Interim Awards of Attorneys' Fees Under The Civil Rights Attorney's Fees Awards Act of 1976

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The Civil Rights Attorney's Fees Awards Act of 1976 [CRAFAA][1] provides that a prevailing party in a civil rights case may obtain an award of attorneys' fees.[2] Congress intended this Act to encourage plaintiffs to litigate meritorious claims under civil rights statutes which depend upon private action for enforcement.[3]

Traditionally, courts award attorneys' fees, if available, on a "final order," a term usually interpreted to mean that the decision is no longer appealable.[4] When a case is no longer appealable, it is a simple matter for the courts to determine the victor and to determine the amount of his attorneys' fees with certainty and finality. Nevertheless, what is simple is not necessarily fair.

Civil rights ligitation is often lengthy and complex.[5] Once a determination is made that civil rights were violated, the sometimes long process of fashioning relief, such as desegregation plans[6] and reformation measures[7] has only begun.[8] Plaintiffs will not be encouraged to litigate these questions of important rights if attorneys' fees awards must remain pending until all issues, substantive and remedial, are resolved.[9] Consequently, such delays in awarding attorneys' fees thwart the purpose of the CRAFAA.

Although there is no explicit authorization for interim awards in

1. 42 U.S.C. § 1988 (1976) (quoted in text at note 132 *infra*).
2. *Id.*
3. S. REP. No. 1011, 94th Cong., 2d Sess. 2-3 *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 5908, 5909-10; H.R. REP. No. 1558, 94th Cong., 2d Sess. 1 (1976).
4. BLACK'S LAW DICTIONARY 779 (3rd ed. 1933); Bradley v. School Bd., 416 U.S. 696, 711 n.14, 722 n.28 (1974). *See, e.g.*, Keyes v. School Dist. No. 1, 439 F. Supp. 393, 397 (D. Colo. 1977).
5. *See, e.g.*, Bradley v. School Bd., 416 U.S. 696, 699-702 (1974); Keyes v. School Dist. No. 1, 413 U.S. 189, 191-94 (1973); Brown v. Board of Educ., 347 U.S. 483, 486-88 (1954).
6. *E.g.*, Bradley v. School Bd., 416 U.S. 696, 699-702 (1974); Keyes v. School Dist. No. 1, 439 F. Supp. 393, 397 (D. Colo. 1977).
7. *E.g.*, Souza v. Southworth, 564 F.2d 609, 610 (1st Cir. 1977); Finney v. Hutto, 548 F.2d 740, 741 (8th Cir. 1977).
8. Finney v. Hutto, 548 F.2d 740, 742 (8th Cir. 1977).
9. Bradley v. School Bd., 416 U.S. 696, 723 (1974).

the CRAFAA,[10] the legislative history of the Act indicates Congress' implicit authorization of interim awards.[11] Therefore, courts should interpret the CRAFAA to permit such awards in order to carry out congressional intent.

This Note will examine the applicability of interim awards under the CRAFAA. First, the development of attorneys' fees awards will be discussed with special emphasis on the United States Supreme Court decision in *Alyeska Pipeline Service Co. v. Wilderness Society*[12] which reversed a trend towards liberalizing attorneys' fees. Next, the CRAFAA will be analyzed with a focus on the apparent congressional intent evidenced by enactment of the Act. An examination of the appropriateness of granting interim awards to fully implement the congressional intent behind the CRAFAA will follow. Finally, some guidelines for the exercise of judicial discretion in making interim awards will be suggested.

THE AMERICAN RULE IN ATTORNEYS' FEES AWARDS

In many countries, courts routinely award attorneys' fees to the prevailing party in civil lawsuits.[13] In the United States, however, such "fee shifting" has been the exception rather than the rule.[14] The American rule dictates that the prevailing party is ordinarily not entitled to recover attorneys' fees.[15] Although an award of the cost of litigation is often made to the winning party,[16] attorneys' fees are generally not included in such costs absent certain exceptions that will be discussed later.[17]

Despite a long English tradition of fee shifting,[18] the American

10. *See* 42 U.S.C. § 1988 (1976).

11. S. REP. No. 1101, *supra* note 3, at 5; H R. REP. No. 1558, *supra* note 3, at 8.

12. 421 U.S. 240 (1975).

13. Comment, *Court Awarded Attorney's Fees and Equal Access to the Courts*, 122 U. PA. L. REV. 636, 639 (1974). Countries which routinely award attorneys' fees to prevailing parties include Great Britain, Germany, South Africa, Switzerland, France, and Hungary. *Id.* at 637 n.3, 639. Nevertheless, this rule of fee shifting is subject to some qualifications. In England, the court has discretion to refuse to award fees to the winning party. Mause, *Winner Takes All: A Re-Examination of the Indemnity System*, 55 IOWA L. REV. 26, 46 (1969). In Sweden, the prevailing party's counsel fees are generally paid by the losing party unless the loser was subject to surprise regarding certain facts that eventually determined the outcome of the litigation. *Id.*

14. *See, e.g.*, Alyeska Pipeline Service Co. v Wilderness Soc'y, 421 U.S. 240, 247 (1975); Hall v. Cole, 412 U.S. 1, 4 (1973); Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 717 (1967).

15. *See* D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES 194 (1973); Falcon, *Award of Attorneys' Fees in Civil Rights and Constitutional Litigation*, 33 MD. L. REV. 379, 379 (1973); Note, *The Civil Rights Attorneys' Fees Awards Act of 1976*, 34 WASH. & LEE L. REV. 205, 205 (1977); Comment, *Attorney Fee Awards and the Public-Interest Litigant*, 65 KY. L.J. 562, 564 (1976).

16. Kuenzel, *The Attorney's Fee: Why Not a Cost of Litigation*, 49 IOWA L. REV. 75, 75 (1963).

17. See text & notes 57-80 *infra*.

18. *See* Comment, *supra* note 13, at 639-40; Falcon, *supra* note 15, at 380-81.

rule developed in our colonial and revolutionary period.[19] The reason for its inception is subject to dispute.[20] The legal profession was distrusted among the colonists.[21] Consequently, one theory of the rule's origin asserts that the colonists were not willing to perpetuate fee shifting because it was viewed as beneficial only to lawyers.[22] Alternatively, Professor Ehrenzweig has explained the American rule as a historical accident.[23] In 1848, the New York legislature adopted a statute that authorized attorneys' fees awards, but at fixed monetary amounts rather than more flexible terms such as percentages.[24] As costs rose, the statute was not amended so as to continue to reflect fair remuneration for legal services.[25] Eventually, the statutory amounts became meaningless and awards of attorneys' fees fell into extinction.[26]

Whatever the reason for the inception of the American rule, it was officially recognized by the United States Supreme Court in 1796 in *Arcambel v. Wiseman*.[27] The Court asserted that "[t]he general practice of the United States is in oposition [*sic*] to [the allowance of attorneys' fees] . . . and even if that practice were not strictly correct in principle, it is entitled to the respect of the court, 'till it is changed, or modified, by statute."[28] This point of view has persisted despite recent criticism calling for reform.[29]

Its proponents insist the American rule represents the optimum solution to the question of who shall bear the costs of litigation.[30] Since awards of attorneys' fees can be regarded as punitive,[31] the prospect of the burden of paying one's own attorneys' fees and those of the opponent if one loses may discourage the use of the courts to resolve controversies.[32] Consequently, the American rule purports to protect the poor

19. Comment, *supra* note 13, at 640-41.
20. *Id.*
21. *Id.*
22. *Id.* at 641. *See also* D. DOBBS, *supra* note 15, at 201; Goodhart, *Costs*, 38 YALE L.J. 849, 873 (1929).
23. Ehrenzweig, *Reimbursement of Counsel Fees and the Great Society*, 54 CAL. L. REV. 792, 798 (1966).
24. *Id.* at 799.
25. *Id.*
26. *Id.*
27. 3 U.S. (3 Dall.) 306 (1796). In this case the Court rejected the idea that a $1600 attorney's fee ought to be recoverable as a legitimate item of damage necessary to make the litigant whole. *Id.* at 306.
28. *Id.*
29. *See generally* Ehrenzweig, *supra* note 23; Kuenzel, *supra* note 16; McCormick, *Counsel Fees and Other Expenses of Litigation as an Element of Damages*, 15 MINN. L. REV. 619 (1931); Stoebuck, *Counsel Fees Included in Costs: A Logical Development*, 38 U. COLO. L. REV. 202 (1966).
30. *See generally* Satterthwaite, *Increasing Costs to be Paid by Losing Party*, 46 N.J.L.J. 133 (1923); Watson, *A Rationale of the Law of Costs*, 16 CENT. L.J. 306 (1883).
31. D. DOBBS, *supra* note 15, at 201; Falcon, *supra* note 15, at 384.
32. D. DOBBS, *supra* note 15, at 201.

litigant from being deterred from bringing a claim to court.[33] A second argument is based on the idea that the winning party is entitled only to compensatory damages resulting from the adjudicated wrongful activities.[34] Supporters of the American rule do not view attorneys' fees as being proximately caused by an activity that may lead to litigation.[35] A third justification of the American rule is derived from the idea that the outcome of a lawsuit is not a definitive statement of who was right or wrong.[36] There may be no moral culpability on the part of a losing party who has acted in good faith.[37] Coupled with this idea of nonculpability is the problem that the prevailing party may be difficult to identify.[38] For example, if the judgment is rendered against the defendant, but the damages awarded to the plaintiff are less than the amount offered by the defendant as a settlement, either party could be considered to have prevailed depending upon how one views the formal verdict.[39]

The critics of the American rule dispute the validity of these arguments.[40] First, critics have asserted that the American rule stifles rather than protects the access of the poor to the courts.[41] Under the American rule, a person who successfully litigates a claim is not made whole when attorneys' fees must be paid out of damages recovered.[42] Thus, the winning party is always the loser to the extent of his attorneys' fees.[43] Furthermore, this criticism is as true for the middle-class litigant as it is for the poor one.[44] Second, there is no reason to regard attorneys' fees as an extraordinary result of business activity.[45] The expense of litigation is a foreseeable consequence of a wrongful act,[46] and the hiring of lawyers is a foreseeable consequence of litigation.[47] Furthermore, litigation and accompanying legal fees are predictable as

33. Falcon, *supra* note 15, at 384.
34. *Id.* at 385.
35. *Id.*
36. *Id.*
37. Goodhart, *supra* note 22, at 877.
38. D. DOBBS, *supra* note 15, at 202.
39. *Id.*
For example, suppose the plaintiff wins a verdict for $10,000. On the surface, he has prevailed over the defendant. The smug look on defense counsel's face indicates otherwise: he had offered $20,000 in settlement and the plaintiff had refused, insisting upon $50,000. In a real sense the defendant has prevailed here, and he might be identified as the prevailing party if we look beyond the formal verdict.
Id.
40. *See generally* Ehrenzweig, *supra* note 23; Kuenzel, *supra* note 16; McCormick, *supra* note 29; Stoebuck, *supra* note 29.
41. D. DOBBS, *supra* note 15, at 201; Falcon, *supra* note 15, at 385-86.
42. D. DOBBS, *supra* note 15, at 201.
43. *Id.*
44. *Id.*
45. Falcon, *supra* note 15, at 386.
46. *Id.*
47. D. DOBBS, *supra* note 15, at 202.

costs a person must pay to protect his property or money.[48] Third, a critic of the American rule categorically denies that verdicts in lawsuits are no indication of merits.[49] Although the legal system is not perfect, it may not be conceded that the courts are more often wrong than right.[50] Consequently, the effect of the American rule is to burden a majority of innocent parties whose fees and costs were caused by wrongdoers, so that a few innocents will be spared additional costs when they lose.[51] Finally, American rule critics assert that the likelihood of an award of attorneys' fees will promote the exercise of discretion by both plaintiffs and defendants.[52] An increase in out-of-court settlements and a reduction of court congestion could conceivably be a pleasant side effect of eliminating the American rule.[53] This prospect is reasonable since the decision to litigate will be made by the lawyers whose fees will be based upon success.[54]

Despite criticism, the American rule has survived although there has been some modification in its actual application. For instance, private parties may waive the effect of the American rule by a valid contract which provides for such fees.[55] Specific statutory authorization of attorneys' fees awards will also by-pass the restrictions of the American rule.[56]

Additionally, over the years, courts have created certain exceptions to the American rule as part of the exercise of their equitable powers.[57]

48. *Id.* at 201.
49. Falcon, *supra* note 15, at 388.
50. *See id.*
51. *Id.* In this regard, Professor Goodhart suggests that if justice were indeed so much a matter of luck it might be advisable to save the expensive court process, since it would be "cheaper, and certainly less dilatory, to spin a coin." Goodhart, *supra* note 22, at 876-78.
52. D. DOBBS, *supra* note 15, at 202; Falcon, *supra* note 15, at 389-90.
53. D. DOBBS, *supra* note 15, at 202.
54. *Id.*
55. *Id.* at 194; *accord*, Exchange Bank v. Appalachian Land & Lumber Co., 128 N.C. 193, 195-96, 38 S.E. 813, 813 (1901) (enforced a provision in a promissory note by which the defendant agreed to pay 10% of any attorneys' fees necessary for collection of the note); Bosko v. Pitts & Still, Inc., 75 Wash. 2d 856, 868, 454 P.2d 229, 236 (1969) (enforced a provision in an insurance contract to pay all costs taxed against the insured in the defense of a claim which included attorneys' fees). *See also* Levanthal v. Krensky, 325 Mass. 336, 340-41, 90 N.E.2d 545, 547-48 (1950).
56. D. DOBBS, *supra* note 15, at 194. *See, e.g.*, ARIZ. REV. STAT. ANN. § 12-341.01(A) (1978) (providing that "[i]n any contested action arising out of contract, express or implied, the court may award the successful party reasonable attorney's fees."); ALASKA STAT. § 09.60.010 (1962) (providing that "[e]xcept as otherwise provided by statute, the supreme court shall determine by rule or order what costs, if any, including attorney fees, shall be allowed the prevailing party in any case."). *See also* Freedom of Information Act, 5 U.S.C. § 552(a)(4)(E)(1976); Packers and Stockyards Act § 309(f), 7 U.S.C. § 210(f) (1976); Truth in Lending Act § 130, 15 U.S.C. § 1640(a)(3) (1976); Education Amendments Act of 1972 § 718, 20 U.S.C. § 1617 (1976); Fair Labor Standards Act § 16(b), 29 U.S.C. § 216(b) (1976); Federal Water Pollution Control Act § 505(d), 33 U.S.C. § 1365(d) (1976); Clean Air Act § 304(d), 42 U.S.C. § 1857h-2(d) (1976); Civil Rights Act of 1964, tit. II § 204(b), *id.* § 2000a-3(b); Civil Rights Act of 1964, tit. VII, § 706(k), *id.* § 2000e-5(k); Fair Housing Act of 1968 § 812(c), *id.* § 3612(c); FED. R. CIV. P. 37(a), (c).
57. *See, e.g.*, Hall v. Cole, 412 U.S. 1, 5-6 (1973); Mills v. Electric Auto-Lite Co., 396 U.S. 375, 396 (1970); Sprague v. Ticonic Nat'l Bank, 307 U.S. 161, 168 (1939). *See generally* D. DOBBS,

These exceptions have been designated as the bad faith, common fund-benefit, and private attorney general exceptions. A discussion of these exceptions follows.

Exceptions to the American Rule

The bad faith exception shifts the fees to the losing party who acted in a "wanton and vexatious"[58] manner or in "unreasonable, obdurate obstinacy."[59] Thus, an award of attorneys' fees under this exception may be viewed as a punitive measure.[60] For example, in *Bradley v. School Board*,[61] the defendant school board's "obstinate non-compliance with the law or the use of the judicial process for purposes of harassment or delay in affording rights clearly owed"[62] were found to be actions in bad faith, thus justifying an award of attorneys' fees.[63]

The common fund exception spreads the cost of attorneys' fees among those who benefit from the litigation.[64] The rationale underlying this exception focuses upon the policy against unjust enrichment.[65] "To allow 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."[66] An award under the common fund exception is appropriate when representative litigation creates, increases, or protects a common fund from which all members of the class will benefit.[67] For example, in *Sprague v. Ticonic National Bank*[68] petitioner Sprague delivered to the Ticonic National Bank funds which were to be held in trust for her and secured by bonds purchased by the bank.[69] Subsequently, the bank's assets and liabilities were placed in receivership.[70] Sprague successfully brought suit to im-

supra note 15, at 197-200; Falcon, *supra* note 15, at 399-407; Note, *supra* note 15, at 208-14; Comment, *supra* note 13, at 660-66.

58. Vaughan v. Atkinson, 369 U.S. 527, 530 (1962); 6 J. MOORE, FEDERAL PRACTICE ¶ 54.77[2], at 1709 (2d ed. 1972).

59. Bradley v. School Bd., 416 U S. 696, 707 (1974).

60. *See* Hall v. Cole, 412 U.S. 1, 5 (1972).

61. 53 F.R.D. 28 (1971), *aff'd on other grounds*, 416 U.S. 696 (1974).

62. *Id.* at 38.

63. *Id.* at 43.

64. *E.g.*, Hall v. Cole, 412 U.S. 1, 5-6 (1973); Mills v. Electric Auto-Lite Co., 396 U.S. 375, 393-94 (1970); Sprague v. Ticonic Nat'l Bank, 307 U.S. 161, 166-67 (1939); Central R.R. & Banking v. Pettus, 113 U.S. 116, 124 (1885). It should be noted that awards under the common fund-benefit exception are not examples of fee shifting to the losing party but are a device to spread the cost among the beneficiaries of a decision. *See* Mills v. Electric Auto-Lite Co., 396 U.S. at 396-97. For discussion of the common fund-benefit exception, see Falcon, *supra* note 15, at 402-07; Walker, *Court Awarded Attorney's Fees Under the Private Attorney General Concept: A Defense Perspective*, 23 U. KAN. L. REV. 653, 656-57 (1975).

65. Trustees v. Greenough, 105 U.S. 527, 532 (1881); Falcon, *supra* note 15, at 402.

66. Hall v. Cole, 412 U.S. 1, 6 (1973).

67. Sprague v. Ticonic Nat'l Bank, 307 U.S. 161, 167 (1939).

68. 307 U.S. 161 (1939).

69. *Id.* at 162.

70. *Id.*

press a lien upon the bank's funds for her trust deposit.[71]

Although Sprague did not claim to be the representative of a class, the establishment of her claim necessarily established by *stare decisis* the claims of fourteen other trusts pertaining to the bank's bonds.[72] Consequently, the Court held that the bonds were a common fund out of which Sprague's attorneys' fees should be paid before settlement of any of the claims.[73] In this manner, the cost of the litigation was spread among those who benefitted from the common fund created.

In *Mills v. Electric Auto-Lite Co.*,[74] the common fund exception was applied where the plaintiff's litigation yielded for others a non-pecuniary benefit—the protection of a legal right.[75] In this context the rule has been called the common benefit exception.[76] *Mills* was a shareholder suit in which the corporation's use of misleading proxy statements was challenged as a violation of the Securities Exchange Act of 1934.[77] Even though no common fund was created by the success of the plaintiff,[78] the Court held that the plaintiff did confer a substantial benefit upon the shareholders of the corporation by protecting their statutory right to an informed corporate election.[79] The cost of the litigation was assessed against all of the shareholders by an attorneys' fees award against the corporation.[80]

In addition to these judicially created exceptions to the American rule, legislatures have given courts statutory authority to award attorneys' fees.[81] These statutory provisions are far from uniform. The circumstances required to justify an award of attorneys' fees vary from statute to statute.[82] Judicial interpretation of attorneys' fees awards statutes has created another equitable exception to the American rule—the private attorney general theory.[83]

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71. *Id.*
72. *Id.* at 166.
73. *Id.* at 167, 169.
74. 396 U.S. 375 (1970).
75. *Id.* at 392.
76. *See* Hall v. Cole, 412 U.S. 1, 5-7 (1973); Lee v. Southern Home Sites Corp., 444 F.2d 143, 145 (5th Cir. 1971).
77. 396 U.S. at 377-78.
78. *Id.* at 392.
79. *Id.* at 396.
80. *Id.* at 395.
81. See discussion in note 56 *supra*.
82. Federal statutes authorize awards under three main categories: 1) Mandatory award of reasonable fees to prevailing plaintiff, Fair Labor Standards Act § 16(b), 29 U.S.C § 216(b) (1976); 2) discretionary award of reasonable fees to a prevailing party, Civil Rights Act of 1964 tit. II § 204(b), 42 U.S.C. § 2000a-3(b) (1976); and 3) discretionary award of reasonable fees to either party, Clean Air Act § 304(d), 42 U.S.C. § 1857h-2(d) (1976).

Alternatively, a statute may proscribe the awarding of attorneys' fees. *See* ARIZ. REV. STAT. ANN. § 33-1315(A)(2) (1974) (a rental agreement shall not provide that the tenant agrees to pay the landlord's attorneys' fees, although it may provide that attorneys' fees may be awarded to the prevailing party in the event of a court action).
83. See text & notes 94-113 *infra*.

Newman v. Piggie Park Enterprises, Inc.[84] is the source of the private attorney general theory and is the landmark case in interpretation of attorneys' fees provisions under the Civil Rights Act of 1964.[85] In *Newman*, a class action was instituted seeking to enjoin racial discrimination in several drive-in restaurants.[86] The United States Supreme Court upheld the injunction and remanded the case for an award of reasonable attorneys' fees.[87] The Court interpreted the statutory phrase "the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee"[88] to mean that a prevailing plaintiff "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust."[89] The Court intended this interpretation to apply to situations like that in *Newman* for which there is statutory authorization for an attorney's fee award but where there is no authorization for monetary damages out of which attorneys' fees could be paid.[90]

The *Newman* Court's rationale was that this interpretation was necessary to implement the congressional intent that private litigation be the primary method to enforce the antidiscrimination law.[91] The Court further noted that if successful plaintiffs were required to privately finance their own attorneys, few people could afford "to advance the public interest by invoking the injunctive powers of the federal courts."[92] Thus, the plaintiff who brought such an action was characterized as a "private attorney general" who vindicated "a policy that Congress considered of the highest priority."[93]

As a result of *Newman*, the private attorney general theory was widely applied between 1968 and 1975 to justify attorneys' fees awards.[94] In *Newman* the private attorney general concept was created to explain the rationale behind an interpretation of a particular attor-

84. 390 U.S. 400 (1968) (per curiam).

85. 42 U.S.C. § 2000a-3(a), (b) provides for injunctive relief for an aggrieved party against any person who has engaged or may be reasonably believed about to engage in any act or practice prohibited by 42 U.S.C. § 2000a-2. The statute further provides that "the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee." *Id.* § 2000a-3(b).

86. 390 U.S. at 401.

87. *Id.* at 402.

88. 42 U.S.C. § 2000a-3(b) (1976). See discussion note 85 *supra*.

89. 390 U.S. at 402.

90. *Id.* In *Newman* the only relief available to the plaintiff was an injunction against the discriminatory practices at the respondents' restaurants. *Id.* at 400.

91. *Id.* at 402.

92. *Id.*

93. *Id.*

94. *See generally* Comment, *The Discretionary Award of Attorney's Fees by the Federal Courts: Selective Deviation from the No-Fee Rule and the Brief Life of the Private Attorney General Doctrine*, 36 OHIO ST. L.J. 588, 611-33 (1975); Comment, *supra* note 13 at 655-70; Note, *Awarding Attorneys' Fees to the "Private Attorney General:" Judicial Green Light to Private Litigation in the Public Interest*, 24 HASTINGS L.J. 733, 742-70 (1973).

neys' fees statute.[95] Nevertheless, *Newman* was subsequently cited by lower courts as justification for an award of attorneys' fees even where there was no statutory authorization.[96]

Thus, a new equitable power evolved as a hybrid of *Newman* and *Mills*.[97] *Newman* spawned the theory that vindication of congressional policy was sufficient grounds for equitable fee shifting.[98] Under this theory, the availability of attorneys' fees awards could be attributed to almost any federal statute since enactment alone could indicate a strong congressional policy. *Mills*, decided after *Newman*, expressed the common benefit theory, thus shifting the fee burden to the corporate defendant as a means of spreading the cost of litigation among those who would benefit from the litigation.[99] Nevertheless, this explanation may be regarded realistically as somewhat tenuous. In *Mills* the supposed beneficiaries were the stockholders of the corporation sued.[100] Although a majority of the stockholders did not feel their interests were served by the litigation,[101] nevertheless, the Court held that they were the beneficiaries of the plaintiff's suit to uphold the stockholders' right to fair and informed corporate sufferage.[102] It has been proposed that rather than shifting the fee burden to the class benefitted, *Mills* represents a fee shifting to the defendant as enforcement of the governmental interest in fair and informed corporate sufferage.[103] Regardless, *Newman* and *Mills* together formed the basis of the private attorney general theory exception.

An example of this new equitable exception may be seen in *Lee v. Southern Home Sites Co.*[104] In *Lee* a suit was brought charging racial discrimination in the sale of real property.[105] The suit was brought

95. 390 U.S. at 402.

96. *E.g.*, Brandenburger v. Thompson, 494 F.2d 885, 888-89 (9th Cir. 1974); Cooper v. Allen, 467 F.2d 836, 841 (5th Cir. 1972); Knight v. Auciello, 453 F.2d 852, 853 (1st Cir. 1972).

97. *See* Note, *Awarding Attorney and Expert Witness Fees in Environmental Litigation*, 58 CORNELL L. REV. 1222, 1237 (1973); Comment, *supra* note 94, at 617.

98. Comment, *supra* note 94, at 618.

99. *See* discussion notes 74-80 *supra*. The precise wording of the *Mills* court rationalization of the fees award was:

> To award attorneys' fees in such a suit to a plaintiff who has succeeded in establishing a cause of action is not to saddle the unsuccessful party with the expenses but to impose them on the class that has benefited from them and that would have had to pay them had it brought the suit.

396 U.S. at 396-97.

100. 396 U.S. at 396.

101. Comment, *The Allocation of Attorney's Fees After Mills v. Electric Auto-Lite Co.*, 38 U. CHI. L. REV. 316, 333 (1971). This commentator contends that a majority of the stockholders were opposed to the enforcement of the Securities Exchange Act regulations and the litigation involved in *Mills*. *Id.*

102. 396 U.S. at 396. *See* Comment, *supra* note 101, at 333.

103. *See* 396 U.S. at 377. *See also* Comment, *supra* note 94, at 618.

104. 444 F.2d 143, 148 (5th Cir. 1971).

105. *Id.* at 143-44. Southern Home Sites Corp. operated a mail campaign to develop beach property in Mississippi. *Id.* at 143. The promotional letter stated that for the recipient to take advantage of the offer he "must be a member of the white race." *Id.* at 144. Lee, a Black man,

under 42 U.S.C. § 1982 which does not authorize an award of attorneys' fees.[106] Although an award of fees on the basis of the bad faith of the defendant was available, Judge Wisdom, writing for the court, chose to base his decision on a new equitable exception.[107] Aware of the importance of the rights protected by section 1982 and the dependence upon private enforcement of those rights,[108] he held "that attorney's fees are part of the effective remedy a court should fashion to carry out the congressional policy embodied" in the statute.[109]

Other lower courts began to recognize this justification for the private attorney general exception to the "no-fees" rule.[110] The factors considered by the courts in determining whether to invoke this exception have varied somewhat.[111] These factors can be gathered under two general concepts: 1) Whether the successful plaintiff had promoted the public interest; and 2) whether fee shifting was a fair means of encouraging socially beneficial legal action.[112] The private attorney general exception was considered by some to be a boon to public interest litigation.[113]

In *Alyeska Pipeline Service Co. v. Wilderness Society*,[114] however, the United States Supreme Court put an abrupt end to this expansion of *Newman* into a judicially fashioned equitable power.[115] In *Alyeska*,

received the letter and attempted to purchase the property offered. Southern Home Sites refused to sell to him. *Id.*

106. "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property." 42 U.S.C. § 1982 (1978).

107. 444 F.2d at 144. The court cited *Mills* as authority for federal courts to award attorneys' fees when this type of remedy effectuates congressional policy. *Id. Newman* was cited for factors to be used in determining what constitutes congressional policy. *Id.* at 147.

108. *Id.*

109. *Id.* at 144.

110. *See, e.g.*, Wilderness Soc'y v. Morton, 495 F.2d 1026, 1036 (D.C. Cir 1974) (en banc), *rev'd sub nom.* Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240 (1975) (environmental group suing to bar construction of the Alaska pipeline under NEPA); Cooper v. Allen, 467 F.2d 836, 841 (5th Cir. 1972) (denial of equal rights under the law under 42 U.S.C. § 1981); Knight v. Auciello, 453 F.2d 852, 853 (1st Cir. 1972) (racial discrimination in a rental agreement under 42 U.S.C. § 1982); Sims v. Amos, 340 F. Supp. 691, 694-95 (M.D. Ala. 1972), *aff'd*, 409 U.S. 942 (1972) (malapportionment case under 42 U.S.C. § 1983).

111. The various factors identified by the courts have been: 1) The strength of the congressional policy, *see, e.g.*, Lee v. Southern Home Sites, Corp., 444 F.2d 143, 146-47 (5th Cir. 1971); 2) widespread social benefit, *see, e.g.*, Wyatt v. Stickney, 344 F. Supp. 387, 409 (M.D. Ala. 1972); 3) benefit to a particular class, *see, e.g.*, Brandenburger v. Thompson, 494 F.2d 885, 888 (9th Cir. 1974); 4) necessity of private enforcement, *see, e.g.*, Stanford Daily v. Zurcher, 366 F. Supp. 18, 24 (N.D. Cal. 1973), *aff'd*, 550 F.2d 464 (9th Cir 1977), *rev'd on other grounds*, 436 U.S. 547 (1978); 5) unavailability of monetary damages, *see, e.g.*, Sims v. Amos, 340 F. Supp. 691, 695 (M.D. Ala. 1972), *aff'd*, 409 U.S 942 (1972); 6) obstacles facing private litigants, *see, e.g.*, Skehan v. Board of Trustees, 501 F.2d 31, 44 (3rd Cir. 1974). *See* Comment, *supra* note 94, at 628.

112. Comment, *supra* note 94, at 628.

113. *See* Derfner, *One Giant Step: The Civil Rights Attorney's Fees Awards Act of 1976*, 21 ST. LOUIS U.L.J. 441, 444-45 (1977); Note, *supra* note 94, at 769-70; Comment, *supra* note 15, at 566-67.

114. 421 U.S. 240 (1975).

115. *Id.* at 263.

an environmental group sued for an injunction against the construction of the trans-Alaska pipeline.[116] The court of appeals granted the injunction[117] and awarded attorneys' fees to the plaintiff because it had acted as a private attorney general "to vindicate important statutory rights of all citizens."[118] The United States Supreme Court rejected this analysis and reversed the award of attorneys' fees.[119] The Court held that the "circumstances under which attorneys' fees are to be awarded and the range of discretion of the courts in making those awards are matters for Congress to determine."[120] In this decision, the Court recognized that Congress has provided for fee shifting under certain statutes to protect certain rights.[121] In *Alyeska*, however, there was no applicable statute that authorized an award of attorneys' fees.[122] Furthermore, the circumstances did not warrant a fees award based on either the bad faith or common fund-benefit exceptions to the American rule.[123] Since Congress chose not to encourage the prospective private attorney general by a statutory fees award provision, the Court concluded that the congressional intent must be that no fee awards were intended.[124] Consequently, courts cannot, according to the *Alyeska* decision award fees under the guise of enforcing congressional intent without express statutory authorization.[125]

In summary, after *Alyeska* the courts retain the power to award attorneys' fees under the bad faith and common fund-benefit exceptions,[126] but if neither of these exceptions apply, attorneys' fees can be awarded only under express statutory authority.[127]

THE CIVIL RIGHTS ATTORNEY'S FEES AWARDS ACT OF 1976

Public interest lawyers were distressed by *Alyeska* because attor-

116. *Id.* at 241-46. This suit was based upon violations of the Mineral Leasing Act of 1920 and noncompliance with the National Environmental Policy Act of 1969. *Id.* at 242-43.

117. *Id.* at 244-45. This result, however, was subsequently mooted by special congressional legislation permitting Alyeska to proceed with the pipeline construction. *Id.* at 245. That legislation was the Trans-Alaska Pipeline Authorization Act, 43 U.S.C. §§ 1651-1655 (1976).

118. 421 U.S. at 245 (citing Wilderness Soc'y v. Morton, 495 F.2d 1026 (D.C. Cir. 1974) (en banc)).

119. *Id.* at 269-70.

120. *Id.* at 262. Essentially this decision marked a return to Arcambel v. Wiseman, 3 U.S. (3 Dall.) 306 (1796) in which the Supreme Court recognized the American rule against fee shifting. *See* text & notes 27-28 *supra*.

121. 421 U.S. at 259.

122. *Id.* at 245.

123. *Id.*

124. *Id.* at 260.

125. *Id.* at 263.

126. *Id.* at 257-59.

127. For discussions of *Alyeska*, see Note, *A Giant Step Backwards: Alyeska Pipeline Service Co. v. Wilderness Society and Its Effect on Public Interest Litigation*, 35 MD. L. REV. 675 (1976); Note, *Attorney's Fees—Rejection of the Private Attorney General Exception*, 50 TUL. L. REV. 161 (1975); 6 CUM. L. REV. 481 (1975); 4 FORDHAM URBAN L.J. 211 (1975).

neys' fees awards under the private attorney general theory had promised to be a source of funding for public interest litigation.[128] The congressional response was also critical of *Alyeska*.[129] Representative Sieberling deplored the inhibiting effect *Alyeska* would have on public interest litigation since courts were forbidden to make awards of attorneys' fees without statutory authorization.[130]

In response to *Alyeska*, the Congress passed the Civil Rights Attorney's Fees Awards Act of 1976.[131] Included in the Act is a provision stating:

> In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, . . . or in any civil action or proceeding by or on behalf of the United States of America, to enforce, or charging a violation of, . . . title VI of the Civil Rights Act of 1964, *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.*[132]

The intent of Congress in CRAFAA was to counteract, at least in part, the detrimental effects of *Alyeska* on public interest litigation.[133] The Act authorizes awards of reasonable attorneys' fees at the court's discretion in virtually all areas of civil rights litigation.[134]

The Act suggests a special congressional commitment to encourage full enforcement of personal civil rights.[135] The primary objective of the Act is to attract competent counsel to civil rights litigation.[136] The

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128. *A Bad Year for Lawyers*, 33 CONG. Q. WEEKLY REP. 1603 (1975).

129. *See* 121 CONG. REC. 18736-37 (1975) (remarks of Rep. Seiberling); 121 CONG. REC. 26806 (1975) (remarks by Sen. Tunney). *See also* Note, *The Enforceability and Proper Implementation of § 1983 and the Attorney's Fees Awards Act in State Courts*, 20 ARIZ. L. REV. 743, 754-55 (1978).

130. *Awarding of Attorney's Fees Hearings Before the Sub-Committee on Courts, Civil Liberties, and the Administration of Justice of the House Committee on the Judiciary*, 94th Cong., 1st Sess. 8-9 (1975).

131. Pub. L. No. 94-559, 90 Stat. 2641 (codified at 42 U.S.C. § 1988 (1976)).

132. *Id.* (emphasis added).

133. Mid-Hudson Legal Services Inc. v. G & U Inc., 443 F. Supp. 893, 894 (S.D.N.Y. 1978); S. REP. 1011, *supra* note 3, at 4. *See generally* Derfner, *supra* note 113; Lipson, *Beyond Alyeska—Judicial Response to the Civil Rights Attorneys' Fees Act*, 22 ST. LOUIS U.L.J. 243 (1978); Malson, *In Response to Alyeska—The Civil Rights Attorney's Fees Awards Act of 1976*, 21 ST. LOUIS U.L.J. 430 (1977); Note, *supra* note 15.

134. S. REP. No. 1011, *supra* note 3, at 4. For instance, purportedly covered by the Act are employment discrimination, discrimination in public accomodations, and discrimination by persons acting under color of law. *Id*.

135. *See* text & note 132 *supra*. Environmental protection statutes are not included under the Act even though such statutes were brought under the protective umbrella of the private attorney general exception to the American rule. *See generally* Alyeska Pipeline Ser. Co. v. Wilderness Soc'y, 421 U.S. 240 (1975); La Raza Unida v. Volpe, 57 F.R.D. 94 (N.D. Cal. 1972); Note, *supra* note 97.

136. H.R. REP. No. 1558, *supra* note 3, at 3, states:

> [The] Committee received evidence that private lawyers were refusing to take certain types of civil rights cases because the civil rights bar, already short of resources, could not afford to do so. Because of the compelling need demonstrated by the testimony, the Committee decided to report a bill allowing fees to prevailing parties in civil rights cases.

prospect that a losing party would pay attorney's fees was intended to encourage plaintiffs to litigate nonremunerative but meritorious claims.[137] Alternatively, CRAFAA may serve to deter vexatious or frivolous litigation because each party must consider the added cost of the opponent's attorneys' fees if it is unsuccessful.[138]

Judicial Interpretation of the CRAFAA

The primary objective of this Note is to determine whether CRAFAA authorizes an interim award of attorneys' fees within the discretion of the courts under the Act. The Act's legislative history implies an assumption that courts will be influenced by prior attorneys' fees cases such as *Newman*, *Bradley*, and *Mills*.[139] Recent judicial interpretations of the Act indicate that the courts intend to comply with this assumption.[140]

Under CRAFAA fee awards must be reasonable.[141] A number of factors should be considered in the determination of the amount that would constitute a reasonable fee, including, but not limited to, the time and effort expended by counsel, the results achieved, and awards in similar public interest cases.[142]

Under CRAFAA there are restrictions as to whom may be held liable for the attorneys' fees award. Awards cannot be made against the United States or its agencies because the CRAFAA contains no specific waiver of immunity.[143] States and state agencies, however,

See also Sherrill v. J.P. Stevens & Co., 441 F. Supp. 846, 849 (W.D.N.C. 1977).

137. S. REP. No. 1011, *supra* note 3, at 6. The report expresses a concern that attorneys' "fees awards are necessary if citizens are to be able to effectively secure compliance with [the civil rights statutes]." *Id. See* Arthur v. Nyquist, 426 F. Supp. 194, 197 (W.D.N.Y. 1977).

138. S. REP. No. 1011, *supra* note 3, at 6 asserts that "[t]his bill thus deters frivolous suits by authorizing an award of attorney's fees against a party shown to have litigated in 'bad faith' under the guise of attempting to enforce federal rights created by the statutes [listed in the Act]." *Id.*

139. S. REP. No. 1011, supra note 3, at 4-5. The report declared, "[I]t is intended that the standards for awarding fees be generally the same as under the fee provisions of the 1964 Civil Rights Act." *Id.* at 4.

140. For example, in Keyes v. School Dist. No. 1, 439 F. Supp. 393 (D. Colo. 1977) the court, relying on Bradley v. School Bd., 416 U.S. 696, 711 (1974), held that CRAFAA was to apply retroactively to all cases pending on the effective date of the act. 439 F. Supp. at 401. The *Bradley* rule, *see* text & notes 61-63 *supra*, has been held to include cases pending appeal under § 1988. Stanford Daily v. Zurcher, 550 F.2d 464, 466 (9th Cir. 1977), *rev'd*, 436 U.S. 547 (1978). CRAFAA applies even if the only issue pending on appeal is one of attorneys' fees. Phillips v. Moore, 411 F. Supp. 833, 834 (W.D.N.C. 1977). This interpretation accounts for the extensive case law on the statute despite its recent enactment. *See also* Beazer v. New York City Transit Auth., 558 F.2d 97, 100 (2d Cir. 1977), *rev'd*, 99 S. Ct. 1355 (1979); Wade v. Mississippi Co-op Extension Service, 424 F. Supp. 1242, 1252-53 (N.D. Miss. 1976).

141. Planned Parenthood v. Citizens for Community Action, 558 F.2d 861, 871 (8th Cir. 1977) (dictum).

142. Keyes v. School Dist. No. 1, 439 F. Supp. 393, 420 (D. Colo. 1977). See discussion of other factors in determination of a reasonable fees award at notes 315-31 *infra*.

143. The doctrine of sovereign immunity bars an award of attorneys' fees, absent a waiver by the United States. Shannon v. HUD, 433 F. Supp. 249, 251 (E.D. Penn. 1977). This doctrine is represented by the limited waiver of immunity in 28 U.S.C. § 2412 (1976): "Except as otherwise

were not explicitly exempted from the operation of the CRAFAA.[144] The eleventh amendment of the United States Constitution, although providing for state immunity,[145] is no bar to the award of attorneys' fees under the CRAFAA.[146] In *Fitzpatrick v. Bitzer*,[147] the United States Supreme Court held that the eleventh amendment was "necessarily limited by the enforcement provision of [section] 5 of the Fourteenth Amendment."[148] The CRAFAA was enacted pursuant to the enforcement clause of the fourteenth amendment.[149] In *Rainey v. Jackson State College*,[150] the Fifth Circuit Court of Appeals held that when *Fitzpatrick* and the CRAFAA are read together, the eleventh amendment is no bar to a fees award under the Act.[151] Therefore, state officials may be sued in their official capacity,[152] but their immunity as individuals has not been waived.[153]

Most important to this discussion, the CRAFAA has been interpreted to authorize an interim award.[154]

Availability of Interim Awards Under CRAFAA

The CRAFAA was intended to encourage civil rights litigation by providing that a successful plaintiff will not have to pay his attorneys' fees.[155] Excessive delays in obtaining an award may thus defeat the objectives of the CRAFAA.[156] Moreover, the congressional record indicates the intention to authorize interim fees awards under the CRAFAA.[157] In the report that accompanied the passage of the CRAFAA, the applicability of the *Bradley* sanction of interim awards to the CRAFAA was recognized.[158]

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specifically provided by statute, a judgment for costs . . . but not including the fees and expenses of attorneys may be awarded to the prevailing party in any civil action brought by or against the United States. . . ."

144. 42 U.S.C. § 1988 (1976). *See* text accompanying note 132 *supra*.

145. "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST., amend. XI.

146. Gates v. Collier, 559 F.2d 241, 243 (5th Cir 1977).

147. 427 U.S. 445 (1976).

148. *Id.* at 456.

149. Gates v. Collier, 559 F.2d 241, 243 (5th Cir. 1977).

150. 551 F.2d 672 (5th Cir. 1977).

151. *Id.* at 675. *But see* Skehan v. Board of Trustees, 436 F. Supp. 657, 666 (M.D. Pa. 1977) (dictum) (absent express statutory language subjecting a state to the authority of the statute the court cannot avoid the 11th amendment).

152. Gates v. Collier, 559 F.2d 241, 243-44 (5th Cir. 1977).

153. Universal Amusement Co., Inc. v. Vance, 559 F.2d 1286, 1301 (5th Cir. 1977).

154. Finney v. Hutto, 548 F.2d 740, 742 (8th Cir. 1977); Howard v. Phelps, 443 F. Supp. 374, 376-77 (E.D. La. 1978).

155. S. REP. No. 1011, *supra* note 3, at 5; H.R. REP. No. 1558, *supra* note 3, at 6.

156. *See* Bradley v. School Bd., 416 U.S. 696, 723 (1974).

157. S. REP. No. 1011, *supra* note 3, at 5. *See* Note, *supra* note 129, at 756.

158. *Id.* The report reads:

> In appropriate circumstances, counsel fees under [this Act] may be awarded pendente lite. *See Bradley v. School Board of the City of Richmond*, 416 U.S. 696 (1974). Such

In *Bradley*, black parents and guardians of school children brought a class action against the Richmond School District under the Civil Rights Act of 1871[159] to desegregate the schools.[160] Approximately ten years elapsed between the initiation of the lawsuit and the adoption of a final plan for desegregation.[161] In 1971, the district court awarded $43,355 in attorneys' fees which represented less than one year's work on the entire suit.[162]

This award of counsels' fees was challenged under a claim that there was no equitable or statutory authority to make such an award.[163] The United States Supreme Court upheld the award as authorized under section 718 of the Emergency School Aid Act[164] which was passed during the course of litigation.[165] The Court held that this statute applied retroactively to cases pending on appeal as of the statute's effective date.[166] More importantly, the Court held that an award was appropriate when an order has been entered "that determines substantial rights of the parties."[167] Since it was Congress' intent that *Bradley* should be applied to CRAFAA, subsequent interpretations of *Bradley* are, no doubt, pertinent.

Subsequent cases in which courts have interpreted *Bradley* reveal that there may be an entitlement to a fees award even when the party's

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awards are especially appropriate where the party has prevailed on an important matter in the course of litigation, even when he ultimately does not prevail on all issues.

Id. See also H.R. REP. No 1558, *supra* note 3, at 8 which reads: "The word 'prevailing' is not intended to require the entry of a *final* order before fees are recovered." (emphasis in original).

159. 42 U.S.C. § 1983 (1976):

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

160. Bradley v. School Bd., 416 U.S. 696, 699 (1974).

161. *See id.* at 699-706.

162. *Id.* at 705. This award applied to services rendered from March 10, 1970 to January 29, 1971. *Id.* at 705-06.

163. *Id.* at 706-10. The position of the defendants was that there was no statutory authority authorizing awards of attorneys' fees when the substantive issues of the case were decided. *Id.* at 706. The defendants asserted that they could not be said to have acted in bad faith because the problems of desegregation had not been concretely resolved to give them adequate indication of their violation. *Id.* at 706-09.

164. PUB. L. No. 92-318, 86 Stat. 369 (1976) (codified at 20 U.S.C. § 1617 (1976)) authorizes the court, in its discretion, to allow the prevailing party reasonable attorneys' fees upon entry of a final court order against a local educational agency, a state, or the United States for discrimination in violation of title VI of the Civil Rights Act of 1964.

165. 416 U.S. at 724.

166. *Id.* The Court held that the statute should apply retroactively, "unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." *Id.* at 711.

167. *Id.* at 723 n.28. This interpretation was applied to an attorneys' fees statute that required a final order as a condition to an award. See note 164 *supra*. CRAFAA makes no such requirement. See text accompanying note 132 *supra*. Consequently, if courts may make an interim award under a statute that expressly requires a final order, then interim awards should be available under CRAFAA which has no such express limitation.

success was not evidenced by a court order.[168] If a party can show the necessity of bringing the action and if a successful settlement with respect to the central issue has been reached, fees may be awarded.[169] These requirements may be met by a consent order,[170] by an out-of-court settlement,[171] or by voluntary compliance to the plaintiff's demands by the defendant.[172] Consequently, the Act does not necessarily postpone a finding of a prevailing party and the accompanying award of attorneys' fees until the ultimate disposition of the case.[173]

Furthermore, interim awards are in keeping with the stated congressional purpose of CRAFAA to avail "private citizens of a meaningful opportunity to vindicate the important congressional policies" expressed by the civil rights statutes.[174] If a plaintiff must wait until the absolute end of litigation to receive remuneration, many attorneys may be reluctant to engage in civil rights litigation.[175] Consequently, "delay[ing] a fee award until the entire litigation is concluded would work a substantial hardship on plaintiffs and their counsel, and discourage the institution of actions."[176] The legislative history of the CRAFAA indicates that such a result is to be avoided.[177]

In interpreting statutes that authorize attorneys' fees awards to the prevailing party, courts have applied different standards, depending upon whether the prevailing party is the plaintiff or the defendant.[178] If the plaintiff prevails, an award is appropriate unless circumstances would render the award unjust.[179] In *Newman*, the Court recognized

168. *See, e.g.*, Incarcerated Men v. Fair, 507 F.2d 281, 288 (6th Cir. 1974); Hammond v. Housing Auth. & Urban Renewal Agency, 328 F Supp. 586, 588 (D. Ore. 1971).

169. Howard v. Phelps, 443 F. Supp. 374, 376 (E.D. La. 1978).

170. *E.g.*, Brown v. Culpepper, 559 F.2d 274, 277 (5th Cir. 1977); Davis v. Reed, 72 F.R.D. 644, 645 (N.D. Miss. 1976).

171. Reynolds v. Coomey, 567 F.2d 1166, 1166 (1st Cir. 1978).

172. *E.g.*, International Soc'y for Krishna Consciousness v. Andersen, 569 F.2d 1027, 1029 (8th Cir. 1978) (per curiam); Sherrill v. J.P. Stevens & Co., 441 F. Supp. 846, 847 (W.D.N.C. 1977); Buckton v. NCAA, 436 F. Supp. 1258, 1264 (D. Mass. 1977).

173. "Final disposition" is used in the context of having exhausted or waived all possible appeals. Bradley v. School Bd., 416 U.S. 696, 711 n.14, 722-23 n.28 (1974).

174. S. REP. No. 1011, *supra* note 3, at 2.

175. *See* Bradley v. School Bd., 416 U.S. 696, 723 (1974).

176. *Id.*

177. S. REP. No. 1011, *supra* note 3, at 5; H.R. REP. No. 1558, *supra* note 3, at 8.

178. *See* Christiansburg Garment Co. v. Equal Employment Opportunity Comm'n, 434 U.S. 412, 421-22 (1978) (defendant standard); Northcross v. Board of Educ., 412 U.S. 427, 428 (1973) (plaintiff's standard); Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400, 402 (1968); Carrion v. Yeshiva Univ., 535 F.2d 722, 727-28 (2nd Cir 1976) (defendant's standard); Parnham v. Southwestern Bell Tel. Co., 433 F.2d 421, 429-30 (8th Cir. 1970) (plaintiff's standard); United States Steel Corp. v. United States, 385 F. Supp. 346, 347-49 (W.D. Pa. 1974) (defendant's standard).

179. Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400, 402 (1968). Whether an award is unjust may depend on three factors. *See* Bradley v. School Bd., 416 U.S. 696, 717 (1974). The nature and identity of the parties and their respective abilities to present and protect their interests must be considered. The more disparity between the parties, the more just the award will be to the less capable party. Secondly, the nature of the rights in issue must be analyzed. For instance, if there are constitutional rights at issue, an award might be more appropriate than if a private property right were at issue. Finally, the nature of the impact of the change in law upon those

that this interpretation was essential to implement the congressional policy of encouraging private enforcement of civil rights.[180] Plaintiffs initiating lawsuits to vindicate civil rights are likely to have limited financial resources.[181] Such plaintiffs, without assistance, normally would not have the resources to pay the costs and attorneys' fees for prolonged litigation and thus would not be likely to pursue even a meritorious claim if required to bear the burden of their own attorneys' fees.[182]

In contrast, an award of attorneys' fees to a defendant who is the prevailing party generally has been more restricted.[183] *Christiansburg Garment Co. v. Equal Employment Opportunity Commission*[184] defined the criteria generally used to evaluate the appropriateness of such an award.[185] *Christiansburg* was a suit for the recovery of attorneys' fees by a successful defendant in an employment discrimination suit brought under the authority of title VII of the Civil Rights Act of 1964.[186]

In *Christiansburg*, the Court recognized that an award to the prevailing defendant differs dramatically from an award to a prevailing plaintiff in civil rights litigation.[187] The prevailing plaintiff is acting in the role of a private attorney general.[188] Also, an award to a prevailing plaintiff is an award against a violator of federal law.[189] The rationale behind an award to a prevailing defendant, however, is to discourage the instigation of lawsuits without foundation.[190] Consequently, this intent will not be served if the prevailing defendant routinely receives an attorney's fee as a matter of right when he succeeds.[191] Although a showing of bad faith is not necessary to justify an award, the plaintiff's claim must be found to be at least unreasonable.[192]

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rights should be considered. The greater the service to the community at large the more just the award will be. *Id.*

180. *Id. See* S. REP. NO. 1011, *supra* note 3, at 2. *See also* Torres v. Sachs, 538 F.2d 10, 13-14 (2nd Cir. 1976).

181. *See* 122 CONG. REC. 33313 (1976).

182. *See* Comment, *supra* note 13, at 570-71.

183. *See, e.g.*, Christiansburg Garment Co. v. Equal Employment Opportunity Comm'n, 434 U.S. 412, 422 (1978); Carrion v. Yeshiva Univ., 535 F.2d 722, 727 (2nd Cir. 1976); United States Steel Corp. v. United States, 385 F. Supp. 346, 349 (W.D. Pa. 1974).

184. 434 U.S. 412 (1978).

185. *Id.* at 417-22.

186. *Id.* at 413-15. Section 706(k) as amended, 42 U.S.C. § 2000e-5k (1976), provides:

> In any action or proceeding under this subchapter [42 U.S.C. § 2000e-2000e-17] 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.

187. 434 U.S. at 418-22.

188. Newman v. Piggie Park Enterprises, Inc., 390 U.S 400, 402 (1968).

189. Christiansburg Garment Co. v. Equal Employment Opportunity Comm'n, 434 U.S. 412, 418 (1978).

190. *Id.*

191. Carrion v. Yeshiva Univ., 535 F.2d 722, 727 (1976).

192. Christiansburg Garment Co. v. Equal Employment Opportunity Comm'n, 434 U.S. 412, 421 (1978).

This more restrictive test is probably based upon the presumption that a defendant in a civil rights case is usually either a government entity[193] or a large corporation.[194] Nonetheless, it is certainly possible that the defendant will have limited financial resources.[195] Even so, an award to a prevailing defendant at the termination of litigation has been rare[196] and presumably will continue to be so under a similar treatment of defendants under CRAFAA.[197]

This differing treatment of prevailing plaintiffs and defendants is unsupported by the literal language in the CRAFAA which refers only to the prevailing party.[198] In *United States v. Allegheny-Ludlum Industries, Inc.*,[199] a petition was brought by the defendant for an attorneys' fees award under title VII of the Civil Rights Act of 1964.[200] In *Allegheny*, Judge Gee never reached the question of an award because the petition was held to be premature.[201] In *dictum*, however, Judge Gee voiced disagreement with the different treatment of prevailing plaintiffs and defendants under a statutory phrase that merely says prevailing party.[202] He asserted that the statute gives unfettered discretion to the courts and, if that discretion was to be qualified, the language of the statute would have so indicated.[203]

To the contrary, however, the congressional reports show that notice was taken of the dichotomy of application of the phrase "prevailing party" and Congress intended this dichotomy to apply to the CRAFAA.[204] During the floor debates, concern was expressed by Senator Bumpers that the CRAFAA would not apply to plaintiffs and defendants alike because defendants would have to show the plaintiffs' bad faith.[205] He proposed an amendment to the CRAFAA that would make a prevailing defendant eligible for an award even if he could not show the plaintiffs to have acted "in bad faith, frivolously, vexatiously,

193. For example, in Oliver v. Kalamazoo Bd. of Educ., 73 F.R.D. 30 (W.D. Mich. 1976) the defendant was a school board.

194. Sherrill v. J.P. Stevens & Co., 441 F. Supp. 846 (W.D.N.C. 1977).

195. For example, awards are authorized in suits against individual landlords for attorneys' fees under § 1981. See 42 U.S.C. § 1988, *supra* note 132. It is reasonable to project that some such defendants, i.e., the average person who rents an apartment in his or her residence, would have no more financial resources than most plaintiffs.

196. *See* text & notes 273-81 *infra*.

197. S. REP. NO. 1011, *supra* note 3, at 4, reads: "It is intended that the standard of awarding fees be generally the same as under the fee provisions of the 1964 Civil Rights Act."

198. *See* text & note 132 *supra*. *See also* Note, *supra* note 129, at 756-57.

199. 558 F.2d 742 (5th Cir. 1977).

200. *Id.* at 743. See text & note 186 *supra*.

201. 558 F.2d at 743-44. The petition was premature because the defendant had prevailed on a procedural issue and the substantive issue was still pending in a lower court. *Id.* at 743. Consequently, substantial rights of the parties had not been decided. *Id.* at 743-44.

202. *Id.* at 744.

203. *Id.*

204. S. REP. NO. 1011, *supra* note 3, at 5; H.R. REP. NO. 1558, *supra* note 3, at 6-7.

205. 122 CONG. REC. 31792 (1976).

or for the purpose of harrassing the defendant."[206] The bill as finally enacted did not include Senator Bumper's amendment.[207] Consequently, one may reasonably assume that Congress intended to endorse the established judicial policy that different standards should apply to prevailing defendants as opposed to prevailing plaintiffs.

Once eligibility for an interim fees award has been determined, the award itself must be calculated. Generally, the criteria used in calculating the interim award should be the same as that applied to determination of a final award.[208] An interim award should only include services already rendered.[209] When an interim award is made there is a possibility that the status of a prevailing party may not remain stable. Additional costs may be incurred in litigating an appeal. Nevertheless, these additional fees should not be prospectively included in an interim award.[210] When a party has prevailed on a majority of the major issues, however, attorneys' fees may be awarded for the entire litigation[211] or apportioned to the extent to which the party prevailed.[212] The fees award may be adjusted upwards as long as the party continues to succeed.[213] The final award may even include reimbursement for the fees incurred litigating the attorneys' fees issue.[214] Any interim

206. *Id.* Amendment 2378 would have added to the present CRAFAA that:

> For the purposes of this section, a prevailing party who is a defendant in such an action or proceeding may be awarded a reasonable attorneys' fee, at the Court's discretion, even if the defendant cannot show that the plaintiff bringing such action or proceeding acted in bad faith, frivously, vexatiously, or for the purpose of harassing the defendant.

Id.

207. 122 CONG. REC. 33315 (1976).

208. *See* S. REP. NO. 1011, *supra* note 3, at 6; H.R. REP. NO. 1558, *supra* note 3, at 8-9. These congressional reports indicate that the criteria used in Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974) were intended to apply to the CRAFAA. *Id.* A reasonable extrapolation of this authorization is that since interim fees were also authorized, the same criteria applied to final awards should apply as well to interim awards. *See* discussion of awards criteria in text and note 315-331 *infra*.

An interim award has been made under the CRAFAA that was calculated on criteria developed by a prior case interpreting another attorney's fee statute. Guajardo v Estelle, 432 F. Supp. 1373, 1388 (E.D. Tex. 1977) (citing Johnson v. Georgia Highway Express, Inc., 488 F. 2d 714 (5th Cir. 1974)).

209. Arthur v. Nyquist, 426 F. Supp. 194, 198 (W.D.N.Y. 1977).

210. *Id.*

211. Guajardo v. Estelle, 432 F. Supp. 1373, 1387-88 (S.D. Tex. 1977). The award of $127,565 in attorneys' fees did not include the law clerk's research. *Id.* at 1388. The court held that award of these expenses would be inappropriate because law firms hire law clerks to serve a dual purpose. "[N]ot only are clerks hired to do legal research but also to give students exposure to the legal world, and to recruit new lawyers for the firm." *Id.* Paralegal services and LEXIS time, however, were held recoverable. *Id. See also* Torres v. Sachs, 538 F.2d 10, 11 (2d Cir. 1976).

212. *See, e.g.*, Keyes v. School Dist. No. 1, 439 F. Supp. 393, 400 (D. Colo. 1977) (awarding fees by determining the percentage of success in the whole case and awarding that percentage of total reasonable fees requested); Inmates of Neb. Penal & Correctional Complex v. Greenholtz, 436 F. Supp. 432, 433 (D. Neb. 1976) (awarding fees based on actual cost of litigating successful issue). *See also* text & notes 42-43 *supra*.

213. Souza v. Southworth, 564 F.2d 609, 612-13 (5th Cir. 1977). The court's discussion seems to imply that awards are appropriate at each judicial level according to that particular court's discretion.

214. *Id.* at 614. "To hold otherwise would permit a deep pocket losing party to dissipate the incentive provided by an award through recalcitrance and automatic appeals." *Id.*

award is applied towards any final award.[215] There is the possibility that the prevailing party at the district level will suffer a reversal on appeal. In this situation, the prior award of attorneys' fees is forfeited because the receiving party was not, indeed, the prevailing party.[216] To ensure that the paying party will recover the attorneys' fees paid in such situations, courts may require the receiving party to post a bond to ensure repayment of the award if there is a reversal of the prevailing party's status during subsequent litigation.[217] This bond will be necessary to prevent the unjust enrichment of the party receiving an interim award if an appeals court reverses the judgment.

Consequently, judicial interpretation and legislative history indicate that interim awards are available under the authority of the CRAFAA. It is reasonable to assume that interpretation of the phrase "prevailing party" will be applied strictly for defendant's awards and liberally for plaintiff's awards. Such a policy will best carry out the congressional intent in the CRAFAA's enactment to encourage plaintiffs to litigate meritorious claims. Interim awards of an attorneys' fees, however, should be limited to fairly compensate for the services rendered as of the time when the award is being considered, regardless of which party prevails. The receiving party will be required to post a bond in consideration of the tentative nature of an interim award.

Application of Interim Attorneys' Fees Awards

The interim award has been used in several cases involving the desegregation of schools under the Emergency School Aid Act.[218] Education desegregation cases usually are brought by parents claiming that the existing segregated school system discriminates against their children.[219] For example, such a suit may seek to compel officials to eliminate the existing discrimination by restructuring the school system to achieve racial balance.[220] The remedy often includes the fashioning of desegregation plans[221] and there may be several court orders before all

215. Nicodemus v. Chrysler Corp., 445 F. Supp. 559, 560 (N.D. Ohio 1977). *Nicodemus* was an interim award case brought under title VII's fees award provision which is very like the CRAFAA. *Id.* at 560. *See* note 186 *supra*. The litigation was pending for four years and the only issue decided was liability. 445 F. Supp. at 560. All the remedial issues were yet to be decided. The case defines prevailing party as the winner on the issue of liability. *Id.* at 560. The court also implies a preference that the parties themselves agree on the amount of reasonable attorneys' fees and use the court only as a final arbitrator. *Id.*

216. 445 F. Supp. at 560.

217. *Id.*

218. *See, e.g.*, Keyes v School Dist. No. 1, 439 F. Supp. 393, 396 (D. Colo. 1977); Arthur v Nyquist, 426 F. Supp. 194, 195 (W.D.N.Y. 1977); Armstrong v. O'Connell, 416 F. Supp. 1325, 1328 (E.D. Wis. 1976).

219. *See* discussion note 223 *infra*.

220. *See* Bradley v. School Bd., 416 U.S. 696, 700 n.2 (1974).

221. *See id.* at 699-705.

appeals are exhausted or waived.[222]

The defendant in desegregation cases is usually a school board, a governmental body funded by tax monies.[223] Generally in such situations the expensive process of appellate litigation presents less of a financial problem to the defendant than to the plaintiff.[224] The plaintiff is not likely to have the resources for prolonged and expensive litigation.[225] Unless the plaintiff is assisted by funding from an interested organization, he is dependent upon the dedication of an attorney who is willing to render his services *gratis* until the end of the litigation.[226] In such circumstances, the availability of an interim award is arguably the best way to assure that the plaintiff will be able to continue to litigate the claim.[227]

In *Keyes v. School District* No. 1,[228] the parents of Denver school children brought an action charging the school board with purposeful manipulation of a neighborhood school policy in order to maintain an ethnically or racially segregated school system.[229] The parents sought a decree directing desegregation of the entire school district.[230] The attorneys' fees issue was litigated only after the final desegregation plan was implemented and approved and when all possible appeals on the substantive issues had been exhausted.[231] The litigation process from initial motions to the last denial of certiorari by the United States Supreme Court lasted approximately eight years.[232] The litigation included ten trials, three United States Supreme Court appearances, and 133 hours of court time.[233] The final award of attorneys' fees was $360,100 which reflected both disallowed charges as well as a discount because the plaintiff did not prevail on all issues.[234]

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222. *Id.* at 723.

223. *See, e.g.*, Bradley v. School Bd., 416 U.S. 696, 699 (1974) (a local school board); Northcross v. Board of Educ., 412 U.S. 427, 427 (1973) (a local school board); United States v. Texas Educ. Agency, 532 F.2d 380, 384 (5th Cir. 1976) (a state agency); Keyes v. School Dist. No. 1, 439 F. Supp. 393, 397 (D. Colo. 1977) (a local school district).

224. The plaintiff is likely to be of a disadvantaged class but even if he is not, an agency that can call on the resources of a state will always have a financial advantage. *See* Comment, *supra* note 13, at 651-52; Comment, *supra* note 94, at 598.

225. When attorneys' fees may amount to hundreds of thousands of dollars, the average private individual cannot be expected to carry such an expense which could work substantial hardship, especially since the only remedy available will be injunctive. *See* Bradley v. School Bd., 416 U.S. 696, 722-23 (1974).

226. *But see* ABA CODE OF PROFESSIONAL RESPONSIBILITY EC 2-25, which provides that the responsibility for providing legal services for those who are unable to pay rests on the individual lawyer. Each lawyer is individually obligated to render services to the disadvantaged without pay.

227. *See* text & note 249-55 *supra*.

228. 413 U.S. 189 (1973).

229. *Id.* at 191.

230. *Id.*

231. Keyes v. School Dist. No. 1, 439 F. Supp. 393, 397 (D. Colo. 1977).

232. *Id.*

233. *See id.* at 397 n.1, 412.

234. *Id.* at 400-01, 416.

Keyes is an example of the expense and length of litigation that can be expected when a plaintiff initiates a desegregation suit. Aside from correcting an unconstitutional situation, the plaintiffs received no remuneration in the way of damages for their efforts.[235] *Keyes* may be an anomoly, however, as plaintiffs were able to continue to litigate without an interim award. Such a situation, however, is unlikely to be present in most civil rights cases.[236] Thus, because civil rights enforcement depends in large part on enforcement by private litigation and the availability of resources of the plaintiff,[237] a defendant with financially superior resources may exhaust the plaintiff's resources through appeals and post-trial motions and thus eventually prevail by harrassment.[238] Making interim awards available would help remedy this perversion of the legal process.

Since the passage of the CRAFAA, courts have looked to the Emergency School Aid Act to authorize the interim award of attorneys' fees in school desegregation cases.[239] Familiarity with this particular statute and the lack of necessity to look elsewhere for authorization of attorneys' fees probably stifled the development of interim awards under the CRAFAA. At least one court, however, has recognized that such awards could be made under either the Emergency School Aid Act or the CRAFAA.[240]

Under the CRAFAA, the employment of interim awards could be useful in vindicating civil rights in areas other than school desegregation. A prime target would be violations of civil rights within penal institutions.[241] Like school desegregation, suits seeking prison reform involve injunctive relief and court regulation of reform plans.[242] Ultimate disposition may take several years while plans are drawn and tested and appeals are litigated.[243] The private plaintiff is likely to be at a financial disadvantage.[244]

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235. *Id.* at 397.

236. *See* Souza v. Southworth, 564 F.2d 609, 614 (1st Cir. 1977).

237. *See* Bradley v. School Bd., 416 U.S. 696, 723 (1974).

238. *See* Souza v. Southworth, 564 F.2d 609, 614 (1st Cir. 1977).

239. *See, e.g.*, Arthur v. Nyquist, 426 F. Supp 194 (W.D.N.Y. 1977); Armstrong v. O'Connell, 416 F. Supp. 1325 (E.D. Wis. 1976); Norwood v. Harrison, 410 F. Supp. 133 (N.D. Miss. 1976).

240. Davis v. Reed, 72 F.R.D. 644 (N.D. Miss. 1976).

241. Racial discrimination, cruel and unusual punishment, and barriers to access to counsel and courts are examples of the denial of civil rights that may occur in penal institutions. Howard v. Phelps, 443 F. Supp. 374, 375-76 (E.D. La. 1978).

242. *See, e.g.*, Souza v. Southworth, 564 F.2d 609, 610 (1st Cir. 1977); Finney v. Hutto, 548 F.2d 740, 741 (8th Cir. 1977); Howard v. Phelps, 443 F. Supp. 374, 375-76 (E.D. La. 1978).

243. *See, e.g.*, Finney v. Hutto, 548 F.2d 740, 741 (8th Cir. 1977) (litigation lasted four years); Guajardo v. Estelle, 432 F. Supp. 1373, 1388 (S.D. Tex. 1977) (litigation lasted six years); Inmates of Neb. Penal & Correctional Complex v. Greenholtz, 436 F. Supp. 432, 443 (D. Neb. 1976) (litigation lasted four years).

244. In Howard v. Phelps, 443 F. Supp. 374 (E.D. La. 1978), the plaintiffs were prisoners and the defendant was the State of Louisiana Corrections Department. *Id.* at 375-76. The prisoners' financial condition is reflected by the fact that counsel provided services for no fee. *Id.* at 377.

Conceivably, the types of interest groups eager to aid in the protection of the rights of others, such as school children or minorities, are likely to regard the protection of the rights of convicted criminals with considerably less enthusiasm.[245] Consequently, prison reform plaintiffs may not have access to assistance from private sources. It is not surprising, therefore, that interim fee awards have been made under the CRAFAA in prison reform cases.[246]

The CRAFAA has been held to apply to types of suits concerning the denial of civil and constitutional rights by persons acting under color of state law,[247] discrimination by private persons and governmental officials in contractual relationships,[248] and discrimination in real property transactions.[249] In these cases the prevailing plaintiff was eligible for an interim award of attorneys' fees although few were actually awarded in the interim.[250] In future cases, interim awards may be necessary to achieve the congressional objective of encouraging private enforcement of personal civil rights which was intended by the passage of the CRAFAA.[251]

That there have been few interim awards made under the Act[252] might be attributable to the reluctance of American courts to award any attorneys' fees.[253] It might also be attributable, however, to the lack of guidelines governing a court's discretion in cases where the

245. *See generally* Inmates of Neb. Penal & Correctional Complex v. Greenholtz, 436 F. Supp. 432 (D. Neb. 1976). The opinion illustrates the slowness of the process of prison reform which might indicate such reform is either unpopular or of low priority.

246. *See* cases cited in note 242 *supra*. For example, in Howard v. Phelps, 443 F. Supp. 374 (E.D. La. 1978) inmates of a Louisiana prison brought an action against state correctional officials alleging racial discrimination, constitutional violations, and lack of adequate facilities. *Id.* at 375. The inmates received injunctive relief. *Id.* at 375-76. The prison was closed and the prison officials were given an opportunity to submit plans to bring about compliance with the law for the court's approval. Because the inmates had substantially prevailed at this stage of the proceedings, the court granted an interim award of attorneys' fees under the CRAFAA. *Id.* Since it may be several years before the remedial issues of *Howard* are resolved, postponing the award of attorney's fees until that resolution would have been unfair and unnecessary. *Id.* at 376-77. The inmates, however were required to post a bond for the award received as a condition to that award. *Id.* at 377.

247. *See, e.g.*, Williams v. Anderson, 562 F.2d 1081, 1085, 1102 (8th Cir. 1977); Bond v. Stanton, 555 F.2d 172, 173-74 (7th Cir. 1977); Bogart v. Unified School Dist., 432 F. Supp. 895, 897, 906 (D. Kan. 1977). *See* Note, *supra* note 129, at 745.

248. *See, e.g.*, Sherrill v. J.P. Stevens & Co., 441 F. Supp. 846, 847 (W.D.N.C. 1977); Buckton v. NCAA, 436 F. Supp. 1258, 1261 (D. Mass. 1977).

249. *See, e.g.*, Wharton v. Knefel, 562 F.2d 550, 556-58 (8th Cir. 1977); Hughes v. Repko, 429 F. Supp. 928, 931 (W.D. Pa. 1977).

250. *See* Martinez Rodriguez v. Jimenez, 551 F.2d 877, 879 (1st Cir. 1977); Howard v. Phelps, 443 F. Supp. 374, 375, 377 (E.D. La. 1978); Bogart v. Unified School Dist., 432 F. Supp. 895, 906-07 (D. Kan. 1977).

251. *See* text & notes 167-73 *supra*.

252. *E.g.*, Martinez Rodriguez v. Jimenez, 551 F.2d 877, 879 (1st Cir. 1977); Howard v. Phelps, 443 F. Supp. 374, 375, 377 (E.D. La 1978); Bogart v. Unified School Dist., 432 F. Supp. 895, 906-07 (D. Kan. 1977).

253. *See* text & notes 19-29 *supra*.

CRAFAA is applicable. Discretion is left to district courts[254] whose decisions will not be disturbed unless the appellate court determines that the awarded party could not be deemed to have prevailed or that the district court abused its discretion.[255] For the sake of uniformity and clarity some basic criteria to guide and evaluate the exercise of a court's power of discretion is needed.

PROPOSED GUIDELINES TO JUDICIAL APPLICATION OF THE CRAFAA TO INTERIM AWARDS

CRAFAA sets some limits upon the discretionary application of the Act by its use of broad terms such as "prevailing party,"[256] "reasonable attorney's fees,"[257] and "the court, in its discretion."[258] These phrases alone, however, offer little guidance for judicial discretion. The legislative history indicates that in the exercise of this discretion the court should evaluate each case in light of the legislative purpose behind the enactment of the CRAFAA and the statutes for which it authorizes attorneys' fees.[259] The courts may also look to cases such as *Newman*, *Bradley*, and *Christiansburg Garment*, which concern the interpretation of fee awards statutes,[260] and nonstatutory equitable exceptions that might be applicable.[261]

These statutory, historical, and judicial limitations, however, serve only to imply rather than define the limitations of the discretionary authority to make an interim award of attorneys' fees under the CRAFAA. The problems presented by the possibility of a future reversal on appeal may reasonably inspire conservative application of the interim award. Such caution must be counterbalanced, however, by the statutory purpose of encouraging meritorious civil rights litigation. Recognizing these competing interests, it is suggested that the following guidelines provide a framework within which to evaluate a request for an interim award.

Every interim award decision should focus on the good faith of the applicant and the bad faith of the opponent[262] as well as the applicant's

254. Berger, *Court Awarded Attorneys' Fees: What is "Reasonable?"*, 126 U. PA. L. REV. 281, 284 (1977).

255. *Id.* "Abuse of discretion" means actions which are arbitrary, fanciful, or clearly unreasonable. United States v. McWilliams, 163 F.2d 695, 697 (D.C. Cir. 1947).

256. *See* text & notes 178-89 *supra*.

257. *See* text & notes 315-31 *infra*.

258. *See* text & notes 302-06 *infra*. See text at note 132 *supra*.

259. *See* text & notes 155-217 *supra*.

260. *See id.*

261. *See* Carter v. Montgomery Ward & Co., 76 F.R.D. 565, 568 (E.D. Tenn. 1976); 10 WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE § 2675, at 194 (1971). *See also* text & notes 57-80 *supra*.

262. See text & notes 268-94 *infra*.

financial ability to retain counsel.[263] A court, however, should not consider an award mandatory upon a favorable finding upon these issues.[264] The authority is unequivocably discretionary. The court should not consider whether the prevailing party has served an important public interest by initiating the litigation in making the interim award determination.[265] If approved, the interim award must be for a reasonable fee for those services which should be calculated according to the factors enumerated in *Johnson v. Georgia Highway Express, Inc.*[266] and *Keyes*[267] relevant to the particular case. Finally, the reasoning behind the calculation of the fees award should be fully documented in the decision.

The Relative Good Faith of the Parties

The fact that a party acted in bad faith or good faith in pursuing litigation should be a primary factor weighed in the consideration of the appropriateness of an interim award.[268] Among the purposes for the CRAFAA was to encourage plaintiffs to litigate meritorious claims.[269] That defendants are also eligible for a fees award, however, indicates that Congress also intended to discourage plaintiffs with unreasonable or frivolous claims.[270] Generally, a frivolous or vexatious claim brought by a plaintiff is considered necessary for a prevailing defendant to be eligible for a statutorily authorized fees award.[271]

Nevertheless, recent cases interpreting the CRAFAA hold that whether the losing defendant acted in good faith or bad faith is irrelevant because equitable considerations are not necessary since the award is statutorily authorized.[272] Thus, in *Ryals v. Azalea City Racing Club, Inc.*,[273] the prevailing defendant was awarded attorneys' fees without a showing that the plaintiff exhibited bad faith in bringing the

263. See text & notes 295-301 *infra*.
264. See text & notes 302-06 *infra*.
265. See text & notes 307-14 *infra*.
266. 488 F.2d 714, 717-19 (1974).
267. Keyes v. School Dist. No. 1, 439 F. Supp. 393, 402 (D. Colo 1977). See text & notes 315-31 *infra*.
268. See text & notes 57-63 *supra*.
269. See text & notes 133-38 *supra*.
270. See text & notes 183-96 *supra*.
271. *Id. See also* Carrion v. Yeshiva Univ., 535 F.2d 722, 728 (2nd Cir. 1976). In this case, an action alleging employment discrimination under title VII of the Civil Rights Act of 1964, the court found for the defendant employer and based a fees award to the defendant on the plaintiff's vexatious behavior. *Id.* Examples of her bad faith were founding her claim on a "tissue of lies," "deliberately perjur[ing] herself," and attempting to secure false testimony in order to ruin the reputation of her supervisor. *Id.*
272. *See, e.g.*, Gates v. Collier, 559 F.2d 241, 242 (5th Cir. 1977); Ryals v. Azalea City Racing Club, Inc, 443 F. Supp. 146, 146-47 (S.D. Ala. 1977); Norwood v Harrison, 410 F. Supp. 133, 141 (N.D. Miss. 1976).
273. 443 F. Supp. 146 (S.D. Ala. 1977).

suit.[274] *Ryals* was an attorneys' fees case resulting from an employment discrimination suit brought under 42 U.S.C. § 1981.[275] The plaintiffs sought recognition of their employment union by the employer defendant.[276] The defendant had prevailed on the substantive issues and brought an action to recover attorneys' fees under the CRAFAA.[277] The court reasoned that the legislative intent was that the CRAFAA standards for awarding fees would be generally the same as under fee provisions of the 1964 Civil Rights Act.[278] Consequently, the *Ryals* court looked to *United States v. Allegheny-Ludlum Industries, Inc.*,[279] for guidance in the fees award decision. *Allegheny-Ludlum*, an employment discrimination suit under title VII of the 1964 Civil Rights Act,[280] held that a showing of the plaintiff's bad faith was not necessary for the prevailing defendant to obtain a fees award.[281]

Allegheny-Ludlum and *Ryals* may exemplify a trend away from judicial policy imposing a dual standard that distinguishes between plaintiffs and defendants when interpreting fee statutes that authorize awards to prevailing parties.[282] While the party's conduct may be irrelevant to the ultimate decision of whether to award fees, it should nevertheless be considered when making an interim award. An interim award puts an added burden on the paying party.[283] If he is acting in good faith, such added burden before the ultimate disposition may be unjust.

Alternatively, the paying party's vexatious or obstinate behavior adds support to the interim assessment of fees.[284] Certainly, Congress intended to discourage such behavior in either the plaintiff or defendant under the punitive aspects of the CRAFAA.[285] For example, unless such behavior is reprimanded in some fashion, a "deep pocket" defendant would be able to dissipate the private attorney general's incentive to litigate.[286] Furthermore, attorneys' fees should also be available for litigating the issue of attorneys' fees to prevent obstinate behavior on the

274. *Id.* at 146-47.
275. *Id.* at 147.
276. *Id.* at 148.
277. *Id.* at 146-47.
278. *Id.* at 147. See text & notes 85, 186 *supra*.
279. 558 F.2d 742 (5th Cir. 1977).
280. *See* 42 U.S.C. § 2000e-5(k) (1976). See note 186 *supra*.
281. 558 F.2d at 744.
282. *See* text & notes 187-203 *supra*.
283. In essence, the paying party would be required to carry the burden of paying all attorneys' fees while he pursues vindication of his own position on appeal.
284. If one party is prolonging litigation without a meritorious claim or defense, the cost of litigating should rightly belong to that party. *See* Souza v. Southworth, 564 F.2d 609, 614 (1st Cir. 1977).
285. S. REP. No. 1011, *supra* note 3, at 5.
286. *See* Souza v Southworth, 564 F.2d 609, 614 (1st Cir. 1977).

part of the defendant.[287]

In *Skehan v. Board of Trustees*[288] the court held that a showing of the plaintiff's bad faith could not be ignored in a decision to make an interim award under the CRAFAA.[289] In that case a teacher at a state college claimed to have been deprived of his right to due process when his employment was terminated without a hearing.[290] The plaintiff sought equitable relief of reinstatement to his teaching position, monetary damages, and attorneys' fees.[291] The court determined that the clean hands doctrine should be considered when equitable relief is sought for violations of civil rights.[292] Because the plaintiff's behavior was uncooperative and the defendant's behavior was reasonable and in good faith, the plaintiff's request for attorneys' fees was denied.[293] Consequently, if the plaintiff's bad faith conduct will bar recovery of attorneys' fees on final disposition, it will surely bar an interim award.[294]

The Prevailing Party's Ability to Pay

The second threshold issue in the determination of the appropriateness of an interim award is whether the prevailing plaintiff is able to pay his attorneys' fees. Some fee awards statutes place limitations on the court's discretion. For example, the Fair Housing Act requires a finding that the prevailing plaintiff is unable to pay his attorneys' fees in order to justify an award.[295] Although the CRAFAA places no such limitations on the court's discretion, whether a plaintiff is able to pay his attorneys' fees seems central to the issue of an interim award.

If a plaintiff is unable to pay his attorney, there is a possibility that he will be left without counsel.[296] The purpose behind the CRAFAA is

287. *Id.*
288. 436 F. Supp. 657 (M.D. Pa. 1977).
289. *Id.* at 664.
290. *Id.* at 659-63.
291. *Id.* at 659-60. Attorneys' fees were sought under the authority of CRAFAA. *Id.* at 665.
292. *Id.* at 664, 667.
293. *Id.* at 665-67.
294. *See* S. REP. NO. 1011, *supra* note 3, at 5.
295. 42 U.S.C. § 3612(c) (1976). That section authorizes an award of reasonable attorneys' fees to a prevailing plaintiff "[p]rovided that the said plaintiff in the opinion of the court is not financially able to assume said attorney's fees." The evaluation of what constitutes "financially unable to assume said attorney fees" includes current assets and immediate economic prospects and not future earning capacity. Smith v. Anchor Bldg. Corp., 536 F.2d 231, 236 (8th Cir. 1976). Furthermore, attorneys' fees may be awarded in these circumstances even if there is no obligation to pay for legal services. Hairston v. R & R Apartments, 510 F.2d 1090, 1092-93 (7th Cir. 1975).
296. But see ABA CODE OF PROFESSIONAL RESPONSIBILITY EC 2-32, DR 2-110 (A), (B), (C) which provide that an attorney should make the decision to withdraw only on the basis of "compelling circumstances." In any event the withdrawing lawyer is under an obligation to take steps to avoid forseeable prejudice to the rights of his client. *Id.* Although lack of funds may be a barrier to the plaintiff's securing any representation at all, the inability of the client to pay fees to counsel who has accepted employment is not a proper ground for withdrawal from employment absent additional circumstances enumerated in DR 2-110. Every attorney has a duty to provide

to help assure that the plaintiff can continue to litigate his cause.[297] Towards that end, Congress authorized the attorneys' fees awards as incentive to attorneys who might otherwise be unable to take a civil rights case for which damages upon which to base a contingent fee were not available. If it is forseeable that the award will be delayed until the end of lengthy litigation, the effectiveness of the incentive would, in many situations, be severely reduced.[298] The result may be that fewer attorneys will be willing to serve as counsel at the inception of the case or that financial hardship may force the abandonment of the cause of action or defense. Consequently, if an interim award is necessary for the plaintiff to continue, the award is essential to the fulfillment of the congressional intent.[299]

Alternatively, if the plaintiff is able to pay his counsel, either through his personal resources or through the assistance of an organization, the interim award may nevertheless be appropriate, but would not be essential to assure the litigation to enforce the plaintiff's civil rights.[300] Even if an organization is assisting the plaintiff, however, it might be argued that the organization wishes to assist in other civil rights litigations. The denial of an interim award in one case may bar the litigation of an equally legitimate claim elsewhere.[301] In such circumstances a court might appropriately grant an interim award.

Fees Awards Are Discretionary, Not Mandatory

The preceding criteria are central to a determination of the appropriateness of an interim award and should be given substantial weight. Nevertheless, even if the court should find in favor of the applicant on these points, an interim award of attorneys' fees is not mandatory. A prevailing plaintiff "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust."[302] Courts have routinely granted awards to the prevailing plaintiff.[303] Neverthe-

legal services to the indigent. *See* note 226 *supra*. If the attorney has been retained and is aware that his fee will be contingent on a court award under the CRAFAA, it may be argued that the attorney would be ethically bound either to continue his representation or to secure for his client another attorney. Nevertheless, Fisher v. State, 248 So.2d 479, 486-87 (Fla. 1971), held that in a civil case an attorney may withdraw if his client becomes financially insolvent. Given the *Fisher* exception and notwithstanding the ABA Code, it is possible that a client may be abandoned if the litigation becomes lengthy and expensive. *See* Berger, *supra* note 254, at 312-15.

297. See text & note 227 *supra*.

298. See text & notes 175-177 *supra*.

299. See text & notes 237-38 *supra*.

300. *Id.*

301. See text & note 137 *supra*.

302. Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400, 402 (1968); *see* Northcross v. Board of Educ., 412 U.S. 427, 428 (1973).

303. *See, e.g.*, Miller v. Amusement Enterprises, Inc., 426 F.2d 534, 538 (5th Cir 1970); Sanborn v. Wagner, 354 F. Supp. 291, 298 (D. Md. 1973); United States v. Gray, 319 F. Supp. 871, 873 (D.R.I. 1970). *See also* Falcon, *supra* note 15, at 397-98.

less, a recent case interpreting the Freedom of Information Act,[304] which is worded substantially the same as CRAFAA,[305] held that discretion allows the court to deny a fee even though all other requirements of the statute were met.[306] Consequently, while a determination of a prevailing party is necessary for an interim award, it should not be treated as warranting an award without consideration of any other factors the court may consider relevant.

Serving the Public Interest

Another possible factor for the court's consideration is whether the prevailing plaintiff has served an important public interest by initiating the litigation. In *Naprstek v. Norwich*,[307] one of the factors cited in the court's decision to deny attorneys' fees to the prevailing plaintiff was that the issue of the case was not of sufficient magnitude or importance to warrant an award of attorneys' fees.[308] In *Naprstek*, the challenge to an unconstitutionally vague city curfew ordinance was held to be an insignificant threat to the public interests.[309] There is support for the idea that when determining whether to make an award of statutorily authorized attorneys' fees, the court should consider the particular value of the services rendered to the public by the particular "private attorney general."[310] A proponent of this view points out that justification for the statute allowing fee awards is that the plaintiff is serving an important public interest by enforcing the civil rights statute.[311]

The *Alyeska* court, however, specifically disapproved of this type of judicial speculation.[312] It held that the courts are not free to fashion rules governing the awards of attorneys' fees based on the court's evaluation of the importance of the public policies involved in particular cases.[313] Only Congress has the authority to denote certain actions as serving the public interest sufficiently to warrant special exception to the general rule against fee shifting.[314] Consequently, if a plaintiff comes within the subject matter criteria of the CRAFAA, the court should not disallow an interim award because it finds the issue being litigated a matter of minor public importance.

304. 5 U.S.C. § 552(a)(4)(E) (1976) provides: "The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed."
305. *See* text & note 132 *supra*.
306. Cuneo v. Rumsfeld, 553 F.2d 1360, 1367-68 (D.C. Cir. 1977).
307. 433 F. Supp. 1369 (N.D.N.Y. 1977).
308. *Id.* at 1371.
309. *Id.*
310. Comment, *supra* note 15, at 572.
311. *See id.*
312. Lipson, *supra* note 133, at 255.
313. 421 U.S. 240, 269 (1975).
314. *Id.*

Calculation of the Interim Fees Award

If the court concludes that an interim award is appropriate, it must then decide what would constitute a "reasonable attorney's fee" in the particular case. Congress never specifically dealt with the calculation of CRAFAA interim awards.[315] Nevertheless, the legislative history[316] indicates that generally the fees authorized by the CRAFAA should be determined with consideration given to the criteria listed in *Johnson v. Georgia Highway Express, Inc.*[317]

In *Johnson*, the court discussed a number of factors to be weighed in the determination of reasonable attorneys' fees on a case by case basis.[318] Some of these factors were: 1) The time and labor required; 2) the novelty and difficulty of the questions involved; 3) the skill requisite to perform properly; 4) the preclusion from other employment as counsel because the particular case was accepted; 5) the attorney's customary fee; 6) the time limitations imposed by the client or circumstances; 7) the results obtained; 8) the experience, reputation, and ability of the attorney; 9) the undesirability of the case; 10) the nature and length of the attorney-client relationship; and 11) the awards in similar cases.[319] The *Johnson* court urged restraint in the application of these factors so that these awards will serve the congressional purpose of assuring the plaintiff competent counsel without "making plaintiff's counsel rich."[320] An excessive, lucrative award would be considered by the court to "ridicule the public attorney general."[321]

Generally, the courts have looked to the *Johnson* factors in calculating fee awards under the CRAFAA.[322] In *Keyes* the district court formulated a few additional factors that may be pertinent to calculating an interim award.[323] The nature and extent of objections to the allowance of fees is the first factor proposed in *Keyes*.[324] In determining an interim award, such objections are important because an award is an

315. *See* S. REP. No. 1011, *supra* note 3, at 6; H.R. REP. No. 1558, *supra* note 3, at 8-9.

316. See note 315 *supra*.

317. 488 F.2d 714 (5th Cir. 1974). *Johnson* was a racial discrimination in employment action brought under title VII of the 1964 Civil Rights Act. The attorneys' fees award provision is substantially the same as the CRAFAA. *See* text at note 186 *supra*.

318. 488 F.2d at 717-19.

319. *Id.* One factor that was omitted was whether the fee is fixed or contingent.

320. *Id.*

321. *Id.* See also ABA CODE OF PROFESSIONAL RESPONSIBILITY EC 2-18, DR 2-106 which provide that attorneys' fees should be reasonable, not illegal or clearly excessive. The excessiveness of a fee is judged by the standard of what is reasonable to a "lawyer of ordinary prudence." *Id.* at DR 2-106(A). Factors the ABA provides as guides are generally the same as those enumerated under *Johnson*. *See id.* at DR 2-106(B).

322. *See, e.g.*, Souza v. Southworth, 564 F.2d 609, 611 (1st Cir. 1977); Phillips v. Moore, 441 F. Supp. 833, 834 (W.D.N.C. 1977); Keyes v. School Dist. No. 1, 439 F. Supp. 393, 403 (D. Colo. 1977).

323. 439 F. Supp. at 402-05, 413-15.

324. *Id.* at 402.

additional financial burden for the losing party who intends to appeal.[325] Assistance by a governmental agency is relevant to interim awards[326] because it goes to the financial ability of the prevailing plaintiff to continue to litigate.[327] Another *Keyes* factor is the public or private nature of the party who would be paying the fee award.[328] In *Keyes* the fact that an award against the school district would most likely come out of school program funds and would consequently affect school programming was weighed with other factors.[329] The court held that the plaintiffs were entitled to a fee award, but the amount must be tempered to consider that the school district would also have to make additional expenditures to implement the court ordered plan.[330] Furthermore, the court observed that Denver's most prestigous firms reduced their fees when charging a public entity for their services.[331] Consequently, in order to ensure appropriate exercise of discretion in making an interim award, a judge would be well advised to use the *Keyes* and *Johnson* factors as guidelines.

Finally, the criteria that are used in the court's fee award decision should be identified and documented in the decision in order to establish a record from which an appeals court can evaluate the court's use or abuse of discretion.[332] Furthermore, future litigants will be better advised as to the consequences of bringing suit. They will be better able to evaluate the likelihood of being charged with or of receiving an interim award of attorneys' fees. Unless the parties can forecast the possibility of this additional cost or the defrayment of cost, the CRAFAA will not serve its purpose of encouraging justifiable litigation and of discouraging frivolous litigation.

Conclusion

The Civil Rights Attorney's Fees Act of 1976 authorizes an award of reasonable attorneys' fees to the prevailing party in civil rights litigation. The congressional intent expressed by the Act was to encourage private citizens to bring meritorious litigation to enforce civil rights protected by statute. Citing the *Bradley* authorization of interim awards, Congress gave implicit endorsement to interim awards under the CRAFAA. Furthermore, interim awards are essential to the encouragement of private enforcement of civil rights. Because of the

325. See text & note 283-84 *supra*.
326. 439 F. Supp. at 403.
327. See text & notes 296-99 *supra*.
328. 439 F. Supp. at 414-15.
329. *Id.* at 415.
330. *Id.*
331. *Id.* at 414. *See generally* Berger, *supra* note 254 (for a discussion of fees calculation).
332. King v. Greenblatt, 560 F. 2d 1024, 1027 (1st Cir. 1977).

often lengthy nature of civil rights litigation, delay of an award of attorneys' fees may be unreasonable if the substantive issues have been resolved and only remedial issues are pending resolution.

In making interim awards under the CRAFAA, some guidelines for the exercise of judicial discretion are suggested. The good faith conduct of the prevailing party should be weighed in favor of an award. Likewise, the unreasonable behavior of the losing party should also favor an award. Because the purpose of the CRAFAA is to ensure that lack of finances will not impede the full litigation of civil rights issues, the plaintiff's ability to pay for legal representation should be considered. If the plaintiff is impecunious, the interim award of attorneys' fees may be essential for continued litigation. In all other respects, an interim award should be governed by the same factors considered in a final award.

This proposed application of interim fees awards under the CRAFAA will extend the usefulness of interim awards beyond school desegregation cases. An interim award will be appropriate in any extended civil rights litigation, especially prison reform.