The Comparative Catalyst: Reforming *Graham v. DaimlerChrysler**

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I. INTRODUCTION

Consider the following scenario: An attorney is contacted by a potential client who claims that he has purchased a product that was falsely advertised by its manufacturer. In researching the claim, the attorney learns that two public agencies have threatened suit against the manufacturer and the filing of a formal complaint appears imminent. The manufacturer has already publicly acknowledged its error and convened a special committee to determine how to make amends, so any complaint would likely be moot and there will be no damages for the plaintiff. Is it in the economic interest of the plaintiff's attorney to file suit against the manufacturer? Is it in society's interest for the plaintiff's attorney to file such a suit?

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The goal of a sound public policy regarding attorneys' fees should be to harmonize these inquiries as much as possible, but the California Supreme Court's December 2004 decision in *Graham v. DaimlerChrysler Corp.* may produce quite divergent answers.[1] The answer to the first question is clear: an attorney who files such a suit can not only receive fees for "catalyzing" any remedial action on the part of the manufacturer, even if the action is likely moot by the time it is considered by a court,[2] but the attorney may also recover the costs of litigating the exact amount of those attorneys' fees.[3] The question whether the suit is beneficial to society is more troublesome. If the Attorney General is already investigating the manufacturer, there would appear to be little need for a "private attorney general" to enter the fray as well. This is especially so where the dispute involves the legal relationship between two private parties—there is no imperative here to enforce important civil rights against a recalcitrant government entity. Moreover, the manufacturer has already admitted its error, and it is not evident that it will offer an inadequate remedy.

Unfortunately, this is exactly the sort of scenario that the California Supreme Court has sanctioned in *Graham*. The court has interpreted the state's attorneys' fees law to encourage such "tagalong" suits that appear to have little if any social utility.[4] The *Graham* court has stretched the language of California Code of Civil Procedure section 1021.5 far beyond what its plain meaning will bear. The State Supreme Court has thus managed to transform an important civil rights fee-shifting statute into a tool for private disputes that the dissent darkly predicts will make California "a mecca for plaintiffs and plaintiffs' attorneys throughout the country . . . ."[5]

II. THE FACTS AND ISSUES OF *GRAHAM*

Justice William Brennan once described appeals to determine attorneys' fees as "one of the least socially productive types of litigation imaginable."[6] Within this rarefied class of pointless litigation, *Graham* may indeed be the most farcical of all. The underlying lawsuit did not produce even a consent decree, let alone a jury verdict. The lower courts ultimately awarded the plaintiffs' attorneys $762,830, yet "roughly 90

1. 101 P.3d 140 (Cal. 2004), *modified*, 2005 Cal. LEXIS 16 (Jan. 12, 2005).
2. *See id*. at 147.
3. *See id*. at 157 ("[I]t is well established that plaintiffs and their attorneys may recover attorney fees for [litigating] fee-related matters.").
4. Justice Chin refers to such suits as "tagalong" suits in his *Graham* dissent because of their relationship to public agency action. *Id*. at 171 (Chin, J., dissenting).
5. *Id*. at 161.
6. Hensley v. Eckerhart, 461 U.S. 424, 442 (1983) (Brennan, J., dissenting).

percent of this award was for fees plaintiffs generated while seeking fees."[7]

The original dispute arose out of DaimlerChrysler's attempts to develop a "sporty version" of one of its existing truck models.[8] The original model could tow 6400 pounds, and DaimlerChrysler advertised that its 1998 and 1999 Dakota R/T trucks had similar capacities.[9] In fact, these trucks could safely tow no more than 2000 pounds, lest the suspensions bottom out, stressing the frames and increasing fatigue and wear.[10]

By February 1999, the carmaker had established a "response team" to address the problem.[11] By June, DaimlerChrysler had taken steps to replace the incorrect marketing materials and owner's manuals for the trucks it had yet to sell, but the carmaker was still distributing brochures misrepresenting the towing capacity as of August 1999.[12] The carmaker informed those who had already purchased the vehicles that they should not attempt to tow more than 2000 pounds, and "began to address remedial measures for customers who had bought or leased their Dakota R/T's under the incorrect marketing program."[13] DaimlerChrysler offered $300 refunds to buyers who had purchased hitches to safely increase the trucks' towing capacities, and by the summer DaimlerChysler had authorized dealers to repurchase or replace the trucks "on a case-by-case basis, but only for customers who demanded such a remedy."[14]

On July 29, 1999, the Santa Cruz County District Attorney contacted DaimlerChrysler about the problem and threatened legal action; on August 10, the California Attorney General joined the effort.[15] The agencies delayed filing an action, to provide an opportunity for the carmaker to respond to their charges.[16]

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7. *Graham*, 101 P.3d at 163 (Chin, J., dissenting).
8. *Id*. at 144 (majority opinion).
9. *Id*.
10. *Id*.
11. *Id*. at 145.
12. *Id*.
13. *Id*.
14. *Id*. Unfortunately, the majority opinion stated vaguely that DaimlerChrysler started its buy back program "by the summer," even though the exact date is clearly relevant in determining to what extent the plaintiff's civil action "catalyzed" the carmaker's remedial measures. If "by the summer" means before August 23, 1999, when the action was filed, the plaintiffs have a much weaker argument that they were responsible for the remedy the carmaker offered.
15. *Id*.
16. *Id*.

In the meantime, a group of plaintiffs, only one of whom actually lived and purchased his truck in California, filed a complaint in Los Angeles County Superior Court on August 23.[17] The plaintiffs alleged a single breach of warranty cause of action seeking the return of their purchase or lease payments, compensatory damages, and attorneys' fees.[18] On September 10, DaimlerChrysler offered to repurchase or replace all previous Dakota R/T trucks.[19] The trial court determined that DaimerChrysler had already offered the plaintiffs all of the relief they sought and dismissed the action as moot.[20]

How much is a moot, seven-page complaint that tags on to the investigation of two public agencies worth?[21] The trial court awarded the plaintiffs' attorneys $762,830 for their efforts.[22] The Court of Appeals affirmed.[23]

The only issue that remained for the California Supreme Court on appeal was the appropriateness of the attorneys' fees, and the court upheld the award, four to three.[24] The majority, purporting to interpret California Code of Civil Procedure section 1021.5, virtually ignored the intertwined questions of whether private enforcement was "necessary" and whether the suit enforced "an important right affecting the public interest," finding these prerequisites for the award of fees met.[25] The bulk of the court's discussion centered around whether a plaintiff who had plausibly changed the defendant's behavior through the threat of litigation, but never actually achieved a judicial ruling on the merits of his claim, could be awarded attorneys' fees. The *Graham* court chose to part ways with the United States Supreme Court, which had rejected the "catalyst" theory for the award of attorneys' fees in *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health of Human Resources* in 2001.[26] The *Graham* court thus interpreted the term

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17. *Id*.
18. *Id*.
19. *Id*.
20. *Id*.
21. *Id*. at 161 (Chin, J., dissenting).
22. *Id*. at 146.
23. *Id*. The trial court found the "lodestar" amount to be $329,620, to which it applied a multiplier of 2.25 because the case was taken on a contingency fee and involved further litigation of the proper attorneys' fees. *Id.* at 156-57. For discussion of the calculation of the lodestar amount and multipliers, see *infra* notes 106-06 and accompanying text.
24. Chief Justice George and Justices Kennard and Werdegar joined Justice Moreno's majority opinion; Justices Baxter and Brown joined Justice Chin's dissent. *See id.* at 161.
25. *Id*. at 156.
26. 532 U.S. 598, 610 (rejecting the "catalyst theory" for the award of attorneys' fees under the Fair Housing Amendments Act and the Americans with Disabilities Act). For criticism of *Buckhannon*, see Robin Stanley, Note, Buckhannon Board & Care

"successful party," as stated in section 1021.5, to mean a "party to litigation that achieves its objectives," rather than a party that forces a change in the legal rights between parties.[27] Finally, the court found that the plaintiffs' attorneys could be awarded "fees on fees" for the cost of litigating the issue of attorneys' fees.[28] The case was remanded to the lower courts to consider the award under the Supreme Court's new interpretation of section 1021.5.[29]

III. INTERPRETING SECTION 1021.5

Graham appears to present a straightforward exercise in statutory interpretation. California's attorneys' fees statute was adopted in 1977,[30] on the heels of landmark federal attorneys' fees laws passed by the 94th Congress.[31] In 1975, Congress enacted fee-shifting provisions for violations of the Voting Rights Act,[32] and the following year extended one-way fee-shifting to all civil rights claims brought under 42 U.S.C. § 1983.[33] California's scheme, however, differs substantially from the federal scheme. The federal Civil Rights Attorney's Fees Award Act[34] was confined, as the title Congress bestowed upon it indicates, to the enforcement of civil rights laws that are explicitly enumerated in the

Home, Inc. v. West Virginia Department of Health and Human Resources*: To the Prevailing Party Goes the Spoils . . . and the Attorney's Fees*, 36 AKRON L. REV. 363 (2003) (arguing that *Buckhannon* will discourage civil rights litigation and encouraging Congress to intervene).

27. *Graham*, 101 P.3d at 151; *cf*. *Buckhannon*, 532 U.S. at 605 ("Our precedents thus counsel against holding that the term 'prevailing party' authorizes an award of attorney's fees *without* a corresponding alteration in the legal relationship of the parties.").

28. *Graham*, 101 P.3d at 172 (Chin, J., dissenting) (coining the term "fees on fees").

29. *Id*. at 161.

30. The sums paid to lawyers are variously referred to by courts, commentators, and Congress as attorney, attorney's, and attorneys' fees. For the sake of consistency, I have used the last form throughout, regardless of the number of attorneys actually involved, except when quoting opinions or legislative enactments that use the alternative forms.

31. CAL. CIV. PROC. CODE § 1021.5 (West Supp. 2005). For a discussion of the genesis and original policy objectives of section 1021.5, see Jeff Thomas, Comment, *The Private Attorney General in California—An Evolution of the Species*, 18 SAN DIEGO L. REV. 843, 844-47 (1981).

32. Pub. L. No. 94-73, 89 Stat 400 (codified at 42 U.S.C. § 1973*l*(e) (2000)).

33. Pub. L. No. 94-559, 90 Stat. 2641 (codified at 42 U.S.C. § 1988 (2000)).

34. Pub. L. No. 94-559, 90 Stat. 2641 (codified at 42 U.S.C. § 1988 (2000)).

statute.[35] Where Congress has chosen to extend fee-shifting provisions beyond the context of civil rights enforcement, such as certain claims under the Endangered Species Act or the Americans with Disabilities Act, it has generally done so explicitly.[36]

The California Legislature, however, drafted the state's attorneys' fees statute more broadly.[37] The specific claims for which attorneys' fees may be awarded are not specified in the statute. Instead, fees can be awarded in "any action which has resulted in the enforcement of an important right affecting the public interest."[38] Nonetheless, the legislature placed some limits on this provision. The lawsuit must confer "a significant benefit, whether pecuniary or nonpecuniary . . . on the general public or a large class of persons . . . ."[39] Moreover, the "the necessity and financial burden of private enforcement . . . [must] make the award appropriate. . . ."[40]

Although Congress has frequently amended attorneys' fees provisions to encompass new types of claims, the California legislature has left section 1021.5 intact since 1977, with one insignificant exception.[41] Nonetheless, the California Supreme Court has steadily expanded the scope of the law's provisions to make it applicable to an ever broader array of claims.[42] After the *Graham* decision, however, the plain

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35. *See* 42 U.S.C. § 1988(b) (2000) (referring to specific types of claims that have been added to the statute since 1976, such as those falling under the Religious Freedom Restoration Act of 1993 or the Institutionalized Persons Act of 2000).

36. *See* 16 U.S.C. § 1540(g)(4) (2000) (Endangered Species Act); 42 U.S.C. § 12205 (2000) (Americans with Disabilities Act).

37. Section 1021.5 reads in relevant part:

> 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, or of enforcement by one public entity against another public entity, 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.

CAL. CIV. PROC. CODE § 1021.5 (West Supp. 2005).

38. *Id*.

39. *Id*.

40. *Id*.

41. A 1993 amendment added language only relevant to suits involving public entities. *See* 1993 Cal. Stat. 645.

42. An early commentator on section 1021.5 could find only one private attorney general case involving a private defendant that was litigated in the first four years after the statute was passed. *See* Thomas, *supra* note 31, at 862. Suits against private actors, however, have become increasingly common. *See, e.g.*, Graham v. DaimlerChrysler, 101 P.3d 140 (Cal. 2004) (defendant carmaker); Beasley v. Wells Fargo Bank, 1 Cal. Rptr. 2d 459 (Ct. App. 1991) (defendant bank).

meaning of section 1021.5 can no longer bear the high court's interpretive gloss.[43]

The California Supreme Court interpreted three important phrases in section 1021.5 so as to render them virtually meaningless. The court has conflated "an important right affecting the public interest" with any private right having an incidental benefit on third parties. Its approval of the "necessity" of private action under these procedural facts essentially removes that language from the statute. Finally, the court broadly construed "successful party" to require that the *threat* of suit change a defendant's behavior, rather than the filing of a meritorious suit.[44]

A. A Public or Private Interest?

The trial court found that Graham's suit "resulted in the enforcement of an important right affecting the public interest, . . . the protection and

43. The *Graham* majority wisely rejected the resort to the legislative history of section 1021.5, noting that "[m]aterial showing the motive or understanding of an individual legislator, including the bill's author, his or her staff, or other interested persons, is generally not considered. This is because such materials are generally not evidence of the Legislature's *collective* intent." *Graham*, 101 P.3d at 152 n.5 (quoting Metro. Water Dist. v. Imperial Irrigation Dist., 96 Cal. Rptr. 2d 314, 329-30 (Ct. App. 2000)) (internal citations omitted). It would be doubly foolish to infer the intent of legislators from a *different* enactment. But it is nonetheless interesting, if legally irrelevant, to note that the California Assembly, with a similar political composition, had, two years before it enacted section 1021.5, passed the Medical Injury Compensation Reform Act (MICRA). CAL CIV CODE § 3333.2(b) (2005). The damage caps on medical malpractice awards by MICRA have become President George W. Bush's model for national medical malpractice reform. MICRA clearly recognized that the overproduction of certain suits vindicating private economic rights, *see infra* Part III-D, will be borne by consumers. It is very difficult to believe that an Assembly that enacted MICRA would therefore have intended section 1021.5 to be used so far beyond the context of civil rights as to subsidize suits pursuing private economic rights.

44. The *Graham* court's treatment of the issue of "fees on fees" is also deeply flawed, but the judicial reasoning and policy concerns differ from these three core issues, and thus the fees on fees issue will not be considered at length in this casenote. Section 1021.5 does not mention at all whether attorneys' fees can be awarded for the fee litigation itself, and the California Supreme Court has viewed its inherent authority to imply attorneys' fees quite broadly. *See, e.g.*, Serrano v. Priest, 569 P.2d 1303, 1312-15 (Cal. 1977) ("Serrano III") (explicitly rejecting the United States Supreme Court's refusal to imply attorneys' fees without explicit legislative authorization in Alyeska Pipeline Co. v. Wilderness Soc'y, 421 U.S. 240 (1975)). From a policy perspective, appellate litigation over attorneys' fees is completely unproductive, and should be strongly discouraged in a manner that would be inappropriate for the general provisions of section 1021.5. Because both parties as law firms are likely able to bear the cost of litigation, two-way fee-shifting is probably appropriate in such cases.

enforcement of consumer rights, including highway safety."[45] Because of the plaintiffs' suits, "thousands of consumers received pecuniary benefits and enhanced safety. Thousands more are likely to benefit from it if DaimlerChrysler and/or other manufacturers are deterred from similar conduct in the future."[46] The *Graham* majority, reviewing this determination under an abuse of discretion standard, asserted that the question whether the plaintiffs' action conferred a public benefit "need not detain us long" and affirmed that Graham's suit satisfied the public interest prong of section 1021.5.[47]

The majority's flippancy, however, was hardly warranted. The court essentially conflated suits for public benefit, what we may think of as traditional civil rights suits, with actions enforcing private rights that have an incidental benefit to a large number of third parties. The significance of the distinction is evident under a law and economics analysis. The enforcement of civil rights under a pure American rule, where parties pay their own attorneys' fees regardless of who prevails, may be problematic because the value to society of a successfully prosecuted suit may be far greater than any economic gain that may accrue to the plaintiff or his attorney. Thus, for example, the value to society of a racially integrated school district may far exceed the economic damages that plaintiffs who suffer from segregation may be able to quantify and prove.[48] Attorneys' fees statutes therefore allow the defendant, usually some government entity, to transfer legal resources to certain plaintiffs and essentially subsidize a service that is underproduced in the marketplace for legal representation.[49]

However, in suits involving private economic rights, there is no "market failure" that results in the underproduction of certain suits. A rational plaintiff will file suit if he believes that his potential recovery, discounted for the possibility of failure on the merits, will exceed his legal costs. While the enforcement of, for example, consumer rights against corporate defendants might serve a public interest, a code of civil

45. *Graham*, 101 P.3d at 146.
46. *Id*. at 146.
47. *Id*. at 156.
48. Julie Davies, *Federal Civil Rights Practice in the 1990's: The Dichotomy Between Reality and Theory*, 48 HASTINGS L.J. 197, 207-11 (1997) (explaining how the availability of attorneys' fees drives civil rights litigation).
49. I use the terms "subsidize" and "subsidy" in this paper not to refer to government financial support for litigants, but the forced transfer of legal resources, through the award of attorneys' fees, from defendants to plaintiffs. The plaintiffs' actions are therefore subsidized to the extent that they deviate from the equilibrium engendered by the pure American rule, whereby the litigants in a civil action bear their own attorneys' fees. *See* Part III-C, *infra*. California explicitly recognized the American rule as its general rule for attorneys' fees in 1872 with the enactment of California Code of Civil Procedure section 1021.

procedure without fee-shifting already incentivizes such suits through the damages remedies available to the plaintiff and the availability of the modern class action device for aggregating claims.[50]

This principle was well-stated when the California Supreme Court first construed the newly enacted section 1021.5 in 1979. In *Woodland Hills Residents Association v. City Council of Los Angeles*, the high court observed, "An award on the 'private attorney general' theory is appropriate when the cost of the claimant's legal victory transcends his personal interest, that is, when the necessity for pursuing the lawsuit placed a burden on the plaintiff 'out of proportion to his individual stake in the matter.'"[51] As a state appeals court later explained, "[section] 1021.5 was not designed as a method for rewarding litigants motivated by their own pecuniary interests who only coincidentally protect the public interest."[52]

The California Supreme Court initially held tightly to this formulation in *Pacific Legal Foundation v. California Coastal Commission*.[53] The court rejected a claim for attorneys' fees by a private landowner who argued that his challenge to the Coastal Commission's permitting process would deter undesirable conduct by the agency in the future, thus conferring a broadly shared public benefit.[54] More recently, an intermediate court of appeals interpreted *Pacific Legal Foundation* to mean that "the possibility that the lawsuit convey[s] a cautionary message to the defendant about its conduct [is] insufficient to satisfy the significant public benefit requirement."[55]

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50. *See* FED. R. CIV. P. 23.

51. 593 P.2d 200, 213 (Cal. 1979) (quoting County of Inyo v. City of L.A., 144 Cal. Rptr. 71, 76 (Ct. App. 1978)). The phrase "transcend the individual plaintiff's pecuniary interest" derives from *Serrano v. Priest*, 569 P.2d 1303, 1314 ("Serrano III") (Cal. 1977), which was decided shortly before the California legislature adopted the current statutory language of § 1021.5.

52. Beach Colony II Ltd. v. Cal. Coastal Comm'n, 212 Cal. Rptr. 485, 491 (Ct. App. 1985).

53. 655 P.2d 306 (Cal. 1982).

54. *Id*. at 311.

55. Flannery v. Cal. Highway Patrol, 71 Cal. Rptr. 2d 632, 636 (Ct. App. 1998); *see also* Planned Parenthood v. City of Santa Maria, 20 Cal. Rptr. 2d 391, 395 (Ct. App. 1993) (interests of the general public were incidental to Planned Parenthood's primary objective of obtaining funds in its action to invalidate a restriction conditioning receipt of grant money on waiver of privacy rights); Kistler v. Redwoods Cmty. Coll. Dist., 19 Cal. Rptr. 2d 417, 423 (Ct. App. 1993) (terminated community college employees improperly deprived of accrued vacation pay were not seeking to establish new law on a question of public importance but were simply seeking wages due them); Wang v. Div. of Labor Standards Enforcement, 268 Cal. Rptr. 669, 675 (Ct. App. 1990) (any public benefit

Instead of reaffirming this principle of law, however, the *Graham* court confused the matter by relying on a highly problematic Court of Appeals decision, *Beasley v. Wells Fargo Bank*.[56] That dispute over attorneys' fees grew out of a massive class action against the defendant bank for overcharging certain credit card fees.[57] The *Beasley* court, however, made no attempt to analyze whether the plaintiffs' suit transcended their own financial interests. Rather, the court declared that "the question whether there was an important public interest at stake merely calls for an examination of the subject matter of the action—i.e., whether the right involved was of sufficient societal importance."[58] The *Graham* court substituted the mechanical Beasley approach for any serious consideration of how Graham vindicated anything other than his own personal property rights.[59] After *Graham*, any suit that can be

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resulting from general contractor's challenge of an administrative interpretation of a Labor Code section was incidental to the contractor's personal financial stake in the matter).

56. 1 Cal. Rptr. 459 (Ct. App. 1991); *see also* Graham v. DaimlerChrysler, 101 P.3d 140, 156 (Cal. 2004) (relying on *Beasley* approach).

57. *Beasley*, 1 Cal. Rptr. 2d at 461.

58. *Beasley*, 1 Cal. Rptr. 2d at 465 (quoting § 1021.5(a)).

59. *Graham*, 101 P.3d at 156. What I identify in Part III-A as the public interest prong of section 1021.5, that is, whether the suit transcends the personal stake of the plaintiffs, has been the source of considerable doctrinal confusion. The *Woodland Hills*, 593 P.2d at 213, and *Beach Colony*, 212 Cal. Rptr. at 491, courts analyzed the question as part of the "necessity" prong, that is, whether "the necessity and financial burden of private enforcement are such as to make the award appropriate." § 1021.5(b). On the other hand, *Flannery*, 71 Cal. Rptr. 2d at 636, considered the financial interests of the plaintiff in terms of whether the suit conferred a significant benefit on a large class of persons. § 1021.5(a). Justice Chin, in his dissent in *Graham*, raises the issue under the public interest prong, describing Graham's suit as "a vindication of personal rights, not an important right affecting the general public." 101 P.3d at 146, 170 (Chin, J., dissenting).

Fortunately, the differences in these approaches are more superficial than substantive. Section 1021.5 is written in general language, and the various prongs inevitably bleed into one another. Whether a "significant benefit" has been "conferred . . . on a large class of persons" is clearly an important factor in determining whether the plaintiff has vindicated "an important right affecting the public interest." Likewise, whether the plaintiff vindicated "an important right affecting the public interest" is an important factor in determining whether "the necessity and financial burden of private enforcement . . . are such as to make the award appropriate."

The logical flaw of the *Beasley* court was to ignore the overarching inquiry contemplated in section 1021.5, the necessity of private enforcement, in favor of a simplistic and formalistic view of discrete elements of the statute. The court dismissed Wells Fargo's argument that the plaintiffs' suit "vindicated only the private rights of Wells Fargo cardholders, rather than benefiting the public as a whole." *Beasley*, 1 Cal. Rptr.2d at 465. The court insisted that this argument

> confuses the question whether there was an important public interest at stake with the question whether a 'significant benefit' has been 'conferred on the general public or a large class of persons . . . .' The significant benefit criterion calls for an examination whether the litigation has had a beneficial impact on the public as a whole or on a group of private parties which is

characterized as protecting consumers will provide the requisite public interest,[60] and therefore the test collapses into an inquiry of how large the plaintiff class is.[61] The California Supreme Court in *Graham* completely ignored the *Woodland Hills* language about "transcend[ing] . . . personal interest;"[62] rather than citing its own precedent, it relied on a dubiously reasoned appeals court opinion.[63]

However, the *Graham* majority stretches the definition of public interest even beyond *Beasley*. While *Beasley* was a class action to recover fees "on behalf of hundreds of thousands of Wells Fargo

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> sufficiently large to justify a fee award. This criterion thereby implements the general requirement that the benefit provided by the litigation inures primarily to the public. In contrast, the question whether there was an important public interest at stake merely calls for an examination of the subject matter of the action—i.e., whether the right involved was of sufficient societal importance.

Id. Wells Fargo, however, was not confused in questioning whether the suit vindicated a right that transcended the personal financial interests of the plaintiffs, just as *Woodland Hills*, *Beach Colony*, and *Flannery* had considered before under various prongs of section 1021.5. The *Beasley* court replaced any such inquiry with a simple two-part test: is the subject matter of the action important, and does it benefit a large number of people? While the satisfaction of this test is no doubt essential for an award of attorneys' fees under section 1021.5, this simplistic test cannot tell us whether a suit transcends the personal interests of the plaintiffs, let alone whether this renders private enforcement of the right necessary.

60. The *Beasley* court observed that consumer protection actions "have long been judicially recognized to be vital to the public interest." *Id*. at 465 (citations omitted). But how does the judiciary determine the vindication of rights granted by a statute enacted by the legislature is "vital to the public interest" while the vindication of rights granted by another statute is not? Under *Beasley*, and now *Graham*, the judge is essentially asked to render his or her own personal judgment about the importance of various laws. This certainly contravenes any notion that the judge is the faithful agent of the legislature in interpreting the law. The California Supreme Court acknowledged this in *Serrano v. Priest*, 569 P.2d 1303, 1315 (Cal. 1977) ("Serrano III"), which recognized the inherent power of state courts to award attorneys' fees, but the court attempted to avoid the problem of judges selecting which laws to enforce by declaring that the vindication of any right under the state Constitution could justify an award of attorneys' fees.

61. *Beasley*, 1 Cal. Rptr. 2d at 465 ("The question whether a significantly large number of 'private' persons was benefited so as to justify a fee award is pertinent only to the significant benefit criterion . . . .").

62. *Woodland Hills*, 593 P.2d at 213.

63. *Graham*, 101 P.3d at 156 (relying on the "public interest" and "significant benefit" rules of *Beasley*, 1 Cal. Rptr. 2d 459, a California Court of Appeals decision). The irony of this test is that the strongest case for an award of attorneys' fees under section 1021.5 is the modern consumer class action, which, by pooling claims, provides incentives for plaintiffs' attorneys that would be infeasible to pursue individually, and allowing for recovery of fees out of a common fund.

customers,"[64] the plaintiffs in *Graham* were never certified as a class.[65] In fact, only *one* of the plaintiffs actually lived and purchased his truck in California.[66] This, of course, did not trouble the trial court, which found that "thousands of consumers received pecuniary benefits and enhanced safety. Thousands more are likely to benefit from it if DaimlerChrysler and/or other manufacturers are deterred from similar conduct in the future."[67]

The problem with this characterization of the case is that the plaintiffs filed suit on a single claim of breach of warranty.[68] They sought no declaratory or injunctive relief that could be seen to "transcend" their personal economic interests.[69] As the dissent points out, "Maximizing plaintiffs' pecuniary gain does nothing to enhance public safety."[70] Unfortunately, the *Graham* majority opinion sanctions an antithetical proposition. The pursuit of private economic interest provides an incidental deterrent that renders it a public interest eligible for subsidized legal resources.

The ramifications of this holding are potentially explosive. It is difficult to see why the prosecution of any tort suit against a corporate or government defendant could not result in fee-shifting to plaintiffs.[71] Any lawsuit filed by a plaintiff has the potential to pressure a defendant

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64. *Beasley*, 1 Cal. Rptr. 2d at 465.
65. *Graham*, 101 P.3d at 145.
66. *Id*. at 162 (Chin, J., dissenting).
67. *Id*. at 146.
68. *Id*. at 161 (Chin, J., dissenting).
69. Symptomatic of the majority's misapprehension of the rationale behind section 1021.5 is its decision to view this prong of the test under an abuse of discretion standard, following *Hewlett v. Squaw Valley Ski Corp*., 63 Cal. Rptr. 2d 118, 146 (Ct. App. 1997) (quoting Crawford v. Bd. of Educ., 246 Cal. Rptr. 806, 812 (Ct. App. 1988)). This deference to the trial court may be appropriate if applying section 1021.5 merely requires counting the number of actual plaintiffs or those whom it can plausibly be claimed benefited from the action. However, determining whether an action transcends personal interest is essentially a question of law concerning which types of suits are appropriately subsidized by defendants. Thus, in *Pacific Legal Foundation*, the high court found that the plaintiff homeowners' suit against the Coastal Commission was not eligible for attorneys' fees as a matter of law because it did not affect a public right broader than their interests as landowners. Pac. Legal Found. v. Cal. Coastal Comm'n, 655 P.2d 306, 311 (Cal. 1982).
70. *Graham*, 101 P.3d at 170 (Chin, J., dissenting).
71. In fact, it is difficult to see why the *Graham* rationale could not be applied to corporations suing corporations for unfair business practices, antitrust violations, and the like. Preventing corporate abuses is certainly a "public interest" that will benefit a large swathe of the citizenry. In theory, such an application of the *Graham* approach should be undermined by section 1021.5(c)—that an award of attorneys' fees is only appropriate if "such fees should not in the interest of justice be paid out of the recovery, if any." CAL. CIV. PROC. CODE § 1021.5 (West Supp. 2005). Presumably, corporate litigants have the resources to support their legal actions such that it would not be in the interests of justice to award attorneys' fees out of their damage awards. However, there is no discussion of this in *Graham* as an equitable concept.

to change some aspect of its policy—this is inherent in the potentially coercive power of a civil action. Thus, any plaintiffs' attorney who drafts a complaint so as to link his clients' personal economic interests with some marginal deterrent benefit will have a winning argument for attorneys' fees under *Graham*.[72] By obliterating the distinction between suits that deserve special subsidy and typical private actions that may have an incidental public benefit, the court has turned an important civil rights statute into a boon for plaintiffs seeking purely economic recoveries.

B. Relationship with Public Enforcement

The *Graham* decision has rendered the second requirement of California Code of Civil Procedure section 1021.5 virtually meaningless as well. The statute provides that attorney fees may be awarded if "the *necessity* and financial burden of private enforcement, or of enforcement by one public entity against another public entity, are such as to make the award appropriate . . . ."[73]

This requirement that private enforcement be necessary has firm grounding in public policy.[74] Public agency enforcement of rights is preferable in most instances, and almost certainly here where the purported public interest is the prevention of false advertising.[75] Public prosecutors do not benefit financially from bringing certain cases, so

72. The facts of the *Graham* case itself demonstrate that the court's definition of "public benefit" will permit an award of attorneys' fees to generate a net economic loss for society. The cost of modifying the Dakota truck so that its towing capacity would conform to what was advertised was $300 per truck, and fewer than 1000 Californians purchased the affected trucks. *Graham*, 101 P.3d at 144-45. The case does not mention any injury that occurred because of the false advertising, and it appears that at the time the complaint was filed, DaimlerChrysler already "notified existing buyers of the error [and] told them not to attempt to tow more than 2,000 pounds . . . ." *Id*. at 145. The danger of future accidents was thus abated, and so the benefit accruing to all the California truck purchasers, whether or not they were plaintiffs in this case, was collectively no more than $300,000 ($300 x 1000 truck purchasers). However, even discounting the appellate litigation over fees, the lodestar amount awarded to the plaintiffs' attorneys was $329,620. *Id*. at 146. *Graham* thus sanctions the award of fees where the costs of litigation exceed the recovery, and there is no intangible public right being protected. The economic irrationality of this holding is only compounded by considering the defendant's legal costs and avoidance costs.

73. CAL. CIV. PROC. CODE § 1021.5 (West Supp. 2005) (emphasis added).

74. The policy justifications for the private attorney general model are discussed in Thomas, *supra* note 31, 846-47.

75. *See Graham*, 101 P.3d at 146 (discussing the trial court finding that the plaintiffs' efforts secured consumer protection).

they may choose to pursue the violations they find most egregious. Plaintiffs' attorneys, on the other hand, are quite naturally attracted to the cases that will generate the largest fees and damage awards, regardless of whether such actions benefit society the most. Plaintiffs' attorneys likewise may represent clients whose interests conflict with those other aggrieved members of the public because of the finite resources available for compensation.[76] Public prosecutors, however, are not, at least in theory, beholden to the interests of a discrete group of clients.

The private attorney general model of vindicating public rights is preferable only in certain clearly defined situations. For example, the private attorney general model is essential for protecting private citizens against government violations of their civil rights. Forcing one government entity to litigate such claims against another government entity runs counter to the basic rationales for our adversarial system of civil justice.[77] Likewise, the private attorney general model may be appropriate where government resources are inadequate to bring suit.[78]

Neither justification, however, is present in the *Graham* case. To the extent that Graham's suit attempts to vindicate a public interest at all—preventing false advertising—there is no reason to believe that it is necessary or even preferable that this right be vindicated by a private party. The defendant is not a government entity, and therefore there is no concern that a civil rights challenge will not be vigorously prosecuted.

Even more shocking in *Graham* is that both the Santa Cruz District Attorney and the California Attorney General had initiated an investigation of DaimlerChrysler's practices by late July 1999.[79] When Graham's attorney filed a complaint on August 23, the public agency actions were already under way.[80] While it is true that the public entities had not filed suit against the carmaker, they had refrained because they wished to give DaimlerChrysler an opportunity to respond before

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76. See, for example, the United States Supreme Court's discussion of this problem in *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997). The asbestos litigation would almost certainly bankrupt the corporation, so in settlement the plaintiffs' attorneys were required to apportion damages among those who had already experienced medical problems and those who were only at risk for future problems. *Id*. at 603-04.

77. *See* Thomas, *supra* note 31, at 856 ("Private enforcement is necessary when the public entities fail to litigate the case.").

78. In *Serrano III*, in which the California Supreme Court recognized the applicability of the private attorney general model for vindication of constitutional rights, the court offered the unsatisfying explanation that "for various reasons the burden of enforcement is not always adequately carried by [public prosecutors]." Serrano v. Priest, 569 P.2d 1303, 1313 (Cal. 1977).

79. *Graham*, 101 P.3d at 145.

80. *Id*.

commencing litigation.[81] In this brief window of several weeks, Graham's attorney filed his tagalong suit.[82] It is simply perverse to insist, as the trial court apparently did, that the public agencies' desire to prevent litigation strengthened the plaintiffs' attorney's argument that his own intervention was therefore necessary.

Even if one were to argue that the intervention of the public entities did not render the private action duplicative, it is appropriate to compare the records of the public and private actions in placing pressure on DaimlerChrysler to change its behavior. Graham's action was dismissed as moot, and it is likely that the complaint was moot the moment it was filed.[83] The plaintiffs therefore received no compensation that the carmaker had not already offered at the time the private suit commenced. On the other hand, the public entity suit, which focused on the false advertising claim and not the breach of warranty claim, continued after the private suit was dismissed, as the carmaker continued to distribute misleading marketing materials.[84] DaimlerChrysler eventually settled the matter with the government for $75,000 and agreed not to use the materials again.[85] The private plaintiffs never won a penny or wrung a legal commitment out of the carmaker not to use the false marketing materials.

The California Supreme Court reviewed the award of attorneys' fees to the plaintiffs' attorneys in this case under an abuse of discretion standard. On the facts on this case, however, it is very difficult to see how a future trial court could possibly abuse its discretion by finding

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81. *Id*.
82. *Id*.
83. DaimlerChrysler sent a letter to all purchasers of the Dakota R/T truck on June 16, 1999, acknowledging its error. *Id*. at 145. By the "summer," the carmaker had "authorized dealers to repurchase or replace Dakota R/Ts on a case-by-case basis, but only for customers who demanded such a remedy." *Id*. After the complaint was filed, DaimlerChrysler agreed to repurchase all of the falsely advertised trucks. *Id*. The only relief that DaimlerChrysler offered after the filing of the complaint that it had not offered before was to actively offer to repurchase the trucks, rather than simply to acquiesce in this demand from its customers. *Id*. The *Graham* court, at the request of the California Attorney General, adopted a rule that the "plaintiff seeking attorney fees under a catalyst theory must first reasonably attempt to settle the matter short of litigation." *Id*. at 155 (citations omitted). Thus, if Graham failed to present his demands to DaimerChrysler, he has not met this consultation requirement. If he did make such demands, the trial court's findings of fact indicate that he would have received an offer of repurchase, so his suit would have been moot at the moment it was filed.
84. *Id*. at 145-46.
85. *Id*. at 146.

that such a tagalong suit is "necessary" and thus fulfills the strictures of section 1021.5. *Graham* is the prototypical example of when a private attorney is *not* appropriate. The California Supreme Court's refusal to reverse the lower court's finding of the necessity of private enforcement—when two public entities have threatened suit and the defendant has already conceded its mistake in a written letter to its consumers—has essentially read this requirement out of the statute.

C. What is a Successful Party?

The most contentious issue in the suit, however, was whether Graham could be considered a "successful party" to whom the award of attorneys' fees was appropriate under section 1021.5. The California Supreme Court has never interpreted the phrase "successful party" to mean that a party may receive attorneys' fees under section 1021.5 only if it pursues a suit to a final judgment. In *Westside Community for Independent Living, Inc. v. Obledo*, the high court rejected such an interpretation of the language.[86] Instead, the court, per Chief Justice Rose Bird, endorsed the "catalyst test," which provides that a "plaintiff will be considered a 'successful party' where an important right is vindicated 'by activating defendants to modify their behavior.'"[87]

Although a number of lower federal courts also adopted this "catalyst" approach to defining "successful party,"[88] the United States Supreme Court rejected it in *Buckhannon*.[89] Chief Justice William Rehnquist, writing for a five-to-four court, observed that the catalyst theory "allows an award where there is no judicially sanctioned change in the legal relationship of the parties."[90] Thus, a "defendant's voluntary change in

86. 657 P.2d 365 (Cal. 1983).

87. *Id.* at 367 (quoting Robinson v. Kimbrough, 652 F.2d 458, 465 (5th Cir. 1981)) (internal quotations omitted). Justice Chin, however, argues that *Westside Community* did not adopt the catalyst approach because the claim for attorneys' fees was ultimately rejected, rendering the statements about who may constitute a catalyst to be dicta. This is somewhat problematic, however, as the *Westfield Community* court had to determine if the plaintiffs' actions were sufficient to invoke the catalyst theory in order to reach the question of causation.

88. *See* Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res., 532 U.S. 598, 602 n.3 (2001) (collecting the circuit court cases embracing the "catalyst" approach).

89. *Id*. at 610. The *Graham* court was dismissive of the United States Supreme Court's interpretation of what constitutes a "successful party." *Graham*, 101 P.3d at 150. Interestingly, the *Westside Community* court a generation before had explained that "[section] 1021.5 codified the common law theory of the private attorney general. The Legislature relied heavily on federal precedent when enacting the statute, and California courts often look to federal decisions when interpreting it." *Westside Cmty.*, 657 P.2d at 367 n.5.

90. *Buckhannon*, 532 U.S. at 605.

conduct, although perhaps accomplishing what the plaintiff sought to achieve by the lawsuit, lacks the necessary judicial *imprimatur* on the change."[91]

The disagreements between Chief Justices Bird and Rehnquist, and later between the majority and dissent in *Graham*, reveal a difficult problem in defining who is a successful party. If a defendant can escape attorneys' fees by voluntarily changing his conduct, he will have an incentive to avoid any judicially sanctioned settlement. The cessation of his conduct will moot the claim, at least for injunctive relief, and the plaintiffs' attorney will have no right to fees.[92] On the other hand,

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91. *Id*. It should be noted, however, that *Buckhannon* did not present exactly the same question as did *Graham*. In the former, the plaintiff was a corporation that operated assisted living facilities. West Virginia's Fire Marshal attempted to shut down its facilities because "some of the residents were incapable of 'self-preservation' as defined under state law." *Id*. at 600. Buckhannon sued on behalf of itself and similarly situated care homes on the ground that the state's action violated the federal Fair Housing Amendments Act (FHAA) and the Americans with Disabilities Act (ADA). *Id*. at 600-01. The following year, the West Virginia legislature enacted a law that repealed the "self-preservation" requirement. *Id*. at 601. Buckhannon argued that its suit had "catalyzed" the legislature's remedial action. *Id*. at 600-02.

Buckhannon thus differs from *Graham* in four important respects, three of which present a more sympathetic argument for the award of attorneys' fees than in *Graham*. First, as Buckhannon sought only declaratory and injunctive relief, clearly its action transcended its parochial economic interests more than Graham's suit. Second, Buckhannon sued a state agency, not a private party, and thus the necessity of private enforcement was surely greater than in *Graham*. Third, Congress explicitly extended one-way fee-shifting provisions to both the FHAA and the ADA, while the California Supreme Court has expanded the range of suits eligible for fee-shifting under section 1021.5 without the further endorsement of the state legislature.

On the other hand, Buckhannon argued that it had catalyzed a change in policy of a state legislature, which presents seemingly insuperable evidentiary problems. How does one determine the reasons that individual state legislators voted for the bill? Would it matter if most knew nothing of Buckhannon's suit but otherwise thought the reform to be desirable? Individual legislators had no personal economic stake that was threatened by a successful suit, so it is difficult to assess the catalyzing effect of the suit.

92. Chief Justice Rehnquist expressed skepticism in his *Buchkannon* majority opinion that the failure to adopt the catalyst rule would encourage defendants to unilaterally moot suits, labeling such claims "entirely speculative and unsupported by any empirical evidence . . . ." *Buckhannon*, 532 U.S. at 608.

Even if empirical research reveals that defendants do seek to moot actions to avoid attorneys' fees, the risk of such action is already built into the contingency fee multiplier that the court may award. For example, in *Graham*, the plaintiffs' fees were multiplied by a factor of 2.25 to account for the risk of bringing the action as a contingency. *Graham*, 101 P.3d at 163 (Chin, J., dissenting). Moreover, in those cases where the defendant moots the action by ceasing the objectionable practice, the plaintiff has won what he sought, and the defendant's costs in conforming its practices are minimized. One would think that such a result would be welcomed rather than shunned.

awarding attorneys' fees without the "imprimatur" of the court on the merits could dramatically encourage pointless litigation. Even if the parties were to avoid a trial, they would be required to litigate the merits of the case to determine whether there is a proper causal nexus between the civil action and the defendant's "voluntary" change in conduct.

The *Graham* court apparently believed that it solved this problem by requiring courts awarding attorneys' fees to ensure that a causal nexus exists between the plaintiff's attorneys' action and the defendant's change in conduct,[93] and that the claim is "not frivolous, unreasonable, or groundless."[94] The fatal flaw in the majority's line of reasoning is that it is not merely actions that are egregious enough to be legally frivolous that result in breakdowns of judicial economy, but the filing of large numbers of suits that have little chance of success on the merits. Under California law, an action is defined as "frivolous" only if it is "totally and completely without merit" or brought "for the sole purpose of harassing an opposing party."[95] The *Graham* rule will only inhibit the filing of the most blatantly meritless suits, which are already discouraged by the sanctions and cost-shifting provisions of California Code of Civil Procedure section 128.5.

The goal of an attorneys' fees regime and the tort system in general should be to encourage the optimal number of lawsuits that will produce social benefits. The difficult question is how the system should treat the vast number of suits that have *some* merit, that is, that are neither legally

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93. The *Graham* court also adopted the Attorney General's proposal that "a plaintiff seeking attorney fees under a catalyst theory must first reasonably attempt to settle the matter short of litigation." *Id*. at 155.

94. *Id*. at 154 (quoting Stivers v. Pierce, 71 F.3d 732, 752 n.9 (9th Cir. 1995)). The majority states that the inquiry into the merits of the case should be similar to that undertaken in considering a motion for a preliminary injunction. *Id*. This would seem to indicate that the majority has in mind a weighing of the "likelihood of success on the merits," the test I propose in Part IV. Sw. Voter Registration Educ. Project v. Shelley, 344 F.3d 914, 917 (9th Cir. 2003). However, the *Graham* majority characterizes this inquiry as "a determination at a minimum that the questions of law or fact are grave and difficult," *Graham*, 101 P.3d at 154 (internal quotations omitted), which does not appear to require an examination of the merits at all.

Moreover, the *Graham* majority explicitly states that it is adopting the two-pronged test developed by the lower federal courts, the second prong of which is that "a finding that the lawsuit was not frivolous, unreasonable, or groundless." *Id*. (quoting Stivers v. Pierce, 71 F.3d 732, 752 n.9 (9th Cir. 1995)). It then proceeds to reject a proposed requirement that the plaintiff's action be able to survive a motion to dismiss on the grounds that this rule is too *narrow*, excluding suits that have been unilaterally mooted by defendants. *Id*. at 154-55. The court does explain that the favorable result for the plaintiff must be "achieved by threat of victory, not by dint of nuisance or threat of expense." *Id*. at 154 (internal quotations and citation omitted). The court's willingness, however, to sanction fees on the facts of this case indicates that the threat of victory need not be a promising one. After *Graham*, the rule appears to contain no requirement that the suit be likely to prevail on the merits, merely that it is not frivolous. *Id*.

95. CAL. CIV. PROC. CODE § 128.5(b)(2) (West Supp. 2005).

frivolous nor clearly persuasive. California has chosen to address this issue by adopting a strong preference for the settlement of civil disputes. For example, the state has granted trial court judges the authority to compel settlement conferences among the litigants,[96] and has enacted modified two-way cost-shifting following settlement offers.[97] Implicit in this policy is that it is neither possible nor desirable for *all* civil actions to be litigated. Instead, an action has a "value" that is determined by the damages that would be expected at trial discounted by the probability that the suit may fail for substantive or procedural reasons, minus the costs of litigating the suit.[98] A well-functioning tort system will strike a balance between the incentives of plaintiffs and defendants so that the settlement value of individual claims closely approximate their social utility.

The *Graham* approach, however, serves to upset the delicate equilibrium that exists under a pure American rule in two fundamental ways. First, the *Graham* regime decouples the link in suits seeking to vindicate private rights between the merits of an action and the plaintiffs' attorney's incentives to bring suit. Where plaintiffs' attorneys operate on contingency fees under a pure American rule, the value of a suit will be the expected economic recovery for the plaintiff multiplied by the probability of success on the merits, minus the costs of litigation to the plaintiff's attorney.[99] This system, while imperfect, at least serves to discourage some socially unproductive suits, such as those in which the cost of litigation would exceed the recovery, or nonfrivolous suits in which the chances of success on the merits are remote.

Under *Graham*, however, a plaintiffs' attorney can garner fees in virtually any tort action so long as he can characterize the suit as a "consumer protection" action that benefits a large number of people. No expected return for his client is too trifling, as he may collect fees no matter how small the recovery. Indeed, in *Graham*, the clients received no award of damages at all, but the attorneys still won $762,830 in fees.[100] The majority was wholly unconcerned that this staggering

96. CAL. CT. R. 222(a) (2005).
97. CAL. CIV. PROC. CODE § 998 (West Supp. 2005).
98. For a discussion of the valuation of suits for plaintiffs' attorneys, see *Beasley v. Wells Fargo Bank*, 1 Cal. Rptr. 2d 459, 462-64 (Ct. App. 1991).
99. For a general discussion of the role of attorneys' fees and fee-shifting statutes in altering the litigants' strategies during settlement, see Jonathan T. Molot, *How U.S. Procedure Skews Tort Law Incentives*, 73 IND. L.J. 59, 69-81 (1997).
100. Graham v. DaimlerChrysler, 101 P.3d 140, 161 (Cal. 2004) (Chin, J., dissenting).

amount might have been far out of proportion to the harm suffered by the plaintiffs or the reasonable avoidance costs for DaimlerChrysler.

Second, the various holdings in *Graham* together transform the incentives for bringing tagalong suits. Consider again the hypothetical attorney in Part I deciding whether to file suit. His potential fee award for filing suit is huge—the attorneys in *Graham* earned approximately $76,000, excluding fees on fees, for filing a seven-page complaint.[101] After *Graham*, however, the potential risks to the plaintiffs' attorneys in pursuing such a windfall are minimal. The attorney need not be concerned that the costs of litigation may outweigh the potential damages because his fees are not awarded out of the damages. He need not consider the costs of actually litigating the case, as no ruling on the merits is necessary to collect his fees. Most importantly, he need not be concerned that his case may be far from meritorious. So long as the case is not frivolous, he is eligible to recover fees. The plaintiff's attorney risks very little of his own time and capital in preparing and filing such a complaint.

The most important variables for the plaintiffs' attorney's calculations are whether the defendant will actually change its policy and whether the plaintiff can establish a causal nexus between the filing of the complaint and that change. In tagalong suits, the defendants may change their policies anyway in response to public agency pressures. But, as *Graham* clearly shows, the existence of parallel government action will not invalidate a plaintiffs' attorney's claim for attorneys' fees. As a practical matter, the causal nexus will normally be shown by circumstantial evidence of the date of the plaintiff's filing, the defendant's knowledge of the suit, and the date the policy changed. The low costs and risks of preparing complaints thus provide plaintiffs' attorneys every incentive to tag along to public agency actions in the hope that the dates will properly align to support an award of attorneys' fees. If a plaintiffs' attorney is diligent in following public agency investigations and files enough suits, he is sure to reap a windfall eventually. These are the incentives that *Graham* has created.

IV. REFORMING *GRAHAM*: THE COMPARATIVE CATALYST

Justice Chin recognized in his dissent that the *Graham* decision "goes farther than this court has ever gone before—indeed, so far as I can tell, further than any other court has ever gone . . . ," placing California far outside of the mainstream of federal and other state practices regarding

101. *Id.* at 163 (Chin, J., dissenting) ("[R]oughly 90 percent of [the $762,830 attorneys' fees] award was for fees plaintiffs generated while seeking fees.").

attorneys' fees.[102] The *Graham* decision also appears to be out of step with the voters of California, who in November 2004 passed Proposition 64, which entrenches in state law a strong preference for public over private enforcement of certain consumer rights under California Business and Professions Code section 17200.[103] The potential for a further explosion of litigation in California through the application of section 1021.5 to run-of-the-mill tort suits militates in favor of a similar intervention through the initiative process or by the state legislature.

Reform of California's attorneys' fees statute in light of *Graham* must have two guiding principles. First, the phrase "important right affecting the public interest" should be tightened so that it will encompass civil rights claims, but cannot be used to turn every breach of warranty action into a "public interest" suit. The preferred solution would be for California to follow the federal model and specify the individual statutes under which claims can give rise to attorneys' fees. This would allow the legislators who devise a particular regulatory scheme to choose the degree to which they believe private enforcement is appropriate.

There will still be borderline cases, though, such as section 17200 claims, in which it is difficult to adopt a blanket rule. Therefore, the legislative process should adopt some language similar to the following:

> Attorneys' fees shall not be awarded where the plaintiff succeeds in altering the behavior of a defendant primarily through the threat of compensatory damages, out of which the plaintiff would receive any recovery, imposed on the defendant.[104]

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102. *Id.* at 161 (Chin, J., dissenting).

103. For a thorough discussion of the abuses of the private attorney general model which gave rise to Proposition 64, see Mathieu Blackston, Comment, *California's Unfair Competition Law—Making Sure the Avenger Is Not Guilty of the Greater Crime*, 41 SAN DIEGO L. REV. 1833, 1836 (2004).

104. This clause anticipates California Governor Arnold Schwarzenegger's proposal to "redirect" punitive damage awards. Because punitive damages are meant to penalize and deter the defendant, and not to compensate the plaintiff, such damages should be paid to state coffers rather than individual plaintiffs, much as a civil penalty in a securities or tax fraud case brought by the federal government. Governor Schwarzenegger's plan would therefore require that seventy-five percent of the punitive damage award to be paid to the state. Adam Liptak, *Schwarzenegger Sees Money for State in Punitive Damages*, N.Y. TIMES, May 30, 2004, at A16. In the event that such a proposal were enacted into law, the language I have proposed would still allow for a recovery of attorneys' fees if only punitive damages were awarded. This would be a classic case in which the financial incentives to the plaintiff might not otherwise be adequate to vindicate a public interest that transcends the parochial financial interests of the plaintiff.

> An award of attorneys' fees is only appropriate where the relief sought and obtained by the plaintiff transcends the private economic rights that he or she may vindicate.

Under this rule, Graham would not be able to receive attorneys' fees for his breach of warranty claim because DaimerChrysler was only reacting to the threat of damages. If, however, Graham had sought and achieved an injunction against DaimlerChrysler's false marketing practices, he would be eligible for attorneys' fees, because this sort of action may otherwise have been an underproduced action in the market for legal representation.

The second guiding principle in reforming California's statute should be redefining the catalyst model to weed out awards for socially unproductive tagalong suits. The abolition of the catalyst rule through a requirement that the plaintiff actually achieve a ruling on the merits of the case would be most effective to prevent such suits. However, if this is not politically possible, a compromise solution is presented by a "comparative catalyst" model that would discourage the most egregious tagalong suits, yet also remove the incentive of defendants to unilaterally moot actions against them to prevent an award of attorneys' fees.

Under the *Graham* approach, the trial judge determines whether the plaintiff's complaint was a "substantial factor" in changing the defendant's behavior.[105] Such a binary determination, though, does not accurately reflect the value of the suit to society, especially considering the inherently slippery meaning of the term "substantial." Defendants may face many legal pressures to change their behavior. In some cases, especially civil rights cases, the private suit may be the *exclusive* pressure applied to the defendant. In tagalong suits, however, the private suit is part of a mix of legal pressures including the threat of public enforcement. The marginal value to society of a meritorious suit in the first instance is far greater than the second, even though both may be deemed "substantial" by a court awarding attorneys' fees.

A comparative catalyst standard would instruct the trial judge to determine to what degree the plaintiff's action contributed to the overall mix of legal pressures that forced the defendant to change his conduct. The value of the suit would be expressed as a multiplier between zero and one, then multiplied by the lodestar amount.[106] The comparative catalyst would act just like multipliers for contingency fees, tackling difficult legal issues, or the like, that are recognized under current law, except that it could be used to reduce or maintain the value of an award

105. *Graham*, 101 P.3d at 149.

106. The lodestar amount is defined as the "basic fee for comparable legal services in the community," determined by multiplying the time expended by the attorneys on the suit by the prevailing hourly rate. Ketchum v. Moses, 17 P.3d 735, 741 (Cal. 2001).

rather than to increase it.[107] Attorneys who bring the most socially valuable suits—usually civil rights cases or consumer cases seeking injunctive relief where public agencies have refused to act—would likely receive full compensation, because their actions would be the sole source of legal pressure. On the other hand, in a case such as *Graham* in which the civil complaint tagged along with an ongoing public investigation, the civil suit may have constituted only, say, sixty percent of the legal pressure that forced the changes. Thus, if the trial court in *Graham* had adopted such a finding under a comparative catalyst rule, the court would have awarded the plaintiff's attorneys $457,698 ($762,830 x 0.6).[108]

The advantage of the comparative catalyst approach is that it creates a sliding scale to measure the social contribution of actions filed by plaintiffs' attorneys that aligns the incentive to file suit with the social good that results. The comparative catalyst approach thus considers not just the "fair market value" of the suit to an attorney, but the fair market value of the suit to society.[109] If a civil action would be duplicative of public agency actions, the fair market value of the suit to society is lower; the attorney would have less of an incentive to file suit because of the multiplier. This approach more accurately conforms to the private attorney general model—private litigation should receive special encouragement in the form of attorneys' fees provisions if the actions of public entities are inadequate to the task.

In his dissent in *Graham*, Justice Chin observed that the catalyst theory requires courts to make the very difficult assessment of the alleged causal connection between the filing of the civil complaint and a defendant's decision to change its behavior.[110] This is especially problematic where the defendant is a corporate or government entity whose subjective intent is elusive. It may be argued that a comparative catalyst approach would complicate this matter even further by requiring

107. California law also recognizes multipliers for "the skill displayed in presenting" the legal issues to the court and "the extent to which the nature of the litigation precluded other employment by the attorneys . . . ." *Id*.

108. Note that such a comparative catalyst rule would not exclude the other multipliers currently applied by the courts. In *Graham*, for example, the calculation would have been the lodestar amount multiplied by the contingency fee multiplier (2.25) multiplied by the comparative catalyst fraction (0.6). *Graham*, 101 P.3d at 146.

109. *See Ketchum*, 17 P.3d at 741 (discussing lodestar multiplier's correlation with fair market value).

110. *Graham*, 101 P.3d at 168 (Chin, J., dissenting).

a court to pin down not only *whether* the defendant was influenced by the complaint, but *by how much*.

This problem, however, can be avoided if the court awarding the attorneys' fees adopts an objective rather a subjective test for the actual apportionment of credit for catalyzing behavior. The court should weigh the complaint as would a reasonable attorney representing the defendant in the case. It should examine whether the complaint is facially moot or frivolous in light of the facts conceded in the case. The court need not undertake a probing inquiry of the merits. It should proceed much as it would in considering the likelihood of success on the merits in an emergency injunction request.[111] In assessing the pressure asserted by a complaint, the court would thus consider both the merits, at least superficially, and the role of the suit in changing the defendant's conduct vis-à-vis the actions of public agency action and voluntary actions already commenced at the time the complaint was filed. It is true that a judge may not understand the factual situation giving rise to the case in the same intimate detail as the defense attorney, and thus he or she does not know whether discovery will strengthen or weaken the plaintiffs' claims. Nonetheless, trial court judges in California have extensive experience in overseeing settlement negotiations and are well positioned to evaluate how a particular complaint may affect the overall mix of legal pressures.

Another benefit of a well-drafted comparative catalyst rule is that it could dramatically reduce the appellate litigation over attorneys' fees which Justice Brennan decried.[112] If the abuse of discretion standard is retained, it will be much more difficult to overturn a trial judge's designation of some fraction for attorneys' fees rather than a binary all-or-nothing decision. In practice, a California appeals court is less likely to overturn a forty percent award it believes should be sixty percent than a zero percent award that, given two choices, it believes should have been one hundred percent. Such, for better or worse, has been the experience with appellate review of large punitive and noneconomic damage awards. Appellate courts in such situations have usually overturned such awards only if they believe the order of magnitude to be wrong, not just that the award was off by twenty percent.[113]

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111. In considering a motion for a preliminary injunction, a court may consider the "likelihood of success on the merits," even though at this time little or no discovery may have taken place. Sw. Voter Registration Educ. Project v. Shelley, 344 F.3d 914, 917 (9th Cir. 2003).

112. Hensley v. Eckerhart, 461 U.S. 424, 442 (1983) (Brennan, J., dissenting).

113. See, for example, the United States Supreme Court's discussion of what constitutes "excessive" punitive damages in *BMW of North America v. Gore*, 517 U.S. 559, 568 (1996). The court refused to establish a specific ratio of punitive to economic damages above which an award becomes excessive, rejecting the notion that the line of permissible damages "is marked by a simple mathematical formula . . . ." *Id*. at 582.

The exception would lie where the multiplier is most easily quantifiable, which would protect civil rights plaintiffs. Thus, if a private plaintiff, unsupported by the actions of other public agencies, won an injunction against, for example, a discriminatory government practice, the application of any multiplier less than one may be an abuse of discretion subject to reversal. On the other hand, the application of any multiplier above zero may be an abuse of discretion if a plaintiff's attorney's efforts merely involved filing a facially moot or frivolous complaint. However, the adoption of a sliding scale rather than a binary determination will reduce the incentive of litigants to file appeals in all but the most egregious cases.

V. CONCLUSION

These modest reform proposals are an attempt to forestall the potentially devastating effects of the California Supreme Court's decision in *Graham* on judicial economy in the state's courts. The California legislature has undertaken major legislative projects to reduce the amount of litigation in the courts without denying remedies to meritorious plaintiffs. To this end, it has enacted fast track requirements and limited fee shifting following settlement conferences.[114] The *Graham* decision will severely undermine these efforts by encouraging socially unproductive tagalong suits through the catalyst theory. Moreover, *Graham* further shifts the risks of litigation away from plaintiffs by extending the rationale of civil rights fee-shifting to suits that seek to vindicate economic interests without transcendent benefits for society. Such a regime threatens to subvert the policy goals of loss spreading by further severing the connections between the prophylactic measures undertaken by corporate defendants and their expected liabilities. Ultimately, it is the California consumer who will pay higher prices without any appreciable benefit in terms of improved public safety. The adoption of a stricter definition of "public interest" litigation and a comparative catalyst rule will serve to stem the flood of unproductive lawsuits the high court's ill-conceived decision will otherwise unleash.

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Instead, the court noted that the 500 to 1 ratio in *Gore* was an order of magnitude higher than anything that had been previously upheld by the Supreme Court. *Id*. at 581-83.

114. *See supra* notes 95-97 and accompanying text.