8-1-1981

The Private Attorney General in California - An Evolution of the Species

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Section 1021.5 of the California Code of Civil Procedure codifies the California Supreme Court's holding in Serrano v. Priest, ordering payment of attorneys' fees to plaintiffs who vindicate important public policies and confer benefits on the public. This Comment examines how Section 1021.5 has been applied over the last three years. In particular, the Comment analyzes the policy behind the private attorney general fee award and attempts to define "important public policy," "substantial benefits," "disproportionate burden," and "enforcement" as they are used in the context of Section 1021.5.

INTRODUCTION

The traditional American Rule requires a party to pay his own attorneys' fees. Nevertheless, for over a decade the courts have recognized that the rule is ill-fitted to increasingly prevalent public interest litigation. This type of legal action results in only small benefits to the individual plaintiff and thus is frequently not economically feasible. This consideration, combined with the inability of public enforcement agencies to pursue every meritorious claim, produced the need for an exception to the American Rule. That exception is the private attorney general doctrine, which relieves a successful public interest litigant of the financial burden of attorney's fees.

In 1977 California embraced the private attorney general doctrine. Almost simultaneously the legislature and Supreme Court adopted very similar approaches to compensating successful pub-

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2. The term "private attorney general" was first used in a suit where the central issue was standing to sue. Associated Industries v. Ickes, 134 F.2d 694 (2d Cir. 1943). It was first applied in an attorney fee setting in Newman v. Piggie Park Enterprises, 390 U.S. 400 (1968). See Note, supra note 1, at 636.
lic interest litigants.\textsuperscript{3} Thus, the advisability of the doctrine, which has been the subject of volumes of scholarly debate,\textsuperscript{4} is now a settled issue in California. As California courts have labored to apply the new rule, however, it has become clear that questions remain. This Comment addresses four of these questions: 1) How are the three criteria of the new rule to be construed? 2) When has a policy truly been enforced? 3) Are there different considerations when the defendant is a private party rather than a governmental entity? 4) What application does the doctrine have in administrative proceedings?

BACKGROUND

The federal courts were the first to recognize the need to encourage meritorious public interest litigation through attorneys' fee awards. The first fee awards were authorized by statute.\textsuperscript{5} The federal courts later began to award fees to successful plaintiffs where there was no statutory authorization, basing the award instead in the "inherent equitable powers" of the court.\textsuperscript{6}

No single formula was arrived at for determining when it was proper to shift the fee burden under this approach. Two criteria are found, however, in all the decisions invoking the rule: a judgment by the court that "including attorneys' fees as costs is an additional remedy necessary to effectuate the congressional underpinnings of a substantial program,"\textsuperscript{7} and a finding that the litigant's individual interest is minor but the alleged injury is to a broad class and is extensive.\textsuperscript{8}

The private attorney general doctrine became a well-accepted rule in the federal courts. One court held that when fee shifting is necessary "to eliminate the impediments to pro bono publico litigation and to carry out congressional policy, an award of attorneys' fees not only is essential but also is legally required."\textsuperscript{9} That rule was soon discarded, however.

In 1975 the United States Supreme Court dealt a fatal blow to

\textsuperscript{3} The California Supreme Court decided Serrano v. Priest (Serrano III), 20 Cal. 3d 25, 569 P.2d 1303, 141 Cal. Rptr. 315 (1977), and the legislature enacted \textsc{Cal. Civ. Proc. Code} § 1021.5 (West 1980).


\textsuperscript{5} \textit{E.g.}, in Newman v. Piggie Park Enterprises, 390 U.S. 400 (1968), the basis of the fee award was 42 U.S.C. § 2000a-3(b) (1964), which is the attorney fee provision of the Civil Rights Act of 1964.


\textsuperscript{7} \textit{Id.}

\textsuperscript{8} Wilderness Soc'y v. Morton, 495 F.2d 1026, 1030 (D.C. Cir. 1974).

the private attorney general doctrine at the federal level. In Alyeska Pipeline Co. v. Wilderness Society the Court held that inherent in any application of the doctrine is a determination that certain legislation is sufficiently important to warrant reallocation of attorneys' fees in an effort to encourage private enforcement. Such a determination, in the Court's view, is outside the judiciary's role; the relative importance of the enacted laws is a problem better left to the legislative branch. The Court established the law that now governs in federal courts—absent statutory authorization, all parties pay their own fees.

The California Supreme Court, in Serrano v. Priest (Serrano III), found the Alyeska decision unpersuasive. While the California Court recognized the danger of intruding into the domain of the legislature, it found no such danger when the litigation vindicates a constitutional right. Constitutional provisions were deemed to be of the requisite magnitude to warrant encouragement of enforcement.

Serrano III announced three prerequisites to shifting attorneys' fees under the private attorney general doctrine: 1) the public policy vindicated must be of sufficient strength or societal importance; 2) the necessity for private enforcement and the resulting burden on the plaintiff must be of sufficient magnitude; and 3) a sufficiently large number of people must benefit from the litigation. The court held that under the facts of Serrano II, the landmark equality of school financing case, all three of these requirements were met.

Coincident with the Serrano III opinion, the California legislature drafted its version of the private attorney general doctrine. The result, California Code of Civil Procedure section 1021.5, un-

12. Id. at 46, 569 P.2d at 1315, 141 Cal. Rptr. at 326.
13. Id. at 25, 569 P.2d at 1303, 141 Cal. Rptr. at 327 (1977).
15. CAL. CIV. PROC. CODE § 1021.5 (West 1980) provides for attorney fees in cases involving enforcement of important rights affecting the public interest.

Upon motion, a court may award attorneys' fees to a successful party against one or more opposing parties in any action which has resulted in the enforcement of an important right affecting the public interest if: (a) a significant benefit, whether pecuniary or nonpecuniary, has been conferred on the general public or a large class of persons, (b) the necessity and financial burden of private enforcement are such as to make the award appropriate, and (c) such fees should not in the interest of justice be paid out of the recovery, if any. With respect to actions involving pub-
dermined any continued validity the *Alyeska* decision may have enjoyed in California courts. The statute recognizes that fee reallocation is a valid method of encouraging private enforcement of important public policies. It delegates to the courts the authority to determine which policies are sufficiently important. The statute also states that statutory policies can be sufficiently important to trigger application of the private attorney general doctrine; *Serrano III* did not address this issue. Section 1021.5 differs from *Serrano III* in only one other way. Whereas *Serrano III* requires that there be a large "number of people standing to benefit from the decision,"16 the statute requires that "a significant benefit, whether pecuniary or nonpecuniary, [be conferred] on the general public or a large class of persons."17 Although the difference in language seems slight, the statute’s use of the words "significant" and "class" has caused some to question the consistency of the statute with *Serrano III*.18 In all other ways the three criteria adopted by *Serrano III* and section 1021.5 are identical.

**THE POLICY**

The policy underlying section 1021.5 must be understood before examining that section’s application by the California courts. The section is directed at the need to encourage private enforcement of public policies.19 "Encourage" is the key word. The doctrine is not a vehicle for rewarding litigants who have successfully protected the public interest. The fee award is a means toward an end, not an end in itself. The actual goal of the doctrine is stimulating future public interest litigation. The doctrine is not designed to punish those who violate the constitutional or statutory rights of a substantial number of persons.20 The policy of encouragement is prospective rather than retrospective. The goal is to convince attorneys that it is economically feasible to litigate in the public interest when no compensation can be expected from the client. Regardless of the amount of fees awarded, the statute will be a failure if those awards do not stimulate public interest litigation.

Courts applying the rule must strive for consistency and pre-
dictability above all else. Before an attorney can afford to put months and even years into a case without being paid by the client, his expectation of an attorneys’ fee award in event of victory must be fairly certain. To instill this confidence in potential defenders of the public interest, the courts must clearly define and consistently apply the criteria of the private attorney general doctrine. Judicial discretion in this area must always be explained and should be confined by adherence to guidelines. Only in this way will the requisite, cohesive body of precedent emerge.

An examination of the California courts’ application of Serrano III and section 1021.5 requires analysis of two bodies of case law. The first is comprised of the post-1977 California cases that have applied the private attorney general doctrine. The second is the pre-Alyeska federal decisions dealing with the doctrine. These federal cases are persuasive authority in California because the state supreme court, in the leading post-Serrano III private attorney general case, held that the cases are reliable authority in California. This holding is based on the legislature’s reliance on these federal cases in drafting section 1021.5.

The Three Criteria of the Private Attorney General Rule

"Important Right"

Serrano III and section 1021.5 both require that, before the private attorney general doctrine will apply, the litigation must vindicate an “important right.” This criterion has been the most

21. Inconsistency not only undercuts the effectiveness of the private attorney general doctrine, it also posesthe threat that the rule will discourage public interest litigation. This is because many public interest law firms are funded by charitable organizations and private foundations. This funding is usually on a short term basis and is an unreliable source of future funding. See Cahn & Cahn, Power to the People or the Profession?—The Public Interest in Public Interest Law, 79 YALE L.J. 1005, 1007-08 (1970). Frequently this funding is given with the understanding that it will be cut off if the recipient can support itself through attorney fee awards. Such is the case with Public Advocates, Inc. of San Francisco, one of the firms for plaintiff in Serrano III. Thus, the possibility exists that a few sporadic awards under section 1021.5 could convince charitable contributors there is greater need for their assistance elsewhere. If the doctrine is consistently applied, new public interest attorneys will be motivated to fill the void left by withdrawal of these funds. Without consistency, however, only a void will result and the doctrine will be counterproductive.


23. Id. at 934, 593 P.2d at 209, 154 Cal. Rptr. at 511-12.
frequent target of criticism by commentators on California’s private attorney general law. The objection to use of this criterion is that the subjectivity of the determination involved (the relative importance of the right at issue) decreases the predictability of a fee award. Also, the other two criteria adequately distinguish public interest litigation from private disputes. The suggested solution has been to assume that all constitutional and statutory policies are of the requisite importance. The courts claim to have rejected this approach. In *Woodland Hills Residents Association v. City Council of Los Angeles*, the California Supreme Court held that although the legislature had authorized fee-shifting when either constitutional or statutory rights are vindicated, the courts nevertheless must be selective, because not all legislative policies are "important." The court admitted that there is no clear standard available but suggested that "in determining the 'importance' of the particular 'vindicated' right, courts should generally realistically assess the significance of that right in terms of its relationship to achievement of fundamental legislative goals (citations)." Because a court theoretically must always try to effect legislative intent when weighing the conflicting statutory rights asserted by the litigants, this standard apparently turns on the question of what legislative goals are "fundamental." The substitution of "fundamental" for "important" does not, however, make the determination any more objective.

California courts have consistently echoed the restrictive language of *Woodland Hills Residents Association* but if we follow Justice Holmes’ advice and look to what the courts do rather than what they say, it becomes clear that the courts are actually interpreting this first criterion liberally. Only two of the cases since 1977 which considered the application of the private attorney general rule have refused to award attorneys’ fees to the successful plaintiff because the rights and policies involved were not of suf-

25. *Id.* at 152.
27. CAL. CIV. PROC. CODE § 1021.5 (West 1980).
29. *Id.* at 935-36, 593 P.2d at 209-10, 154 Cal. Rptr. at 512-13.
cient importance.\textsuperscript{32} Furthermore, neither of those cases refused to award fees solely because of the triviality of the policies involved; the courts relied more heavily on the failure of the plaintiffs’ fee claims to meet other requirements of section 1021.5. A successful litigant claiming attorneys’ fees under California’s private attorney general rule has never been refused solely because the policy vindicated by the litigation was deemed unimportant.

In \textit{AFL-CIO v. California Employment Development Department},\textsuperscript{33} the court discussed the other two prerequisites to a fee award\textsuperscript{34} and proceeded to award fees to the plaintiff without even discussing the importance of the policies and rights involved. This represents a reluctance by California courts to invade the legislative domain. The courts recognize the subjectivity and legislative function inherent in determining the propriety of a private attorney general fee award on the basis of the relative strength of the legislative policy at issue. Thus, in regard to statutory policies in this setting, a presumption of importance is evolving.

A factor contributing to the presumption’s evolution is the belief that specific statutory directives are linked to fundamental rights and policies, putting the importance of those directives beyond question. For instance, in \textit{Gunn v. Employment Development Department}\textsuperscript{35} the plaintiff successfully challenged the refusal of the defendant state agency to grant her unemployment insurance benefits because she refused to reveal whether she was pregnant. The court held that the first criterion of section 1021.5 was satisfied because the constitutionally protected right to privacy had been vindicated. That is, the court did not limit its analysis of the “important right” criterion to a consideration of California Insurance Code section 1253, dealing with unemployment insurance benefits, but instead awarded fees based on vindication of article I of the California Constitution.

When a court traces a statute back to its most basic policy foundation it is a rare piece of legislation indeed that is not linked to a policy of prima facie importance. This is most evident in \textit{Wilder-}
ness Society v. Morton, a federal case specifically recognized by the California Supreme Court as helpful in interpreting California's private attorney general law. In Wilderness Society, the judgment for the plaintiff, who sought to stop construction of the Alaska oil pipeline facilities, was based on a 1920 statutory restriction on the width of such facilities. The court recognized that the restriction was "anachronistic" and no longer consistent with congressional intent; certainly the statute did not represent a policy which was either fundamental or important. The court found, however, that the litigation enforced a different policy—that the government follow proper procedure when enacting legislation. According to the court, the litigation led to a more complete examination of the pipeline construction by Congress, including an official abandonment of the 1920 width restriction. The court awarded fees to the plaintiff for its effort in ensuring thoroughness in the legislative process.

The logical extension of this decision would completely destroy any further relevance of the "important policy" criterion. Whenever the courts recognize as correct a litigant's statutory interpretation, the policy that the law will be properly enacted and applied is furthered. Wilderness Society dramatically demonstrates how a lawsuit can be viewed as furthering important governmental policies although the specific basis for the judgment is trivial.

Wilderness Society illustrates another factor which is endemic to application of this first criterion of the private attorney general doctrine—what constitutes a public interest? The dissenters in Wilderness Society vehemently argued that the fee award was not proper because the plaintiff was not acting in the public interest; both popular opinion and congressional intent favored the pipeline. The dissenters asserted that the litigation actually was an impediment to achievement of a goal which was in the public interest. This issue plagues any discussion of public interest litigation and is relevant in the context of the private attorney general doctrine to the rule's first two criteria (important policy and widespread benefit). There is no single public interest. Effectuation of a policy held dear by one group thwarts a policy advocated by others, and a benefit to one person is often a burden to

36. 495 F.2d 1026 (D.C. Cir. 1974).
37. Woodland Hills Residents Ass'n v. City Council, 23 Cal. 3d at 938, 593 P.2d at 211, 154 Cal. Rptr. at 514 (1979).
someone else.  

This problem need not long concern the courts when the issue is reallocation of attorneys' fees under section 1021.5. The statute allows fee awards only to prevailing parties. This alone is enough to relieve the courts of the task of weighing the validity of the conflicting public interests asserted by the parties. In deciding which party is to prevail, the courts must defer to the legislature when it enacts constitutionally sound legislation. That a party prevailed in court necessarily means that the court found his position consistent with legislative intent to further a particular public interest. Thus, the argument that a fee award is improper because it favors one public interest over another should be addressed to the legislature rather than the courts. The prohibition of fee awards to losing parties preserves the credibility and impartiality of the courts; the argument by some commentators that it be abandoned is unpersuasive.

The requirement that an "important" public policy be enforced before fees will be shifted has rarely been an obstacle to private attorney general fee awards. This is a positive development. It indicates the courts' recognition of the subjectivity inherent in the criterion, and the inconsistency which goes hand-in-hand with subjectivity. A liberal approach to this first criterion also avoids the problem of deciding how far back the courts must trace the policy foundation of an enforced statute in order to identify the policy vindicated.

A Widespread Benefit

Section 1021.5 requires that "a significant benefit, whether pecuniary or nonpecuniary, [be] ... conferred on the general public

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41. Residents Ad Hoc Stadium Comm. v. Board of Trustees, 89 Cal. App. 3d 274, 152 Cal. Rptr. 585 (1979), holds that the court does not have the power under either section 1021.5 or Serrano III to award fees to a losing party. California Trout, Inc. v. State Water Resources Control Bd., 90 Cal. App. 3d 616, 153 Cal. Rptr. 672 (1979), holds that when a plaintiff prevails at trial and is awarded fees but judgment on the merits is reversed on appeal, the plaintiff is not entitled to fees for trial or appeal. Mandel v. Lackner, 92 Cal. App. 3d 747, 155 Cal. Rptr. 269 (1979), holds that when fees are awarded to the plaintiff at trial, the defendant appeals the dollar amount awarded, and the appellate court decreases the amount of the award, the plaintiff is not entitled to fees on appeal because the defendant "prevailed."
42. See Note, supra note 1.
or a large class of persons." This initially caused some observers to wonder whether the statute required a more tangible and concrete benefit than that envisioned by Serrano III. The courts have now expressly held that this is not the case. This settled, the question remains—How does this criterion restrict the awarding of fees?

Woodland Hills Resident Association examines the issue in depth:

[The benefit] in some cases may be recognized simply from the effectuation of a fundamental constitutional or statutory policy. . . . In Serrano III itself, for example, our court recognized the propriety of an attorney fee award under the private attorney general doctrine simply because of the magnitude and significance of the fundamental constitutional principles involved in that litigation and the benefit that flowed to the general public in having such principles enforced.

The Woodland Hills Residents Association court apparently accepted the argument made by some commentators that, at least in some cases, the benefit the general public receives simply from having the laws properly enforced is sufficient for the purposes of the second criterion of the private attorney general doctrine. The court stresses, however, that this type of benefit will not always be sufficient. The court recognized that in every legal action the public as a whole benefits through proper enforcement, but unless the issues involved are of sufficient magnitude the benefit will not be "significant." In cases where the issues are less important, the trial court must determine "the significance of the benefit, as well as the size of the class receiving benefit . . . in light of all the pertinent circumstances."

43. CAL. CIV. PROC. CODE § 1021.5 (West 1980).
46. Woodland Hills Residents Ass'n v. City Council, 23 Cal. 3d at 939, 593 P.2d at 212, 154 Cal. Rptr. at 515 (1979) (emphasis added).
48. This broad conception of benefit conferred most likely had its genesis in La Raza Unida v. Volpe, 57 F.R.D. 94 (N.D. Cal. 1972). This case is probably the most frequently cited federal case in California private attorney general cases as it was the first to identify and utilize the exact same three criteria adopted by section 1021.5. The case holds that where the housing relocation and environmental study prerequisites to highway construction are enforced, the entire society benefits because the policies involved "are nearly everyone's business." 57 F.R.D. at 100.
49. Woodland Hills Residents Ass'n v. City Council, 23 Cal. 3d at 939, 593 P.2d at 212, 154 Cal. Rptr. at 515 (1979).
50. Id. at 939-40, 593 P.2d at 212, 154 Cal. Rptr. at 515.
In some cases, the litigation will directly and immediately confer a benefit on an easily identifiable class, and the widespread benefit requirement will clearly be fulfilled.\textsuperscript{51} Where this is not the case, \textit{Woodland Hills Residents Association} seems to direct the courts to determine how far-reaching a decision will be. The important question to be asked is "What will be the future effect of this particular decision, assuming no further judicial or legislative orders?"

In considering this question, the California courts have often found that although the class which immediately benefits from the litigation is quite small, the prospect that others will benefit in the future warrants reallocation of the plaintiff's attorney's fees.\textsuperscript{52} In \textit{Rich v. City of Benicia},\textsuperscript{53} for instance, the plaintiff challenged the defendant city's allowance of the conversion of a single residence house (which was located across the street from plaintiff's home) into a multi-residence. Plaintiff prevailed because the city had failed to prepare an environmental impact report before authorizing the conversion. The court found the immediate benefits of the lawsuit to be confined to the plaintiff and a handful of other neighbors. Nevertheless, the court held that there was a good possibility the litigation may have improved city officials' attitudes toward compliance with state environmental laws. It observed that if this were true, all the residents of the city would eventually benefit from the lawsuit. The court used this rationale to award plaintiff attorneys' fees.

This recognition of benefits that are one step removed from the four corners of the judgment is necessary to effectuate the policy underlying the private attorney general doctrine. It is inherent in the nature of public interest litigation that the resulting benefits are not always concrete and often are reaped only in the future. Therefore, if the private attorney general rule is to effectively encourage public interest litigation, the courts must recognize this

\textsuperscript{51} E.g., Mack v. Younger, 27 Cal. 3d 687, 612 P.2d 966, 165 Cal. Rptr. 876 (1980), held constitutional a statute ordering the state attorney general to destroy conviction records relating to certain marijuana offenses. All those whose records will be destroyed as a result of the litigation will directly benefit.

\textsuperscript{52} See, e.g., Wyatt v. Stickney, 344 F. Supp. 387 (M.D. Ala. 1972). As a result of that case the court ordered the state of Alabama to increase the quality of care in state mental health institutions. The court found that all the residents of the state benefitted, due to the prevalence of mental illness. \textit{See also} County of Inyo v. City of Los Angeles, 78 Cal. App. 3d 82, 144 Cal. Rptr. 71 (1978).

type of indirect benefit. If the courts narrowly define the benefits which are considered sufficient, the inevitable result will be reluctance of attorneys to litigate on the public’s behalf for fear of being unable to make a showing of direct, immediate and widespread benefits.

One approach to assessing these less tangible benefits is to isolate the statutory or constitutional policy which has been enforced and then determine the class of persons the policy was intended to protect. If that class is sufficiently large and the determination is made that the violative action of the defendant and others similarly situated will actually be curtailed by the litigation, then the second criterion of section 1021.5 has been satisfied. *Wilderness Society v. Morton*,54 adopts this approach. The *Wilderness Society* court stated that the benefits conferred through enforcement of a public policy are sufficient when the violation alleged by the plaintiff caused “great harm to important public interests when viewed from the perspective of the broad class intended to be protected by that statute.”55 Similar reasoning was employed in *Stanford Daily v. Zurcher*.56 In that case the plaintiff successfully challenged the use of a search warrant by local police when the party searched was not suspected of criminal activity. The court implied that the benefits from the litigation flowed to the general public because all individuals enjoy the protection of the Fourth Amendment. Under the restrictive language of *Woodland Hills Residents Association*57 and the holding of *Rich*,58 the class benefitted would be limited to those individuals living within the jurisdiction of the defendant police department. Nevertheless, it is a sufficiently large class to permit reallocation of attorneys’ fees.

Under this “class protected” approach, the courts’ determination of what benefits have been conferred depends on the nature of the policy found to have been enforced under the important policy criterion.59 The broader the policy, the larger the class protected and the more likely the result that sufficient benefits have been conferred.

Two recent California cases have each added a new hurdle that must be cleared before a significant benefit is found to be conferred. In *Marini v. Municipal Court*,60 the plaintiff successfully

54. 495 F.2d 1026 (D.C. Cir. 1974).
55. Id. at 1030.
57. See notes 49-50 *supra*.
58. See text accompanying note 53 *supra*.
59. See text accompanying notes 24-42 *supra*.
challenged a court order to abandon a county rehabilitory program for drunk drivers. The basis of the order had been that state law required use of a state program. The result of the litigation was that the county district attorney was again given the discretion to operate the county program. The court of appeals held that no benefit was conferred on parties who would be eligible for the program because the lawsuit did not result in a guarantee that the program would be available. The court reasoned that because the benefits were contingent on the occurrence of another event (in this case the decision of the district attorney to offer the program) they were not sufficiently significant. This holding seems inconsistent with the directive of *Woodland Hills Residents Association* to make a "realistic assessment" of the resulting benefits. The court in *Marini* did not consider whether in fact the local program was continued. If it was, then the conclusion seems inescapable that some very real benefits resulted from the litigation.

The second new hurdle was erected by *Save El Toro Association v. Days*. In that case a California appellate court stated that if the litigation’s result could have been achieved through some means other than legal action then a court should not view the benefits conferred as having flowed from the litigation. Apparently, the goal of the court was to force parties to exhaust all alternative forms of action before turning to the courts. The desire that all litigation be necessary is certainly a reasonable one, but as the concurrence in *Save El Toro Association* recognizes, there are some dangers in this approach. If the plaintiff must prove that legal action was the last resort, meritorious public interest litigation will be discouraged. The defendant is the only party who knows what coercion is required before he will conform to the plaintiff's wishes. To place such a burden on the plaintiff will convince even more attorneys that they cannot afford to take on a case in the public's behalf. The solution suggested by the concurrence appears valid: allow the defendant to present

61. *See* text accompanying notes 49-50 *supra*.
62. The result in *Marini* would have been the same despite the decision on this issue because the court based its refusal to award fees on several grounds.
64. The statement, *id.* at 555, 159 Cal. Rptr. at 583, is dicta.
evidence to show that the litigation was unnecessary but place no burden on the plaintiff.

Under *Woodland Hills Resident Association*, the key question in determining the benefit conferred by a lawsuit is how far-reaching the judgment will be. The benefits must be tangible, but they may accrue in the future and may be reaped by a group not directly interested in the outcome of the litigation. Recognition of this type of benefit is crucial, for such benefits are the goal of public interest litigation.

**The Necessity and Burden of Private Enforcement**

The purpose of the three-criteria test is to distinguish public from private litigation. No element of the test is as effective in this regard as the third criterion, which requires that private enforcement be necessary and that it result in a burden on even successful plaintiffs. Although necessity and burden are actually distinct requirements, only the latter merits detailed consideration, because the necessity for private enforcement has become consistently recognized. Private enforcement is necessary when public entities fail to litigate the case. When public enforcement is inadequate the requirement is met. Two reasons generally are given to explain inaction by governmental enforcement bodies: one governmental entity cannot be expected to sue another, and when the defendant is a private party the public enforcers cannot be expected to take every meritorious case due to funding and manpower constraints. These factors create a presumption that when a private party litigates in the public interest without help from government attorneys, public enforcement has proven inadequate for enforcement of the policies involved.

The second element of this criterion, the burden factor, is explained in *Serrano III* as the requirement that the litigation place "upon the plaintiff a burden out of proportion to his individual stake in the matter." In other words, the costs which the plaintiff expects to incur must exceed the anticipated benefit of the lawsuit to him as an individual. The plaintiff's motive is truly the

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69. This Comment's author was unable to locate a case wherein the court denied fees because public enforcement was deemed adequate.
factor which distinguishes public litigation from private. The importance of this element is illustrated by the fact that in the last three years the most common basis for refusal of a section 1021.5 attorneys' fee award has been that the lawsuit is "self-serving." 71

Where a plaintiff's personal interest in the litigation is limited to his share of benefits sought for a large class, the burden requirement is usually met. "Absent foundation funding," 72 it is simply not economically rational for any single individual or small group of individuals, to attempt to capture their minute portion of aggregate good by incurring large expense to enforce a widely held right." 73 Conversely, if the plaintiff expects a net monetary gain from the litigation it is clear that no burden results from the lawsuit.

Satisfying the criterion becomes more difficult when the plaintiff reaps a substantial nonpecuniary gain as a result of the litigation. The California courts have recognized that a party may have a nonmonetary interest in a suit which warrants the personal expenditure of attorneys' fees, and they have denied fee awards accordingly. 74 At least in the area of suits brought by criminal defendants, however, the cases are in conflict. In Marini v. Municipal Court 75 the court deemed the litigation "self-serving" because the plaintiff could have avoided a drunk driving conviction by prevailing in the lawsuit. 76 In Mack v. Younger, 77 however, the plaintiff sued to have his conviction record destroyed and was awarded attorneys' fees when he prevailed. Although the benefits

72. Serrano v. Priest, 20 Cal. 3d 25, 569 P.2d 1303, 141 Cal. Rptr. 315 (1977), held that the facts that the plaintiff's attorney received public funding and that plaintiff was under no obligation to pay his attorney were not relevant to the determination of the propriety of a private attorney general fee award. Id. at 47-48, 569 P.2d at 1315-16, 141 Cal. Rptr. at 327. The extent of public and foundation funding, however, was held to be a proper consideration in setting the amount of the award. Id. at 49, 569 P.2d at 1317, 141 Cal. Rptr. at 328.
74. See, e.g., County of Inyo v. City of Los Angeles, 78 Cal. App. 3d 82, 144 Cal. Rptr. 71 (1978), where the plaintiff's personal environmental interests were considered great enough to warrant a refusal to shift the attorney fee burden.
75. 99 Cal. App. 3d 829, 160 Cal. Rptr. 465 (1979). For the facts of this case, see text accompanying note 60 supra.
76. Id. at 837, 160 Cal. Rptr. at 470.
77. 27 Cal. 3d 687, 612 P.2d 966, 165 Cal. Rptr. 876 (1980).
to the plaintiffs in the two cases are not identical, they are very similar in terms of value to the individual plaintiff. The conflict is caused by differing subjective valuations of the interest involved.

A certain amount of subjectivity is inevitable when a court is asked to value an interest which has no dollar equivalent. Nevertheless, every effort should be made to limit subjectivity to a bare minimum. Open questions and unclear standards reduce the predictability of a fee award, which undermines the policy behind the private attorney general doctrine. In deciding *Mack*, the California Supreme Court should have distinguished or overruled *Marini*.

Perhaps the best approach to resolving the burden criterion would be to combine a cost/benefit analysis with a reasonable person standard and apply the test when the litigation begins. If a reasonable person, after deciding that expected costs exceed anticipated benefits of the litigation, proceeds with the action then the burden requirement is satisfied. This analysis must be viewed as having been made at the instigation of the lawsuit. Frequently in private litigation a party prevails only to discover that he faces a net loss as a result of the litigation. In such a case, the burden criterion is not satisfied; it is not the result but the expectation which distinguishes public interest litigation from its private counterpart. Therefore, hindsight should play no role in this determination. In addition, the cost/benefit analysis should be made independently of other economic factors; the financial situation of the parties is irrelevant.\textsuperscript{78}

Application of the burden criterion requires an examination of the plaintiff's motive. Where the potential benefit to the plaintiff does not exceed the anticipated costs of the lawsuit, the litigation is sufficiently burdensome to justify fee-shifting. The courts should rely heavily on this criterion when the applicability of the private attorney general doctrine is a difficult issue. It is this element, the nature of the plaintiff's stake, which best distinguishes public interest litigation from a private dispute.

**ENFORCEMENT**

The three criteria examined above are said to comprise the formula of the private attorney general rule. In reality, however, there is a fourth criterion: the requirement that the policy involved be "enforced.”

\textsuperscript{78} The courts have recognized that the ability of a party to pay his own attorneys' fees is irrelevant to the propriety of a private attorney general fee award. See *AFL-CIO v. California Employment Dev. Dep't*, 88 Cal. App. 3d 811, 822, 152 Cal. Rptr. 193, 200 (1979).
Resolution of the parties' dispute is not necessarily synonymous with enforcement. When a plaintiff bases his claim on a statute and prevails on the merits, and then the defendant is ordered to conform his behavior to the statute, clearly that statute has been enforced and its underlying policy vindicated. This conclusion, however, does not necessarily follow when the parties settle or plaintiff prevails on an alternate ground. Section 1021.5 requires that the right involved be "enforced" before a fee award is given. It is uncertain that there has been enforcement when the court never decides the applicability of the "important" right or policy upon which the fee award depends. Due to frequent settlements and judgments on alternate grounds, this question has been described as "endemic to the application" of the private attorney general rule.79

The question of enforcement in the event of judgment on an alternate ground was at issue in Woodland Hills Residents Association. In Woodland Hills I,80 the plaintiffs made two arguments: the map for the subdivision which was being challenged did not conform to the city's general plan, and the city failed to make the required findings that there was such conformity. The court never reached the first contention but found that the defendant was required to make the findings and had not done so.81 Nevertheless, plaintiffs' claim for attorneys' fees was based on enforcement of the unadjudicated policy of conformity. The court held that in some cases, enforcement does not depend on a binding judgment on the policy involved.

[T]he fact that plaintiff is able to win his case on a 'preliminary' issue, thereby obviating the adjudication of a theoretically more 'important' right, should not necessarily foreclose the plaintiff from obtaining attorney fees under a statutory provision. When a defendant's action is invalid on a number of grounds, it would be both unfair and contrary to the legislative purpose of section 1021.5 to deprive a plaintiff of attorney fees simply because the court decides the case in plaintiff's favor on a 'simpler' or less 'important' theory (citations).82

The court recognized, however, that in some cases, the dispositive issue will be far enough removed from the "important" policy to invalidate application of section 1021.5. It is left to the lower

81. Id.
82. Woodland Hills Residents Ass'n v. City Council, 23 Cal. 3d at 938, 593 P.2d at 211, 154 Cal. Rptr. at 514 (1979).
courts to determine, "from a practical perspective," whether the litigation served to vindicate the important right.

The court based its decision on federal precedent. The cases cited held that where both statutory and constitutional claims are made, the constitutional issues may be considered "enforced" although only the statutory issues are addressed by the court. One of the cases cited was Southeast Legal Defense Group v. Adams, which held that the undiscussed constitutional policy should be considered enforced unless the claim is "'obviously frivolous', 'plainly unsubstantial,' or 'obviously without merit.'” Thus, Woodland Hills Residents Association supports the position that when a plaintiff prevails, the court will adopt a very deferential standard of review toward all of plaintiff's unadjudicated claims for purposes of an attorneys' fee award.

It is on the question of enforcement without judgment that three justices dissent in Woodland Hills Residents Association. The dissenters argue that the majority's opinion will frustrate the efficiency of the courts by forcing them to decide issues in order to settle an attorneys' fee claim which otherwise need not be considered. This argument fails to recognize two factors. The first factor is that application of the private attorney general doctrine is not so trivial an issue as to be a waste of the court's time. The legislature has determined that in some cases an attorneys' fee award should be part of the remedy. It is the job of the judiciary to make such decisions as are necessary to shape that remedy. Secondly, under the liberal standard of review to be used, consideration of the unadjudicated issues need not be exhaustive. The court's job is finished when it finds that the unadjudicated claim is not "obviously frivolous."

The courts have also held fee awards proper when no judgment is made on the important policy because the parties settle. In Northington v. Davis the court observed that "prior authorities make it clear that 'voluntary' corrective action (by the defendant), induced by litigation, may properly be considered a 'benefit' of

84. This holding is based on the judicial policy of avoiding constitutional interpretation when the case can be decided on nonconstitutional grounds. See Hagans v. Levine, 415 U.S. 528, 537 (1966).
86. Id. at 894.
88. See text accompanying note 86 supra.
89. 23 Cal. 3d 555, 593 P.2d 221, 154 Cal. Rptr. 524 (1979).
the litigation in determining the propriety of an attorney fee award."90 This holding is consistent with both California91 and federal92 precedent. To hold otherwise would discourage settlement and promote unnecessary litigation.

An ill-advised California case on the question of enforcement is Marini v. Municipal Court.93 The plaintiff in that case based his claim on the constitutional principles of local autonomy94 and separation of powers.95 Despite the fact that plaintiff prevailed on these constitutional policies, the court held that they had not been enforced to the degree envisioned by the private attorney general doctrine.

[I]t is by no means clear that respondent's action enforced or vindicated these principles in the requisite sense. No one disputed these principles. . . . In these circumstances Superior Court's order amounted to 'enforcement' or 'vindication' of the constitutional principles, if at all, only in the broadest and most theoretical sense.96

In other words, a plaintiff does not enforce a policy by alleging, proving, and alleviating a violation of that policy as long as the defendant never disputes the existence or propriety or both of the policy itself. If this rationale had been applied in Serrano III, no fees would have been awarded. The defendant therein did not dispute the existence and validity of equal protection but simply alleged that there had been no violation of that policy. Policies do not exist in vacuums; they take on meaning and significance only when applied. A policy is vindicated not when it receives lip-service but when it is properly applied. Thus, the holding of Marini is incorrect.

It is clear that the courts have not viewed the issue of enforcement as a major obstacle to application of the private attorney general doctrine. This view is sound. One commentator has correctly observed that "Requiring a showing of both statutory vindication and a class wide benefit, would seem to entail a largely

90. Id. at 960 n.2, 593 P.2d at 224 n.2, 154 Cal. Rptr. at 527 n.2.
94. CAL. CONST. art. XI, § 7.
95. CAL. CONST. art. III, § 3.
Indeed, where a policy is intended to confer certain benefits, and a court finds that a litigant's efforts have established those benefits, it would appear to be settled that the policy has been vindicated.

Suits Against Private Parties

Almost without exception, the California private attorney general cases decided since Serrano III and the enactment of section 1021.5 have involved governmental entities as defendants.\textsuperscript{98} Apparently, the body of precedent regarding the private attorney general doctrine has discouraged attorneys from handling public interest litigation involving only private parties.

Use of the doctrine is being unnecessarily confined. There is no reason why the doctrine should be inapplicable in suits between private parties. One California case\textsuperscript{99} has recognized that section 1021.5 implicitly authorizes fee shifting in wholly private litigation. Furthermore, there is ample federal precedent for private attorney general fee awards against private parties.\textsuperscript{100}

The same three-criteria analysis applies regardless of whether the defendant is public or private. The requirements of benefit conferred and burden of the litigation ensure that the lawsuit is not purely private in nature. There is, however, one difference when a private defendant is named—the source of the funds to pay the attorneys' fee award. When the defendant is a governmental entity there is a basic notion of fairness at play which further justifies shifting the costs of the litigation to the defendant. It is the public which benefits from the litigation and it is the public which pays the cost through expenditure of tax dollars. Although preventing unjust enrichment is not the policy behind the private attorney general doctrine, the fact that the recipient of the benefits also pays for them makes the doctrine more acceptable. In the case of a private defendant it is very possible that the party forced to pay the fees will not share in the benefits created by the litigation. This result seems inconsistent with the theory of loss distribution, which is so widely accepted by California in other ar-

\textsuperscript{97} Note, Awarding Attorneys Fees to the 'Private Attorney General': Judicial Green Light to Private Litigation in Public Interest, 24 Hastings L.J. 733, 749 (1973) (emphasis original).

\textsuperscript{98} This Comment's author found only a single California private attorney general case involving a private defendant. Franzblau v. Monardo, 108 Cal. App. 3d 522, 166 Cal. Rptr. 610 (1980).

\textsuperscript{99} Id.

eas of the law,\textsuperscript{101} because there is no assurance that the defendant will be able to spread its loss over a large group. For this reason, several commentators have advocated the creation of a public fund out of which private attorney general fee awards would be paid.\textsuperscript{102}

Shifting the costs of public interest litigation would seem more equitable if the policy behind the reallocation of costs were punishment or deterrence, but it is neither.\textsuperscript{103} The policy is encouragement of public interest litigation in recognition of the inadequacy of public enforcement. This being the case, fairness dictates that the costs of public interest litigation be paid out of the same fund that supports the inadequate public enforcement—the public treasury.\textsuperscript{104} In the absence of such an appropriation, the choice is between allowing financial constraints to continue to discourage meritorious public interest litigation and occasionally allocating costs to a party who has not benefitted. The former seems the lesser of two evils.

**APPLICATION OF THE DOCTRINE IN ADMINISTRATIVE PROCEEDINGS**

The California Supreme Court has held that despite the fact that section 1021.5 is directed expressly to the courts, under equitable judicial power as recognized in \textit{Serrano III}, administrative agencies may also award fees to a private attorney general. In \textit{Consumers Lobby Against Monopolies v. P.U.C.},\textsuperscript{105} the supreme court awarded to the plaintiff the attorneys' fees it incurred in appearing before the defendant agency. The court held that when the agency proceeding is in essence an adjudication, the agency possesses "well established and well understood judicial power," including the equitable power to award fees.\textsuperscript{106} Fees incidental to plaintiff's participation in a ratemaking proceeding, however, were denied. The court found that proceeding to be legislative in nature and thus the analogy between the role of the courts and that of the agency was inapplicable.

\begin{itemize}
    \item \textsuperscript{101} Levy & Ursin, \textit{Tort Law in California: At the Crossroads}, 67 \textit{CALIF. L. REV.} 497 (1979).
    \item \textsuperscript{102} Dawson, \textit{Lawyers and Involuntary Clients in Public Interest Litigation}, 88 \textit{HARV. L. REV.} 849 (1975); Note, \textit{supra} note 1.
    \item \textsuperscript{103} Wilderness Soc'y v. Morton, 495 F.2d 1026, 1036 (D.C. Cir. 1974).
    \item \textsuperscript{104} Note, \textit{supra} note 1.
    \item \textsuperscript{105} 25 Cal. 3d 891, 603 P.2d 41, 160 Cal. Rptr. 124 (1979).
    \item \textsuperscript{106} \textit{Id.} at 906, 603 P.2d at 50, 160 Cal. Rptr. at 133.
\end{itemize}
For purposes of determining the applicability of the private attorney general doctrine in administrative proceedings, the distinction between adjudicatory and legislative action by administrative agencies is sound. The court in *Consumers Lobby Against Monopolies* supported the distinction by observing that in a legislative proceeding there are numerous participants and intervenors and it would be impossible to separate the contributions of each toward the benefits which result from the proceeding. This is a valid observation, but there is a more fundamental reason for distinguishing adjudication from legislation. Mr. Justice Holmes, speaking for the United States Supreme Court, explained:

A judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. Legislation on the other hand looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power.¹⁰⁷

This definition of the difference between adjudication and legislation has been accepted by the California courts.¹⁰⁸ Adjudication, then, is application of existing law. In this setting, the private attorney general doctrine is proper, for the doctrine is founded on the vindication of existing statutory or constitutional policies. Vindication is achieved through proper application. Legislation, by contrast, makes new law. General policies may be applied, but the central activity is creation rather than application. Rights are created, not vindicated, through legislation. As a California court recently observed, "no person has a right to the adoption of legislation."¹⁰⁹ For this reason, the private attorney general rule, with its emphasis on enforcement and vindication, is properly confined to the adjudicatory setting.¹¹⁰

Within the context of adjudication, fairness and adherance to the basic policy involved require that the private attorney general doctrine be extended to administrative proceedings. Very often, due to the doctrine of exhaustion of administrative remedies, a party is forced to present his claim to an administrative tribunal before a court will hear his case.¹¹¹ The policy of encouraging

public interest litigation will be thwarted if litigants are forced to take their cases to an administrative agency and then required to bear their own costs in the proceeding.\textsuperscript{112} The California Supreme Court's opinion in \textit{Consumers Lobby Against Monopolies} takes the private attorney general doctrine one step further toward achievement of its ultimate goal.

**CONCLUSION**

Public interest litigation has become increasingly prevalent and has proved itself an adequate vehicle for protection of interests which otherwise would go unrepresented.\textsuperscript{113} Its considerable potential, however, is threatened by financial burden. The private attorney general doctrine seeks to remove this obstacle. When the doctrine becomes established as a regularly and consistently applied element of the public interest remedy then it will achieve its goal. The California courts have taken important steps toward this end by resisting the urge to allow subjectivity too great a role, by recognizing future benefits of public interest litigation, by adopting a liberal standard of review toward the question of enforcement, and by applying the doctrine to administrative proceedings wherein the agency is functioning in an adjudicatory fashion. Continuation of this trend will inevitably improve the quality of law enforcement in the California courts.

\textbf{JEFF THOMAS}

\textsuperscript{112} Judge Harold Leventhal was a strong supporter of attorney fee awards in administrative proceedings:

Administrative law and regulation have been profoundly influenced by the participation, in both agencies and courts, of public interest representatives who have, identified issues and caused agencies and courts to look squarely at the problems that otherwise would have been swept aside and passed unnoticed . . . . The possibility of the award of attorneys' fees will facilitate the participation of informal citizens' groups that do not have large financial resources and will give the decision-making process the benefit of their participation and assistance.


\textsuperscript{113} Chayes, \textit{The Role of the Judge in Public Law Litigation}, 89 HARV. L. REV. 1281 (1976).