislature that judicial weighing of statutory policies involves. Moreover, if the court follows its approach in *Serrano* for state constitutional rights, that is, considering all such rights sufficiently important to qualify for a fee award, any potential problems of developing manageable standards will be abated.<sup>49</sup>

A question arises, however, whether awarding fees in litigation enforc-

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45. This conclusion is consistent with the reasoning of *Lund v. Affleck*, 442 F. Supp. 1109 (D.R.I. 1977), in which the district court awarded attorneys' fees under the Civil Rights Attorneys' Fees Awards Act of 1976 to plaintiffs who prevailed under the Social Security Act. The court rejected claims that fees could only be awarded to reward constitutional litigation, declaring, "To hold otherwise would necessarily encourage plaintiffs not to raise meritorious statutory claims and thus defeat the jurisprudential wisdom of preferring statutory to constitutional decisions." *Id.* at 1113.

The only California case that has addressed the question of the propriety of an award based on vindication of statutory policy essentially ducked the issue. In *Friends of "B" Street v. City of Hayward*, 142 Cal. Rptr. 50, 53 (1st Dist. 1977), *hearing granted*, No. S.F. 23774 (Cal. Sup. Ct. Jan. 25, 1978), the court of appeal refused to apply the private attorney theory to litigation enforcing statutory rights, stating: "We are persuaded that as an intermediate appellate court we should not take it upon ourselves to fashion a new remedy of statewide application where the Supreme Court has so recently declined to do so." It is difficult to understand how the court's status as an intermediate appellate court compelled it to rule a certain way on an issue the supreme court in *Serrano III* expressly left open "for an appropriate case." 20 Cal. 3d at 47, 569 P.2d at 1315, 141 Cal. Rptr. at 327.

46. *Dowd Box Co. v. Courtney*, 368 U.S. 502, 507-08 (1962); *Williams v. Horvath*, 16 Cal. 3d 834, 837, 548 P.2d 1125, 1127, 129 Cal. Rptr. 453, 455 (1976).

47. *S.P. Growers Ass'n v. Rodriguez*, 17 Cal. 3d 719, 727, 552 P.2d 721, 726, 131 Cal. Rptr. 761, 766 (1976).

48. *Minneapolis & St. Louis R.R. Co. v. Bombolis*, 241 U.S. 211 (1916).

49. See Note, *Attorneys' Fees*, *supra* note 40, at 180-81.

ing federal statutes that do not contain fee provisions would conflict with federal policy. It might be argued that because Congress has provided that attorneys' fees should be awarded in litigation enforcing some federal statutes and has failed to include fee provisions in others, awarding fees for litigation vindicating the latter statutes would conflict with substantive federal policies. Where the application of a state procedural rule would conflict with the substantive policies underlying the federal scheme, and following the federal rule would not unduly interfere with the orderly operation of the state courts, the federal rule prevails.<sup>50</sup>

It is difficult to see, however, which federal policy would be thwarted by awarding fees in state court litigation vindicating federal statutory rights. To begin with, an award of attorneys' fees does not alter the outcome of a lawsuit. Thus any federal concern for defendants' substantive rights will be protected by the state court's judgment on the merits. Moreover, any defendant who feels jeopardized by the prospect of having to pay attorneys' fees in litigation enforcing federal rights has the option of removing the case to federal court.<sup>51</sup>

It is true that state court awards of attorneys' fees in instances where the federal courts are prohibited from making similar awards may to some extent encourage forum shopping. But the financial incentive to litigate in state court will not undermine any federal interest in providing plaintiffs with a wide channel of access to federal forums. Plaintiffs who feel they will not be treated fairly in state court may still choose to go to federal court, and are likely to do so despite the incentive to litigate in state court provided by the prospect of fee awards. And if forum shopping becomes a serious problem for a given federal statute, Congress may amend that law to provide for exclusive federal jurisdiction.<sup>52</sup>

Finally, the state-federal conflict on the issue of attorneys' fees is more apparent than real. The most that can be read into the congressional failure to include a fee provision in a certain statute is that Congress believed that no extra incentive was needed to enforce that statute. By awarding fees for enforcement of that statute, a California court is merely concluding that in this state additional incentive to enforcement is appropriate. This is not the kind of state-federal conflict envisioned in the rule that state procedure must be subordinated to federal substantive policy.

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50. *Dice v. Akron, Canton & Youngstown R.R. Co.*, 342 U.S. 359 (1952).

51. 28 U.S.C. § 1441 (1970).

52. Forum shopping is not necessarily an evil in itself. Every attorney who must choose between litigating in state or federal court, decide the appropriate county in which to bring a statewide action, or decide whether to seek a change of venue engages in forum shopping; in each case the decision will be based on the strategically most advantageous forum for the client. Forum shopping in the state-federal context only becomes an evil if litigants are able to use it to avoid a federal substantive policy.

*Should the California private attorney general rule extend to the vindication of common law rights in private litigation?* Another issue concerning the first criterion is whether fees can be awarded in litigation between private parties establishing new common law rights.<sup>53</sup> For example the appellant-defendant in *Green v. Superior Court*,<sup>54</sup> who helped establish the right of a tenant to withhold payment of rent as long as the landlord fails to maintain the apartment in a habitable condition, would appear to have established a sufficiently important right. It could be contended, however, that such an award would not be consistent with the enforcement purpose of the private attorney general theory. In a case such as *Green*, rather than supplementing the enforcement process, the litigant is asking the court to engage in judicial lawmaking.

This argument, however, creates an artificial distinction between common law and other kinds of judicial decisions. To begin with, litigation involving common law rights cannot be distinguished from constitutional litigation on the ground that the former involves lawmaking while the latter merely supplements public enforcement. There was no more possibility of public enforcement in a constitutional case like *Serrano* than there was in a common law case like *Green*. Action by a private litigant is essential in both types of litigation, and hence it would be anomalous to conclude that the private attorney general rationale is applicable to one but not to the other. Further, no meaningful contrast between the two types of litigation can be drawn by characterizing one as lawmaking and the other as lawfinding, *i.e.*, as merely enforcing existing rights. There was no more "lawmaking" in *Green* than there was in *Serrano*. In *Green*, the supreme court relied in part on existing California statutes and decisions requiring that leased premises be maintained in habitable condition<sup>55</sup> and on the existing contracts doctrine of dependant covenants.<sup>56</sup> Similarly in *Serrano* the supreme court relied on the general provisions of existing law—the state equal protection clauses—to establish a previously unrecognized right—the right of school children to an equally funded education. Each type of case involves elements of both enforcement and lawmaking. Thus, if fees are justified in a case like *Serrano*, they cannot be denied in a case like *Green* on the ground that such cases create rather than enforce rights.

The "lawmaking" argument, however, is derived from a more legitimate concern, the fear that application of the private attorney general rule to common law litigants will lead to unfair results in many cases. This fear is in

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53. Even when no new law is established, fees can and should be awarded when a lawsuit is successful in changing the behavior of a private party whose actions have affected a large number of people. For example, a fee award in a private nuisance action against an industry that has befouled the water system of an entire city should not offend anyone.

54. *Green v. Superior Court*, 10 Cal. 3d 616, 517 P.2d 1168, 111 Cal. Rptr. 704 (1974).

55. *Id.* at 628, 517 P.2d at 1176-78, 111 Cal. Rptr. at 712-14.

56. *Id.* at 634-35, 517 P.2d at 1180-81, 111 Cal. Rptr. at 716-17.

turn based on two related notions. First, because the private ordering function of the common law requires that persons be entitled to rely on existing rules of law, it might be unfair to subject a private party to a large penalty for failing to comply with a previously unrecognized duty. Second, even in cases where the reliance problem is not acute, it may be unfair to impose on a small and relatively impecunious litigant the entire cost of creating a new right that confers a widespread benefit.<sup>57</sup>

Unfairness, however, is unlikely to result. Even in the few cases in which new law is established at the expense of a small private litigant, an award of attorneys' fees may be justified. Courts of equity need not let theoretical considerations blind them to the economic realities of a case. The losing litigants' behavior may warrant a nominal award of attorneys' fees notwithstanding the theoretical unfairness of an award. While one may sympathize in theory with the landlord in *Green* who was chosen among all the state's apartment owners to test the warranty of habitability theory, one's sympathy should be tempered with the knowledge that the landlord's tenants were forced to live in an apartment with a collapsed ceiling, rats, mice, cockroaches, no heat, plumbing blockages, faulty wiring, and an unsafe stove.<sup>58</sup> In sum, it is far from inevitable that attorneys' fee awards in private litigation will lead to unfair results in many cases.

2. *Need for Private Enforcement.* The second fee award requirement imposed by *Serrano III* and section 1021.5—that the need for private enforcement and its resulting burden on the plaintiff must justify the award—lies at the heart of the private attorney general doctrine. That doctrine is based on the idea that fees must be awarded to secure representation of interests that might otherwise remain unrepresented.<sup>59</sup> This second criterion essentially tests whether the public interest advanced by the litigation would have been represented without the plaintiff acting as a private attorney general.

To answer that question, a court must first determine whether private litigation was needed to enforce the right, and then decide whether fairness requires shifting the burden of enforcement from the plaintiff to another party. The first question must be answered by looking at the alternative to the private attorney general—the public Attorney General or another public officer. When the suit is against a public entity, a court should usually conclude that private enforcement was necessary. In *Serrano*, for example, one could hardly expect the California Attorney General to challenge the California school financing system.<sup>60</sup> When public interest litigation is

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57. While this concern primarily focuses on common law litigation, which almost always pits private litigants against each other, it also applies to private litigation vindicating constitutional or statutory rights.

58. 10 Cal. 3d at 621, 517 P.2d at 1170, 111 Cal. Rptr at 706.

59. Comment, *Equal Access*, *supra* note 5, at 676.

60. *See Serrano III*, 20 Cal. 3d at 47 n.20, 569 P.2d at 1315 n.20, 141 Cal. Rptr. at 327 n.20.

brought against a private party, there is often a possibility that a governmental entity could have brought suit instead. This possibility, however, should not preclude a fee award. The private attorney general theory is based in part on the supposition that even in cases in which public enforcement is possible, public agencies are often unwilling or incapable because of insufficient staffing to protect important rights.<sup>61</sup> Redundant litigation should not be rewarded,<sup>62</sup> but in determining the necessity of private enforcement, courts "should look to the adequacy of actual enforcement by the government and not simply to the adequacy of potential or authorized enforcement."<sup>63</sup>

The determination whether someone other than plaintiffs or their attorneys should bear the burden of private enforcement rests on an assessment of the potential benefits accruing to the plaintiff compared with the costs of the litigation.<sup>64</sup> Generally recovery is justified when the plaintiff, in winning the litigation, captures for herself a "minute portion of aggregate good by incurring large expense to enforce a widely held right."<sup>65</sup> When the plaintiff has won a substantial monetary recovery or has gained a significant right with primarily individual application, the second criterion has not been met.<sup>66</sup> Because most public interest litigation seeks declaratory and injunctive relief rather than damages,<sup>67</sup> and because public interest firms generally do not file lawsuits solely for the personal vindication of a small group of individuals, these limitations should not hinder responsible public interest lawyers.

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Theoretically, in *Serrano* a low wealth school district rather than students and taxpayers could have brought suit, but public entities present much less compelling constitutional claims than do individuals. Moreover, the theoretical possibility that a public entity might bring a suit not normally within the scope of its activities is hardly sufficient to justify a ruling that private enforcement was unnecessary.

61. 20 Cal. 3d at 44, 569 P.2d at 1313, 141 Cal. Rptr. at 325.

62. See, e.g., *Brewer v. School Bd.*, 456 F.2d 943, 950 & n.22 (4th Cir. 1972) (denying award of fees based on private attorney general theory in school desegregation cases, noting that several federal agencies were empowered to bring desegregation actions). The *Brewer* court, however, failed to make a finding that these federal agencies actually were litigating in the area, a finding which seems crucial in order to draw the conclusion that private enforcement is not necessary. See text accompanying note 63 *infra*.

63. Comment, *Equal Access*, *supra* note 5, at 677 (citing *Office of Communication v. FCC*, 359 F.2d 994, 1003-04 (D.C. Cir. 1966) (noting that FCC enforcement of license renewal rules must be supplemented by private vigilance)).

64. For a discussion of the costs of litigation to public interest firms and their clients, see text accompanying notes 134-138 *infra*.

65. *La Raza Unida v. Volpe*, 57 F.R.D. 94, 101 n.10 (N.D. Cal. 1972). See also *Jutkowitz v. Bourns, Inc.*, 76 Cal. App. 3d 985, 991-92, 143 Cal. Rptr. 337, 341 (2nd Dist. 1978).

66. In such a case, it is also likely that the third criterion, that the benefit of the litigation be widespread, will be not met.

67. See *La Raza Unida v. Volpe*, 57 F.R.D. 94, 101 (N.D. Cal. 1972). Not only is public interest litigation generally directed at goals other than damages, but legal services organizations, which form the bulk of the public interest bar, are forbidden to take fee-generating cases. 42 U.S.C. § 2996f(b)(1) (Supp. V 1975).

3. *Benefits to Party Other than the Plaintiff.* The major problem concerning the remaining criterion for recovery of attorneys' fees derives from the difference between *Serrano III* and section 1021.5 in phrasing the requirement. *Serrano III* refers to "the number of people standing to benefit from the decision," while the statute provides for fee awards when "a significant benefit, whether pecuniary or nonpecuniary, has been conferred on the general public or a large class of persons." The major issue raised by the different wording is whether the statutory reference to "substantial benefits" incorporates the sense of that term as used in the traditional substantial benefit theory rather than the less stringent requirements of the private attorney general theory.

*Serrano III* illustrates the importance of this issue. The supreme court refused to award fees to plaintiffs' counsel on the substantial benefit theory, but awarded them under the private attorney general rule. The court acknowledged that plaintiffs had performed a service for the entire state of California by insuring that the school financing system will be constitutional in the future, but declared: "[T]o award fees on the 'substantial benefit' theory on the basis of considerations of this nature—separate and apart from any consideration of actual and concrete benefits bestowed—would be to extend that theory beyond its rational underpinnings."<sup>68</sup> The court found, however, that the benefits conferred on the state were sufficient for purposes of the private attorney general doctrine.<sup>69</sup> Thus, under the private attorney general theory of recovery, the benefits conferred on the public need be no more tangible than the knowledge that a public right has been vindicated, while the substantial benefit theory requires something more "concrete."<sup>70</sup>

If section 1021.5 is to have the effect its framers intended, fees should be awarded if benefits are conferred on the public in the sense used in the private attorney general theory. If a more stringent test for recovery were used, then the statute would do no more than codify the existing substantial

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68. 20 Cal. 3d at 42, 569 P.2d at 1312, 141 Cal. Rptr. at 323. Plaintiffs argued that concrete benefits were produced by the legislation passed in response to *Serrano I* providing for increased aid to low wealth school districts. The court, however, stated that the decision to increase aid was legislative, not judicial; all *Serrano* requires is equalization of wealth-related spending, not necessarily an increase in spending. *Id.* at 40-41, 569 P.2d at 1311, 141 Cal. Rptr. at 322-23.

69. *Id.* at 47-48, 569 P.2d at 1315-16, 141 Cal. Rptr. at 327.

70. It is difficult to ascertain what level of "concreteness" will justify an award under the substantial benefit theory. The *Serrano III* court noted with approval *Hall v. Cole*, 412 U.S. 1 (1973) and *Mills v. Electric Auto-Lite*, 396 U.S. 375 (1973). 20 Cal. 3d at 42, 569 P.2d at 1312, 141 Cal. Rptr. at 323. In *Hall*, the Court concluded that the plaintiff had conferred substantial benefits on a union by winning the right to free speech within that union, while in *Mills* the Court ruled that a corporate shareholder who succeeded in vacating a proxy election based on misleading proxy statements had conferred a substantial benefit on the corporation. The distinction between conferring a right to speak freely in a union hall and the right to attend an equally financed school is not readily apparent.

benefit exception to the American Rule.<sup>71</sup> On the presumption that the legislature means its statutes to have an actual effect, the "significant benefit" requirement of section 1021.5 should be applied as it is in private attorney general cases.<sup>72</sup>

4. *An Overall Approach.* Thus far the *Serrano III*-section 1021.5 criteria have been discussed as if they were distinct, exact measurements that will be evaluated separately to yield the correct result in every case. Of course, legal criteria rarely operate in such a precise manner, and these criteria are no exception. They overlap to a significant extent,<sup>73</sup> and are by necessity worded so generally that judges may be inclined to make fee award determinations solely on the basis of their approval of the underlying litigation or of the participating attorneys.<sup>74</sup> It is, however, possible to formulate a principled approach to interpreting the three criteria that generally will yield predictable and fair results.

This suggested approach to a fees award request would focus primarily on the second *Serrano III* criterion, the need for private enforcement, and secondarily on the third criterion, whether the benefits of the underlying litigation will be widely enjoyed by the public. It would largely disregard the first criterion—the importance of the right vindicated—and instead treat all statutory and constitutional provisions on an equal basis.

Stressing the need for private enforcement and deemphasizing judicial weighing of statutory importance should be beneficial in several respects. First, this approach lessens the danger of judicial infringement on the legislative function.<sup>75</sup> Far from acting as legislators engaged in comparing

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71. A plaintiff must actually comply with three requirements to obtain an award under the substantial benefit theory. The underlying litigation must invoke the equitable powers of a court, be maintained as a representative action, and result in a disposition that confers a substantial benefit. See *Coalition for Los Angeles County Planning in the Pub. Interest v. Board of Supervisors*, 76 Cal. App. 3d 241, 248, 142 Cal. Rptr. 766, 771 (2d Dist. 1977). The first two requirements, however, are not difficult to meet. Almost all public interest litigation asks for some equitable relief, and a representative action need not be a class action or derivative action, as long as the plaintiff's claim is representative of other claims. *Id.* at 248, 142 Cal. Rptr. at 770-71. The most difficult criterion to meet, therefore, is that requiring substantial benefit to be conferred.

72. In any event, whether an award is sought under the private attorney general or substantial benefit theories, *Serrano III* establishes that the benefit need not be pecuniary and that it need not be conferred on the defendant. 20 Cal. 3d at 38, 40 n.10, 569 P.2d at 1309, 1310 n.10, 141 Cal. Rptr. at 320-21, 322 n.10.

73. See, e.g., Note, *Awarding Attorneys' Fees to the "Private Attorney General": Judicial Green Light to Private Litigation in the Public Interest*, 24 HASTINGS L.J. 733, 749 (1973): "Requiring a showing of both statutory vindication and a class wide benefit, would seem to entail a largely redundant demonstration."

74. When the same judge that decided the merits of a case decides the fees issue, plaintiffs might be expected to do well if judges are purely subjective, but the motion for fees may be heard in a different court and a different judge will certainly rule on an appeal.

75. The *Serrano III* court limited the scope of the decision to the vindication of constitutional policies partially because it felt that it would offend legislative sensibilities for courts to determine which statutory policies are important. 20 Cal. 3d at 44-46, 569 P.2d at 1313-15, 141



the merits of various statutory policies, judges using this approach would be making essentially procedural decisions, decisions they are uniquely equipped to make. In determining that the need for private enforcement justifies a fee award, a court is not deciding the relative merits of the statutory or constitutional policy vindicated by the litigation, but rather is protecting access to the courts. Insuring that no voice remains unheard and that no interest remains unrepresented in a court of law always has been a judicial junction,<sup>76</sup> one zealously performed by the California Supreme Court.<sup>77</sup> Determining whether a plaintiff has met the third *Serrano III* criterion, *i.e.*, whether the benefit bestowed by the litigation will be enjoyed widely, is somewhat more subjective, but still does not intrude on the legislative function. Courts do not have to decide whether particular litigation is beneficial, but only whether the benefits it does produce extend sufficiently beyond the relief granted to the individual plaintiff. This determination is not unlike that made each week by the supreme court when it decides which petitions for hearing to grant.<sup>78</sup> Picking and choosing among statutes, with the implicit judgment that some statutes are unimportant, could offend the legislature. Focusing instead on matters within the court's traditional purview both insures greater competence and avoids conflicts between the branches of government.

A second advantage of the suggested approach is its relative predictability. In dispensing with judicial comparison of policies, the suggested approach would eliminate the potentially most arbitrary aspect of the criteria. It is nearly impossible to predict in a given case whether a court will conclude that one statute protecting the environment is as important as another concerning voting rights, and whether vindicating either merits an award of attorneys' fees. The supreme court recognized the difficulty and subjectivity involved in making such distinctions when it rejected the comparison approach for state constitutional policies in *Serrano III*.

Finally, the suggested approach would yield fair results. A determination that the suit meets the latter two criteria should provide sufficient reassurance of the importance of the action in furthering the public interest. Furthermore, plaintiffs deserving of attorneys' fees will not go unrewarded

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Cal. Rptr. at 325-26. Needless to say, it is hardly less of an intrusion to hold in effect that *no statutory policies* are important enough to protect through the award of attorneys' fees.

76. *See, e.g.*, *Boddie v. Connecticut*, 401 U.S. 371 (1971) (ruling unconstitutional the imposition of filing fees on indigent persons seeking divorces).

77. *See, e.g.*, *Payne v. Superior Court*, 17 Cal. 3d 908, 553 P.2d 565, 132 Cal. Rptr. 405 (1976) (indigent prisoner sued in a civil action could not be denied right to appointed counsel and right to personal appearance in court).

78. CAL. RULES OF CT. 29(a): "A hearing in the Supreme Court after decision by a Court of Appeal will be ordered (1) where it appears necessary to secure uniformity of decision or the settlement of important questions of law . . . ." *See also id.*, Rule 976(b), which requires a court of appeal or superior court appellate department, in order to decide whether an opinion rendered by it should be published, to determine whether it establishes a new rule of law, involves a legal issue of continuing public interest, or criticizes existing law.

because of judicial antipathy to the statutory policy protected in their litigation.<sup>79</sup>

In addition, this liberal approach to the private attorney general rule will not have the deleterious effect of encouraging unmeritorious litigation. Critics of the private attorney general rule contend that the rule will lead to a large bonanza for attorneys pursuing nuisance suits.<sup>80</sup> Whether this concern is expressed in terms of protecting the courts from increased congestion<sup>81</sup> or preventing suits in which the litigation costs outweigh the social benefits,<sup>82</sup> critics of a liberalized private attorney general theory are afraid that private attorneys general will bring suits that should not be brought. To be sure, many suits are prosecuted that would be better left unlitigated. It is doubtful, however, that implementation of a liberal private attorney general doctrine will cause an increase in such suits.

Courts are able and willing to deal with frivolous litigation in ways more direct and effective than denying attorneys' fees. Attorneys may not recover a fee award unless they win the case, and so-called nuisance suits brought by private attorneys general have no more chance of winning than do ordinary nuisance suits. Even if the plaintiff in such a nuisance suit is victorious, the court need not award fees. The label "nuisance" often means that the lawsuit could easily have been avoided if the plaintiff had agreed to negotiate or if the plaintiff had directed the attention of an appropriate public entity to the problem. When this is the case, a court should conclude that there was no need for enforcement by a private attorney general. Other nuisance suits, even when unavoidable, serve only to vindicate the personal satisfaction of the plaintiff. In these cases, too, a court can determine that even if private enforcement was needed, the cost of the enforcement should be borne by the plaintiff or plaintiff's counsel rather than the public. Further, in almost every case in which a statutory policy vindicated is truly trivial, the third *Serrano III* criterion will also not be met: the litigation will have no widespread public consequences, even under the liberal benefit criterion of *Serrano III*.

Moreover, in addition to refusing to award fees to the victorious plaintiff, the court may use its equitable powers, in the interests of fairness and deterrence, to award costs and attorneys' fees against an unsuccessful litigant who sues in bad faith or uses the legal process for the sole purpose of harassment.<sup>83</sup> The federal Legal Services Corporation Act of 1975,<sup>84</sup> pursuant to which a substantial amount of public interest law is funded, permits

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79. See text accompanying note 74 *infra*.

80. See generally Note, *The Allocation of Attorney's Fees After Mills v. Electric Auto-Lite Co.*, 38 U. CHI. L. REV. 316, 333-34 (1971).

81. See, e.g., 122 CONG. REC. 16882 (1976) (remarks of Sen. Helms).

82. See, e.g., Note, *Attorneys' Fees*, *supra* note 40, at 179.

83. See generally Comment, *Equal Access*, *supra* note 5, at 645-55, 660-61.

84. 42 U.S.C. §§ 2996a-2996l (Supp. V 1975).

states to provide that courts may award fees to victorious defendants in cases where a recipient of funds under the act has brought an action for “the sole purpose of harrassment of the defendant.”<sup>85</sup> Federal courts have also relied upon their equitable powers to award fees to victorious litigants in cases in which the losing party has acted oppressively or in bad faith.<sup>86</sup> As long as courts recognize that the bad faith rule is applicable to both plaintiffs and defendants, and is a narrow exception designed to counter particularly abusive and perhaps unethical conduct, it can serve a useful function of deterrence that will not also discourage responsible public interest litigation.

In summary, the major issues surrounding the criteria for recovery under *Serrano III* and section 1021.5 are what types of statutory policies and federally created rights can be vindicated by private attorneys general, how plaintiffs’ costs and benefits will be balanced by the courts, and how strictly the “significant benefits” requirement in the statute will be interpreted. A comprehensive approach to interpreting these criteria that stresses the need for private enforcement and deemphasizes the merits of the statutory policy vindicated by the litigation would produce predictable and fair results. Moreover, such an approach would minimize conflict between the judicial and legislative branches of the government, and is unlikely to lead to any increase in frivolous or bad faith litigation.

#### *b. Determination of Who Pays and Who Receives Counsel Fee Awards*

1. *Who Should Pay Attorneys’ Fees?* Problems arise concerning the persons against whom fees should be awarded when the party opposing the plaintiff does not appear to be the logical party to be paying attorneys’ fees.<sup>87</sup> This situation is most likely to occur when a plaintiff successfully challenges the constitutionality of a statute in an action defended by a private party or by a governmental entity other than the state.

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85. *Id.* § 2996e(f). Under this provision any such costs or fees are to be paid directly by the Legal Services Corporation. Remarks made during the debates on this legislation indicate that this provision is “only applicable in the extraordinary situations where legal services attorneys have totally abused the legal system in violation of the Canons of Ethics and Code of Professional Responsibility.” 120 CONG. REC. 24052 (1974) (remarks of Sen. Mondale). *See, e.g., id.* at 24037 (Sen. Cranston) and 15008 (Rep. Steiger).

86. *See, e.g.,* F. D. Rich Co. v. United States *ex rel.* Industrial Lumber Co., 417 U.S. 116, 129 (1974); Vaughan v. Atkinson, 369 U.S. 527, 530-31 (1962); Rolax v. Atlantic Coast Line R.R. Co., 186 F.2d 473, 481 (4th Cir. 1951).

The California courts have so far refused to recognize a rule providing for the award of fees under the bad faith rationale, but after *Serrano III* this refusal cannot be justified. The last time the issue was before the supreme court, in *D’Amico v. Board of Medical Examiners*, 11 Cal. 3d 1, 520 P.2d 10, 112 Cal. Rptr. 786 (1974), the court expressly reserved the question for future determination. In the only case to consider the question since *D’Amico*, the court of appeal refused to recognize the bad faith exception. *Young v. Redman*, 55 Cal. App. 3d 827, 838-39, 128 Cal. Rptr. 86, 93-94 (2d Dist. 1976). The court recognized the policy reasons in favor of making such fee awards but stated that the legislature rather than the courts should promulgate such a rule. In light of *Serrano III*’s repudiation of this type of deference to the legislature, this reasoning is no longer sound. *See Note, Attorneys’ Fees, supra* note 40, at 176.

87. This issue is far from academic to plaintiffs. If the only party deemed appropriate to pay attorneys’ fees is one who can present a sympathetic case to a court, the court may rule that

*Serrano III* presents a good example. The litigation was initially brought against state and Los Angeles County executive officials charged with the duty of administering various aspects of the California school financing system.<sup>88</sup> A handful of wealthy school districts intervened as defendants. When the plaintiffs prevailed at trial, only the county officials and the school districts pursued an appeal of the judgment. In an opinion issued initially, the supreme court stated that the plaintiffs were entitled to their fees on appeal, but did not specify who should pay those fees.<sup>89</sup> Before the opinion became final, however, the court modified that portion of its opinion to remand the issue of fees on appeal to the trial court, with directions that fees should be assessed only against the parties pursuing the appeal.<sup>90</sup>

The assessment against the county defendants rather than the state defendants is arguably justified under the facts of *Serrano III*, but should not be interpreted as supporting a general principle that fees can only be assessed against parties. In *Serrano III*, it may have seemed unfair to the court to require the state, which had expressly declined to pursue a doomed appeal, to pay plaintiffs' attorneys' fees on appeal. The state—or at least its executive officials—had no interest in the litigation at that point.<sup>91</sup>

But in the typical case, the losing party is a county or local official administering an unconstitutional state law or a private party in good faith taking advantage of such a law. As a matter of equity, efficiency, and enforcing the principles behind the private attorney general theory, the state, not the lower governmental agency or private party, should pay the plaintiffs' attorneys' fees. The plaintiff, by ridding the state of an unconstitutional law, has bestowed a benefit on everyone in the state, and it is no more equitable to require the defendant to bear all the costs than it is to impose them on the plaintiff.<sup>92</sup> From an efficiency standpoint, to the extent that

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the plaintiff is not entitled to attorneys' fees. In addition, particularly in politically unpopular cases, some parties may present greater collection problems than others. See Section IV *infra*.

88. Although the legislature, not the defendants, was to blame for the unconstitutionality of the school system, the supreme court ruled that the proper defendants in constitutional litigation are executive officials charged with administering the challenged law. *Serrano II*, 18 Cal. 3d 728, 752, 557 P.2d 929, 942, 135 Cal. Rptr. 345, 358 (1976). Even though the state of California and Los Angeles County were not defendants, the individual defendants were sued in their representative capacities, and there has never been any question that the fees are payable by the state and county, not the individuals.

89. 569 P.2d at 1317, 141 Cal. Rptr. at 329 (advance sheets).

90. 20 Cal. 3d at 50, 569 P.2d at 1317, 141 Cal. Rptr. at 329.

91. It is arguable that even on the *Serrano* facts the state could have been held liable for fees on appeal. Even though the state through its executive branch did not pursue the appeal, the state through its legislative branch failed to pass laws that could have resolved *Serrano* during that time period.

92. Comment, *Equal Access*, *supra* note 5, at 671-72.

defendants' behavior is influenced by the prospect of having to pay attorneys' fees, the state is again the logical party to assess. It does not seem desirable to deter defendants acting in good faith from taking advantage of statutes that subsequently prove to be unconstitutional.<sup>93</sup> Finally, the primary function of the private attorney general, to represent voices that otherwise would remain unheard, can best be served if the costs of litigation are spread as widely as possible. As one federal court stated: "Where the interests of so many are at stake, justice demands that the plaintiffs' attorneys be equipped to inform the court of the consequences of available choices; this can only be done if the availability of funds for representation is not left to chance."<sup>94</sup> Under this reasoning, fees should be assessed against the party best able to bear the financial burden—the state.

Code of Civil Procedure section 1021.5 does not permit assessment of fees against the state when it is not a party to the underlying litigation,<sup>95</sup> but such an assessment may be possible under *Serrano III* or the substantial benefit theory.<sup>96</sup> In one recent case now before the supreme court, the court of appeal declared that fees could be assessed against a party that did not take part in the underlying litigation.<sup>97</sup> The court directed a fee award against the City of Los Angeles, ruling that the city in effect was represented in the underlying litigation by the City Council, the Planning Commission and an advisory agency.<sup>98</sup> Extending this principle, it could be argued that when a private party or a lower governmental agency acting in good faith<sup>99</sup> defends the constitutionality of a statute, that party is a representative of the state, not under formal agency theory, but in the sense that the state has as much interest in preserving the statute as does the defendant. Thus the state should be considered as a possible source of funding for plaintiffs' attorneys' fees when a statute is ruled unconstitutional, even when the state is not a party.

Granting fees against the nonparty state in a case involving a private defendant might, however, be considered an overextension of the court's equitable powers. Where the state's interest is neither represented by the

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93. *Id.* at 672.

94. *Bradley v. School Bd.*, 53 F.R.D. 28, 42 (E.D. Va. 1971), *rev'd*, 472 F.2d 318 (4th Cir. 1972), *vacated and remanded*, 416 U.S. 696 (1974).

95. The statute provides that fees may be awarded against "one or more opposing parties." CAL. CODE CIV. PROC. § 1021.5 (West Supp. 1978). Of course, in order that the state be assessed fees, the state must be named a party in the fees litigation. It could be argued that by making the state a party to the fees litigation, even if the state was not a defendant in the litigation on the merits, the plaintiff has complied with the statute.

96. *See Mandel v. Hodges*, 54 Cal. App. 3d 596, 127 Cal. Rptr. 244 (1st Dist. 1976).

97. *Woodland Hills Residents Ass'n v. City Council*, 141 Cal. Rptr. 857 (2d Dist. 1977), *hearing granted*, No. L.A. 30897 (Cal. Sup. Ct. Jan. 25, 1978).

98. *Id.* at 861.

99. The term "good faith" is used advisedly. There may be situations in which the defendant has no good faith belief in the validity of the statute. Also, there may be cases in which the defendant's behavior is so outrageous that fee-shifting to the state is inappropriate notwithstanding the defendant's reliance on a statute.

state nor a state agency, it may be unfair and impractical to award fees against the state. Nevertheless, the fairness of the state subsidizing these cases remains undisputed. If it is outside the court's purview to effect such a policy, these arguments should be directed to the legislature. To effectuate the policies embodied in its adoption of the private attorney general rule, the legislature could sanction such awards either through special appropriations or by the creation of a special reserve fund to finance such awards.<sup>100</sup>

When the underlying litigation vindicates statutory rather than constitutional rights, however, different considerations arise. As a matter of policy, the equitable balance is different in statutory litigation than in constitutional cases. In each the plaintiff bestows a benefit on the general public, a consideration that supports spreading the costs of a lawsuit to the state. In statutory litigation, however, unlike constitutional lawsuits, the defendant has not in good faith relied on a statute later proved invalid. Indeed, the defendant has violated the statute. Assessing fees against the defendant may deter future statutory violations, and assessing fees against the state will not have the same therapeutic effect.<sup>101</sup>

Doctrinally, it is also harder to justify an award against the nonparty state government in statutory litigation. In constitutional litigation the defendant may be said to represent the state, which has an interest in protecting its statutes from attack, but no such interest exists when the underlying litigation seeks to enforce statutory policy. Therefore, except perhaps in cases in which spreading the costs of litigation to the nonparty state government is necessary for the recovery of fees at all, courts should not impose such fee-shifting in statutory litigation.

## 2. *Who Should Receive Attorneys' Fees?*<sup>102</sup> Fees can be awarded to

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100. See Comment, *Equal Access*, *supra* note 5, at 680.

101. It may be argued, however, that assessments of fees against the state in statutory litigation will encourage the state to enforce its own laws more diligently. *Id.* at 678.

102. Another question might be raised concerning whether a litigant must be victorious to qualify for a fee award. Section 1021.5 on its face appears to bar recovery to such a litigant. Under *Serrano III*, however, the question might be closer in some cases, depending on how a court views the purposes behind the private attorney general rule. Insofar as the court concludes that the sole purpose of the rule is enforcement of important rights, fees should never be awarded for completely unsuccessful litigation. The litigant who has failed to enforce any right at all has done nothing that would merit an attorneys' fee award. Occasionally, however, a litigant is successful in vindicating an important right, but fails to obtain the precise relief sought. For example, in *Westbrook v. Mihaly*, 2 Cal. 3d 765, 471 P.2d 487, 87 Cal. Rptr. 839 (1970), *vacated*, 403 U.S. 915 (1971), the supreme court invalidated on equal protection grounds the requirement that two-thirds of the voters must approve general obligation bonds, but applied the decision to future elections only. The litigants, who enforced an important constitutional right without capturing any personal benefit, seem to have acted as private attorneys general in the purest sense. Attorneys' fees awards are needed to encourage such technically unsuccessful litigants, who otherwise might have no incentive at all to vindicate significant rights. See 2 Cal. 3d at 804, 471 P.2d at 515, 87 Cal. Rptr. at 867 (Mosk, J., concurring and dissenting). A court might conclude, moreover, that private attorneys general not only enforce important rights, but also represent people who otherwise would be left unrepresented. In some

all kinds of private plaintiffs<sup>103</sup> and their counsel, even public interest lawyers whose clients do not pay fees.<sup>104</sup> The major undecided issue relating to who may appropriately receive attorneys' fees concerns the eligibility of defendants.

*Serrano III* neither provides for nor appears to contemplate that defendants will receive awards, but section 1021.5 states that "a court may award attorneys' fees to a successful party against one or more opposing parties" without specifying that the awards will be limited to plaintiffs. Although widespread awards to defendants seem unlikely, it is both inevitable and desirable that some awards to defendants will be made. Defendants often voice unrepresented interests, and successful defenses have often established rights benefiting the entire public. In *Payne v. Superior Court*,<sup>105</sup> for example, a man accused in a civil suit of stealing guard dogs won the due process right to appointed counsel for all indigent prisoners sued civilly. Defendants in such circumstances are no less worthy of private attorney general status than they would be if they were plaintiffs, and indeed it is often an accident or a matter of strategy whether a person pursuing an important statutory or constitutional principle is a plaintiff or a defendant.<sup>106</sup>

Courts should, however, tread lightly in granting defendants attorneys' fees, lest they deter plaintiffs from acting as private attorneys general. The *Serrano III* and statutory criteria must be applied as strictly for defendants as they are for plaintiffs, and if so applied, few defendants will qualify. In most successful defenses, the defendant is not capturing a "minute portion of aggregate good by incurring large expense to enforce a widely held right,"<sup>107</sup> but is instead procuring a large portion of that good by securing a personal benefit. There is, in other words, no need for private enforcement, and no conferring of significant benefit on the public. For example, the prisoner civil defendant in *Payne* arguably acted as a private attorney general in that he secured an important due process right for all indigent prisoners, while his personal benefit was limited to the unlikely prospect that he would fare better in his damage suit with due process than he would

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cases, this representation might warrant an award. See, e.g., Comment, *Equal Access*, *supra* note 5, at 674-75. See also *Stanford Daily v. Zurcher*, 64 F.R.D. 680, 684 (N.D. Cal. 1974) (stating that federal courts often award fees based on services rendered making reasonable, albeit unsuccessful, claims as part of successful litigation).

103. Public entities are expressly excluded from receiving fee awards by section 1021.5 and implicitly excluded by the private attorney general rationale adopted in *Serrano III*.

104. 20 Cal. 3d at 47-48, 569 P.2d at 1315-16, 141 Cal. Rptr. at 327.

105. 17 Cal. 3d 908, 553 P.2d 565, 132 Cal. Rptr. 405 (1976).

106. For example, a person successfully attacking the constitutionality of a statute on first amendment grounds may well be eligible for an award of attorneys' fees under the private attorney general rule. But the award is just as appropriate if the attack is made through defending against a criminal charge as it would be if the challenge were brought as an injunction against operation of the statute. Indeed, courts prefer the former approach. See *Younger v. Harris*, 401 U.S. 37 (1971).

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

without it.<sup>108</sup> But the prisoner would not be a private attorney general in proving at the subsequent civil proceeding that he is not liable for stealing the guard dogs, because the benefit of such an outcome would be almost purely personal. This fact is even more applicable to large commercial defendants, because the benefit they obtain is rarely such a small portion of the overall benefit bestowed on the public that attorneys' fees are needed to encourage further similar defenses.<sup>109</sup>

### III. *The Amount of Attorneys' Fees Awarded*

Establishing a right to attorneys' fees under *Serrano III* or section 1021.5 of the Code of Civil Procedure may be only half the battle for public interest attorneys. After the right is won, the court must still be persuaded to award fees in an amount that will adequately compensate plaintiff or plaintiff's counsel for the effort and expenses involved in the litigation. The major unresolved issues in this area are the precise standard for determining the amount of fees, the treatment of public interest law firms in calculating the fee award, the nature of the services and costs for which fees can be charged, and the desirability of assessing plaintiffs a portion of the fee costs when the plaintiffs have secured a large portion of the overall benefit of the litigation.

#### a. *Standard for Determining Amount of Fees*

Like most appellate opinions affirming fee award judgments,<sup>110</sup> *Serrano III* listed a plethora of criteria on which the trial court relied, and then added that the trial court judgment would not be disturbed unless clearly wrong.<sup>111</sup> Because of the number of variables and the degree of discretion granted trial courts, it is difficult to predict how much money a trial court will award in a particular instance. The only sure thing is that the court will begin its determination with the number of attorney hours spent on the case<sup>112</sup> times the reasonable hourly rate for each attorney. Using the hourly

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108. Of course, he could not possibly fare worse. Under the law existing prior to *Payne*, he was not only denied counsel, but was not permitted to appear personally to defend. 17 Cal. 3d at 911, 553 P.2d at 568, 132 Cal. Rptr. at 408.

109. See, e.g., *United States Steel Corp. v. United States*, 519 F.2d 359, 364 (3d Cir. 1975): "A prevailing defendant seeking an attorney's fee [in an employment discrimination case] does not appear before the court cloaked in a mantle of public interest. In contrast to the advantage to the public that inheres in a successful attack against discriminatory practices . . . one cannot say as a general rule that substantial public policies are furthered by a successful defense against a charge of discrimination."

110. See, e.g., *Mandel v. Hodges*, 54 Cal. App. 3d 596, 623-24, 127 Cal. Rptr. 244, 262 (1st Dist. 1976).

111. 20 Cal. 3d at 49, 569 P.2d at 1316-17, 141 Cal. Rptr. at 328. See also *Coalition for Los Angeles County Planning in the Pub. Interest v. Board of Supervisors*, 76 Cal. App. 3d 241, 251, 142 Cal. Rptr. 766, 772-73 (2d Dist. 1977).

112. 20 Cal. 3d at 48 n.23, 569 P.2d at 1316 n.23, 141 Cal. Rptr. at 328 n.23. As the court quite correctly points out, anchoring the analysis to the number of hours expended is the only approach that can claim objectivity. *Id.*; see *Berger*, *supra* note 13, at 315-20.



fee determination as a base, the trial court is then free to increase<sup>113</sup> or decrease the amount, depending on its balance of a number of factors.<sup>114</sup>

The factors considered relevant in setting the fee award in *Serrano III* were: (1) the novelty and difficulty of the issues involved, and the skill the attorneys displayed in the case;<sup>115</sup> (2) the extent to which the litigation prevented other employment by the attorneys;<sup>116</sup> (3) the contingent nature of the fee award, both as to eventual victory on the merits and as to establishing eligibility for an award;<sup>117</sup> (4) the fact that taxpayers would ultimately bear the burden of an award against the state;<sup>118</sup> (5) the public and charitable funding received by the attorneys for the purpose of bringing law suits like *Serrano*;<sup>119</sup> (6) the fact that the fee award would not benefit the individual attorneys involved but, rather, would go to the organizations that employed them;<sup>120</sup> and (7) the court's view that the two law firms involved had

113. In *Serrano*, the compilation of hours spent and reasonable hourly compensation for each attorney yielded a total dollar figure of \$571,172.50 for the two firms in the case, but the trial court increased the total award to \$800,000. *Id.* at 48-49, 569 P.2d at 1316-17, 141 Cal. Rptr. at 328. See also *Coalition for Los Angeles County Planning in the Pub. Interest v. Board of Supervisors*, 76 Cal. App. 3d 241, 251, 142 Cal. Rptr. 766, 772-73 (2d Dist. 1977).

114. 20 Cal. 3d at 49, 569 P.2d at 1316, 141 Cal. Rptr. at 328.

115. See *Beazer v. New York City Transit Auth.*, 558 F.2d 97, 100 (2d Cir. 1977) (\$50,000 added premium to attorneys' fee award rejected because "the legal issues were relatively simple and few"); *Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp.*, 487 F.2d 161, 168 (3rd Cir. 1973) ("[a]ny increase or decrease in fees to adjust for the quality of work is designed to take account of an unusual degree of skill, be it unusually poor or unusually good"); *Pealo v. Farmers Home Admin.*, 412 F. Supp. 561, 567 (D.D.C. 1976) (higher than average hourly rate awarded to counsel because of their skill); *Blank v. Talley Indus.*, 390 F. Supp. 1, 5-6 (S.D.N.Y. 1975) (skill rewarded in substantial fee award).

116. To an extent, this factor already is accounted for in computing the basic hourly rate. See also text accompanying notes 135-140 *infra*.

117. Taking into account the contingent nature of the litigation is not equivalent to awarding attorneys' fees based on a percentage of the total recovery, an approach condemned by some commentators as irrational and arbitrary. See, e.g., *Berger*, *supra* note 13, at 324-26; *Dawson*, *Lawyers and Involuntary Clients in Public Interest Litigation*, 88 HARV. L. REV. 849, 912 (1975). The award remains anchored to the number of hours worked times the reasonable hourly rate. Because the private attorney general rule is designed to act as an incentive to enforce important rights, that incentive should be increased to encourage especially difficult and risky cases, *i.e.*, cases that otherwise would not be brought. See *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 471 (2d Cir. 1974) ("The greater the probability of success . . . the less this consideration should serve to amplify the basic hourly fee.").

118. This factor did not play a substantial role in determining the *Serrano* fee and arguably should not be deemed important in future cases. Most public interest cases are brought against a public entity such as the state. To limit awards on that basis would vitiate the effectiveness of the private attorney general rule. Moreover, such a limitation would make little sense from a policy standpoint. Successful public interest litigation brings widespread benefit to the public, and it is by no means unjust that the costs of the litigation be spread to the public. Indeed, it is part of the rationale of the private attorney general theory.

The United States Supreme Court recently reached the same conclusion in a different legal context. In a case in which fees were awarded against the plaintiff Equal Employment Opportunity Commission, the high court rejected arguments that fee awards "against the Commission should rest on a standard different from that governing fee awards against private plaintiffs." *Christiansburg Garment Co. v. EEOC*, 98 S.Ct. 694, 701 n.20 (1978).

119. See Section IIIb *infra*.

120. Presumably, this factor, if it had any effect at all, led to an increase in the fee award,

approximately equal shares in the success of the litigation.<sup>121</sup> As the court noted, some of these factors moved the trial court to increase the award, while others may have led it to decrease the award or limit the increase.<sup>122</sup>

*b. The Treatment of Public Interest Firms*

Although the court in *Serrano III* reaffirmed that publicly and charitably funded law firms may be awarded counsel fees as private attorneys general,<sup>123</sup> it also stated that a trial court may consider such funding in determining the size of the award.<sup>124</sup> Taken too literally, this statement may lead some trial courts to grant minuscule awards to public interest law firms.<sup>125</sup> Such a result would be contrary to the actual result of *Serrano III* and the policy behind the private attorney general doctrine.<sup>126</sup>

Despite the supreme court's statement that the funding of plaintiffs' counsel can be considered in determining the size of a fee award, there is no indication that the fee award affirmed in *Serrano III* was diminished because plaintiffs' counsel were funded by foundations and the federal

since the fee award would help finance other public interest litigation rather than benefit the individual attorneys. See Section IIIb *infra*.

121. Computing the number of hours times a reasonable hourly rate in *Serrano* yielded a total of \$320,710 for the Western Center on Law and Poverty, \$225,662.50 for Public Advocates, and \$24,800 for certified law students.

122. *Id.* at 49, 569 P.2d at 1316, 141 Cal. Rptr. at 328.

123. The propriety of such awards under statutory provisions had already been well established in California. See, e.g., *Horn v. Swoap*, 41 Cal. App. 3d 375, 116 Cal. Rptr. 113 (2d Dist. 1975); *Trout v. Carleson*, 37 Cal. App. 3d 337, 112 Cal. Rptr. 282 (4th Dist. 1974). As the court noted, a contrary rule would be inconsistent with the private attorney general rule itself. 20 Cal. 3d at 48, 569 P.2d at 1316, 141 Cal. Rptr. at 327. See also Comment, *Awards of Attorney's Fees to Legal Aid Offices*, 87 HARV. L. REV. 441 (1973) [hereinafter cited as Comment, *Legal Aid*]; Comment, *Equal Access*, *supra* note 5, at 92-94. Further, remarks during the debates on the Legal Services Corporation Act of 1974 (codified at 42 U.S.C.A. §§ 2996-2996f (West Supp. 1975)) make clear that Congress expected "that the courts will award fees to legal service programs in cases where an award would be made to a private attorney or where such offices are functioning like 'private attorneys general.'" 120 CONG. REC. 24056 (1974) (remarks of Sen. Kennedy); see *id.* at 24037, 24038 (Sen. Cranston), 24052 (Sen. Mondale), 15001 (Rep. Meeds).

124. 20 Cal. 3d at 49 n.24, 569 P.2d at 1317 n.24, 141 Cal. Rptr. at 328 n.24.

125. See, e.g., *Trout v. Carleson*, 37 Cal. App. 3d 337, 341, 112 Cal. Rptr. 282, 284 (4th Dist. 1974), in which the court stated in dictum that it would not have been improper for the trial court to take into account in awarding fees that the plaintiff was represented by a legal services organization. *But see Hypolite v. Carleson*, 52 Cal. App. 3d 566, 587-88, 125 Cal. Rptr. 221, 235 (1st Dist. 1975), in which the court stated that it did not feel compelled to follow the *Trout* dictum in awarding fees.

Federal courts have for the most part granted equal treatment to public interest firms. *Tillman v. Wheaton-Haven Recreation Ass'n*, 517 F.2d 1141, 1148 (4th Cir. 1975) (award cannot be diminished on ground that attorney agreed to contribute it to civil rights organization); *Fairley v. Patterson*, 493 F.2d 598, 606 (5th Cir. 1974); *Lund v. Affleck*, 442 F. Supp. 1109 (D.R.I. 1977); *Torres v. Sachs*, 69 F.R.D. 343, 347-48 (S.D.N.Y. 1975) (affirming market rates awards to publicly-funded attorneys), *aff'd*, 538 F.2d 10, (2d Cir. 1976). *But see* *Natural Resources Defense Council, Inc. v. EPA*, 484 F.2d 1331, 1339 (1st Cir. 1973) (public interest lawyers impose their services on the public and accordingly their fees may be diminished).

126. See generally *Berger*, *supra* note 13, at 310-15.

government. Indeed, the trial court awarded the attorneys in the case substantially more than the fee computed strictly on the basis of number of hours worked.<sup>127</sup> Thus, the statement that the source of funding may be taken into account in determining the size of fee awards should be viewed together with the actual award affirmed.

In any event, the statement should not be allowed to diminish fee awards in future cases. The arguments supporting second class citizenship for public interest attorneys have no merit. It has been argued that public interest firms acting as private attorneys general should recover their actual costs of litigation,<sup>128</sup> rather than attorneys' fees based on a reasonable hourly rate.<sup>129</sup> According to this argument, the private attorney general theory is based on the idea that a plaintiff's cost of litigation should be shifted to the defendant in certain cases. When the plaintiff's attorney is a private practitioner, the plaintiff's reimbursable cost is the fee paid to the attorney. When the attorney is a private practitioner taking the case without fee, the recoverable cost is the amount of fees (again, based on an hourly rate) that could have been charged had the attorney spent the equivalent time on a paying client.<sup>130</sup> When counsel is a public interest law firm, however, the only reimbursable cost is the actual cost of the litigation borne by the firm. This cost can be computed by accounting methods rather than on an hourly basis.<sup>131</sup> To do otherwise, it is argued, would turn public interest firms into "bounty hunters" seeking money-making lawsuits.<sup>132</sup> In addition, successful litigation would be used to finance unsuccessful litigation that should not be brought.<sup>133</sup>

There are several flaws in this argument. First, starting with the premise of equality, the argument concludes by justifying an inequality; *i.e.*, awards of substantial fees based on hourly rates when litigation is brought by private law firms, but awards of much smaller fees for public interest firms. This result is achieved by labeling the money a public interest firm receives as "profit," while terming the hourly rate paid private law

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127. See note 96 *supra*.

128. *Serrano III* reaffirmed that attorneys' fees may be awarded directly to the plaintiffs' attorney. 20 Cal. 3d at 47 n.21, 569 P.2d at 1315 n.21, 141 Cal. Rptr. at 327 n.21.

129. Answer to Brief of Amicus Curiae Center for Law in the Public Interest at 27-32, *Serrano III*, 20 Cal. 3d 25, 569 P.2d 1303, 141 Cal. Rptr. 131 (1977) [hereinafter cited as Answer].

130. *Id.* at 31.

131. In *Serrano*, the Attorney General, who advanced this cost argument, stated that the costs he referred to were not limited to costs recoverable under statutes and court rules, see note 147 *infra*, but included all actual litigation costs, including the salaries of the attorneys involved in the litigation.

132. See Responding Brief re Attorneys' Fees By State Appellants and Cross-Respondents at 8-10, *Serrano III*, 20 Cal. 3d 25, 569 P.2d 1303, 141 Cal. Rptr. 315 (1977). The argument there was addressed to the plaintiffs' entitlement to an award, not to the amount. See also *Serrano III*, 20 Cal. 3d at 54, 569 P.2d at 1320, 141 Cal. Rptr. at 331-32 (Clark, J., dissenting).

133. Answer, *supra* note 129, at 29.

firms as "costs." But whenever an award is made on an hourly rate based on the prevailing market, the recipient, whether private law firm or public interest firm, will receive more than was actually needed to pursue the particular litigation. That the excess is used by the public interest firm to finance other litigation rather than to buy a second Mercedes is not necessarily a reason to condemn the award.<sup>134</sup>

A second problem with the argument is that it perceives the attorneys' fees issue from the standpoint of public interest firms rather than their clients. Because of this, it misconstrues the nature of the costs of litigation. Public interest law firms represent clients with little or no other access to the legal system. Poor people are served almost exclusively by government-funded legal services programs, which have never had the resources to provide adequate representation for all. In 1969, only 4,000 of the nation's 296,000 lawyers served the 33 million citizens who fell below the federal poverty level.<sup>135</sup> Lower middle income citizens and the near-poor<sup>136</sup> fare little better, and may fare worse. Although some low-cost legal services are available to these persons for routine legal matters, a person must be wealthy or nearly wealthy to afford major litigation. Thus, public interest clients as a group pay a cost in every public interest litigation. A *Serrano* can be achieved only at the cost of foregoing other opportunities for litigation on behalf of the poor and the powerless.<sup>137</sup>

This cost to public interest clients must be measured by reference to the fees of the private bar. The nature and source of the court's power to award fees should guide the determination of the fee award.<sup>138</sup> A major goal of the private attorney general theory is to ensure representation of interests that would otherwise go unrepresented. A potential client whose litigation is foregone because of the inadequate funding of legal service organizations can find representation, if at all, only in the private bar, which would presumably charge market rates. Thus the "cost" of litigation by public interest firms, in terms of what its clients have given up for it, is indeed equal to what the litigation would have cost if undertaken by the private bar.

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134. Another way to look at the argument is to suppose that senior public interest attorneys drew the \$100,000 salaries many of them could earn in private practice. In that case, under the "cost" argument, the fee award to such attorneys' firms would accordingly be increased to reflect the "cost" of the salaries, although it is difficult to understand why a firm's fee award should be increased because it pays its attorneys \$100,000 per year rather than \$20,000.

135. Silver, *The Imminent Failure of Legal Service for the Poor: Why and How to Limit Caseload*, 46 J. URB. L. 217 (1968). At the other end of justice's scales, 70% of the attorneys admitted to practice served the legal needs of the wealthiest 25% of the population. *Id.* at 218. See *Lund v. Affleck*, 442 F. Supp. 1109, 1111-12 (D.R.I. 1977).

136. Under Legal Services Corporation regulations, a legal services organization may not, absent certain exceptional circumstances, represent a person living alone who earns more than \$3,500 per year. The maximum income for a family of four is \$6,874. 41 Fed. Reg. 51,607 (1976). Obviously, millions of people who are unable to afford a lawyer for most types of cases are excluded by these regulations.

137. See Comment, *Legal Aid*, *supra* note 123, at 414.

138. See Berger, *supra* note 13, *passim*; Comment, *Equal Access*, *supra* note 5, at 689.

Paying less than these market rate fees when the winning party is represented by a public interest firm reduces the level of legal services available to the poor.

This effective reduction in services available is not a purely legislative consideration. The legislature may pick and choose among funding for consumer protection, drought relief, tax reform, and attorneys' fees. But the courts have no choice but to preserve equal access to justice. As noted above,<sup>139</sup> the California judiciary has never shrunk from the task of affirmatively insuring access to the courts, even when doing so involved the payment of public funds.<sup>140</sup>

Further, limiting the attorneys' fees awarded public interest firms because of their funding would hinder the operation of the private attorney general rule. To the extent that the rule serves a therapeutic value by encouraging prospective defendants to comply with the law, that value would be diminished if the size of awards were based in part on the source of plaintiffs' counsel's funding.<sup>141</sup> As a corollary, diminution of fee awards to public interest firms raises serious problems concerning equal justice. The prospect of a substantial fee recovery from the defendant provides leverage to the plaintiff both in settlement negotiations and in seeking to encourage the defendant to change its behavior without litigation. To condition the amount of such leverage on the ability to afford private counsel is unjust.<sup>142</sup>

Finally, the fear that awarding substantial fees to public interest firms will lead to bounty hunting has no basis in reality. To win a fee award under the private attorney general rule an attorney must first win a case in a relatively new area of law, which, by definition, is rather difficult. Then a disinterested judge must be convinced that the litigation met the *Serrano III*-statutory criteria. Even then, wealth is hardly guaranteed by a fee award based primarily on what a private attorney would have received from a paying client, who might be less inclined to question the amount claimed than a judge. Fee awards have never been as high for public interest cases as they are in such areas as antitrust law.<sup>143</sup> The spectre of bounty hunting is

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

140. See, e.g., *Gardiana v. Small Claims Court*, 59 Cal. App. 3d 412, 424, 130 Cal. Rptr. 675, 682 (1st Dist. 1976) (holding that courts have inherent power to order that an interpreter be paid from public funds).

141. Comment, *Legal Aid*, *supra* note 123, at 417.

142. *Id.*

143. A recent unpublished survey of one hundred forty district court cases involving attorneys' fees illustrates this pattern. While the mean hourly rate by courts under the fee provisions of the private antitrust statutes was \$181 in the cases surveyed, the mean hourly rate awarded in the Title VII (employment discrimination) cases surveyed was \$40. A general review of the reported decisions inescapably confirms the conclusion that statutory fee awards under civil rights, environmental, consumer, and government information access statutes have been substantially lower than awards under antitrust, securities, and other fee statutes involving commercial rights.

Berger, *supra* note 13, at 310-11 (citations omitted). See, e.g., *Bradley v. School Bd.*, 53 F.R.D. 28, 44 (E.D. Va. 1971) (noting that the fee awarded in the instant school desegregation case was

just that: a spectre.<sup>144</sup>

As for the argument that the public interest firm will use its fees from successful litigation to fund its unsuccessful lawsuits, the possibility must be conceded. No law firm wins all its cases, particularly not public interest law firms attempting to establish new principles in uncharted areas of law. Unsuccessful litigation, however, is not the same thing as nuisance litigation,<sup>145</sup> and is not always devoid of merit. The policy behind the private attorney general rule—to provide representation to the powerless and to permit courts to hear all interests before deciding cases—may be vindicated as well by unsuccessful litigation as by successful suits.<sup>146</sup> In addition, the fact that a public interest firm will not be reimbursed for unsuccessful litigation already provides a disincentive to the bringing of suits that are likely to fail. The prospect that attorneys' fees for public interest firms might help finance litigation that ultimately proves unsuccessful does not justify limiting such fees.

In short, the fact that a firm receives funding from foundations or the government provides no reason to limit the amount of a fee awarded it. Fairness and the principles behind the private attorney general rule require equal treatment for public interest firms and their clients.

### *c. Nature of Services and Costs for Which Fees Can Be Awarded*

Plaintiffs entitled to fee awards under the private attorney general doctrine may recover the "costs" of the litigation as defined by statute,<sup>147</sup> fees for services rendered, and out-of-pocket expenses. Since the winning party can already recover costs in most matters notwithstanding entitlement to attorneys' fees, this section focuses on fees and out-of-pocket expenses.

less than half the amount given to attorneys by the same court in a recent comparably difficult antitrust case). This discrepancy, however, is not justifiable theoretically. *See Berger, supra* note 13, at 310-15.

144. This fact was aptly noted by former Sen. Tunney in a debate on the Civil Rights Attorney's Fees Award Act of 1976 (codified at 42 U.S.C.A. § 1988 (West Supp. 1977)). He said, "Senator Kennedy yesterday challenged Senator Allen to show a single case of a lawyer getting rich on civil rights cases. It just does not happen." 122 CONG. REC. 16491 (1976).

145. *See* text accompanying notes 80-83 *supra*.

146. Such suits often educate the public and the courts about certain problems, and should not be considered nuisance litigation simply because they do not succeed. *Cf. Natural Resources Defense Council v. EPA*, 454 F.2d 1331, 1335 (1st Cir. 1973) (holding that where all of plaintiff's contentions were reasonable, the fact that some were not upheld did not preclude a fee award).

147. Costs are awarded as a matter of right to the prevailing party in superior court, CAL. CIV. PROC. CODE § 1032 (West Supp. 1977), and on appeal CAL. RULES OF CT. 26. At the trial level, the items recoverable as costs are determined primarily at the discretion of the trial court. *ABC Egg Ranch, Inc. v. Abdelnour*, 223 Cal. App. 2d 12, 35 Cal. Rptr. 487 (4th Dist. 1963), while costs on appeal are specifically described and limited by the rules. CAL. RULES OF CT. 26(c).

1. *Fees*. In a normal case, the plaintiffs will seek fees for work performed at the trial level and fees based on services rendered while appealing or defending an appeal of the trial court judgment. When appellate litigation is necessary to preserve a victory won at trial or to reverse a defeat there, fees on appeal will routinely be awarded.<sup>148</sup>

The most controversial aspect of plaintiffs' fee requests, whether at trial or on appeal, is a request for "fees on fees," that is, fees for services rendered in establishing the right to attorneys' fees. In *Serrano III*, the fee award in the judgment apparently included fees on fees, and the defendants did not challenge that aspect of the fee award.<sup>149</sup> On petition for rehearing, however, the state defendants in *Serrano III* asked the supreme court to modify its opinion to clarify that the plaintiffs were not entitled to fees for services performed in *Serrano III*.<sup>150</sup> Plaintiffs asked for a clarification that they were so entitled,<sup>151</sup> but the court remanded the fees on fees issue, along with the other fees on appeal questions, to the trial court. The issue has thus not yet been resolved.

Although the issue has never before been expressly confronted in California, in at least two opinions affirming judgments granting fees pursuant to a statutory provision,<sup>152</sup> the courts of appeal have awarded fees on appeal when the only issue on appeal was whether plaintiffs were entitled to fees.<sup>153</sup> Other opinions awarding fees have not excluded fees for services rendered on the fee issue.<sup>154</sup> Thus, California courts have routinely awarded fees on fees without expressly saying they were doing so.

Moreover, the weight of federal precedent<sup>155</sup> and the policy behind the private attorney general theory both support recovery of fees on fees. As one federal judge stated, denying an award for fees rendered while litigating the

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148. *See, e.g.*, *Miller v. Amusement Enterprises, Inc.*, 426 F.2d 534, 539 (5th Cir. 1970); *Trout v. Carleson*, 37 Cal. App. 3d 337, 344, 112 Cal. Rptr. 282, 286 (4th Dist. 1974).

149. *See* Affidavit of Attorney Sidney M. Wolinsky, Clerk's Transcript on Appeal, vol. II, at 372-73, *Serrano II*, 18 Cal. 3d 728, 557 P.2d 929, 135 Cal. Rptr. 345 (1976) (describing time spent in researching attorneys' fees issue).

150. Petition for Rehearing, *Serrano III*, 20 Cal. 3d 25, 569 P.2d 1303, 141 Cal. Rptr. 315 (1977).

151. Response to Petition for Rehearing, *Serrano III*, 20 Cal. 3d 25, 569 P.2d 1303, 141 Cal. Rptr. 315 (1977).

152. CAL. WELF. & INST. CODE § 10962 (West Supp. 1977).

153. *County of Humboldt v. Swoap*, 51 Cal. App. 3d 442, 445, 124 Cal. Rptr. 510, 512 (1st Dist. 1975); *Trout v. Carleson*, 37 Cal. App. 3d 337, 344, 112 Cal. Rptr. 282, 286 (4th Dist. 1974).

154. *See, e.g.*, *Card v. Community Redev. Agency*, 61 Cal. App. 3d 570, 583, 131 Cal. Rptr. 153, 164 (2d Dist. 1976).

155. *Perkins v. Standard Oil Co.*, 474 F.2d 549, 554 (9th Cir.), *cert. denied*, 412 U.S. 940 (1973) (Clayton Act); *Culpepper v. Reynolds Metals Co.*, 422 F.2d 1078, 1081-82 (5th Cir. 1971) (employment discrimination); *Torres v. Sachs*, 69 F.R.D. 343, 348 n.2 (S.D.N.Y. 1975), *aff'd*, 538 F.2d 10 (2d Cir. 1976) (Voting Rights Act); *Cole v. Hall*, 376 F. Supp. 460, 461-62 (E.D.N.Y. 1974) (Labor Management Reporting and Disclosure Act); *Stanford Daily v. Zurcher*, 64 F.R.D. 680, 683 (N.D. Cal. 1974), *aff'd*, 550 F.2d 464 (9th Cir.), *cert. granted*, 98 S.Ct. 52 (1977) (private attorney general theory recovery).

right to fees "would allow parties to dilute the value of a fees award by forcing the attorneys into extensive, uncompensated litigation in order to gain any fees."<sup>156</sup> For example, if a plaintiff is awarded \$25,000 in attorneys' fees, but then is forced by the obstinacy of the defendant to spend \$10,000 defending the right to obtain these fees, the actual net award is only \$15,000. The prospect of such an arbitrary reduction of fees might well discourage prospective plaintiffs from bringing public interest litigation, a result directly contrary to the purposes behind the private attorney general theory. Unless plaintiffs are allowed their full recovery of attorneys' fees undiminished by the cost of prolonged uncompensated litigation on the fees issue, defendants will have the unilateral power to thwart the private attorney general theory.

2. *Out-of-Pocket Expenses.* Plaintiffs and their attorneys may also recover out-of-pocket expenses, those costs of litigation not automatically paid to the winning party as costs in most litigation.<sup>157</sup> Examples of out-of-pocket expenses include reimbursement for necessary travel<sup>158</sup> and amounts paid to procure the services of expert witnesses.<sup>159</sup>

The payment of such expenses is supported by the sparse state authority<sup>160</sup> and more extensive federal precedents<sup>161</sup> on the matter, as well as by the policy behind the private attorney general rule. The rule is designed to encourage public interest litigation by reimbursing the plaintiff for fees paid private counsel or by reimbursing public interest counsel for the same amount. To the extent that an attorney normally charges for certain types of expenses separately rather than including them in the hourly rate charged,<sup>162</sup> the public interest attorney should be able to recover them as well.

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156. *Stanford Daily v. Zurcher*, 64 F.R.D. 680, 684 (N.D. Cal. 1974).

157. See note 147 *supra*.

158. See, e.g., *Bradley v. School Bd.*, 53 F.R.D. 28, 44 (E.D. Va. 1971), *rev'd*, 472 F.2d 318 (4th Cir. 1972), *vacated and remanded*, 416 U.S. 696 (1974).

159. *Red School House, Inc. v. Office of Economic Opportunity*, 386 F. Supp. 1177, 1192-99 (D. Minn. 1974).

160. In *Knoff v. City & County of San Francisco*, 1 Cal. App. 3d 184, 203, 81 Cal. Rptr. 683, 695 (1st Dist. 1969), the court of appeal affirmed an attorneys' fee award that included "out-of-pocket expenditures." The basic fee in the case, however, was a percentage of the money saved taxpayers by the underlying litigation, rather than as in a private attorney general case, a fee based on the number of attorney hours worked. It is unclear whether the difference in the type of basic fee influenced the court in its decision to award out-of-pocket expenses.

161. *Fairley v. Patterson*, 493 F.2d 598, 607 n.17 (5th Cir. 1974); *Cathey v. Johnson Motor Lines, Inc.*, 398 F. Supp. 1107, 1122-23 (W.D.N.C. 1974); *Sims v. Amos*, 340 F. Supp. 691, 695 (M.D. Ala. 1972); *Bradley v. School Bd.*, 53 F.R.D. 28, 42-43 (E.D. Va. 1971), *rev'd on other grounds*, 472 F.2d 318 (4th Cir. 1972), *vacated and remanded*, 416 U.S. 696 (1974).

162. Of course, some costs, such as secretarial time spent typing pleadings, are normally overhead costs included in the hourly rate recovery, and cannot be claimed separately as out-of-pocket expenses. Perhaps what constitutes out-of-pocket expenses recoverable separately and what constitutes mere overhead should be judged as it would be in a case in which a private attorney were suing in *quantum meruit* to recover a fee from a client.



d. *Apportionment of Fees*

The recent case of *Woodland Hills Residents Association v. City Council*<sup>163</sup> raises the question whether attorneys' fees can be apportioned between plaintiffs and defendants in some private attorney general cases. In *Woodland Hills*, residents of Woodland Hills, who had obtained a writ of mandate vacating the approval of a map of a proposed subdivision in their neighborhood, were awarded attorneys' fees under the substantial benefit rule. In remanding to the trial court to determine the amount of reasonable fees, however, the court of appeal stated that the plaintiffs should bear a large part of the cost of their attorneys "since the benefit to plaintiffs is greater than the benefit to the taxpayers in general."<sup>164</sup>

It is questionable whether such an apportionment should be extended from substantial benefit to private attorney general cases. The private attorney general rule is more concerned with vindication of important statutory and constitutional policies and the representation of otherwise unrepresented interests than it is with the prevention of unjust enrichment, the prime rationale of the substantial benefit doctrine.<sup>165</sup> A precise apportionment of the costs and benefits of particular litigation is accordingly less important.

Moreover, under the private attorney general rule, the issue whether the costs of litigation may fairly be borne by a plaintiff is resolved when the court determines whether the plaintiff is eligible for an award.<sup>166</sup> It need not also be made when the amount is calculated. If apportionment is made in some cases, however, courts should make an exception if the plaintiff can show that economic hardship would result from having to bear a portion of the attorneys' fees.

#### IV. *Collecting Fees from Public Entities*

Ideally, this Foreword should now be complete. Once a public interest law firm has won its litigation, convinced the court that it is entitled to attorneys' fees and received a judgment awarding substantial fees, there should be nothing left to do but count the money. Unfortunately, further complications arise when the judgment is against a public entity, particularly when the entity is the state. In that case, collecting the fees may be as difficult as winning entitlement to them.

Fees can be won against a private party, a governmental body other than the state, or the state. In the first instance, a plaintiff or plaintiff's

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163. 141 Cal. Rptr. 857 (2d Dist. 1977), *hearing granted*, No. L.A. 30897 (Cal. Sup. Ct. Jan. 25, 1978).

164. *Id.* at 862.

165. *Fletcher v. A.J. Indus., Inc.*, 266 Cal. App. 2d 313, 324, 72 Cal. Rptr. 146, 152-53 (1st Dist. 1968).

166. See text accompanying notes 64-67 *supra*.

counsel can resort to all the remedies generally available to judgment creditors,<sup>167</sup> and no problems should arise. Enforcing fee awards against governmental bodies, particularly against the state, may involve more difficulty.

*a. Awards Against Governmental Bodies Other than the State*

When attorneys' fees are awarded against a governmental entity other than the state, ordinarily the judgment will be paid voluntarily. After litigation that has been particularly bitter, however, the losing governmental party may simply refuse to pay attorneys' fees notwithstanding a judgment against it.

In that event, the plaintiffs may either circumvent the government's refusal to appropriate money for fees or confront it directly. Under the first approach, the plaintiff would attempt to execute on property owned by the government as if the government were an ordinary judgment debtor. Of course, the government is not an ordinary debtor, and will argue that its property is exempt from execution. By statute, certain types of government property, such as county public offices, town halls, and public parks are exempt.<sup>168</sup> Even without statutory provision, property owned by a government for public purposes is exempt from execution.<sup>169</sup> However, property that local government holds for proprietary purposes rather than public use can be subject to execution.<sup>170</sup>

If the governmental body refusing to pay attorneys' fees holds no such property, a confrontation is inevitable. When an appropriation covering payment of attorneys' fees has been made, a writ of mandate can be used to collect the fees.<sup>171</sup> If the governing body has not made an appropriation sufficient to pay the fee award, mandate might also be available,<sup>172</sup> but the writ by necessity will require that the governing body pass an ordinance appropriating the money. If the governing body refuses to obey that order, the question becomes, as Justice Mosk asked in a recent dissent, "How do my learned colleagues propose to enforce their order?"<sup>173</sup>

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167. See CAL. CIV. PROC. CODE §§ 681-713 (West Supp. 1977).

168. *Id.* § 690.22 (West Supp. 1977).

169. *C. J. Kubach Co. v. City of Long Beach*, 8 Cal. App. 2d 567, 574, 181 P.2d 181, 185 (2d Dist. 1935).

170. *Id.* at 574, 48 P.2d at 185.

171. See, e.g., *Ross v. Board of Educ.*, 18 Cal. App. 222, 122 P. 967 (1st Dist. 1912) (school board compelled to pay \$100 employee claim).

172. See, e.g., *Title Guar. Co. v. Long Beach*, 4 Cal. 2d 56, 60, 47 P.2d 472, 473 (1935) (writ issued compelling city to levy tax sufficient to repay bond obligation).

173. *Glendale City Employees' Ass'n, Inc. v. City of Glendale*, 15 Cal. 3d 328, 350, 540 P.2d 609, 624, 124 Cal. Rptr. 513, 528 (1976) (Mosk, J., concurring and dissenting). In *Glendale*, the majority contemplated a writ directed at ministerial officials, but as Justice Mosk pointed out, no effective relief could be granted in the case until the city council passed the appropriate wage ordinance. *Id.* at 349, 540 P.2d at 623, 124 Cal. Rptr. at 527.

Justice Mosk's question was answered in *Ross v. Superior Court*.<sup>174</sup> In *Ross*, the trial court awarded retroactive benefits to welfare recipients in Plumas County. Pursuant to a court order, the Department of Benefit Payments notified the county board of supervisors to pay the benefits, but the board refused. The court held each of the supervisors in contempt and levied individual fines of \$500. The supervisors appealed, but the supreme court affirmed.

Although public interest lawyers will want to avoid seeking such drastic relief, *Ross* appears to permit the use of contempt powers, when necessary, to enforce a judicial order requiring a governmental body other than the state to pay money. Thus, either indirectly through execution or through direct confrontation, public interest attorneys should eventually be able to collect attorneys' fees awarded against intransigent governmental entities other than the state.

### *b. Awards Against the State*

When a fee award is won against the state, the chances for gaining voluntary compliance with the judgment probably increase, but the prospects for compelling collection decrease. The State of California, unlike some small cities and counties, will never suffer severe fiscal damage from an attorneys' fees award, and therefore should be more willing than local government to pay such awards.<sup>175</sup> Moreover, it would be anomalous for the same body that passed section 1021.5 of the Code of Civil Procedure to refuse to pay fee awards resulting from an application of that very statute.

If the legislature does prove recalcitrant or negligent in paying attorneys' fees, however, the plaintiff seeking to collect the fees is in a difficult position. All property owned by the state or a state agency for any purpose

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174. 19 Cal. 3d 899, 569 P.2d 727, 141 Cal. Rptr. 133 (1977).

175. At the time of this writing, however, the attorneys' fee award in *Serrano III* has not been paid and the likelihood of a legislative appropriation is far from clear. The Governor recommended an appropriation in his budget (see SB 1355 (Rodda), Item 395), but the Legislative Analyst has recommended that the money not be paid. REPORT OF THE LEGISLATIVE ANALYST TO THE JOINT LEGISLATIVE BUDGET COMMITTEE, ANALYSIS OF THE BUDGET BILL OF THE STATE OF CALIFORNIA FOR THE FISCAL YEAR JULY 1, 1978 TO JUNE 30, 1979 at 1041-47.

The Legislative Analyst advances a number of legal and policy arguments against paying the award, most of them summaries of arguments submitted by the Attorney General to the supreme court in *Serrano*. See note 132 *supra* and accompanying text. Nowhere, however, does the Legislative Analyst address the implications of refusing to obey a judgment of the California Supreme Court.

In addition to urging that the legislature refuse to pay *Serrano* fees, the Legislative Analyst recommends that the lawmakers refuse for the second straight year to pay fees awarded in *Mandel v. Hodges*, 54 Cal. App. 3d 596, 127 Cal. Rptr. 244 (1st Dist. 1976). Among the reasons stated for this recommendation are a restatement of the American Rule, a comparison of the fees charged by the plaintiffs' attorneys with the \$33.10 per hour that the Attorney General charged state clients, and a report that the Attorney General believes that the plaintiffs' attorneys could have litigated the case in fewer hours than they did.

has been held exempt from execution.<sup>176</sup> Although a significant portion of the Government Code is devoted to explaining how a person may collect on a claim against the state,<sup>177</sup> all the prescribed procedures are based on the legislature's making an appropriation.<sup>178</sup> The California Constitution states that "[m]oney may be drawn from the Treasury only through an appropriation made by law . . . ."<sup>179</sup> And case law is clear that courts may not order the legislature to make an appropriation.<sup>180</sup>

A plaintiff seeking to compel the state to pay attorneys' fees when no appropriation has been made will thus be required to establish new precedent. Three approaches a plaintiff could argue in seeking to collect are discussed below.

1. *Equitable Relief Against Administrative Officials*. As a first approach, a plaintiff might seek some kind of equitable relief against state administrative officials.<sup>181</sup> As an extreme measure, a plaintiff theoretically could seek an order enjoining state officials from paying out any money in the state budget until the plaintiff's attorneys' fees are collected. In *Robinson v. Cahill*,<sup>182</sup> the New Jersey equivalent of *Serrano*, after five previous decisions failed to induce the state legislature to equalize the school financing system, the New Jersey Supreme Court enjoined further operation of the school system, an action contemplated in the *Serrano* judgment itself.<sup>183</sup> This type of drastic order is designed to call the legislature's bluff; the hope is that the lawmakers will give in to avoid sheer chaos. It seems highly doubtful that a California court would take such an extreme measure for any matter of smaller magnitude than *Serrano*, and even more doubtful that it would use such a measure as a routine means of enforcing attorneys' fee judgments.

Another more feasible approach is to ask the court to order that money appropriated for a certain area but not yet spent be reallocated in order to pay the attorneys' fees. The New Jersey school finance litigation again provides a precedent. In one of the *Robinson v. Cahill* cases,<sup>184</sup> the New Jersey court, as a provisional remedy, ordered that certain state funds appropriated

176. *El Camino Irrig. Dist. v. El Camino Land Corp.*, 12 Cal. 2d 378, 383-84, 85 P.2d 123, 124 (1938).

177. *See, e.g.*, CAL. GOV'T CODE §§ 905.2-905.4, 911.2-911.6, 965.2, 965.4 (West 1966).

178. *See, e.g., id.* § 965.2 (West 1966) (providing that the Controller shall pay any final judgments whenever a sufficient appropriation exists), and *id.*, § 12440 (West 1963) (prohibiting the Controller from drawing a warrant unless specific appropriations are available to meet it).

179. CAL. CONST. art. 16, § 7.

180. *Meyers v. English*, 9 Cal. 341, 349 (1858); *Veterans of Foreign Wars v. State*, 36 Cal. App. 3d 688, 697, 111 Cal. Rptr. 750, 756 (3d Dist. 1974).

181. This is the basic approach used throughout the *Serrano* litigation. The suit sought relief against state administrative officials rather than against the legislature. *See* note 88 *supra* and accompanying text.

182. 70 N.J. 155, 358 A.2d 457 (1976).

183. *Serrano II*, 18 Cal. 3d at 751 n.25, 557 P.2d at 941 n.25, 135 Cal. Rptr. at 357 n.25.

184. 69 N.J. 133, 351 A.2d 713 (1975).

for education be distributed according to an equalization formula rather than as prescribed by statute. The court in a later decision contemplated redistributing the entire state school budget to bring New Jersey's financing system into constitutional compliance.<sup>185</sup>

To perform a similar allocation, a California court would have to find a general fund appropriated by the legislature from which money could be spent for attorneys' fees. That fund would have to be related to the underlying litigation closely enough so that payment from the fund would not violate the constitutional requirement that money can only be drawn from the treasury through an appropriation.<sup>186</sup> Even if such a fund can be found, there is a legal question in some cases whether payment from the fund to a public interest firm would constitute an improper payment of fees by a client,<sup>187</sup> and an ethical question whether plaintiff's attorneys should accept such fees.<sup>188</sup>

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185. *Robinson v. Cahill*, 69 N.J. 449, 355 A.2d 129, 139 (1976). See *Mills v. Board of Educ.*, 348 F. Supp. 866, 876 (D.D.C. 1972), holding that if Congress failed to provide funds sufficient for handicapped children to enjoy their constitutional right to a publicly supported education, other available education funds would have to be reallocated.

186. CAL. CONST. art. 16, § 7 (added 1974). For an example of the use of this solution under the federal constitution, see *Red School House, Inc. v. Office of Economic Opportunity*, 386 F. Supp. 1177, 1197-98 (D. Minn. 1974).

187. Public interest firms are generally prohibited from accepting fees from clients. In *Serrano III*, the court surmised that even if plaintiffs were eligible for an award under the common fund theory, such an award would lead to a diminution in educational funding and thus would constitute an acceptance of a fee from a client. 20 Cal. 3d at 37 n.7, 569 P.2d at 1308 n.7, 141 Cal. Rptr. at 320 n.7. See note 188 *infra*.

188. In addition to stating that a public interest firm's acceptance of a fee under the common fund theory from the State School Fund would constitute an improper payment of a fee by a client, the court reasoned that payment from the fund presumably would not be sought by plaintiffs' counsel. 20 Cal. 3d at 37 n.7, 569 P.2d at 1308 n.7, 141 Cal. Rptr. at 320 n.7. While these points merit serious consideration, they are not self-evident either in *Serrano* or in many other cases.

Initially, the court proves too much. If money were given to plaintiffs' counsel in *Serrano* from the State School Fund, some very slight decrease in educational spending might result. But if this fact militates against recovery of attorneys' fees in *Serrano*, then by the same logic attorneys' fees can never be recovered by a public interest firm in a suit against a public entity. Almost every legal services client is poor and almost every public interest client is a taxpayer. Awards against a public entity almost always divert money that could have been used in part to provide services for the poor and invariably take money from the taxpayers. Yet the court itself reaffirmed that public interest firms are entitled to attorneys' fees awards under the private attorney general rule. There is no obvious distinction between diverting money from the general treasury to pay attorneys' fees under the private attorney general rule and paying those fees from the multi-billion dollar State School Fund. It seems that in either case each of the *Serrano* plaintiffs would "pay" a miniscule amount in increased taxes or decreased school aid.

Moreover, the court may not have meant its statement that recovery of attorneys' fees by a public interest firm under the common fund theory would constitute an impermissible acceptance of a fee from a client to imply that attorneys' fees awarded to such a firm under the private attorney general rationale could not properly be paid out of the State Educational Fund by a court order in aid of execution. Conceptually the two theories are very different. Under the common fund exception, fees are awarded out of the recovery to prevent unjust enrichment of those who are entitled to the fund at the expense of the attorney who prosecuted the case without compensation. Fees awarded under the private attorney rationale are paid by the

2. *Executing Against State Property.* A second approach would be for a plaintiff to attempt to execute against property owned by the state in its proprietary capacity. The rule that all state property is exempt from execution<sup>189</sup> has never been disapproved, but neither has it been reexamined in recent years. The exemption rule is a judicial, not a legislative doctrine,<sup>190</sup>

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defendant in addition to any recovery on the merits. Perhaps the court was merely pointing out the inadequacy of the common fund theory, generally, as a rationale for the award of fees to public interest firms, which are not allowed to accept fees. As the court notes, the *Serrano* litigation did not legally create or preserve any fund. Thus, since the monies in the State Educational Fund can in no way be considered funds to which the plaintiffs became entitled as a result of the *Serrano* decision, theoretically there is no problem in ordering that a judgment for attorneys' fees be paid out of the Fund.

There are cases in which it would be improper for a public interest firm to accept fees. For example, when litigation results in a \$50,000 increase in monetary benefits for the plaintiffs, a public interest attorney should not and cannot seek a \$20,000 counsel fee out of that \$50,000. The problem is how to identify those cases in which fees should not be sought. Two factors which seem important are (1) whether payment of fees will cause a reduction in a fund exclusively designed to benefit the public interest firm's clients, and (2) the monetary loss per client that the payment of fees would cause. With regard to the first factor, if litigation by a public interest firm creates a public fund that benefits both the firm's clients and many others, then the firm arguably has as much right to recover fees from that fund as it would from the general treasury. For example, the *Serrano* litigation was initiated in order to benefit low income students and taxpayers living in low wealth school districts, even though technically the class of plaintiffs represented in the suit was much larger. *Serrano I*, 5 Cal. 3d at 589, 487 P.2d at 1,244, 96 Cal. Rptr. at 604. Yet if *Serrano* caused an increase in the State School Fund, the benefits of the litigation were enjoyed not only by indigent students and taxpayers, but also by higher income students and taxpayers who live in low wealth school districts. *See Serrano II*, 18 Cal. 3d at 793-94, 557 P.2d at 969, 135 Cal. Rptr. at 385. (Clark, J., dissenting). Recovery of fees would not impair a fund created exclusively for the clients of plaintiffs' counsel.

The *Serrano* case also demonstrates the relevance of the amount of money per client diverted by the fee recovery. If the litigation created an annual increase of \$550 million in educational spending, as plaintiffs contended, *Serrano III*, 20 Cal. 3d at 36, 569 P.2d at 1308, 141 Cal. Rptr. at 320, the attorneys' fee recovery would be much less than one percent of the increase, and would, in any event, amount to only pennies per person benefitted. That cannot possibly be the type of fee payment prohibited by regulations governing public interest firms.

Of course, even if recovery from a fund is not prohibited, it might be argued that public interest firms should refrain from seeking such fees. According to this argument, if the purpose of a suit is to create a fund for certain clients, any payment of fees from that fund, however small, would impair that purpose.

The counterargument starts with the premise that money taken from a fund benefitting some clients may be used in litigation on behalf of equally deserving clients, provided it represents a very small amount per client. Indeed, the entire existence of the Legal Services Corporation is premised on the idea that giving \$200 million per year to mostly middle-income lawyers and their support staffs will do more to alleviate poverty than giving \$10 to every poor person in the country. As paternalistic as that notion seems, by and large it is difficult to refute. The *Serrano* litigation alone may be responsible for several hundreds of million dollars in increased educational benefits for poor people in California, regardless of whether it legally caused that increase. Thus, it may be argued that public interest firms should seek attorneys' fees even when those fees are derived from a fund benefitting their clients, provided that no client is significantly harmed by the attorneys' fee recovery.

Each of these opposing arguments has some validity to it. The question of when public interest firms can and should seek attorneys' fees from a fund created for their clients merits serious additional study by the public interest bar.

189. See note 176 *supra* and accompanying text.

190. See note 195 *infra* and accompanying text.

and it appears to rest on principles long since discarded.

The exemption rule apparently originated from the concept of sovereign immunity. The early opinions establishing the rule stated that just as the state could not be sued unless it expressly consented, state property was exempt from execution unless the legislature provided otherwise.<sup>191</sup> Decisions holding that property owned by municipalities in their proprietary capacities is not exempt from execution were distinguished on the ground that the state simply does not own land in the proprietary sense.<sup>192</sup>

These opinions seem to have been implicitly disapproved when the supreme court, in *Muskopf v. Corning Hospital District*,<sup>193</sup> abolished governmental sovereign immunity from tort claims. That decision reaffirmed that a state may indeed act in a proprietary capacity,<sup>194</sup> and made clear that absent express legislative intent to the contrary, the state is subject to its own general laws. Accordingly, state property, at least that held in a proprietary capacity, should be subject to execution unless expressly forbidden by statute. Statutory law does prohibit executions against state property as a means of enforcing tort judgments against the state,<sup>195</sup> but does not exempt state property from execution on any other kind of judgment, including one for attorneys' fees.

In the absence of statutory provision for exemptions, courts should hesitate to follow the lead of outdated case law, particularly in light of the sound policy behind sanctioning execution on state property held in a proprietary capacity. Not only does execution insure that plaintiffs have remedies as well as rights against the state, but it does so without provoking the constitutional confrontation inherent in ordering the legislature to appropriate money. That confrontation will now be explored.

3. *Ordering the Legislature to Appropriate Money for Attorneys' Fees.* If the strategies based on equitable relief and execution fail, the plaintiff must consider the direct approach: asking the court to order the legislature to appropriate money to pay the plaintiff's attorneys' fees. As noted above, precedent opposes such action,<sup>196</sup> but this position is not completely devoid of merit.

In *Ross v. Superior Court*,<sup>197</sup> the supreme court ruled that a county board of supervisors could be ordered to pay welfare benefits pursuant to a judgment, even though the payment required a legislative appropriation. Of

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191. *Skelly v. Westminster School Dist.*, 103 Cal. 652, 656, 37 P. 643, 644 (1894).

192. *El Camino Irrig. Dist. v. El Camino Land Corp.*, 12 Cal. 2d 378, 383, 85 P.2d 123, 124 (1938).

193. 55 Cal. 2d 211, 359 P.2d 457, 11 Cal. Rptr. 89 (1961).

194. *Id.* at 214, 359 P.2d at 458, 11 Cal. Rptr. at 90 (citing *People v. Superior Court*, 29 Cal. 2d 754, 761-62, 178 P.2d 1, 5 (1947)).

195. CAL. GOV'T CODE § 955.5 (West 1966).

196. See note 180 *supra* and accompanying text.

197. 19 Cal. 3d 899, 569 P.2d 727, 141 Cal. Rptr. 133 (1977).

course, *Ross* involved county officials rather than the state legislature, but in some ways the case for enforcing a judgment for attorneys' fees against the legislature is stronger than the argument for enforcing the judicial order in *Ross*.

First, unlike the situation in *Ross*, there may be no way to avoid a clash between the legislature and the judiciary on attorneys' fees. In his dissent in *Ross*, Justice Mosk pointed out that rather than asking the court to invoke its contempt powers, the state could have achieved its goals by threatening to cut off funding to the offending county or by taking over the administration of the welfare program itself. He concluded that "[t]here is good reason why under these circumstances courts should abstain from invoking the draconian remedy of contempt against officials of a coordinate branch of government."<sup>198</sup> In contrast, there may be no alternative method of collection of attorneys' fees from the state, and thus less reason for judicial abstention.

Second, the judiciary may legitimately take drastic action to preserve its ability to function, as Justice Mosk's dissent in *Ross* recognizes.<sup>199</sup> A number of courts have ruled, for example, that a court may order a legislature to provide the court with sufficient funds to enable it to continue to function.<sup>200</sup> A legislative refusal to appropriate money for an attorneys' fees award judgment is analogous to its refusal to fund the courts. The granting of fees stems from the equitable power of the court.<sup>201</sup> Whereas in *Ross* refusal to pay welfare payments thwarted a state legislative policy and could have been remedied by the legislature,<sup>202</sup> refusal to pay court-ordered fees impairs the judicial function, and arguably should therefore be remedied by the courts.

Third, as in *Ross*, legislative refusal to pay fees amounts to an alteration of a final judgment. Legislatures are prohibited from making such alterations through statutes,<sup>203</sup> and it seems no more desirable when accomplished through omission.

Certainly, ordering the legislature to make an appropriation does raise serious problems under the separation of powers clause of the California Constitution,<sup>204</sup> but such problems will be caused by either action or inaction. The judicial and legislative branches are coequal, and this equality is threatened when the legislature thwarts a court's judgment through inaction. Perhaps the conflicting separation of powers concerns can be accommodated

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198. *Id.* at 919, 569 P.2d at 740, 141 Cal. Rptr. at 146.

199. *Id.* at 918, 569 P.2d at 739, 141 Cal. Rptr. at 145.

200. *See, e.g.*, *McAfee v. State*, 258 Ind. 677, 284 N.E.2d 778 (1972); *State ex rel. Edwards v. Murray*, 48 Ohio St. 2d 303, 358 N.E.2d 577 (1976).

201. *Serrano III*, 20 Cal. 3d at 43, 569 P.2d at 1312, 141 Cal. Rptr. at 324.

202. *See* note 198 *supra* and accompanying text.

203. *Progressive Improvement Ass'n v. Catch All Corp.*, 254 Ind. 221, 258 N.E.2d 403 (empowering administrative board to review trial court findings held unconstitutional).

204. CAL. CONST. art. 3, § 3 (added 1972).



by allowing the judiciary to order that an appropriation be made, but only under certain circumstances. That is, no order should be made if there are alternative means of obtaining the goal sought by the judiciary,<sup>205</sup> if the right vindicated in the judgment is purely statutory,<sup>206</sup> or if the amount awarded in the judgment is so substantial that to order the legislature to pay it would require a reordering of legislative priorities.<sup>207</sup> In the case of enforcing an attorneys' fee award, however, there may be no alternative means of enforcing the judgment.<sup>208</sup> The court is exercising its equitable powers under the constitution, not just vindicating a statutory right,<sup>209</sup> and no imaginable attorneys' fees award, even one of *Serrano's* magnitude, can influence a \$17 billion budget. Thus, ordering the legislature under threat of contempt to appropriate attorneys' fees should be considered as a last resort.

None of the three approaches to collecting attorneys' fees from an intransigent legislature—injunctive relief against administrators, execution, or a direct order compelling appropriation—are without serious problems. Hopefully, the need to confront these problems will not arise. They could largely be avoided through legislation creating a general fund out of which judgments for attorneys' fees rendered against the state can be paid, thus abating the need for express legislative authorization in each case. Such legislation would further the private attorney general theory embodied in *Serrano III* and section 1021.5.

### Conclusion

This Foreword has explored issues concerning the application of the recently granted right of public interest plaintiffs and their attorneys to receive attorneys' fees as private attorneys general. There are several unresolved questions concerning the entitlement to, the amount of, and the collection of the fees. *Serrano III* and section 1021.5 present the promise that groups previously unrepresented in the legal process will gain enhanced access to the courts, and that important statutory and constitutional rights previously ignored will now be vindicated. But if that promise is to be fulfilled, courts must consistently award substantial fees whenever possible and plaintiffs must be able to collect them.

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205. See text accompanying notes 189-193, 198 *supra*.

206. See text accompanying notes 199-203 *supra*.

207. This accommodation approach is used by state courts that have ordered legislative bodies to provide adequate funding for the courts. Although the courts may order that their funding be continued, they have no power to make unreasonable monetary demands. *McAfee v. State*, 258 Ind. 667, 284 N.E.2d 778 (1972).

208. This is assuming that execution or equitable relief is impossible.

209. See note 201 *supra* and accompanying text.