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Traditionally American courts disfavor allowance of attorneys' fees to the successful litigant. However, the courts do not always follow this anti-fee-shifting doctrine, and in certain situations will add attorneys' fees as costs to the losing party either through judicially created exceptions to the doctrine or pursuant to statutory provisions. The exceptions created by the courts are based upon the courts' equity power, while under some circumstances federal and state legislation require the award of fees to the prevailing party. It is also common practice to insert attorney fee clauses in contracts, notes, mortgages, and similar instruments, whereby one party agrees to reimburse the other party for counsel fees and expenses if litigation occurs. In this situation the courts will usually uphold the parties intentions and enforce the promise. However, a greater impact on the general rule against fee shifting has been made by the "substantial benefit" theory adopted by the United States Supreme Court in Mills v. Electric Auto-Lite Co. and expanded by the Court in Hall v. Cole. The purpose of this Comment is to explore the "substantial benefit" rationale, explain why it has altered the traditional rule, and project the changes which should occur, not only in litigation based upon congressional and state legislation, but also in litigation based upon contract and other nonstatutory areas of the law.

I. GENERAL RULE AND THE TRADITIONAL EXCEPTIONS

The idea that attorneys' fees should not be taxed to the losing party became well established early in the history of the American judicial system. Our frontier society was characterized by a rugged individualistic spirit, for the very existence of the pioneer depended upon his ability alone to cope with the particular situation. When legal disputes arose, those involved relied upon themselves to achieve justice inside the courtroom, or outside it,
rather than upon lawyers. Thus, the lawyer was considered a luxury, the cost of which should be paid by the litigant who employed him. In addition to becoming a part of tradition, the general rule has been defended on the grounds that it enhances predictability and encourages the resolution of disputes through the courts.

As our civilization became urbanized and concern for the individual gave way to concern for society in general, reform of our judicial system, including its rules pertaining to attorneys' fees, received increasing attention. As a result, the traditional rule has been somewhat eroded, and attorneys' fees may now be awarded when the successful litigant contracts in advance for such an award, brings suit under specific provisions of statutes providing for an award of fees, or creates, increases, or protects a fund which is to be shared by others.

Many federal statutes specifically authorize payment of attorneys' fees to the successful litigant in cases in which there is a violation of the statute by the defendant, or when the plaintiff's action forces the defendant to comply with an order from an administrative agency. For example, Congress has provided for the recovery of fees by the winning litigant in actions to enforce orders of the Interstate Commerce Commission against carriers for payment of money, in actions for infringement of the copyright law, and in suits to recover for injury caused by a violation of the antitrust laws. A considerable number of state statutes allow fee shifting, the most common of which include claims against carriers for freight overcharges, damage to freight shipped, and damage to property along their lines.

The traditional judicial exceptions typically arise under two major cate-

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6. Id. at 1220.
8. Note, supra note 5, at 1221.
9. See note 2 supra and accompanying text.
11. See notes 13-18 infra and accompanying text.
12. Trustees v. Greenough, 105 U.S. 527, 532 (1882); see notes 21-24 infra and accompanying text.
18. MINN. STAT. § 219.33 (1945) (damages from failure to maintain fences); MINN. STAT. ANN. § 221.251 (Supp. 1965) (tariff overcharge); TEX. REV. CIV. STAT. ANN. art. 2226 (Supp. 1971) (tariff overcharges and damaged freight); id. art. 6393 (1926) (freight damaged at depot).
gories. First, if a party brings groundless litigation against another, the courts may utilize their equitable power to charge counsel fees to the losing party. The second category, termed the "common fund category," relates to situations in which the plaintiff's suit creates, increases, or protects a fund which is within the court's jurisdiction and to which others are entitled to share. The United States Supreme Court as early as 1882, in Trustees v. Greenough, recognized that failure to award attorneys' fees to the successful plaintiff who by his litigation creates a fund which benefits others, gives an unfair advantage to the other parties entitled to participate in the fund. The crucial factor is success since the courts award fees only when litigation is successful. Creditors' suits are the most common illustration of this exception and typically the fund is created by setting aside fraudulent transfers of property by an insolvent debtor, by establishing the right of the insolvent debtor in certain property, or by defeating groundless claims against him. Attorneys' fees are allowed to be paid from the fund, not to punish the loser but to avoid the granting of an unfair advantage to the non-litigant beneficiaries. In reality, expenses of the successful litigant are not paid by the unsuccessful party, but by the other beneficiaries who must contribute to the litigation expenses of the particular beneficiary who brought the suit. The courts deem the "common fund" exception necessary since, if the complainant had to bear the whole expense, the sum could easily exceed his portion of the fund, while others who did not participate in the action would receive a larger dividend due to the plaintiff's efforts. Individual creditors would be deterred from initiating proceedings. Thus, the "common fund" exception invites the individual to champion the rights of those who have a common interest with him.

II. The Expansion of the Traditional Exceptions

Building upon the "fund" rationale, the courts began to allow attorneys' fees not only in situations where no fund was involved, but also allowed fee shifting under statutes which did not specifically provide for such. To substantiate this expansion it was necessary that the courts evade the fund requirement and overcome legislative silence.

A. The Benefit Rationale

The Constructive Fund. In Sprague v. Ticonic National Bank the plaintiff established her rights to a trust, and in so doing established the rights of fourteen other persons who were not parties to the suit. The action was

19. See note 10 supra.
22. Id. at 662.
23. 105 U.S. at 532. By charging fees to the fund before distribution, members of the class benefited by the litigation contribute their proportionate share of the expense.
24. Hornstein, supra note 21, at 662.
brought by the plaintiff to segregate a fund which she had deposited in trust in a bank which became insolvent. Under the strict fund exception, the plaintiff is required to sue on behalf of a class and create or protect a fund which is to be distributed to other members of the class. While no fund was created in the traditional sense, the Court refused to restrict the "fund" exception to its established limits and held that the plaintiff had an equitable right to reasonable attorneys' fees. The fact that one professes to sue representatively was held not to affect the court's equity power to grant attorneys' fees. It is unclear whether the Supreme Court intended to delete the strict fund requirements completely, or merely to hold that both requirements were constructively met through the principle of stare decisis. It is clear that Sprague indicated a willingness by the Court to broaden the fund exception, a factor which encouraged further relaxation of the fund requirement.

**Law Enforcement as Benefit.** After the Supreme Court's decision in Sprague the relaxation of the fund requirement continued in the state courts, and it was there that the formalities significantly yielded to the "newly emerging policy imperatives." In Abrams v. Textile Realty Corp. the New York Supreme Court held law enforcement to be a sufficient benefit to those similarly situated to the plaintiff to justify an award of attorneys' fees to the plaintiff even though no fund was created. The plaintiff, a bondholder and stockholder of a corporation, sued the corporation individually and on behalf of all bondholders and stockholders similarly situated to prevent the completion of an ultra vires transaction. At common law commission of ultra vires acts is not only outside the law, but it can entail harm to the corporation, stockholders, and creditors. The court found it irrelevant that the suit created no fund for the corporation or its security holders, or that the corporation or security holders would be financially better off if the ultra vires act had been performed. The court stressed the benefit of law en-

27. Id. at 166. In the words of the Court: [T]he usual case is one where through the complainant's efforts a fund is recovered in which others share. Sometimes the complainant avowedly sues for the common interest while in others his litigation results in a fund for a group though he did not profess to be their representative. The present case presents a variant of the latter situation. In her main suit the petitioner neither avowed herself to be the representative of a class nor did she automatically establish a fund in which others could participate. But in view of the consequences of stare decisis, the petitioner by establishing her claim necessarily established the claims of fourteen other trusts pertaining to the same bonds.

Id.

28. Id. The costs of litigation other than the conventional taxable costs is part of the original authority of the chancellor to do equity in certain situations. Id.; see note 1 supra.

29. Comment, supra note 7, at 326. One who enforces the law benefits those who are protected by the law, and as a matter of policy, those who are benefited should contribute to the cost of enforcement. Id.


31. Id. at 499.

32. Id. at 495. The court recognized that at common law a stockholder may sue in the corporation's behalf to restrain its commitment of an ultra vires act, and such restraint is deemed in law to be protection of and beneficial to the corporation and its security holders even though the act may be economically advantageous to the corporation. Id.

33. Id. at 497.
forcement: "The law cannot refuse to recognize as beneficial full observance of the law. The law cannot hold that corporate interests are better served by action outside rather than within the law. The law must assume that compliance rather than non-compliance . . . better advantaged [the corporation] and its security holders." The court emphasized that the dominant consideration is the production of the benefit and not its form, for it is only the production of the benefit that casts upon those others the duty of sharing in the cost of that production.

Although Abrams held law enforcement to be a sufficient benefit to those similarly situated to the plaintiff to justify fee shifting, the decision did not provide any guidelines for determining which individuals are similarly situated to the plaintiff. Likewise, the court failed to specify what degree of benefit must inure to these individuals before the awarding of attorneys' fees to the plaintiff becomes proper. It is doubtful that the court intended that the slightest benefit to any class should trigger fee shifting. However, since the court failed to set out any definitive guidelines, the opinion could be so interpreted.

**Substantial Benefit.** In Bosch v. Meeker Cooperative Light & Power Ass'n the Minnesota Supreme Court followed the rationale of Abrams, but limited its application to cases where law enforcement resulted in a substantial benefit. In that case the corporation reimbursed attorneys' fees to a stockholder who brought a derivative action against directors and counsel of the defendant corporation and obtained a judicial declaration that the election of certain directors and a proposed amendment to the corporate bylaws were illegal. The court determined that this suit was of substantial benefit to the corporation because it served as a deterrent to irresponsible leadership. Thus, it was ordered that the corporation which was the principle beneficiary of the corrective action should bear the expense of the litigation. However, the court also recognized that awarding counsel fees against a corporation in every instance where the directors act outside of their corporate powers would invite nuisance suits. Therefore, the holding was limited by the stipulation that the derivative actions be instituted in good faith to correct or prevent misconduct and be of "substantial" benefit to the corporation. The Bosch opinion indicates that in order to justify an award of attorneys' fees, the trier of fact must find that the alleged benefit is "more than technical in its

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34. *Id.*
35. *Id.*
36. 257 Minn. 362, 101 N.W.2d 423 (1960).
37. *Id.* at 426. Extensive reliance was placed on a number of articles by George Hornstein, who believed that actions to prevent ultra vires acts which may entail hazards to the corporation and its security holders serve to maintain the "health of the corporation." Since ultra vires conduct of corporate officers is harmful to the corporation, a stockholder is permitted to prosecute a suit to correct a wrong or prevent a threatened wrong to his corporation even though such action does not result in "pecuniary benefit." Hornstein believed that the assurance of an award of attorney's fees to the successful stockholder serves as an inducement for him to take the initiative to challenge the questionable act. *Id.* See also Hornstein, The Counsel Fee in Stockholder's Derivative Suits, 39 COLUM. L. REV. 784, 791 (1939).
38. 101 N.W.2d at 426. The trial court determines what is substantial benefit in light of each case. *Id.*
consequences” to the corporation or its shareholders and that the benefit corrects or prevents an abuse which is detrimental to the corporation or an essential right of the shareholder. Unfortunately, the court failed to provide any insight into the interpretation of these tests and so the guidelines may vary in application depending upon how narrowly or broadly the court’s language is interpreted by the trier of fact.

**B. Congressional Silence**

In *Smolowe v. Delendo Corp.* stockholders sued their corporation and several of its directors pursuant to section 16(b) of the Securities Exchange Act of 1934 and recovered for the defendant corporation profits realized by the directors from security trading. Since this was not an action to recover money belonging to the stockholders, a fund was not created in the traditional sense. However, under the *Sprague* approach a stockholder who is successful in enforcing a penalty payable to the corporation is entitled to reimbursement for reasonable attorneys’ fees on the theory that the corporation which has received the benefit of counsel should pay their reasonable cost. Several sections of the 1934 Act specifically provide for the recovery of counsel fees, but no mention of fees is made under section 16(b). Thus, the issue was raised as to whether Congress, by maintaining silence in section 16(b) with respect to attorneys fees, intended to circumscribe the courts’ equity power to award fees, and, therefore, prevent the application of court created exceptions to actions arising under section 16(b). The court resolved the issue holding that the specific remedy provisions in some sections of the statute should not be interpreted as evidencing congressional intent to deny the courts the power to award fees in actions brought under other sections of the Act which do not mention attorneys’ fees. Instead, those sections specifically providing fees “merely enforce an additional penalty against the wrongdoer.”

**C. Fleischmann Distilling Corp. v. Maier Brewing Co.**

Following the decisions in *Sprague*, *Abrams*, *Bosch*, and *Smolowe*, the courts were frequently using their equitable power to grant attorneys’ fees to the successful plaintiff. Nevertheless, it was at this point that the United States Supreme Court in *Fleischmann Distilling Corp. v. Maier Brewing Co.* reversed the trend and not only destroyed the court-created trademark exception, but also created a reaction which caused the courts to be reluctant in applying any court-created exception to actions arising under congressional legislation. In *Fleischmann* the defendants deliberately infringed plaintiff's

39. *Id.* at 427.
40. 136 F.2d 231 (2d Cir.), *cert. denied*, 320 U.S. 751 (1943).
42. 136 F.2d at 241.
43. *See §§ 9(e), 18(a), 15 U.S.C. §§ 78i(e), 78r(a) (1970).*
44. 136 F.2d at 241.
45. 386 U.S. 714 (1967).
46. For cases denying attorneys’ fees in suits brought under the Interstate Commerce Act, *see* Missouri Pac. R.R. v. Slayton, 407 F.2d 1078 (8th Cir.), *cert. denied,*
Lanham Act\textsuperscript{47} trademark rights. There was significant case authority holding that an award of counsel fees to the successful plaintiff is permissible when the trademark infringement is "deliberate."\textsuperscript{48} However, section 35 of the Lanham Act\textsuperscript{49} provides for recovery to the plaintiff measured by the defendant’s profits accruing from his infringement, damages sustained by the plaintiff, and costs of the action; it does not provide for attorneys’ fees. Thus, the issue was raised as to whether the trial court could award fees under the judiciously created "deliberate trademark infringement" exception in addition to those in section 35.\textsuperscript{50} The Court held that the trademark exception was inapplicable and inferred that the other court-created exceptions were not to be applied to actions arising under legislation such as the Lanham Act: \textsuperscript{51}

The recognized exceptions to the general rule were not . . . developed in the context of statutory causes of action for which the legislature had prescribed intricate remedies. Trademark actions under the Lanham Act do occur in such a setting. For, in the Lanham Act, Congress meticulously detailed the remedies available to a plaintiff who proves that his valid trademark has been infringed. . . . When a cause of action has been created by a statute which expressly provides the remedies for vindication of the cause, other remedies should not readily be implied. . . . We therefore must conclude that Congress intended § 35 of the Lanham Act to mark the boundaries of the power to award monetary relief in cases arising under the Act.\textsuperscript{52}

Thus, counsel fees were held not recoverable under the Lanham Act since the meticulous statutory provisions set forth in section 35 exclude any other monetary remedies for violation of rights protected by the Act.\textsuperscript{53}

The \textit{Fleischmann} holding was interpreted by the lower courts to mean that statutory silence regarding counsel fees indicates a congressional intent to circumscribe the courts’ equitable power to award fees to the successful plain-

\textsuperscript{49} Baker v. Simmons Co., 325 F.2d 580 (1st Cir. 1963); Wolfe v. National Lead Co., 272 F.2d 867 (9th Cir. 1959); Keller Prods. v. Rubber Linings Corp., 213 F.2d 382 (7th Cir. 1954); Century Distilling Co. v. Continental Distilling Corp., 205 F.2d 140 (3d Cir. 1953); Admiral Corp. v. Penco, Inc., 203 F.2d 517 (2d Cir. 1953).
\textsuperscript{50} 15 U.S.C. § 1117 (1970). Section 35 provides:
When a violation of any right of the registrant of a mark registered in the Patent Office shall have been established in any civil action arising under this chapter, the plaintiff shall be entitled, subject to the provisions of sections 1111 and 1114 of this title, and subject to the principles of equity, to recover (1) defendant's profits, (2) any damages sustained by the plaintiff, and (3) the costs of the action. . . . In assessing damages the court may enter judgment, according to the circumstances of the case, for any sum above the amount found as actual damages, not exceeding three times such amount. If the court shall find that the amount of recovery based on profits is either inadequate or excessive the court may in its discretion enter judgment for such sum as the court shall find to be just, according to the circumstances of the case. Such sum in either of the above circumstances shall constitute compensation and not a penalty.
\textsuperscript{51} 386 U.S. at 714.
\textsuperscript{52} Id. at 717-19.
\textsuperscript{53} Id. at 719-21.
Furthermore, Fleischmann was cited as standing for two propositions: (1) court-created exceptions to the general rule are inapplicable to statutory causes of action for which the legislature has provided remedies; (2) when an action arises under a statute which expressly provides remedies in one section, other remedies should not be implied pertaining to other sections of the statute. The result in Fleischmann seems antithetical to the holding of Smolowe, which was interpreted as encouraging the application of judicially created exceptions to statutory causes of action for which remedies were legislatively provided. The effect on the lower courts became apparent as counsel fees were denied on the basis of Fleischmann in actions brought under the Interstate Commerce Act and the Securities Act of 1934, both of which were silent on the question of attorneys' fees in the relevant sections. It appeared that Fleischmann had initiated an era of conservatism, and thirty years of growth in court-created exceptions had been wiped out.

III. MILLS V. ELECTRIC AUTO-LITE CO. AND HALL V. COLE

When Mills v. Electric Auto-Lite Co. came before the Supreme Court, the substantial benefit exception, with law enforcement serving as sufficient benefit to justify an award of counsel fees, had been established in the state courts. However, the Supreme Court in Fleischmann had indicated that such a judicially created exception was inapplicable in actions arising under statutes which did not expressly provide for the awarding of attorneys' fees. In Mills minority shareholders of the defendant, the Electric Auto-Lite Co., brought a derivative action on behalf of minority shareholders as a class to set aside a merger of their company with the Megenthaler Linotype Co. Since the proxy solicitations for the merger by Auto-Lite's management were materially misleading and violated section 14(a) and rule 14a-9 of the Securities Exchange Act of 1934, the Court remanded the action to the district court for determination of the proper relief and granted the plaintiff an interim award of attorney's fees.

In order to award fees under any judicial exception to the general rule against fee shifting, the Court had to overcome congressional silence. As in Smolowe this action had been brought under the statutory authority of section 14(a) which was silent on fees, unlike other sections of the 1934 Act. The Supreme Court could have decided Mills in accordance with the Fleischmann doctrine and held that statutory silence indicates congressional intent to deny fee shifting, and when an action arises under a statute which expressly provides remedies in one section, other remedies should not be im-

54. See note 46 supra and accompanying text.
57. See note 46 supra.
58. Comment, supra note 7, at 322.
61. See notes 40-44 supra and accompanying text.
plied pertaining to other sections of the statute. However, the Court did not follow Fleischmann, but rather held that the absence of express statutory authorization for an award of counsel fees under section 14(a) did not preclude fee shifting. The Court adopted the rationale of Smolowe and noted that the Second Circuit awarded attorneys’ fees in Smolowe despite the lack of any provision for them in the relevant section, “‘on the theory that the corporation which had received the benefit of the attorney’s services should pay the reasonable value thereof.’” Following the same analysis, Mills held that Congress’ inclusion of specific fee shifting provisions in some sections of the Act should not be interpreted as denying to the courts their equity power to award attorneys’ fees in suits arising under sections of the Act which do not provide for fee shifting. The Court did not overrule Fleischmann, but distinguished it from Smolowe by contrasting the legislative remedies. While Congress in the Lanham Act had “meticulously detailed the remedies available to a plaintiff” with the intent of “marking the boundaries of the power to award monetary relief,” the provisions in the Securities Act lacked such pervasiveness. Thus, the Fleischmann doctrine was held inapplicable to the Securities Act in that no intricate statutory remedies were provided, and the Mills decision limits application of the Fleischmann doctrine to the Lanham Act and similar legislation which contains pervasive detailing of remedies available to the plaintiff.

The Mills decision indicates a change in philosophy since Fleischmann. The congressional silence in Fleischmann which had been interpreted to prohibit fee shifting was interpreted by Mills as a mandate to apply the court-created exceptions under appropriate circumstances. Furthermore, Mills neither contained the broad language of Fleischmann indicating that exceptions to the general rule were limited, nor the limitations that the judicially created exceptions were inapplicable in a statutory cause of action. It appears that Mills dictated a reversal in the decision-making process when a remedial statute is in question: Where previously the courts started with the traditional rule against fee shifting and then determined whether the facts were within an approved exception, now the courts are to start with the court’s equitable power to grant attorneys’ fees, placing the burden on the defendant to prove legislative intent to deny an award of fees.

Having surmounted congressional silence, the Court recognized that both Congress and judges have developed exceptions to the anti-fee-shifting rule “for situations in which overriding considerations indicate the need for such a recovery.” Such “overriding considerations” were present in Mills because the plaintiff had successfully maintained a suit “that [benefited] a group of others in the same manner as himself” and to allow the others to benefit from the plaintiff’s action without contributing to the litigation costs.

62. 386 U.S. at 719.
63. 396 U.S. at 390, quoting Smolowe, 136 F.2d at 241.
64. 396 U.S. at 390-91.
65. Id. at 391; see note 52 supra and accompanying text.
66. 396 U.S. at 391.
67. Comment, supra note 7, at 325.
68. 396 U.S. at 391-92.
would unjustly enrich the others at the plaintiff's expense. Traditionally, fee shifting in a stockholder's suit was accomplished only under the "fund" exception, but here no monetary recovery was sought. However, concluding that the lack of a fund from which fees could be paid would not preclude an award based on the benefit rationale, the Court departed from "the traditional metes and bounds" of the "common fund" doctrine and adopted the substantial benefit exception developed in Abrams and Bosch. The language of Mills is broader than that of Abrams or Bosch and reimbursement of fees is to be granted whenever the litigation: "has conferred substantial benefit on the members of an ascertainable class"; "the court's jurisdiction over the subject matter of the suit makes possible an award of attorney's fees that will operate to spread the costs proportionately among them"; and "[permitting] the others to obtain full benefit from the plaintiff's efforts without contributing equally to the litigation expenses would be to enrich the others unjustly at the plaintiff's expense." The Bosch guidelines for determination of substantial benefit were adopted, yet the Supreme Court provided no more insight into their interpretation than did the Bosch court. Law enforcement was accepted as being substantial enough benefit to justify an award of fees to stockholder-plaintiffs where no fund or pecuniary benefit is created; however, neither guidelines nor limitations were delineated to determine the degree of law enforcement necessary to amount to a substantial benefit. Furthermore, the Court provided no guidelines for determining when an "ascertainable" class exists; it was merely held that the corporation and its stockholders were members of the "ascertainable" class in Mills. Thus, the language is vague, and until practical guidelines and limitations are delineated it appears that the Mills doctrine can be construed as broadly as the courts desire.

Mills, like Bosch, made substantial references to a number of articles by George Hornstein, who described the problem created by the anti-fee-shifting rule, and who emphasized that fee shifting would benefit both corpora-

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69. Id. at 392. The dissemination of misleading proxy solicitations was deceitful to the stockholders as a group and the action benefited the corporation and all shareholders. Id.

70. Id. The earliest cases which recognized a right to reimbursement involved litigation that had produced or preserved a "common fund" for the benefit of a group. However, the court noted that nothing in these cases indicates that the suit must actually bring money into the court as a prerequisite to the court's power to order reimbursement of expenses. The court quoted Sprague: "[T]he foundation for the historic practice of granting reimbursement for the costs of litigation other than the conventional taxable costs of the original authority of the chancellor to do equity in a particular situation." Id. at 392-93.

71. Id. at 393-94. The substantial benefit exception had been most common in shareholders' derivative actions where the courts had increasingly recognized that expenses incurred by one shareholder in vindicating a corporate right of action should be spread among all shareholders who benefited by such action through an award against the corporation regardless of whether a monetary recovery had been obtained for the corporation. Id. at 394. In most of these cases, there was no "common fund" except in the constructive sense that the court's jurisdiction over the corporation as defendant made it possible to assess fees against all the shareholders through an award against the corporation. Id. at 395.

72. Id. at 393-97.

73. Id. at 396; see note 39 and accompanying text.

74. 396 U.S. at 395-96.
tions and stockholders by facilitating stockholders' suits, thus promoting fair conduct throughout the corporate world.\textsuperscript{76} Hornstein labeled the remedy "legal" or "corporate therapeutics" in describing its function of increasing law enforcement by shifting fees.\textsuperscript{76}

By accepting the Hornstein terminology and the rulings of Abrams and Bosch, the Mills Court justified a stockholder's suit fee exception based only upon law enforcement policy objectives.\textsuperscript{77} However, Mills stated its doctrine in terms not limited to stockholders' suits, thus opening the possibility of fee shifting in all cases where a plaintiff has successfully maintained a suit "that benefits a group of others in the same manner as himself."\textsuperscript{78} By broadening the scope of the "law enforcement as benefit" concept and its area of application by overcoming congressional silence, the Mills Court introduced the potential for significant changes in the traditional American rule. The United States Supreme Court further developed this potential in its 1973 decision of Hall v. Cole,\textsuperscript{79} which further broadened the area of application by applying the substantial benefit rationale to other than a stockholder's suit.

In Hall a union member criticized union actions and policies and was subsequently expelled on the ground that his criticism violated a union rule. In passing the Labor-Management Reporting and Disclosure Act of 1959\textsuperscript{80} (the LMRDA), Congress recognized that it was necessary that all union members be guaranteed "minimum standards of democratic process."\textsuperscript{81} The union member successfully sued the union under section 102 of the LMRDA,\textsuperscript{82} claiming his expulsion violated his right of free speech guaranteed by section 101(a)(2) of the Act,\textsuperscript{83} and the Supreme Court ordered his reinstatement to the union, vindicated his right of free speech, and awarded him attorneys' fees. In justifying the award of counsel fees to the plaintiff the Court followed the analytical approach it took in Mills\textsuperscript{84} by starting with its equitable power to grant attorneys' fees and then considering whether Congress intended to circumscribe that power.

The union case was held to be clearly governed by the substantial benefit

\textsuperscript{75} Id. at 392-96. See also note 37 supra. Hornstein defined the problem by comparing the stockholders' suit to the case of David and Goliath, with David being unable to afford the slingshot. Similarly, laws authorizing private actions against corporate defendants are ineffective due to the anti-fee shifting rule since few stockholders can afford the high cost of corporate litigation and the deliberate delaying tactics of the corporate defendant. See Hornstein, supra note 21, at 658. Hornstein, supra note 37, at 791. Hornstein recognized that effective law enforcement requires awarding fees to the successful plaintiff as a "necessary concomitant of allowing the stockholder's derivative suit, which is vital to the exposure and redress of corporate abuse." Id. at 816.

\textsuperscript{76} Hornstein, supra note 21, at 662-63.

\textsuperscript{77} 396 U.S. at 396-97.

\textsuperscript{78} See note 69 supra and accompanying text.

\textsuperscript{79} 412 U.S. 1 (1973).


\textsuperscript{81} 105 CONG. REC. 6471 (1959). Prior to passage of the Act congressional findings indicated that in the labor and management fields there had been numerous instances of breach of trust, corruption, disregard of employee's rights, and general failure to observe high standards of responsibility and ethics. 412 U.S. at 7.


\textsuperscript{83} Id. § 411(a)(2).

\textsuperscript{84} See Comment, supra note 7, at 325.
doctrine adopted in MILLS. The Court in Hall concluded that the union member should receive an award of counsel fees since his successful litigation conferred a substantial benefit on the union and its members and the trial court's jurisdiction over the subject matter of the suit made possible an award that operated to spread the costs proportionately among the union members. To allow the other union members to obtain full benefit from the plaintiff's efforts without contributing equally to the litigation expenses would enrich the others at the plaintiff's expense. Under those circumstances, the reimbursement of plaintiff's counsel fees out of the defendant's treasury merely shifted the cost to "'the class that has benefited from them and that would have had to pay them had it brought the suit.'" The rights enumerated under section 101(a)(2) were considered "vital to the independence of the [union] membership and the effective and fair operation of the union as the representative of its membership." Therefore, by enforcing the law and vindicating his right of free speech guaranteed by section 101(a)(2) of the LMRDA, plaintiff also vindicated the rights of all union members and rendered a substantial benefit to his union as an entity and to all its members. Thus, the substantial benefit rationale of Mills, which grew out of the stockholder's suit, was applied to the totally different area of labor relations, the union standing in the same relation to the union member as did the corporation in Mills to its shareholders.

Recognizing that Congress has the power to circumscribe the award of attorneys' fees, the Court concluded that such congressional power had not been exercised in the remedy provision of the LMRDA and that the Fleischmann doctrine was inapplicable. Unlike section 35 of the Lanham Act, section 102 of the LMRDA broadly authorizes the courts to grant "appropriate" relief, including injunctions, and does not meticulously detail the remedies available to the plaintiff. Therefore, the Court concluded that the language of section 102 did not imply an intent to deny to the courts the equitable power to grant attorneys' fees in appropriate situations.

The Court in Hall also rebutted a second argument based upon legislative intent. Since Congress expressly authorized fee shifting in sections 201(c) and 501(b) of the LMRDA, the defendant contended that the absence of a

85. 412 U.S. at 7. The court first recognized that the federal courts by exercising their equity powers could award attorney's fees "when the interests of justice so require," and that these courts do not hesitate to exercise this inherent equitable power whenever "'overriding considerations indicate the need for such a recovery.'" Id. at 5, quoting Mills v. Electric Auto-Lite Co., 396 U.S. 375, 391-92 (1970).
86. 412 U.S. at 5-7; see note 72 supra and accompanying text.
89. 412 U.S. at 8. Since such lawsuits contribute to the preservation of union democracy, they are beneficial not only in the immediate impact of the results achieved but in their implications for the future conduct of the union's affairs. Id. at 8-9.
90. Id. at 9.
91. Under the Fleischmann doctrine, court created exceptions are inapplicable to statutory causes of action for which the legislature has "meticulously" detailed remedies which do not include attorney's fees. See notes 54-58 supra and accompanying text.
92. See note 49 supra and accompanying text.
93. 412 U.S. at 10.
95. Id. § 501(b).
similar provision in section 102 indicated an intent to preclude fee shifting in suits brought under that section. 96 Again, the Court relied on a similar contention in Mills and held that since the inclusion of express fee provisions in certain sections of the Securities Exchange Act were not interpreted as denying the courts their equity power to award counsel fees in suits under other sections of the Act, then express provisions in sections 201(c) and 501(b) of the LMRDA could not deny the courts the power to award counsel fees under section 102. 97 Thus, fee shifting in a successful suit brought under section 102 was held consistent with the LMRDA and the "historic equitable power of the federal courts to grant such relief in the interests of justice." 98

IV. IMPLICATIONS OF THE MILLS DOCTRINE AS EXPANDED BY HALL V. COLE

In Hall the Supreme Court had another opportunity to promulgate adequate guidelines for interpreting the broad language of Mills and limiting its application. Unfortunately, the Court provided no more insight into the elements of the substantial benefit doctrine than it did in Mills. Instead, it applied the Mills' rationale to a different factual setting, and, in so doing, expanded the situations in which attorneys' fees may be awarded to the successful plaintiff in the absence of a fund before the court. Thus, it appears that the Hall Court sanctioned a very expansive application of the substantial benefit doctrine, possibly to include all causes of action arising under federal legislation not meticulously detailing the remedies available to the successful plaintiff. The need to provide the individual with private law enforcing power has been recognized and the dominant element in the trial courts' decision making process appears to be the benefits accorded to society by the encouragement of such enforcement.

The broad impact of Mills and Hall comes from the benefit language augmented by the simultaneous adoption of the "therapeutics" principle. 99 Legal therapeutics is based upon deterrence, with the emphasis switched from public to private action. 100 It confronts the problem of prohibitively high litigation costs, a situation not limited to stockholders' suits. Since the Supreme Court has allowed the recovery of attorneys' fees in the diverse factual contexts of Mills and Hall, it seems reasonable to assume that it would

96. 412 U.S. at 10.
97. Id. at 11. The court believed it "untenable" to assert that Congress established the bill of rights under the LMRDA and then intended to have these rights diminished by the fact that a wronged union member would be unable to finance litigation: Not to award counsel fees in cases such as this would be tantamount to repealing the Act itself by frustrating its basic purpose. It is difficult for individual members of labor unions to stand up and fight those who are in charge. The latter have the treasury of the union at their command and the paid union counsel at their beck and call while the member is on his own. An individual union member could not carry such a heavy financial burden. Without counsel fees the grant of federal jurisdiction is but a gesture for few union members could avail themselves of it.
98. 412 U.S. at 14.
99. See Comment, supra note 7, at 329.
100. Id. See also Hornstein, supra note 21, at 663.
sanction the allowance of attorneys’ fees to private litigants who bring suits for the betterment of themselves and others in areas such as civil rights, consumer protection, and air pollution. The following examples illustrate the actual and potential impact of the expansive Mills-Hall development.

Private actions challenging administrative decisions pursuant to regulations protect against weak enforcement of pollution laws, but are discouraged due to the high cost of litigation. However, in *Natural Resources Defense Council v. Environmental Protection Agency (NRDC v. EPA)*, an environmental group successfully challenged EPA approval of portions of state implementation plans and the court awarded counsel fees and costs to the plaintiffs for their efforts in obtaining orders requiring EPA to comply with its obligations under the Clean Air Amendments of 1970. The First Circuit cited Mills in support of the policy favoring the awarding of fees and Hall for authority to apply that policy to the environmental protection area. The court noted: “When private litigation vindicates a significant public policy and, at the same time, creates a widespread benefit, policy today favors awarding attorney fees against a party who exists to serve or represent the interest of all those benefited.” The EPA was held to be related to the taxpayer as was the corporation in Mills to its shareholders and the union in Hall to its members. Thus, by requiring the EPA to pay the plaintiffs’ counsel fees, the taxpayer who receives the benefits of the litigation contributes indirectly to the cost of attaining that benefit. Plaintiffs had championed the policy of the Clean Air Amendments and had compelled strict compliance by the EPA with legislation designed to deter pollution. As a result, policies of the EPA had been corrected, the law had been enforced, refined, and clarified, and statutory goals had been achieved. Therefore:

[I]t seems fair and sensible that the EPA should be taxed for [plaintiffs’] reasonable costs and attorneys’ fees. The EPA has been assigned by Congress the task of supervising pollution control. It handles the public funds appropriated for that purpose. To allocate [plaintiff’s] reasonable costs and attorneys’ fees to it is to spread them ultimately among the taxpaying public, which receives the benefits of this litigation.

102. 484 F.2d 1331 (1st Cir. 1973). Following Mills but prior to Hall the application of the Mills doctrine to administrative decisions regarding pollution laws was predicted in Comment, *supra* note 7, at 328-30, and the Court of Appeals for the First Circuit relied heavily on that article in formulating its opinion. For further application of the substantial benefit exception to environmental law, see *La Raza Unida v. Volpe*, 337 F. Supp. 221 (N.D. Cal. 1972); Wright, *Awarding Attorney and Expert Witness Fees in Environmental Litigation*, 58 CORNELL L. REV. 1222 (1973).
104. 484 F.2d at 1333-34.
105. *Id.* at 1333.
106. *Id.* at 1334.
107. *Id.* The court considered the public suit the most instrumental in enforcing the statute against the EPA because only the public, not the polluter, has the incentive to complain about the EPA’s inadequacy. Yet the court also recognized that the high litigation costs tended to make private suits impractical. *Id.*
108. *Id.*
109. *Id.*
The Court in *NRDC v. EPA* was faced with the problem of sovereign immunity which was not present in *Mills* or *Hall*. This doctrine prevents a court from awarding costs or counsel fees against the federal government or one of its agencies unless Congress provides specific statutory sanction. Section 304(d) of the Clean Air Act sanctions the award of counsel fees in any suit brought under section 304(a), which allows a citizen to sue where there is an alleged failure of the Administrator to perform a non-discretionary duty. However, section 304 on its face deals only with litigation in the district court and this case was brought pursuant to section 307, which requires that petitions for review of implementation plan approval be filed in the court of appeals. The court interpreted section 304(a) to include a petition filed under section 307 as an action pursuant to section 304(a), since that section sets forth the authorization for and conditions of suit and section 307 only directs that some proceedings be brought in the circuit courts. The basis of this interpretation was the court’s belief that Congress intended fee shifting to be available to encourage citizen suits, because without fee shifting many just actions would not be brought due to the fact that fees could easily be higher than any potential gain. The court reasoned that legitimate actions brought under section 307 performed as much a public service as actions pursuant to section 304(a). However, the court warned that where litigation is “wholly or in substantial part frivolous,” neither costs nor fees would be awarded to the plaintiff. Not all of the plaintiffs’ challenges in *NRDC V. EPA* were successful, but the court held that since several major challenges were successful, the substantial benefit test was met and plaintiff need not be penalized for losing the other allegations.

Usually the plaintiff must win the suit in order to receive an award of attorneys’ fees, but this general rule was not followed by a United States district court in *Sierra Club v. Lynn*. In that suit four citizen groups sued the Department of Housing and Urban Development, charging that the building of a community development project violated the National Environmental Policy Act. Even though the suit was unsuccessful, attorneys’ fees were awarded to plaintiffs to be paid by the private developer of the project. The plaintiffs’ position was compared to that of a plaintiff in a civil rights case.

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112. Id. § 1857b-2(a).
113. Id. See also 484 F.2d at 1331.
115. 484 F.2d at 1335-36.
117. 484 F.2d at 1338.
suit where it has been concluded that attorneys' fees should be awarded unless there is specific reason for denial.\textsuperscript{119} As in the civil rights area, the court felt that only concerned citizens could assure full compliance with the National Environmental Policy Act. This case seems inconsistent with the holding of the Supreme Court in \textit{Mills} and \textit{Hall}, because although a substantial benefit existed,\textsuperscript{120} the awarding of fees to unvictorious plaintiffs would encourage frivolous and harassing actions.

In addition to actions challenging administrative decisions, the \textit{Mills-Hall} doctrine could also authorize fee shifting in private actions directly against a violating party, especially in the consumer protection and pollution control areas where injunctive relief against the violator is often the only relief available. Both environmental and consumer protection lawyers are reluctant to bring suits involving only injunctive relief because such actions generate no damages from which a percentage contingent fee may be extracted.\textsuperscript{121} However, under the substantial benefit doctrine large damage awards would not be a prerequisite to the recovery of adequate fees and thus private injunctive actions would become a practical option. Even though the parties in the private injunctive action typically lack the formal relationship that existed between the stockholder and corporation in \textit{Mills} and the member and union in \textit{Hall}, the same policy considerations of therapeutic benefit derived from statutory enforcement underlie both situations. The emphasis should be placed on the receipt of a recognized benefit by persons other than the plaintiff rather than the mere presence of a formal relationship between the plaintiff and those benefited.\textsuperscript{122} In the aftermath of \textit{Hall v. Cole}\textsuperscript{123} it would appear that injunctive, law enforcing suits are now practical in a whole range of areas irrespective of the lack of a damage award. Yet, even if a damage award is authorized, the fee incentive of the \textit{Mills-Cole} doctrines can be important where the insufficiency of the potential award results in minimum use of these authorized suits.\textsuperscript{124}

If the language of the substantial benefit doctrine is as broad and unlimited in scope as the Supreme Court has indicated in \textit{Mills} and \textit{Hall}, then the benefit rationale cannot be limited to causes of action arising under legislation. The substantial benefit exception created by \textit{Abrams} and \textit{Bosch} and expanded by \textit{Hall} is a judicially created exception to the anti-fee-shifting doctrine. In these cases legislative intent has been considered only to determine

\begin{itemize}
\item\textsuperscript{119} \textit{Id.} at 848.
\item\textsuperscript{120} The substantial benefit realized by the suit was that the filing of the action helped insure that information concerning the project and measures taken to protect the environment would be available to the public.
\item\textsuperscript{121} Comment, supra note 7, at 330. See also Starrs, \textit{The Consumer Class Action—Part I: Considerations of Equity}, 49 B.U.L. Rev. 211, 212 (1969).
\item\textsuperscript{122} See Comment, supra note 7, at 330-31.
\item\textsuperscript{123} 412 U.S. 1 (1973).
\item\textsuperscript{124} A typical example is the Civil Rights Act which authorizes civil actions for damages under §§ 1983, 1985, and 1986; 42 U.S.C. §§ 1983, 1985, 1986 (1970). The courts have used these statutes to protect freedom of assembly, \textit{Haque v. CIO}, 307 U.S. 496 (1939), and freedom from unreasonable search, \textit{Lucero v. Donovan}, 354 F.2d 16 (9th Cir. 1965). However, the insufficiency of the potential award has resulted in limited use of these authorized suits. See Note, \textit{Civil Actions for Damages Under the Federal Civil Rights Statutes}, 45 Texas L. Rev. 1015, 1035 (1967). The fee incentive of the \textit{Mills-Cole} doctrine provides these statutes with the effectiveness which Congress intended them to have when they were enacted.
\end{itemize}
whether Congress has acted to circumscribe the courts' equity power to use this exception to justify an award of counsel fees. The court-created exception is the basis of the award, not the statute. Thus, if the elements of the Mills-Hall doctrine are present, and if law enforcement is the acknowledged benefit, there is no reason to doubt that fee shifting would be appropriate in suits based solely upon common law.

If the courts apply the substantial benefit doctrine to suits enforcing judicially made law, the need for more precise guidelines for determining the presence of the elements of the Mills-Hall doctrine become evident. For example, consider a hypothetical whereby corporation A contracts to sell a parcel of land to corporation B, yet A refuses to convey title. B successfully brings a suit against A for specific performance of the contract. Clearly, by enforcing the contract, B is enforcing the "law." However, this is not the type of law enforcement which amounts to a substantial benefit to an ascertainable class. By making corporation A pay corporation B's attorneys' fees, the class benefited by the action contributes to the costs and is, therefore, not unjustly enriched. The shareholders of A and the shareholders of B are the two ascertainable classes affected by the suit. However, the law of contracts on which B depends was designed to protect and benefit the buyer of the land, not the seller. Thus, the purpose of the law is to protect the shareholders of B, not the shareholders of A. It can be argued that compliance rather than noncompliance with the law better advantaged corporation A and its stockholders.\textsuperscript{125} However, forcing A to convey land does not satisfy the Mills requirement of substantiality in that it does not correct an abuse which is detrimental to the essential rights of the shareholders of A. In Mills the statute protected an essential right of the shareholders by preventing misleading proxy statements, and in Hall the statute preserved the union member's freedom of speech, not only a vital union right, but also a fundamental constitutional right. The enforcement of the hypothetical real estate contract does not protect a right equivalent to those protected in Mills and Hall. Also, the effect on the shareholders of A or B fails to meet the second test for substantiality in that it is merely "technical" in nature. Furthermore, even if a substantial benefit to the shareholders B were present, forcing A to pay B's counsel fees would not force the class benefited by the action (shareholders of B) to contribute to the costs, and, therefore, another essential element of the Mills test would be lacking. If the hypothetical were changed so that the contract were between individuals rather than corporations, there would be no ascertainable class to be benefited. Since the great majority of contracts are between individuals or corporations, the courts should determine that the substantial benefit doctrine has little applicability to the law of contracts.

On first consideration, it appears that a broad application of the Mills-Cole doctrine will clog already congested courts with additional suits, since compensatory and injunctive relief otherwise unavailable would now be available. Certainly, more suits will be filed, but countering this negative result will be

\textsuperscript{125} See note 34 \textit{supra} and accompanying text.
an increased willingness by the corporate defendant to compromise and settle just claims prior to trial. The result should not be an increase in actual trial time, but instead, only those suits which present legal or factual issues worthy of litigation will be decided by the courts.

V. CONCLUSION

The logic, principles, and language of the substantial benefit exception adopted by Mills and expanded by Hall are very broad. For a successful plaintiff to receive an award of attorneys' fees under the Mills test it is only necessary that: (1) his action confer a substantial benefit on the members of an ascertainable class; (2) an award of counsel fees operates to spread the costs proportionately among the members of the benefited class so that they are not unjustly enriched; and (3) if the cause of action arises under legislation, such legislation does not "meticulously" detail the remedies. To be substantial, the alleged benefit must be more than technical in its consequence to the benefited class and it must correct or prevent an abuse which is detrimental to an essential right of the members of the class. Law enforcement has been held to be a substantial benefit.

The Supreme Court has been reluctant to delineate precise guidelines and limitations for interpretation of the elements of the Mills test, especially the importance of the law being enforced to those protected by it. Currently, the enforcement of any law satisfies the substantial benefits requirement. Therefore, since the substantial benefit rationale is judicially created and legislative intent has been considered only to determine if the courts' equity power has been circumscribed, the broad interpretation of law enforcement permits the exception to be applied to common law actions. However, such an application overlooks the fact that the Mills and Hall decisions were based on federal statutes which the Congress of the United States enacted after debate and deliberation and which may be presumed to benefit substantially the class of individuals which the legislation is designed to protect. Enforcement of judicially made common law does not enjoy such a presumption. The enforcement of every law should not satisfy the substantial benefit requirement, and the courts must either differentiate the importance of the laws being enforced or else confine the exception to actions arising under legislation. Even if the exception is confined to legislation, more precise guidelines for determining the presence of the other elements of the Mills test should be developed.

The Supreme Court's ratification and liberalization of the substantial benefit exception is a significant challenge to the traditional American rule, and the interpretation of the law enforcement policy imperatives of Mills and Hall by the lower courts will determine its success. By Supreme Court mandate the substantial benefit exception should be applied to actions arising under federal legislation with the exception of those that meticulously detail the remedies available. Likewise, in suits arising under state legislation, attorneys should take the initiative to plead the substantial benefit rationale.
If the courts allow the application of this exception to state legislation, the traditional rule will be weakened to the extent that it will no longer be the general rule. A further extension of the substantial benefit doctrine to common law actions might result in the creation of a new American rule which would award attorneys' fees to the successful plaintiff.