

## FOREWORD

# FINANCING THE COST OF ENFORCING LEGAL RIGHTS

JOHN V. TUNNEY†

In recent years, both the nature and number of rights given to the average citizen have changed. We have more laws; they are more complex; they deal less with traditional property disputes and more with the environment, job safety, medical care, consumer protection, retirement, disability, and other aspects of our personal lives. Because these new rights intimately affect all Americans, unlike the traditional property rights which affected only property owners, the need for representation of all citizens has increased.

While the need for representation has increased with regard to all the citizenry, the ability of an individual to meet the rising price tag on legal services is not as widely shared. The end result of this dichotomy is that there are many important rights of citizens theoretically guaranteed by law which go unenforced and unvindicated because of the high cost of legal representation. Strains have been placed on all the institutions in our society because Congress and the courts have too often focused only on defining substantive rights and have not been concerned with financing and lowering the cost of, or creating other incentives for, their enforcement.

There are many ways to reduce the cost of legal services. Increasing competition among lawyers by liberalizing the restrictions on advertising and solicitation, introducing specialization and mechanization into legal work, and deploying paralegal personnel are but a few. "Self-help" mechanisms such as small claims court and arbitration, subjects of a bill I have introduced,<sup>1</sup> are still others. But there can be no doubt that the cost of litigation will remain an insurmountable obstacle to many Americans in their attempts to enforce important statutory and Constitutional rights. Methods need to be developed to shift or spread the cost of litigation if these rights are to be vindicated.

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† United States Senator from California; Chairman of the Subcommittee on Representation of Citizen Interests, Senate Committee on the Judiciary.

<sup>1</sup> S. 2928, 93d Cong., 2d Sess. (1974) (introduced by Senators Magnuson, Moss, Tunney and Kennedy); see 120 CONG. REC. 855-59 (daily ed. Jan. 31, 1974).

In the United States, unlike most other judicial systems in the world, win or lose, litigants ordinarily bear the expense of their own attorneys. Some devices do exist to shift part of that cost to others. Business litigants may share the cost of their litigation with the general taxpayer by deducting attorney's fees from taxable income as an ordinary and necessary business expense. The poor may also shift their attorney's fees to the general taxpayer by using, where available, OEO-funded Legal Services attorneys. Taxpayers also help to subsidize litigation undertaken by law firms funded through tax-exempt foundations. Three other litigation financing devices, with less governmental involvement, are membership funded organizations such as the Sierra Club, class actions which spread litigation expenses among the beneficiaries of the law suit, and group and prepaid insurance plans.<sup>2</sup> These devices are uncertain, unstable, or limited in scope, and fail to involve large segments of the citizenry and the private bar. Taken together, they fail to deal adequately with the need for legal services.

Another promising method of financing access to courts is through attorney's fee awards to be paid by a party to the litigation, or by someone else within the court's jurisdiction. Such awards are often called "fee-shifting." The Comment which follows explores whether the American Rule preventing such fee shifting promotes the most effective enforcement of important substantive rights and the most equitable distribution of the costs of litigation.

Greater congressional attention to the development of fee shifting is warranted. During the Johnson years with the passage of the Civil Rights Act of 1964, Congress stimulated this development. Now twenty-nine federal statutes authorize courts to shift fees. The courts have begun to interpret this authorization broadly to encourage individuals to vindicate rights.<sup>3</sup> But congressional inattention to financing the enforcement of rights in other areas has left the courts to grapple with their authority to use fee shifting absent explicit statutory authorization.

In my view, congressional silence in these matters is merely a by-product of the legislative process and not a conscious signal to the courts of any kind. The question of attorney's fees often fails

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<sup>2</sup> With the passage of Pub. L. No. 93-95 (Aug. 15, 1973) amending § 302(c) of the Labor Management Relations Act of 1947 (Taft Hartley Act), 29 U.S.C. § 186(c) (1970), to make group and prepaid legal insurance programs a subject of collective bargaining, these plans are expected to proliferate as did health insurance programs.

<sup>3</sup> See, e.g., *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968).

to surface during a legislative debate because the focus of concern is on other issues in the legislation. Recognizing this, the courts have nearly unanimously concluded that congressional silence does not bar fee shifting.<sup>4</sup>

Consistent with the notion that federal courts have, implicit in their jurisdictional grants, power to fashion remedies "necessary to effectuate the Congressional policy underpinning the substantive provisions of [a] statute"<sup>5</sup> the notion of fee shifting proliferated without specific congressional authorization. This has been done in areas ranging from buying a home<sup>6</sup> to privacy<sup>7</sup> to union elections,<sup>8</sup> and to many other areas affecting the personal lives of Americans. This judicial activity has raised several issues which suggest the need for further legislative initiatives.

On October 4 and 5, 1973, the Senate Judiciary Subcommittee on Representation of Citizen Interests, of which I am chairman, held hearings on fee shifting as part of a series of hearings on legal fees. While these hearings showed the great promise of this device for increasing citizen redress, and rectifying an imbalance in our adversary system, they also highlighted the need for legislative reform to ensure uniformity and consistency in application. The Subcommittee is presently exploring comprehensive legislative proposals to determine when fees should be awarded, how large the award should be, who should be eligible for an award, and who should have immunity from the imposition of an award.

The ensuing discussion will consider four aspects of the attorney's fees problem that are of special importance today: the plight of the private litigant with a private claim, the award of attorney's fees in "public interest" litigation, the award of fees to Community Legal Services organizations, and the size of the fee awarded. These areas were chosen because they encompass the two most pressing problems of equalizing court access: the situation of the poor or middle class litigant with a valid claim, but unable to pay an attorney's fee directly; and the situation of the private citizen wishing to litigate claims that involve issues of public policy with broad societal ramifications, who is unable to obtain adequate representation. In each of these areas the in-

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<sup>4</sup> See, e.g., *Hall v. Cole*, 412 U.S. 1 (1973).

<sup>5</sup> *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 402 (1971) (Harlan, J., concurring) (citing *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964)); see *Stanford Daily v. Zurcher*, 366 F. Supp. 18 (1973).

<sup>6</sup> See *Lee v. Southern Home Sites Corp.*, 444 F.2d 143 (5th Cir. 1971).

<sup>7</sup> See *Stanford Daily v. Zurcher*, 366 F. Supp. 18 (1973).

<sup>8</sup> See *Hall v. Cole*, 412 U.S. 1 (1973).

quiry centers on the courts' handling of the attorney's fees problem in the past, and the future ability of the fee award to enhance access to the courts. Often suggestions for legislative reforms are made. Some reforms I agree with; others I do not. All are worthy of consideration.

As demonstrated by Subcommittee investigations to date, economics is the key to representation both in terms of what consumers can afford to pay and what lawyers can afford to accept. Fee shifting holds out great promise to both providers and consumers of legal services as a device for financing the enforcement of legal rights and closing the gap in the representation of citizen interests.