The Role of Attorney Fee Shifting in Public Interest Litigation

Robert V. Percival and Geoffrey P. Miller

The most significant exception to the “American Rule” that civil litigants bear their own attorney fees occurs in cases where a statute expressly authorizes a court award of attorney fees. More than 150 federal statutes now authorize attorney fee shifting and certain state statutes also authorize fee shifting. Most American fee shifting statutes permit fee awards to successful plaintiffs in order to encourage litigation deemed to be in the public interest. Among the most important federal fee shifting statutes are the Civil Rights Attorneys’ Fees Awards Act of 1976 and the Equal Access to Justice Act which permit attorney fees awards to prevailing parties in broad classes of civil rights litigation and in litigation against the federal government.

As court awards of attorney fees to plaintiffs in civil rights, environmental, and consumer cases became more frequent, proposals surfaced to place generic restrictions on attorney fees awards. While proponents of these proposed restrictions maintain that they are necessary to correct abuses, virtually no data supports their claim that excessive fees regularly are being awarded under existing statutes. The real goal of the proposed restrictions is to discourage public interest litigation by reducing both the likelihood of recovering attorney fees and the amount of such recoveries.

The Rationale for Encouraging Public Interest Activity

Before examining the role fee shifting statutes play in public interest litigation, it is important to discuss what actions are considered “public interest activity” and why society can benefit from encouraging such activity.

A. The Nature of Public Interest Activity

The term “public interest” is used in many different contexts to describe and justify a wide variety of policies and activities. While agreement is unlikely on a single definition of public interest, inherent in the concept of public interest activity is the notion of action benefitting a larger group than the individual or group responsible for the activity. Activity primarily benefitting the individual actor can be considered private interest activity, while activity producing wider benefits is more likely to have a public interest character.

Because actions may benefit both the actor and a wider group, there is no clear-cut dichotomy between “public
interest” or “private interest” activities. In his economic analysis of the public interest sector, Burton Weisbrod ranked the public interest character of activities along a continuum based on the ratio of expected external benefits (benefits enjoyed by parties other than the actor) to expected total benefits (sum of external and internal benefits):

\[ P.I. \text{ Ratio} = \frac{\text{External} + \text{Internal Benefits}}{\text{External Benefits}} \]

The greater the value of benefits accruing to persons outside the acting group (external benefits) relative to benefits reaped by members of the group (internal benefits), the greater is the public interest character of the activity in Weisbrod’s scheme.

B. Public Interest Activity as a Response to Market Failures

Economists have long recognized that a pure free market system is not likely to maximize economic welfare due to the existence of market imperfections such as externalities and the problem of producing collective goods. Government intervention in the market place may attempt to correct market imperfections; however, government action alone cannot correct all market imperfections and in some cases may actually exacerbate them. Public interest activity by nongovernmental actors may improve economic welfare by supplementing government action to correct these market failures.

1. Private Market Imperfections. It is well recognized by economists that under certain real world circumstances the private market system cannot be expected to produce an efficient allocation of resources. The classic example of market failure in the environmental area is the problem of externalities. Externalities occur when the costs or benefits of one’s actions are not fully internalized to the actor, but rather are borne or are enjoyed by others. For example, if a factory pollutes the air or water to produce a product more cheaply, the price of the product will not reflect its true social cost because part of the cost (the pollution) will be borne by those who breathe the air or drink the water around the factory. More goods and more pollution will be produced than is economically optimal in the absence of action to internalize the cost of the pollution.

Another failure of private markets is the underproduction of goods whose benefits inevitably are enjoyed by wide segments of society. In the absence of collective action, private markets will not produce sufficient quantities of public goods, such as national defense or police protection. Similarly, a competitive market system will not necessarily allocate resources in an equitable manner. Collective action may be desirable to redistribute resources in a manner more equitable than that produced by private markets.

2. Government Action. Government can play a major role in correcting imperfections in private markets. Through the use of its taxing and spending powers and its other regulatory authorities, government can purchase public goods, help internalize externalities, and redistribute resources in a more equitable manner than the private market system.

Government action cannot, however, be expected to correct all market imperfections. The one-person, one-vote model of a democratic system suggests that a democratic government responds to demands somewhat different from a one-dollar, one-vote market system. Yet, the influence of money in politics and the varying degrees of organization and political influence possessed by various interest groups imply that a democratic government will not always act to improve economic welfare. Moreover, even after legislation designed to correct imperfections is enacted, it may not be administered or enforced in an optimal manner. Enforcement resources are limited and may be subject to pressures not directed toward maximizing economic and social welfare.

3. Public Interest Activity. Like government action, public interest activity by private actors can improve economic and social welfare by correcting market imperfections. Because the private sector does not possess the regulatory authority available to the government, its ability directly to correct market imperfections is more limited. Thus, public interest activity by private parties usually involves efforts to stimulate or to supplement action by governmental bodies.

A wide variety of public actors and organizations engage in public interest activity of the type outlined above.

Although profit-making organizations can engage in public interest activity, organizations primarily devoted to the public interest are concentrated in the voluntary nonprofit sector.

Many kinds of actions may constitute public interest activity. Public interest organizations litigate, lobby, participate in administrative proceedings, conduct research, gather information, educate the public, and provide community services. Each of these activities may be public interest activity to the extent that it generates external benefits. While the focus of this article is on public interest litigation and how it is affected by attorney fee shifting, it is important to remember that public interest groups also engage in a variety of nonlitigation activities to promote the public interest.

Because public interest activities by their very nature are directed toward producing benefits that accrue to broad segments of the public, private individuals have fewer incentives to spend their own time and money on such activities. Organizations have been formed that are devoted to public interest activity and are funded by voluntary contributions. Government has recognized the benefits of public interest activity by private organizations and has acted to encourage it in certain respects. Organizations engaging in public interest activity have been afforded tax-exempt status. In recognition of the benefits of private litigation to enforce statutory and constitutional...
rights, private rights of action have been created by statute or judicial implication, and fee shifting statutes have been enacted to provide an incentive for successful public interest litigation. The role that fee shifting statutes play in encouraging public interest litigation is explored below.

The Role of Fee Shifting in Public Interest Litigation

While public interest litigation is funded by a variety of sources, transaction costs and the diffuse nature of the benefits the litigation produces imply that insufficient resources will be devoted to such litigation in the absence of fee shifting. Congress has enacted fee shifting statutes expressly to encourage public interest litigation by removing some of the economic disincentives facing public interest litigants. While attorney fee awards are an important mechanism for encouraging public interest litigation, they continue to represent only a modest source of funding for most public interest organizations.

A. Inadequacy of Economic Incentives

Most civil litigation is initiated by private parties who possess an interest in the outcome of the litigation sufficient to make litigation worthwhile. Rational plaintiffs would have to expect to receive legal or equitable relief of sufficient value to compensate them for the expense and risk of litigation.

Private individuals have much weaker economic incentives for engaging in public interest litigation. Because public interest litigation seeks to advance interests shared by broad segments of the public (e.g., environmental protection, civil rights, consumer protection), the benefits of such litigation are widely scattered rather than concentrated in an individual party. Thus, the prospective benefit to an individual party generally will not be sufficient to make it worthwhile for him to bear the costs of public interest litigation. For this reason, public interest law is often defined as involving efforts to provide legal representation to previously underrepresented groups or interests. While such a definition could also embrace conventional private litigation undertaken on behalf of persons unable to afford legal fees, the focus here is on litigation that ordinarily would not be undertaken because it generates predominantly external benefits.

The formation of public interest groups funded by voluntary contributions is one means for overcoming some of the disincentives facing the public interest litigant. While voluntary contributions are the principal source of funding for public interest litigation, they alone cannot produce an economically optimal level of funding because of transaction costs and the inability of public interest groups to collect from all beneficiaries of the litigation. Transaction costs include the often significant expenses involved in identifying and contacting potential donors. These transaction costs and the problem of "free riders" (individual beneficiaries of public interest litigation who enjoy its benefits regardless of whether they make a contribution) ensure that voluntary contributions alone will be inadequate to fund an efficient level of public interest litigation.

B. Fee Shifting as an Incentive to Public Interest Litigation

The importance of private rights of action as a means of implementing and enforcing public policy has long been recognized in a wide variety of areas. Where
vate plaintiffs cannot ordinarily be expected to bring such actions on their own. Fee shifting is designed to remove some of the disincentives facing public interest litigants, thus increasing access to the courts for groups who otherwise might be unrepresented or underrepresented. Use of a modified one-way fee shifting in favor of public interest litigants is expected to achieve these goals.

Impact of Proposed Restrictions on Public Interest Litigation

The proposed restrictions on attorney fee awards would significantly reduce the impact of fee shifting statutes in overcoming disincentives to public interest litigation. Proposals imposing caps on hourly rates used in calculating fee awards, eliminating the use of multipliers, and reducing fee awards to public interest groups because of below-market salaries paid to their staff attorneys tend to defeat the very purpose of fee shifting statutes—overcoming disincentives to public interest litigation. Advocates of proposals prohibiting multipliers and imposing a fee cap argue that such measures will only restrict fee awards to levels commensurate with the salaries of government lawyers. This argument, however, ignores the fact that government lawyers are paid whether or not they prevail and are compensated for all their time, whether or not it is spent on activities for which attorney fees are recoverable. Attorneys handling public interest cases bear the risk of ultimately not prevailing in the litigation and thus not recovering fees. Moreover, interim fees are rarely paid to public interest attorneys, who may have to wait years before recovering any fees. A prohibition of multipliers reduces the incentive for public interest litigants to bring the risky or complex cases which often produce the greatest external benefits by developing new areas of law.

Proponents of restrictions on fee awards maintain that such prohibitions provide windfalls that unfairly subsidize public interest groups who pay low salaries to their staff attorneys. It is rare, however, that public interest groups ever recover their full litigation expenses from fee awards. Moreover, public interest lawyers spend much of their time on activities that do not generate eligibility for fee awards, such as participation in administrative proceedings prior to litigation. Even in the rare instance in which a fee award to a public interest organization exceeds the organization’s actual litigation expenses, the award can only be used to fund further public interest activity.

Therefore, rather than providing private windfalls, fee awards at market rates simply permit public interest organizations to provide greater services than awards computed on a cost-plus basis. Court-awarded fees are a useful supplement to the budgets of public interest groups, but not a massive subsidy of their activities.

Conclusion

By authorizing fee shifting in favor of public interest litigants, Congress intended to reduce economic disincentives discouraging public interest litigation in order to further the enforcement of important public policies. The availability of fee awards encourages meritorious public interest litigation that furthers private enforcement of important public policies.