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THE FEES STOP HERE: STATUTORY PURPOSES LIMIT AWARDS TO DEFENDANTS

Richard M. Stephens*

INTRODUCTION

Unlike English courts, American courts have traditionally disfavored the award of attorneys' fees to the prevailing parties as costs. Only Alaska provides for a regular award of fees to litigants. This general reluctance by most courts subsided with the emergence of three theories which justify attorneys' fees awards: the common fund theory, the substantial benefit theory, and the private attorney general theory.

The common fund theory provides for the award of fees to a litigant who secures a fund from which others will benefit. The rationale is that one should not bear the total expense of bringing financial benefits to others. The attorney's fee, however, may be paid by the opposing party and not

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1. "As early as 1278, the courts of England were authorized to award counsel fees to successful plaintiffs in litigation. Similarly, since 1607 English courts have been empowered to award counsel fees to defendants ..." Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 717 (1967) (footnote omitted).

2. See Rude v. Buchhalter, 286 U.S. 451 (1932) (bank-defendant entitled to attorneys' fees from fund relating to discharge of duties under escrow agreement but not from plaintiff); Von Holt v. Izumo Taisha Kyo Mission, 44 Haw. 147, 355 P.2d 40 (1960) (per curiam) (taxpayer suit annulling conveyance by city and county did not create a common fund); State v. Pearl, 163 Wash. 268, 1 P.2d 315 (1931) (criminal defendant's entitlement to fees is wholly statutory).

3. See generally Note, State Attorney Fee Shifting Statutes: Are We Quietly Repealing the American Rule?, 47 LAW & CONTEMP. PROBS. 321 (1984) (examination and survey of attorneys' fee shifting statutes as a response to American rule). However, Alaska rules only provide for a partial recovery. See ALASKA R. CIV. P. 82(a)(1)-(3) authorized by ALASKA STAT. § 09.60.010 (1983).

4. See Sprague v. Ticonic Nat'l Bank, 307 U.S. 161 (1939) (litigant who successfully sought a lien on earmarked funds in insolvent bank is entitled to fees because rights to funds were created in other depositors via the principle of stare decisis); Central R.R. & Banking Co. v. Pettus, 113 U.S. 116 (1885) (attorneys of creditors who sought reclamation of property for benefit of all creditors were entitled to lien on property); Trustees of Internal Improvement Fund v. Greenough, 105 U.S. 527 (1882) (bondholder-plaintiff was entitled to fees from fund in suit against trustees who were destroying fund by selling assets at nominal value).

necessarily out of the common fund. The substantial benefit theory is similar to the common fund, the only difference being that the benefits to others are nonfinancial. Under the substantial benefit theory, fees are paid by the opposing party, rather than by the “beneficiaries” of the suit.

The private attorney general theory allows an award of fees to successful litigants who act as “attorney generals.” Although courts may use different
factors to determine whether to apply this doctrine, several factors predominate. First, the litigant must be successful in the suit. Second, the party seeking fees must have sought to enforce the constitutional or statutory rights of the plaintiff.\(^\text{10}\) Third, the lawsuit must benefit the general public and the suit should be one which the official attorney general will not bring.\(^\text{11}\) The courts should not encourage private litigants to interfere with the attorney general's activities, but rather to supplement the official's litigation.\(^\text{12}\)

The federal and state courts have both begun to develop these three justifications for awarding attorneys' fees.\(^\text{13}\) The United States Supreme Court, however, refused to adopt the private attorney general theory for the federal judiciary in *Alyeska Pipeline Co. v. Wilderness Society*.\(^\text{14}\) In *Alyeska*,

The violation of an important public policy may involve little by way of actual damages, so far as a single individual is concerned, or little in comparison with the cost of vindication . . . . If a defendant may feel that the cost of litigation, and, particularly that the financial circumstances of an injured party may mean that the chances of suit being brought, or continued in the face of opposition, will be small, there will be little brake upon deliberate wrongdoing. In such instances public policy may suggest an award of costs that will remove the burden from the shoulders of the plaintiff seeking to vindicate the public right.


In California, the private attorney general theory was approved by the California Supreme Court in *Serrano v. Priest*, 20 Cal. 3d 25, 569 P.2d 1303, 141 Cal. Rptr. 315 (1977), and was then codified by the California legislature at *Cal. Civ. Proc. Code § 1021.5* (West 1977) [hereinafter section 1021.5]. See *infra* note 135.
Following the decision in *Alyeska Pipeline Co.*, Congress and many state legislatures created statutes providing for the judicial award of attorneys' fees. The federal response provided for the award of fees in particular subject areas of litigation. Most states reacted similarly, but some codified the elements which had emerged in the pre-*Alyeska* case law and created a private attorney general statute providing for the award of fees for any subject matter. Perhaps because of equal protection concerns, many of these statutes are neutral as to which party may be awarded fees. Often fees may go to the prevailing or successful party, rather than only to a successful plaintiff. The legislative purpose of the party neutral language


15. 421 U.S. at 269. The Court declared that the American rule prohibiting the award of attorneys' fees "is deeply rooted in our history and in congressional policy; and it is not for us to invade the legislature's province by redistributing litigation costs in the manner suggested by respondents and followed by the Court of Appeals." *Id.* at 271 (footnote omitted). Furthermore, since Congress has chosen to "carve out specific exceptions to the general rule," the courts should not "pick and choose among plaintiffs and the statutes under which they sue . . . ." *Id.* at 269.

16. Section 1021.5 "was an explicit reaction to the United States Supreme Court's *Alyeska* decision." *Woodland Hills Residents Ass'n v. City Council*, 23 Cal. 3d 917, 934, 593 P.2d 200, 209, 154 Cal. Rptr. 503, 512 (1979).

17. See, e.g., infra note 24.

18. See, e.g., section 1021.5, supra note 13.

19. The United States Supreme Court rejected an equal protection challenge to a Texas statute which allowed only plaintiffs to recover attorneys' fees in wage disputes. *Missouri, Kansas & Texas Ry. v. Cade*, 233 U.S. 642 (1914).

If the classification is otherwise reasonable, the mere fact that attorney's fees are allowed to successful plaintiffs only, and not to successful defendants, does not render the statute repugnant to the 'equal protection' clause. This is not a discrimination between different citizens or classes of citizens, since members of any and every class may either sue or be sued . . . .

Even were the statute to be considered as imposing a penalty upon unsuccessful defendants in cases within its sweep, such penalty is obviously imposed as an incentive to prompt settlement of small but well-founded claims, and as a deterrent of groundless defenses, which are the more oppressive where the amount is small . . . .

*Id.* at 650-51.

The Idaho Supreme Court expressly rejected a claim that a statute which authorized the award of attorneys' fees only to prevailing plaintiffs violates equal protection. *State ex rel. Kidwell v. United States Mktg., Inc.*, 102 Idaho 451, 459, 631 P.2d 622, 630 (1981) (fee statute furthers a legitimate governmental objective).

LIMITING FEE AWARDS

has provided a stumbling block to courts faced with the task of interpreting those statutes.

In light of the history of attorneys' fees going only to plaintiffs, courts are faced with the problem of deciding under what circumstances fees may be awarded to successful defendants in light of the fact that a defending party is not typically regarded as a private attorney general. Furthermore, defendants do not bring suit and may be litigating to avoid liability rather than for an altruistic concern for the public benefit regarding the enforcement or nonenforcement of a particular law.

In Christiansburg Garment Co. v. Equal Employment Opportunity Commission the United States Supreme Court created limitations on the award of fees to prevailing defendants in actions under Title VII. After the Christiansburg decision, Congress expressly codified that limitation in several other federal attorneys' fee statutes. The application of the Chris-


In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.


The court shall, at the conclusion of the action
(1) award to a substantially prevailing claimant the cost of suit attributable to such claim, including a reasonable attorney's fee, or
(2) award to a substantially prevailing party defending against any such claim the cost of suit attributable to such claim, including a reasonable attorney's fee, if the claim, or the claimant's conduct during the litigation of the claim, was frivolous, unreasonable, without foundation, or in bad faith.

Id. The statute further provides for an offset of an award if, for example, a plaintiff was
limitation to other party neutral attorneys' fee statutes, however, has been the subject of much confusion. An analysis of the common purposes of the various attorneys' fee statutes and the rationale of the Christiansburg decision may provide some guidance for the resolution of uncertainties regarding similar statutes.

I. CHRISTIANSBURG GARMENT CO. V. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Rosa Helm filed a charge of racial discrimination against her employer, Christiansburg Garment Co. (Company), with the Equal Employment Opportunity Commission (EEOC). The EEOC notified Ms. Helm of her right to sue after its efforts failed. After receiving new statutory authorization successful but some conduct was frivolous or unreasonable:

The award made under subsection (a) of this section may be offset in whole or in part by an award in favor of any other party for any part of the cost of suit, including a reasonable attorney's fee, attributable to conduct during the litigation by any prevailing party that the court finds to be frivolous, unreasonable, without foundation, or in bad faith.


In any action under subsection (a) of this section—
(1) the amount of the plaintiffs' attorney's fee, if any, shall be determined by the court; and
(2) the court may, in its discretion, award a reasonable attorney's fee to a prevailing defendant upon a finding that the State attorney general has acted in bad faith, vexatiously, wantonly, or for oppressive reasons.


Such relief may include, but shall not be limited to rescission, reformation, restitution, the award of damages and reasonable attorney fees and court costs. A defendant may recover reasonable attorneys' fees if the court determines that the cause of action filed by the plaintiff is frivolous, malicious, or lacking in substantial merit.


In any action under this section the court may, in the interest of justice, award the costs of suit, including reasonable attorney's fees and reasonable expert witnesses fees, to a prevailing plaintiff. Such court may, in the interest of justice award such costs to a prevailing defendant whenever such action is unreasonable, frivolous, or meritless.


25. The courts are split over the application of the Christiansburg limitation to other attorneys' fee statutes. Compare Carpenters S. Cal. Admin. Corp. v. Russell, 726 F.2d 1410, 1416 (9th Cir. 1984) (Christiansburg not applied to claims under the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1132(g)(1) (1982)) with M & R Inv. Co. v. Fitzsimmons, 685 F.2d 283 (9th Cir. 1982) (while court declined to award attorneys' fees under ERISA, it affirmed district court's adoption of Christiansburg standard of bad faith claim as meaning one with no valid basis).

26. 434 U.S. at 414. Mrs. Helm chose not to sue. Id.
to sue in its own name to prosecute "pending" charges, the EEOC sued the Company. The trial court granted the Company's motion for summary judgment on the ground that Ms. Helm's charge was no longer "pending." In addition, the Company petitioned for attorneys' fees under section 706(k) of Title VII. The trial court, however, denied that request.

Because the statute gave courts discretionary authority to award fees to the "prevailing party," the United States Supreme Court created a guideline, perhaps more appropriately termed a "limitation," for granting fees to a prevailing defendant. The Company argued that the only limitation for granting such fees was provided in *Newman v. Piggie Park Enterprises,* where the Court held that a prevailing plaintiff under Title VII "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." The EEOC argued that a defendant should recover fees only if the plaintiff's action was brought in bad faith. The Court created a compromise between the two positions.

The Court gave two reasons for distinguishing the treatment of prevailing defendants and prevailing plaintiffs. First, the plaintiff is "vindicating" a policy that Congress considers of the highest priority. Second, when the plaintiff is successful, by definition, it means that the party required to pay the attorneys' fees is the party that violated federal law. After looking at the sparse legislative history, the Court identified two purposes for the attorneys' fees provisions in Title VII: to encourage plaintiffs to bring a successful suit and to deter bringing meritless suits. The resulting limitation

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27. The EEOC argued that the case was "pending" until either the dispute was resolved or the complaint dismissed. The Company argued that after Ms. Helm was notified of her right to sue, the EEOC no longer had authority to open the case. The district court agreed with the latter argument. 434 U.S. at 414 n.3.

28. *Id.* at 415. See supra note 23.

29. 434 U.S. at 415. The district court apparently required that a suit be "unreasonable or meritless" in order to grant fees to a defendant.

30. See supra note 23.


33. 434 U.S. at 418.

34. *Id.* (quoting Piggie Park, 390 U.S. at 402).

35. *Id.*

36. *Id.* at 420 (quoting Remarks of Senator Humphrey, 110 CONG. REC. 12,724 (1964)).

37. 434 U.S. at 420 (quoting Remarks of Senator Lausche, 110 CONG. REC. 13,668 (1964)). The court also quoted Grubbs v. Butz, 548 F.2d 973, 975 (D.C. Cir. 1976), stating: [From these Senate debates] two purposes for § 706(k) emerge. First, Congress desired to 'make it easier for a plaintiff of limited means to bring a meritorious suit . . .' But second, and equally important, Congress intended to 'deter the
allows trial courts discretion to award attorneys’ fees to prevailing defendants in Title VII cases where the plaintiff’s action is determined to be frivolous, unreasonable, or without foundation, despite the fact that it was not brought in subjective bad faith.

The bad faith requirements urged by the EEOC would have completely rendered the party neutral language meaningless. Courts traditionally have equitable powers to award fees against a plaintiff who litigates in bad faith. This power was demonstrated in Copeland v. Martinez, when the District of Columbia Court of Appeals affirmed the trial court’s holding that the United States may receive fees from an opponent who litigated in bad faith even though the relevant fee statute in Title VII prohibited awards to the federal government. The court stated that “the excepting language, supposing it applicable to the federal government as a defendant, was meant to exclude the United States only from the statutory allowance of fees, governed by the expansive ‘prevailing party’ standard, and to leave undisturbed the narrow equitable exception in cases of bad faith.”

Identifying the purpose of the attorneys’ fee statute was critical in Christiansburg. Courts should avoid interpretations that would yield a result inconsistent with the purpose of the statute, yet courts should also avoid

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Id. at 975.


40. 603 F.2d 981 (D.C. Cir. 1979), cert. denied, 444 U.S. 1044 (1980).


In Copeland, a black female employee of a federal agency brought suit for race and gender discrimination in promotions. The trial court found that the plaintiff failed to establish a prima facie case of discrimination. For instance, 80% of the employee’s department was black, and women outnumbered men more than two to one. Furthermore, the agency promoted more black than white women. Copeland v. Martinez, 435 F. Supp. 1178, 1179 (D.D.C. 1977). The court specifically found the action was brought for harassment and constituted an “intentional abuse of the judicial process.” Id. at 1181.

42. 603 F.2d at 987 (emphasis in original) (footnote omitted).

43. This is a universal rule of statutory construction which prefers legislative supremacy and limits judicial activism. Lord Coke explained the rule as early as 1584:

And it was resolved by them, that for the full and true interpretation of all statutes in general (be they penal or beneficial, restrictive or enlarging of the common law)
reading limitations or requirements into statutes which do not exist on the face of the statute. In *Christiansburg*, the respect for the textual integrity of the statute gave way to an interpretation which fully effectuated its purpose. The attorneys' fee provisions of Title VII of the Civil Rights Act, as well as many other attorneys' fee statutes, are similar to the requirements for attorneys' fee awards under the private attorney general theory. Individuals who have important rights which should be vindicated, may be pressed to forego the enforcement of their rights when they have little financial stake in the outcome. The risk of losing the suit deters individuals from filing a cause of action especially when success brings little, if any, reward above the costs of counsel. The statutes are designed to take the financial sting out of litigation and to encourage private litigants to enforce their rights in court.

If the purpose of party neutral attorneys' fee statutes is merely to provide fair and equal treatment of litigants, the statutes are unnecessary. In the absence of attorneys' fee provisions, each party pays their own attorneys' fees. The attorneys' fee statutes provide for the award of fees to plaintiffs in order to encourage litigation, thus, routine awards of attorneys' fees to defendants would necessarily frustrate that purpose. Potential litigants would be forced to consider not only the prospect of losing, but also the possibility of paying for the opponent's attorneys. This would, once again, deter injured plaintiffs from bringing suit to vindicate their rights.

The purpose for statutory provisions which allow courts to award defendants' attorneys' fees is not as obvious. Because such an award necessarily has a deterrent effect on litigation, the provision for fees to defendants appears to be internally inconsistent with the purpose of the statute. The

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four things are to be discerned and considered:—1st. What was the common law before the making of the act? 2nd. What was the mischief and defect for which the common law did not provide? 3rd. What remedy the parliament hath resolved and appointed to cure the disease of the commonwealth? And 4th. The true reason of the remedy. And then the office of all the judges is always to make such construction as shall suppress the mischief, advance the remedy, and to suppress subtle invention and evasions for continuance of the mischief, and pro privato commodo, and to add force and life to the cure and remedy, according to the true intent of the makers of the act pro bono publico.


44. *See generally* Alyeska, 421 U.S. at 271; Burch v. Foy, 62 N.M. 219, 223, 308 P.2d 199, 202 (1957) ("statute must be read and given effect as it is written by the Legislature, not as the court may think it should be or would have been . . .").

45. *See supra* note 23.

46. *See supra* note 24.

47. *See supra* notes 9-12 and accompanying text.
only resolution of the conflicting effects is to assume that the purpose of the party neutral statute is to encourage some types of litigation and to discourage other types. The Christiansburg limitation, therefore, promotes meritorious claims while it deters frivolous claims. Unless different purposes underlie other fee statutes, the Christiansburg limitation should apply to all other party neutral fee statutes.

II. THE EXTRAPOLATION OF THE CHRISTIANSBURG LIMITATION

While the Christiansburg limitation originally applied only to attorneys' fees granted in Title VII actions, it has been applied to other attorneys' fee statutes which provide for attorneys' fees to "any prevailing party," or similar neutral language. Some courts have expressly rejected the limitation, with unpersuasive reasoning, while other courts have not squarely addressed the issue.

A. Federal Courts


Section 1988 provides that "[i]n any action or proceeding to enforce a provision of Sections 1981, 1982, 1983, 1985, and 1986 . . . the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee . . . ." The federal courts are in substantial agreement that the Christiansburg limitation should also apply to section 1988. The unity of the federal courts on this issue may be due, a fortiori, to the similar purposes of Title VII, sections 1981-1983, and sections 1985-1986: the enforcement of civil rights.

The Ninth Circuit Court of Appeals applied the Christiansburg limitation to section 1988 in Mayer v. Wedgewood Neighborhood Coalition. In Mayer, the plaintiff was attempting to build rental housing for low-income families on land that bordered defendant's land. Defendants attempted to block the construction with a series of administrative proceedings and court actions.

48. Although . . . permitting a prevailing defendant an award of attorney's fees discourages the civil rights litigant from initiating litigation and thus frustrates the policy of the Civil Rights Acts, the answer undoubtedly is that the Congressional intention was to encourage responsible litigation but to discourage baseless or frivolous actions. Carrion v. Yeshiva Univ., 535 F.2d 722, 727 (2d Cir. 1976) (emphasis in original).

49. See supra notes 23, 36-38 and accompanying text.

50. See infra notes 136-58 and accompanying text.


52. See infra notes 53-59 and accompanying text.

53. 707 F.2d 1020, 1021 (9th Cir. 1983) (per curiam).

54. Id. at 1021.
Plaintiff brought suit under Title VII of the Civil Rights Act charging defendants with conspiracy to interfere with plaintiff's civil rights. Defendants counterclaimed that the plaintiff had failed to state a cause of action and that their actions were protected by the first amendment. They also requested attorneys' fees under section 1988. The court specifically acknowledged that "authorization of an award of attorney's fees applies differently to prevailing defendants than to prevailing plaintiffs." As in Christiansburg, the difference in application is wholly extratextual.

The United States Supreme Court expressly adopted the Christiansburg limitation to actions brought under section 1983 in Hughes v. Rowe. The court could "perceive no reason for applying a less stringent standard" to section 1983 actions. In Hughes, a prisoner challenged a disciplinary proceeding against him. The Supreme Court stated that "these limitations apply with special force in actions initiated by uncounseled prisoners.... An unrepresented litigant should not be punished for his failure to recognize subtle factual or legal deficiencies in his claims."

2. ERISA

The Employee Retirement Income Security Act of 1974 (ERISA) also includes a provision for the granting of attorneys' fees in an ERISA action. The statute states that "[a] court in its discretion may allow a reasonable

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55. 42 U.S.C. § 1985(3) (1982) which provides:
(3) Depriving persons of rights or privileges
If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

56. 707 F.2d at 1021.
57. Id.
59. Id. at 15.
61. Id. § 1132(g)(1).
attorney's fee and costs of action to either party." If the action is brought by a fiduciary of the retirement plan, then "reasonable attorney's fees . . . [are] to be paid by the defendant." The question remained as to whether the Christiansburg limitation would apply to the nonfiduciary plaintiff bringing an ERISA claim.

The Court of Appeals in *Carpenters Southern California Administrative Corp. v. Russell* was faced with an award of attorneys' fees to a defendant in an ERISA claim. The action was brought by the administrator of the employee benefit plan, a fiduciary of the retirement plan. The court noted that the "court in all situations save one, has discretion to make fee awards to either party, but that fees must be awarded to the plaintiff if a fiduciary prevails in an action to recover delinquent contributions." Since the fiduciary was not successful in this case, fees could be awarded to the defendant, according to the trial court's discretion.

The court expressly rejected an application of the Christiansburg limitation in ERISA actions. The Christiansburg limitation "impermissibly narrows the scope of the statute with which we are concerned." Instead, the court reaffirmed five factors which should guide the court's discretion:

1. the degree of the opposing parties' culpability or bad faith; 2. the ability of the opposing parties to satisfy an award of fees; 3. whether an award of fees against the opposing parties would deter others from acting in similar circumstances; 4. whether the parties requesting fees sought to benefit all participants and beneficiaries of an ERISA plan or to resolve a significant legal question regarding ERISA; and 5. the relative merits of the parties' positions.

The first factor is essentially a recognition of the longstanding tradition of assessing attorneys' fees against a bad faith litigant. The second factor should be considered irrelevant. Legal rights and responsibilities should not depend on wealth. Although wealth affects the "collectability" of an award, wealth should not govern legal rights to an award of fees. The concern of

62. *Id.*
63. *Id.* § 1132(g)(2)(D).
64. 726 F.2d 1410 (9th Cir. 1984).
66. 726 F.2d at 1415 (emphasis in original).
67. *Id.* at 1416 (citing Iron Workers Local No. 272 v. Bowen, 624 F.2d 1255, 1264-66 n.24 (5th Cir. 1980)). The court in *Iron Workers* rejected an argument that successful plaintiffs should be granted attorneys' fees "as a matter of course 'unless special circumstances would render such an award unjust.'" 624 F.2d at 1265 (quoting *Piggie Park,* 390 U.S. at 402) (an interpretation of the Title II attorneys' fee statute). The Court in Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975), extended the rule of *Piggie Park* to Title VII cases. *Id.* at 415. In *Iron Workers,* the court stated: "If we were to apply the *Piggie Park* construction to section 502(g) of ERISA [29 U.S.C.A. § 1132(g) (1982)] . . . we would presumably be obliged to adopt the Christiansburg bifurcation between prevailing plaintiffs and defendants as well." *Iron Workers,* 624 F.2d at 1266 n.24.
68. *Russell,* 726 F.2d at 1415 (quoting Hummell v. S.E. Rykoff & Co., 634 F.2d 446, 453 (9th Cir. 1980)).
the Christiansburg Court for deterrence is reflected in the third factor. The fourth factor is a regression to the private attorney general and common benefit theories. Such a consideration by the court ignores the statute's purpose of encouraging claims and improperly focuses on, either, the motive of the plaintiff, or the significance of the final decision. Finally, the fifth factor tends to encompass the Christiansburg requirement for frivolous action. The court, however, left itself with more flexibility than the United States Supreme Court by considering the "relative merits."

The use of the five factor test is more fluid than the Christiansburg limitation and may still protect the policies supporting the Christiansburg decision. The granting of undue flexibility may be criticized, however, especially in the context of public interest litigation. What constitutes public interest litigation, however, is open to various interpretations. For instance, one set of public interest lawyers may represent racial minority employees in a discrimination suit. Meanwhile, another group of public interest lawyers may represent nonminority employees, in an intervenor status, to protect against a resolution of the suit which creates "reverse discrimination." The question then arises as to whether one lawyer is litigating in the public interest or whether both attorneys are representing different facets of the public interest. The issue is unimportant until fee awards are considered. A test which leaves the court with a great amount of flexibility, such as the five factor test discussed above, may result in a situation where the plaintiff is successful but no fees are awarded because the court has manipulated the factors to reward only those attorneys who represented the court's definition of the public interest. The more straightforward approach of the Christiansburg Court should be preferred over the balancing of several uncertain factors test of the Russell court.

Confusion in ERISA cases is understandable when one looks at M & R Investment Co. v. Fitzsimmons, another Ninth Circuit case. The case involved an unsuccessful allegation of an improper loan of ERISA funds. The defendants' request for attorneys' fees was denied and they appealed. The court stated that "while it is true that the suit has little merit, it cannot be labeled 'in bad faith' unless it has no valid basis." The court then cited Christiansburg with approval, holding that the action was not brought in bad faith. The standard for governing awards of attorneys' fees to defendants in ERISA actions in the Ninth Circuit remains uncertain.

3. Section 9e of the Securities Exchange Act

The Securities Exchange Act of 1934 provides for the court "in its discretion" to assess "reasonable attorneys' fees, against either party litigant."
Again, this party neutral language posed a problem for some courts. In *Nemeroff v. Abelson*, the plaintiff had filed a two-count class action suit against the author of an article that appeared in *Barron's*, a weekly financial newspaper. The editor and publisher of *Barron's*, and certain investors engaged in trading in the securities of Technicare Corp. The plaintiff alleged that defendants had purposefully leaked inaccurate information about Technicare in order to enable certain investors to trade at a profit. The district court held that the action was commenced in bad faith and awarded defendants attorneys' fees. The Second Circuit Court of Appeals reversed and examined section 9e of the Exchange Act and the bad faith requirement. The court stated that "the legislative history of this provision indicates that Congress included it to deter bad faith actions and 'strike suits.'" Furthermore, the court was guided by the *Christiansburg* Court's decision because it had interpreted a "substantially similar provision . . . ." Allowing attorneys' fees to a defendant without a showing of a frivolous or meritless action would defeat the congressional purpose of encouraging enforcement of the statute. To require actual bad faith is unnecessary because courts have long used equitable powers to impose attorneys' fees on plaintiffs who bring suits in bad faith. Hence, the "minimum standard for an award of fees under Section 9e of the Exchange Act is that set forth in *Christiansburg Garment*, i.e., the action must have been frivolous and without foundation."

4. Voting Rights Act of 1965

The Voting Rights Act of 1965 allows a court, in its discretion, to award attorneys' fees to a "prevailing party." This neutral language again raised the issue of whether prevailing plaintiffs and prevailing defendants should be treated equally or whether the *Christiansburg* limitation should apply. The District of Columbia Court of Appeals addressed this issue in *Commissioners Court of Medina County v. United States*.

The Voting Rights Act requires a preclearance from the Attorney General or the United States District Court for the District of Columbia before any voting practice can be changed. The Attorney General must find that the
practice does not promote racial discrimination in order to retain the particular practice. In *Medina County*, when the Attorney General failed to give the requisite preclearance, a county in Texas brought a declaratory judgment action, seeking a declaration that its redistricting plans were not made with a discriminatory purpose. A new plan was given preclearance and the case became moot. Parties who intervened as defendants requested attorneys' fees.

The intervenor-defendants argued that they were "prevailing parties" because the redistricting plans were not approved and a more favorable plan was implemented. The district court denied the request twice.

The appellate court cited *Christiansburg* for the general proposition that defendants could not recover attorneys' fees unless the plaintiff's action was frivolous, vexatious, or without foundation. The court reasoned, however, that the procedural posture of a party "should not be dispositive."

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any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964 . . . such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color . . . and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: Provided, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made.

85. 683 F.2d at 437-38.
86. Id. at 438.
87. Id. The intervenors were Mexican-American citizens, registered to vote in Medina County.

88. The court of appeals quoted the appellants' Memorandum of Points and Authorities in Support of Defendant-Intervenors' Motion for Attorneys' Fees:

The result of the litigation was that the [1978 and 1979] reapportionment plans . . . were never precleared and a third plan, more favorable to defendant-intervenors, was finally adopted by Medina County. Moreover, the plan adopted by Medina County was very similar to the plan advocated by defendant-intervenors. *Id.* at 438 (footnote omitted).

89. Id. The court denied the request without opinion. Upon reconsideration, the court denied attorneys' fees on the ground that the defendant-intervenors were not prevailing parties. "[T]hey opposed the compromise settlement between plaintiffs and the U.S. which was the basis for dismissing the present litigation." *Medina County*, 683 F.2d at 438 (quoting Commissioners Court of Medina County v. United States, Civ. No. 80-0241 (D.D.C. Apr. 1, 1981) (order denying attorneys' fees). 90. 683 F.2d at 439.
Legislative history also supported the court's conclusion that defendants who were resisting a declaratory judgment were actually seeking to enforce statutory rights. Therefore, the court refused to apply the Christiansburg limitation to defendants who intervened to protect statutory rights. This result was a natural interpretation of any post-Alyeska attorneys' fee statutes. Intervenor-defendants should be treated like plaintiffs rather than unwilling defendants because they voluntarily enter the litigation.

5. The Copyright Act

Section 505 of the Copyright Act provides for attorneys' fees to the prevailing party. The Second Circuit Court of Appeals in Diamond v. Am-Law Publishing Corp. held that a "distinction exists between the award of fees to a prevailing plaintiff and an award to a prevailing defendant." The court explained its holding stating that the purpose of the attorneys' fee statute was similar to the purpose of Title VII: "to encourage the assertion of colorable copyright claims and to deter infringement." The court con-

92. In the large majority of cases the party or parties seeking to enforce such rights will be the plaintiffs and/or plaintiff-intervenors. However, in the procedural posture of some cases (e.g. declaratory judgment suit under Sec. 5 of the Voting Rights Act) the parties seeking to enforce such rights may be the defendants and/or defendant-intervenors.


93. 683 F.2d at 440.

94. See supra notes 14-17 and accompanying text. Congress and state legislatures responded to the United States Supreme Court's ruling in Alyeska that the private attorney general theory for awarding attorneys' fees was dead. The purpose behind that theory was to promote the enforcement of constitutional and statutory rights.


96. In any civil action under this title, the court in its discretion may allow the recovery of full costs by or against any party other than the United States or an officer thereof. Except as otherwise provided by this title, the court may also award a reasonable attorneys' fee to the prevailing party as part of the costs.

Id.

97. 745 F.2d 142 (2d Cir. 1984).

98. Id. at 148 (citing Grosset & Dunlap, Inc. v. Gulf & W. Corp., 534 F. Supp. 606 (S.D.N.Y. 1982) (prevailing defendants not entitled to award of attorneys' fees because plaintiff's claims were not frivolous, unreasonable, or instituted in bad faith)).


In Davis, the court announced in dicta the recurring policy that: "our jurisprudence is to prevent costs from becoming so burdensome that litigants . . . are discouraged from bringing suit . . . . Awarding a counsel fee to a plaintiff against whom some injury has been done would seem less out of harmony with this policy than award to a winning defendant." 257 F. Supp. at 732 (citation omitted).
cluded its analysis by applying the Christiansburg limitation to section 505. 100

A federal district court was faced with a defendant's request for fees under section 505 in Cohen v. Virginia Electric & Power Co. 101 The court was not persuaded that the Christiansburg decision itself was correct. "This interpretation of the meanings of [Title VII and section 1988] prevails despite the wholly evenhanded nature of the language of both statutes. Thus it is clear that the words Congress uses in such statutes does not necessarily convey the intent of Congress as discerned by the courts." 102 The court directly attacked the analysis used by the Diamond court. 103 First, the court stated that "[n]o analogous legislative history exists" in section 505 to that of Title VII. 104 Therefore, the lack of legislative history and the "evenhanded language" of the statute required equal treatment of plaintiffs and defendants. The Cohen court next argued that the precedent relied on by the Diamond court revealed "a long line of bootstrapping from nothing to something." 105

The inconsistency of these decisions has resulted in confusion. Instead of relying on the absence of legislative history, the court in Cohen should have presumed similar interpretation of similar language unless the legislative history compels a different result.

B. The State Courts

Although several states have attorneys' fee statutes which use party neutral language, few have addressed the issue of whether the Christiansburg limitation applies. Of those state courts which have considered the issue, fewer still have adopted the federal rule. One can expect this issue to surface in all states in the future.

1. Oregon

Oregon is one of four states that have found the Christiansburg rationale persuasive. However, only the Oregon Court of Appeals has discussed the

100. "When the plaintiff's claims are objectively without arguable merit, however, a prevailing defendant may recover attorney's fees under Section 505 . . . . [A] finding of subjective bad faith is not necessary . . . ." Diamond, 745 F.2d at 148 (emphasis added) (citing Mailer v. R.K.O. Teleradio Pictures, Inc., 332 F.2d 747 (2d Cir. 1964) (attorneys' fee award to prevailing defendant was upheld because plaintiff's copyright claim, while neither "synthetic" nor "capricious," was "unreasonable"); Nemeroff v. Abelson, 704 F.2d 652 (2d Cir. 1983) (attorneys' fee was awarded to defendant because plaintiff's suit was continued in bad faith).


102. Id. at 621.

103. See also Lieb v. Topstone Indus., Inc., 788 F.2d 151 (3d Cir. 1986), in which the court stated, "[N]or do we accept [Diamond's] double standard for plaintiffs and defendants. Like the Cohen court, we find no justification for such a departure from the law's presumed equality of treatment." Id. at 155.

104. 617 F. Supp. at 621.

105. Id. at 622.
issue. Oregon civil rights law provides for attorneys’ fees to go to “the prevailing party.” In *Payne v. American-Strevell, Inc.*, the employer-defendant prevailed and was awarded attorneys’ fees. On appeal, the court noted the similar language and purposes of the Oregon statute and Title VII. The court specifically adopted the requirement of “frivolous, unreasonable, or without foundation” action by the plaintiff for the purpose of awarding attorneys’ fees to defendants under the Oregon statute.

In *Dobie v. Liberty Homes, Inc.*, the Oregon Court of Appeals was faced with a similar situation. An employee was unsuccessful in an action against his employer because the plaintiff had filed the claim after the statute of limitations for the claim had already expired. The employer-defendant cross-appealed the court’s denial of attorneys’ fees. The court relied on the *Christiansburg* analysis and reiterated the underlying policy of the decision: “If plaintiffs faced the risk of attorney fees simply because they lost, that would discourage all but the most airtight claims and many violations of the Act would go uncontested.” It is surprising that the court did not consider filing a suit after the statute of limitations had run to be meritless action. The court adopted the *Christiansburg* rule, but further warned that the defendants may be entitled to fees if the “plaintiff persists in litigating the claim after it becomes evident the claim is unreasonable or unfounded.” This warning is also a reaffirmation of the equitable power of a court to award fees when an opponent litigates in bad faith.

2. *Florida*

Only the First and Fourth Districts of the District Court of Appeals of Florida have considered and adopted the *Christiansburg* rule.

In *Village of Palm Springs v. Retirement Builders, Inc.*, the court construed a statute that provided for treble damages and attorneys’ fees to

106. The attorneys’ fee statute deals with the enforcement of civil rights and is similar to Title VII’s attorneys’ fee provision. It states: “In any suit brought under [the] subsection, the court may allow the prevailing party costs and reasonable attorney fees at trial and on appeal.” *Or. Rev. Stat.* § 659.121(1) (1985).
108. Id. at 267, 670 P.2d at 1065-66.
109. Id. at 268, 670 P.2d at 1066.
111. The employee alleged the employer failed to reinstate him after he suffered a compensable injury under the Workers’ Compensation Act. *Id.* at 368, 632 P.2d at 450 (citing *Or. Rev. Stat.* § 659.415 (1985)). The statute of limitations is one year from the unlawful employment practice. *Or. Rev. Stat.* § 659.040 (1985). The plaintiff argued that the failure to reinstate was a continuing violation, and accordingly, that his complaint was filed within the applicable time period. *Dobie*, 53 Or. App. at 369, 632 P.2d at 450. The court rejected the plaintiff’s argument. *Id.* at 371, 632 P.2d at 451-52.
114. *Id.*
the "prevailing party." The statute's purpose was not to promote the enforcement of civil rights, but rather to provide utility consumer protection. Nevertheless, the court found the Christiansburg "situation so sufficiently analogous and written with such clarity, expansion or comment upon it would be acts of futility." The statute's purpose was not to promote the enforcement of civil rights, but rather to provide utility consumer protection. Nevertheless, the court found the Christiansburg "situation so sufficiently analogous and written with such clarity, expansion or comment upon it would be acts of futility." The Florida court recognized that discretion must be used within guidelines and some situations may constitute a breach of those guidelines. Implicit in the court's discussion is the assumption that such a breach would result in an award of fees to defendants in the absence of frivolous, unreasonable, without foundation, or bad faith actions by the plaintiff.

In 1983, in National Union of Hospital Health Care Employees v. Southeast Volusia Hospital District, another Florida court was faced with a different party neutral attorneys' fee statute and a request for fees by a successful defendant. The statute authorized the state Public Employees Relations Commission to award all or part of the attorneys' fees to the prevailing party in a labor dispute before the commission. "In order to lend substance to this amorphous statutory grant of discretion, the commission... adopted" the Christiansburg standard. The court affirmed the commission's order and found that the union had continued to litigate when the evidence clearly indicated an unsuccessful claim.

Although this statute, like most other attorneys' fee statutes, leaves the decision to award fees in the court's discretion, "judicial discretion does not imply a court may act... according to the whim or caprice of the deciding judge; it means a discretion exercised within the limits of the applicable principles of law and equity... The Florida court recognized that discretion must be used within guidelines and some situations may constitute a breach of those guidelines. Implicit in the court's discussion is the assumption that such a breach would result in an award of fees to defendants in the absence of frivolous, unreasonable, without foundation, or bad faith actions by the plaintiff.

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116. Id. at 198; Fla. Stat. § 180.191(5) (1970) provides: "In any action commenced pursuant to this section, the court in its discretion may allow the prevailing party treble damages and, in addition, a reasonable attorney's fee as part of the cost."
117. The preamble states:
WHEREAS, it is the legislative finding that there are consumers of electric and gas utilities who live outside of municipalities that own, operate, manage or control plants or other facilities supplying electricity, gas or water and sewer services to or for them within the state who should be protected from excess charges for such utilities by said municipality in view of the exclusive privilege that the municipality enjoys.

FLA. STAT. § 70-997, quoted in Retirement Builders, 396 So. 2d at 198.
118. 396 So. 2d at 198.
119. Id. at 198-99.
120. Id.
122. "The commission may award to the prevailing party all or part of the costs of litigation, reasonable attorney's fees, and expert witness fees whenever the commission determines that such an award is appropriate." FLA. STAT. § 447.503(6)(c) (1981), quoted in National Union, 436 So. 2d at 296 (emphasis added).
123. 436 So. 2d at 296.
124. 436 So.2d at 297. "That the commission has been parsimonious in awarding attorney's fees to successful respondents in unfair labor practice cases speaks not to inconsistency of action, but rather to uniformity in exercising its discretion in a conscientious, cautious manner." Id.
made a prima facie case, its efforts to continue the litigation were considered frivolous. Moreover, the Florida Court of Appeals ratified the commission's adoption of the Christiansburg limitation.

3. Minnesota

The Supreme Court of Minnesota found the rationale of Christiansburg persuasive in Sigurdson v. Isanti County, where the court construed a party neutral attorneys' fee statute related, like Title VII, to employment discrimination. In Sigurdson, the court stated that “[p]olicy reasons support adoption of the federal standard for awarding attorney fees in cases brought under the Minnesota Human Rights Act.” After citing and explaining Christiansburg, the court adopted the Christiansburg standard in order to not discourage potential plaintiffs from filing legitimate claims for fear of being assessed attorneys' fees if the claim is ultimately not successful.

4. Alaska

The Alaska Supreme Court adopted the Christiansburg rationale when it interpreted a party neutral attorneys' fee provision in Whaley v. Alaska Workers' Compensation Board. The case involved an employee's unsuccessful challenge to a denial of disability benefits and an award of fees to the employer-defendant. The court noted that “[a] routine grant of attorneys' fees to employer-defendants would undermine the purposes of the statute and severely limit a claimant's ability to seek appellate relief.” As a result, the court specifically adopted the Christiansburg standard, noting its source

125. Id. In Christiansburg, the Supreme Court warned that courts should not engage in "post hoc reasoning" by concluding that a plaintiff's ultimate failure is equivalent to an action without foundation. 434 U.S. at 421-22. The Florida court addressed this concern:

Finally, although the commission awarded fees despite the union having made a prima facie case, it did not engage in 'post hoc reasoning.' Rather, as the record demonstrates, the evidence of which the union was or should have been aware, overwhelmingly negated a successful claim; but the union continued to litigate. Under Christiansburg, the union's unreasonable tenacity was grounds for an award of attorney's fees. In exercising its discretion toward that end, the commission did not act arbitrarily or outside the law.

National Union, 436 So. 2d at 297.

126. Id.

127. 386 N.W.2d 715 (Minn. 1986).

128. The Minnesota Human Rights Act provides: "In any action or proceeding brought pursuant to this section the court, in its discretion, may allow the prevailing party, . . . a reasonable attorney's fee as part of the costs." Minn. Stat. § 363.14, Subd. 3 (1983).

129. 386 N.W.2d at 722.

130. Id.


133. Id. at 959.
and its application to workers' compensation claims in other jurisdictions.\textsuperscript{134}

5. California

California has a private attorney general statute which authorizes an award of attorneys' fees to the prevailing party.\textsuperscript{135} A California court of appeals in \textit{County of San Luis Obispo v. Abalone Alliance}\textsuperscript{136} held that a court did not have to find the plaintiff's suit frivolous in order for the court to award attorneys' fees to prevailing defendant. The county sued to recover the costs of dealing with an illegal blockade of a nuclear power plant construction site. The court held that the county did not have statutory authority to sue to recover those costs, and found that all of the requirements of the attorneys' fee statute were met to justify an award of fees to the defendants.\textsuperscript{137} The court stated that "Section 1021.5 . . . provides for a fee award to a 'successful party' and draws no distinctions between plaintiffs and defendants . . . . Allowing Section 1021.5 fees only to complainants would not be consistent with the express wording or purpose of the statute."\textsuperscript{138} The appellate court specifically affirmed the trial court's award of attorneys' fees to the defendants from the plaintiffs.\textsuperscript{139}

The court summarily rejected the \textit{Christiansburg} rationale without directly referring to that case. The decision appeared to conflict with the California Supreme Court's admonition that the statute should be interpreted in light of federal private attorney general fee jurisprudence.\textsuperscript{140} The appellate court

\begin{itemize}
\item \textsuperscript{134} \textit{Id.} at 960 n.8 (citing \textit{Christiansburg}, 434 U.S. 412, 422 and Liberty Mut. Ins. Co. v. Taylor, 590 S.W.2d 920, 922-23 (Tenn. 1979)).
\item \textsuperscript{135} \textit{CAL. CIV. PROC. CODE} § 1021.5 (West 1977).
\item 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 public entities, this section applies to allowances against, but not in favor of, public entities, and no claim shall be required to filed therefor.
\item \textit{Id.}
\item \textsuperscript{136} 178 Cal. App. 3d 848, 223 Cal. Rptr. 846 (1986).
\item \textsuperscript{137} \textit{Id.} at 864-70, 223 Cal. Rptr. at 854-59.
\item \textsuperscript{138} \textit{Id.} at 869, 223 Cal. Rptr. at 858.
\item \textsuperscript{139} \textit{Id.} at 870, 223 Cal. Rptr. at 859.
\item 140. The California Supreme Court has relied heavily on the "unanimity" and "time-tested workability" of federal precedent in applying section 1021.5. Serrano v. Unruh, 32 Cal. 3d 621, 634, 652 P.2d 985, 993, 186 Cal. Rptr. 754, 762 (1982) (\textit{Christiansburg} specifically endorsed as valuable precedent for construing section 1021.5). See Woodland Hills Residents Ass'n, Inc. v. City Council of Los Angeles, 23 Cal. 2d 917, 934, 593 P.2d 200, 208-09, 154 Cal. Rptr. 503, 511-12 (1979). The court of appeals in \textit{Abalone Alliance} apparently not only found \textit{Christiansburg} to be unpersuasive, but also \textit{Serrano} which suggests \textit{Christiansburg} is applicable to section 1021.5. \textit{See also supra} note 13.
\end{itemize}
claimed that a distinction between plaintiffs and defendants would be inconsistent with the purpose of the statute, but the court never articulated this purpose or explained how it differed from the federal attorneys' fees statutes.

6. Washington

The Washington Supreme Court expressly refused to apply the Christiansburg limitation to a party neutral attorneys' fee statute. The case involved an unsuccessful antitrust and unfair competition action brought by the Attorney General against several real estate brokers. The state argued that the award of attorneys' fees to the defendants was an abuse of the trial court's discretion. However, the court concluded that although the language in Title VII and the Washington statute was identical, policy differences demanded a result different than the one arrived at in Christiansburg.

The court's policy focus was that "vindicated defendants should be treated fairly." The court did not consider the argument that if the purpose of the statute was fair treatment of the parties, then the statute was unnecessary. The court was concerned that "[s]mall businessmen may be forced into bankruptcy to defend what may turn out to be legitimate business practices." Unlike Title VII cases, the plaintiff in a consumer protection action is not a "chosen instrument of Congress" to vindicate public policy.

Consequently, the court refused to apply the frivolous standard used in Christiansburg. Instead, the court delineated several factors which the trial court should consider:

1. the need to curb serious abuses of governmental power;
2. the necessity of providing fair treatment to vindicated defendants;
3. the strong public interest in continued vigorous state prosecution of consumer protection violations;
4. the necessity of avoiding hindsight logic in making the determination;

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142. 100 Wash. 2d at 794, 676 P.2d at 965.

143. Id. at 805, 676 P.2d at 971.

144. Id. at 806, 676 P.2d at 971.

145. Id. at 805-06, 676 P.2d at 971.

146. Id. at 805, 676 P.2d at 970-71 (quoting Christiansburg, 434 U.S. at 418-19).


148. Id. at 628, 657 P.2d at 334.

149. Id.

150. Id. See supra note 125 ("post hoc reasoning").
5. the complexity and length of the case;\textsuperscript{151} and
6. the necessity of the lawsuit.\textsuperscript{152}

While the court stated that each of these factors is to be considered, it did not address the issue of the weight to be given each factor. The court clearly stated that it was not adopting a balancing test.\textsuperscript{153} This six factor test has the same disadvantages of other overly flexible guidelines, namely uncertainty in application.

The dissent argued that the Christiansburg rationale should apply. "The Attorney General will now be hesitant or fearful to vigorously enforce consumer protection laws out of concern of incurring substantial attorney fee assessments in the event of unsuccessful litigation."\textsuperscript{154} Such was the concern in Christiansburg.\textsuperscript{155} Furthermore, the Washington Consumer Protection Act instructs the judiciary to look to comparable federal law when construing the state law\textsuperscript{156} and federal antitrust law would not allow fees in this case.\textsuperscript{157} Hence, the dissent argued that the Christiansburg limitation should apply.

III. INTERVENORS

The requests for attorneys' fees by intervenors under "prevailing party" fee statutes present special issues.\textsuperscript{158} Are intervenors "parties" for purposes of the statute? If so, should different standards apply to intervenors than those that apply to the original parties? Finally, should intervenor-plaintiffs be treated differently from intervenor-defendants, or should the procedural posture of the parties not be dispositive of the fee issue? If intervenor-defendants are treated as normal defendants, their liability for attorneys' fees is limited only by the practically nonexistent "special circumstances" limit of Newman v. Piggie Park Enterprises.\textsuperscript{159} Hence, potential intervenors will be discouraged from entering litigation to protect their rights. Additionally, the court is disadvantaged by not having available the views of those interested in the case. Some may argue that intervenors tend to complicate litigation and therefore, deterrents to their participation in cases are neces-

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\textsuperscript{151} Black, 100 Wash. 2d. at 806, 676 P.2d at 971.
\textsuperscript{152} Id. at 806, 676 P.2d at 971.
\textsuperscript{153} Id. (citing State Credit Ass'n, 33 Wash. App. 627, 657 P.2d 327 (1983)).
\textsuperscript{154} Black, 100 Wash. 2d at 810, 676 P.2d at 973 (Dore, J., concurring and dissenting).
\textsuperscript{155} See supra note 43.
\textsuperscript{156} Id. at 811, 676 P.2d at 974. See Wash. Rev. Code § 19.86.920 (1961).
\textsuperscript{158} See generally Tamanaha, The Cost of Preserving Rights: Attorneys' Fee Awards and Intervenors in Civil Rights Litigation, 19 Harv. C.R.-C.L. L. Rev. 109 (1984) (proposes unified standard for awarding attorneys' fees to intervenors based on the standards now used for plaintiffs).
\textsuperscript{159} 390 U.S. 400, 402 (1968).
sary. This argument ignores the fact that a judge has the discretion to refuse to allow an individual to intervene in permissive intervention situations if the intervenor will only add confusion to the case. The judge should decide which intervenors are beneficial to a case and which ones will unnecessarily confuse the issues. An attorneys' fee policy which treats intervenors exactly as defendants will deter both helpful and unhelpful intervenors.

Some courts have treated losing intervenors as losing defendants, while others have been hesitant to require intervenor-defendants to pay the opponents' fees. One moderate approach may be to make intervenor-defendants liable for fees only to the extent that the intervenor's participation in the case injected additional issues.

In several cases, intervenor-plaintiffs were granted attorney fees. In *Equal Employment Opportunity Commission v. Murphy Motor Freight Lines, Inc.*, a party intervened as an intervenor-plaintiff in an action brought on his behalf by the Equal Employment Opportunity Commission which charged violations of Title VII. The Minnesota district court held that he was entitled to receive attorneys' fees as a "full fledged" party, reasoning that the intervenor-plaintiff was literally the "prevailing party" and therefore entitled to attorneys' fees under Title VII.

The Ninth Circuit Court of Appeals was faced with requests for attorneys' fees from eight public interest groups as intervenor-plaintiffs in *Seattle School District No. 1 v. Washington*. In *Seattle School District*, the school district challenged a state initiative which would have outlawed the district's voluntary desegregation plan as being unconstitutional under the fourteenth...

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160. FED. R. CIV. P. 24(b). "In exercising its discretion the court should consider whether intervention will unduly delay or prejudice the adjudication of the rights of the original parties." Id.


163. See infra notes 164-83 and accompanying text.

164. 488 F. Supp. 381 (D. Minn. 1980).

165. Id. at 383.

166. Id. at 389. The court also noted that neither party objected to the intervention and that the intervenor's attorney conducted much work, due to the inability of the EEOC counsel. Id.

167. Id.

168. 633 F.2d 1338 (9th Cir. 1980), aff'd, 458 U.S. 457 (1982).
amendment. The public interest organizations raised an additional argument that the district operated an unconstitutional dual school system. The court held that the intervenors could be awarded fees for the new argument they raised, but not for the argument which was adequately covered by the school district.

In the District of Columbia Circuit Court of Appeals decision of Donnell v. United States, intervenor-defendants sought attorneys' fees in an action involving the Voting Rights Act of 1965. The court in dicta reinforced the holding of Murphy by stating, "If this had been a successful suit by these intervenors as plaintiffs...then, their entitlement to attorneys' fees would hardly be in doubt." The legislative history of the Act scantily supported awards to intervenor-defendants. The court held that, although intervenor-defendants may be entitled to an award of attorneys' fees, "we do not believe Congress intended that such an award be as nearly automatic as it is for a party prevailing in its own right."

Stating that the purpose of the attorneys' fee provision of the Voting Rights Act was to enable citizens to sue as "private attorneys general," the court held that an intervenor should not be granted fees if "the intervenor contributed little or nothing of substance in producing the outcome." The

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169. Id. at 1341.
170. Id.
171. Id. at 1349.
173. The suit was brought under 42 U.S.C. § 1973c (1982). Id. at 243. Title 42 U.S.C. section 1973(e) (1982) provides: "In any action or proceeding to enforce the voting guarantees of the fourteenth or fifteenth amendment, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."
174. See supra notes 164-67 and accompanying text.
175. Donnell, 682 F.2d at 245. "The result of the litigation furthered the purpose of the Voting Rights Act." Id.
176. In the large majority of cases the party or parties seeking to enforce [civil] rights will be the plaintiffs and/or plaintiff-intervenors. However, in the procedural posture of some cases (e.g., a declaratory judgment suit under Sec. 5 of the Voting Rights Act), the parties seeking to enforce such rights may be the defendants and/or defendant-intervenors.
178. Donnell, 682 F.2d at 246. The court analogized the Voting Rights Act's purpose to the purpose of section 1988, a similar provision providing for the award of attorneys' fees to prevailing parties in civil rights cases. Id.
179. Id. at 247.

By providing for attorneys' fees to be awarded in actions brought to vindicate the civil rights laws, Congress did not intend to allow private litigants to ride the back
court remanded the case for a determination of the propriety of a fee award to intervenor-defendants.\textsuperscript{180}

Without directly citing to the \textit{Christiansburg} decision, one court has applied its holding to intervenor-defendants. In \textit{Kirkland v. New York State Department of Correctional Services},\textsuperscript{181} minority employees challenged a civil service examination used by the defendant. Nonminority employees intervened to protect their rights from the implementation of an affirmative action plan. The plaintiffs requested fees from the intervenor-defendant.\textsuperscript{182} The \textit{Kirkland} court held that the purpose of Title VII was to encourage the bringing of claims to court. Because the intervenors were bringing claims, the court reasoned, they should be protected as plaintiffs from being assessed the opponent’s fees without a finding of frivolous or meritless action.\textsuperscript{183}

\textbf{IV. EXAMPLES OF FRIVOLOUS ACTIONS}

Since frivolous action is required in order for a defendant to be entitled to an award of attorneys’ fees under several statutes,\textsuperscript{184} counsel for both parties should be informed as to what the court considers a frivolous action. Furthermore, a court may be required to make a specific finding of frivolous or meritless action in order to justify an award of fees to defendants.\textsuperscript{185}

Courts are understandably hesitant to declare a case of first impression to be frivolous, therefore, it may be helpful to determine actions that have not been considered frivolous. For example, an action may not be deemed frivolous if it was able to withstand a motion to dismiss,\textsuperscript{186} even if the complaint was “riddled with elementary legal errors.”\textsuperscript{187} Actions are also deemed not frivolous where there is some basis on which a jury may resolve the issue in the plaintiff’s favor.\textsuperscript{188}

\begin{flushright}
\textit{Id.} at 249.
\textit{180. Id.}
\textit{182. Id. at 1217.}
\textit{183. Id. at 1218-19.}
\textit{184. See, e.g., supra note 24.}
\textit{185. See Davis v. Mills, 777 F.2d 1524 (11th Cir. 1985) (per curiam) (court of appeals remanded because of trial court’s failure to make the ‘specific findings required by the \textit{Christiansburg} rule’).}
\textit{186. Kahan v. Rosenstiel, 424 F.2d 161 (3d Cir.), \textit{cert. denied}, 398 U.S. 950 (1970). The court stated that “[i]n several cases which became moot, courts have said suits were ‘meritorious’ if they could have survived a motion to dismiss.” 424 F.2d at 167.}
\end{flushright}
LIMITING FEE AWARDS

In Interstate Pipe Maintenance, Inc. v. FMC Corp.,189 the Eleventh Circuit Court of Appeals held that the claim, which was barred by res judicata, was frivolous and, therefore, the defendant was entitled to fees under the state statute.190 In another case, the lack of evidence rendered the action frivolous.191 A plaintiff whose action was twice dismissed for lack of prosecution was liable for his opponents’ fees.192 Many cases give examples of actions to avoid.193 Also, novel arguments may have additional risks of being held frivolous rather than merely the prospect of losing.194

Although frivolousness must be determined upon the facts of a particular case, courts have adopted factors to consider to determine whether a plain-

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189. 775 F.2d 1495 (11th Cir. 1985).
190. Id. at 1497-98. FLA. STAT. § 57.105 (1987) provides:
   The court shall award a reasonable attorney’s fee to the prevailing party in equal
   amounts by the losing party and the losing party’s attorney in any civil action in
   which the court finds that there was a complete absence of a justiciable issue of
   either law or fact raised by the complaint or defense of the losing party; provided,
   however, that the losing party’s attorney is not personally responsible if he has
   acted in good faith, based on the representations of his client.

   The Florida courts previously interpreted the absence of a justiciable issue as being equivalent
   (frivolous action is one that is “so clearly devoid of merit both on the facts and the law as to
   be completely untenable”) (emphasis in original), review denied, 392 So. 2d 1373 (Fla. 1980).

   evidence in support of their claims.” Id. at 744. Where “a plaintiff proceeds on the strength
   of allegations [alone], which are unsupported and indeed contradicted by unrebutted deposition
   testimony, attorney’s fees should be awarded to a defendant who obtains summary judgment
   in his favor.” Id. at 743 (footnote omitted). See also Brown v. Fairleigh Dickinson Univ., 560
   F. Supp. 391, 405 (D. N.J. 1983) (individual defendants in civil rights action awarded attorneys’
   fees because “plaintiff produced no evidence” to substantiate his discrimination claims); Goff
   voluntarily dismiss claim after it appeared factually groundless).

   a “spurious claim with . . . total arrogance and indifference to court procedures [causing the]”
   defendant to incur four years of needless inconvenience and expense.” Id. at 603.

193. See, e.g., Munson v. Friske, 754 F.2d 683, 697 (7th Cir. 1985) (plaintiff’s claim that
   his employers had terminated him in retaliation for exercising his first amendment rights by
   submitting a claim for overtime was “simply preposterous”); Charves v. Western Union Tel.
   Co., 711 F.2d 462, 465 (1st Cir. 1983) (sex discrimination was frivolous because plaintiff’s
   evidence was not credible); Rapisardi v. Democratic Party, 583 F. Supp. 539, 540 (N. D. Ill.
   1984) (plaintiff who alleged that he was dismissed from his job for reasons connected with his
   political activity failed to meet initial burden of proving that political consideration motivated
   discrimination action was groundless because of lack of evidence); Woods v. New York, 494
   F. Supp. 201, 204 (S. D. N. Y. 1980) (action raising “serious and damaging” discrimination
   charges, without a “modicum of substantiating evidence,” was frivolous and unreasonable);
   discrimination claim had no basis in fact, and she engaged in vexatious litigation for the purpose
   of inconveniencing her former employer).

194. See Kostiuk v. Town of Riverhead, 570 F. Supp. 603 (E. D. N. Y. 1983) (dog owner’s
   claim of denial of constitutional rights when her loose and unlicensed dog was impounded was
   frivolous).
tiff's action is frivolous. In *Reichenberger v. Pritchard*, for example, the Seventh Circuit Court of Appeals garnered several factors from other cases to develop a standard for determining the frivolousness of an action. The court looked to:

1. whether the issue is one of first impression requiring judicial resolution;
2. whether the controversy was sufficiently based upon a real threat of injury to the plaintiff; and
3. whether the trial court made a finding that the suit was frivolous and the record supports the finding.

Courts have also been willing to give partial fees to defendants when these factors are found in only part of a suit, as well as to reduce the award due to the plaintiff's indigence.

In *Hamilton v. Daley*, the Seventh Circuit Court of Appeals agreed with the trial court that a lawsuit was frivolous when the plaintiff alleged a violation of civil rights by state prosecutors. Because the United States Supreme Court had clearly provided for prosecutorial immunity, this claim was considered frivolous. The court stated that "[i]gnorance of the law is no excuse; it is the responsibility of counsel to know the law and to know whether a claim is clearly foreclosed by precedent." The court hinted,

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195. 660 F.2d 280 (7th Cir. 1981) (section 1988 claim of conspiracy to eliminate nude dancing in plaintiff's night clubs by interfering in municipal administrative proceedings).
197. 660 F.2d at 288 (citing Olitsky v. O'Malley, 597 F.2d 303, 305 (1st Cir. 1979)).
198. 660 F.2d at 288 (citing Vorbeck v. Whaley, 620 F.2d 191, 193 (8th Cir. 1980)).
199. Lewis v. Brown & Root, Inc., 722 F.2d 209, 210 (1984) (plaintiff's counsel acted unreasonably and vexatiously only on proceeding to trial; fee award should be limited to fees incurred during trial).
201. 777 F.2d 1207 (7th Cir. 1985).
202. *Id.* at 1210. The plaintiff was convicted of contributing to the sexual delinquency of a minor. A new trial was granted and the "state's attorney's office *nolle prosequi* the charge." *Id.*
204. 777 F.2d at 1212 (citing Werch v. City of Berlin, 673 F.2d 192, 195 (7th Cir. 1982)). In *Werch*, the plaintiff sought an injunction against local officials in regard to a tax assessment allegedly in violation of the United States Constitution and 42 U.S.C. § 1983 (1982). The court relied upon the Anti-Injunction Act, 28 U.S.C. § 1341 (1982), which precludes the contesting of a state law in a section 1983 action if a "plain, speedy and efficient state remedy" is available. 673 F.2d 192, 194 (7th Cir. 1982). Three separate remedies existed under state law in *Werch*. Hence, the court lacked subject matter jurisdiction and plaintiffs' action was meritless. *Id.* at 195.
however, that a *pro se* litigant may be entitled to greater leniency in regard to his obligation to "know the law."^205  

Actions that are against those with immunity, outside the statute of limitations, or barred by res judicata, are obviously frivolous. Not so easily discernible in terms of frivolousness are cases of first impression or new legal theories. Cases which provide opportunities for arguments favoring changes in law are sometimes desirable, and therefore, parties should not be threatened with attorneys' fees because they dared to challenge "bad precedent." Characterizing legal action as frivolous should be done sparingly.

**CONCLUSION**

Although the American rule denies recovery of attorneys' fees from unsuccessful opponents, numerous statutes, both state and federal, authorize the award of fees to the prevailing party. In regard to two fee statutes, section 1988 and Title VII, the United States Supreme Court has limited the award of fees to defendants to situations where the plaintiffs' action was frivolous, meritless, or without foundation. The Court imposed this limit as a necessary restriction to further the purposes of the fee statutes, which seek to encourage private parties to seek enforcement of rights and to discourage frivolous claims.

Courts should presume that all of the other party neutral statutes have similar purposes. The supposed "equity of treatment" purpose is unconvincing because parties are treated equally in the absence of a fee statute under the American rule. Therefore, unless another purpose can be clearly identified from legislative history, the *Christiansburg* limitation should be applied to all other party neutral attorneys' fee statutes. Otherwise, the clear purpose of encouraging legal enforcement of rights will be unnecessarily frustrated by indiscriminate awards of fees to defendants.

^205. 777 F.2d at 1212 n.1 (citing Hughes v. Rowe, 449 U.S. 5, 15 (1980)).