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ATTORNEY'S FEES UNDER THE LANDRUM-GRIFFIN ACT: THE NEED FOR "UNION THERAPEUTICS"

Whether or not attorney's fees should be awarded to the successful union member in suits against his union under the enforcement provisions of the Labor-Management Reporting and Disclosure Act of 1959[1] (hereinafter "LMRDA" or "the Act") has been vigorously litigated.[2] The judgment that an award of attorney's fees is appropriate now lies within the discretion of the court and depends upon a demonstration that the plaintiff's suit has rendered a "substantial service" to the union and its members.[3] This Comment will support the proposition that the present standard should be replaced by a procedure guaranteeing attorney's fees as a matter of right in every successful LMRDA suit initiated by a union member.[4]

An award of attorney's fees encourages the filing of meritorious complaints under the LMDRA by reducing the potentially prohibitive costs of litigation.[5] This, in turn, furthers the explicit congressional intention to promote fair conduct in union-member relations.[6] The process of shifting the successful union member's litigation costs to his union is "therapeutic"[7] in that it helps to assure the correction or prevention of union management misconduct.[8] By labeling this process of shifting attorney's fees "union therapeutics,"[9] one recognizes it as a positive and healthful approach in furthering the effectuation of the aims of the LMRDA.

Relations between labor unions and their members have historically been plagued by unique problems and possibilities of gross abuse.[10] This state of affairs necessitated congressional passage of the Labor-Management Reporting and Disclosure Act of 1959.[11] The Act was

1. 29 U.S.C. §§ 401-531 (1971).
2. *See* cases cited in notes 26 and 110 *infra.*
3. See text accompanying notes 129-52 *infra.*
4. See text accompanying notes 160-71 *infra.*
5. See text accompanying notes 94-97 *infra.*
6. See text accompanying notes 12-15 *infra.*
7. See note 122 and text accompanying note 166 *infra.*
8. See text accompanying notes 146-49 *infra.*
9. See note 122 and text accompanying note 166 *infra.*
10. Note, *Counsel Fees Incurred by an Individual Union Member in Pursuit of His Rights Held to be an Allowable Award under Section 102 of the Labor-Management Reporting and Disclosure Act,* 43 NOTRE DAME LAW. 574, 580 (1968) [hereinafter cited as *Counsel Fees*].
11. 29 U.S.C. §§ 401-531 (1971).

designed to "afford necessary protection of the rights and interests of employees and the public generally"[12] by eliminating "instances of breach of trust, corruption, disregard of the rights of individual employees, and other failures to observe high standards of responsibility and ethical conduct"[13] by labor officials.[14] In recognition of those goals, Congress included in Title I[15] of the LMRDA a Bill of Rights for union members, *i.e.*, a statement of equal rights,[16] freedom of speech and assembly,[17] a provision for the supervision of dues, initiation fees and assessments,[18] language protecting a union member's right to sue

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12. *Id.* § 401(b), *quoted in* Gartner v. Soloner, 220 F. Supp. 115 (E.D. Pa. 1963), *aff'd in part, rev'd in part*, 384 F.2d 348 (3d Cir.), *cert. denied*, 390 U.S. 1040 (1967).

13. 29 U.S.C. § 401(b) (1971).

14. Goldwater, *The Union Member as a Person*, U. DET. L.J. 179, 186 (1962).

15. 29 U.S.C. §§ 411-15 (1971).

16. Section 101(a)(1) provides:

EQUAL RIGHTS—Every member of a labor organization shall have equal rights and privileges within such organization to nominate candidates, to vote in elections or referendums of the labor organization, to attend membership meetings, and to participate in the deliberations and voting upon the business of such meetings, subject to reasonable rules and regulations in such organization's constitution and bylaws.

29 U.S.C. § 417(a)(1) (1971).

17. Section 101(a)(2) provides:

FREEDOM OF SPEECH AND ASSEMBLY—Every member of any labor organization shall have the right to meet and assemble freely with other members; and to express any views, arguments, or opinions; and to express at meetings of the labor organization his views, upon candidates in an election of the labor organization or upon any business properly before the meeting, subject to the organization's established and reasonable rules pertaining to the conduct of meetings: *Provided*, That nothing herein shall be considered to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations.

29 U.S.C. § 411(a)(2) (1971).

18. Section 101(a)(3) provides:

DUES, INITIATION FEES, AND ASSESSMENTS—Except in the case of a federation of national or international labor organizations, the rates of dues and initiation fees payable by members of any labor organization in effect on the date of enactment of this Act shall not be increased, and no general or special assessment shall be levied upon such members, except—

(A) in a case of a local labor organization, (i) by majority vote by secret ballot of the members in good standing voting at a general or special membership meeting, after reasonable notice of the intention to vote upon such question, or (ii) by majority vote of the members in good standing voting in a membership referendum conducted by secret ballot; or

(B) in the case of a labor organization, other than a local labor organization or a federation of national or international labor organizations, (i) by majority vote of the delegates voting at a regular convention, or at a special convention of such labor organization held upon not less than thirty days' written notice to the principal office of each local or constituent labor organization entitled to such notice, or (ii) by majority vote of the members in good standing of such labor organization voting in a membership referendum conducted by secret ballot, or (iii) by majority vote of the members of the executive board or similar governing body of such labor organization, pursuant to express authority contained in the constitution and bylaws of such labor organization: *Provided*, That

his union,[19] and safeguards against improper disciplinary actions.[20]

Especially important to the achievement of the legislative goals was the scheme for judicial enforcement.[21] Section 102 of the Act reads, in relevant part:

> Any person whose rights secured by the provisions of this subchapter have been infringed by any violation of this subchapter may bring a civil action in a district court of the United States for *such relief* (including injunctions) *as may be appropriate . . . .*[22]

Title III[23] of the LMRDA, which concerns the establishment of trusteeships over subordinate labor organizations, includes similar language in its enforcement provision.[24] Section 304 (a) provides, in pertinent part:

> Any member or subordinate body of a labor organization affected by any violation of this subchapter (except 301) may bring a civil action in any district court of the United States having jurisdiction of the

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such action on the part of the executive board or similar governing body shall be effective only until the next regular convention of such labor organization.
29 U.S.C. § 411(a)(3) (1971).

19. Section 101(a)(4) provides:

PROTECTION OF THE RIGHT TO SUE—No labor organization shall limit the right of any member thereof to institute an action in any court, or in a proceeding before any administrative agency, irrespective of whether or not the labor organization or its officers are named as defendants or respondents in such action or proceeding, or the right of any member of a labor organization to appear as a witness in any judicial, administrative, or legislative proceeding, or to petition any legislature or to communicate with any legislator: *Provided*, That any such member may be required to exhaust reasonable hearing procedures (but not to exceed a four-month lapse of time) within such organization, before instituting legal or administrative proceedings against such organizations or any officer thereof: *And provided further*, That no interested employer or employer association shall directly or indirectly finance, encourage, or participate in, except as a party, any such action, proceeding, appearance, or petition.
29 U.S.C. § 411(a)(4) (1971).

20. Sections 101(a)(5) and 101(b) provide:

SAFEGUARDS AGAINST IMPROPER DISCIPLINARY ACTION—No member of any labor organization may be fined, suspended, expelled, or otherwise disciplined except for nonpayment of dues by such organization or by any officer thereof unless such member has been (A) served with written specific charges; (B) given a reasonable time to prepare his defense; (C) afforded a full and fair hearing.

(b) Any provision of the constitution and bylaws of any labor organization which is inconsistent with the provisions of this section shall be of no force or effect.
29 U.S.C. §§ 411(a)(5), 101(b) (1971).

21. 29 U.S.C. § 412 (1971).

22. *Id.* (emphasis added). Senator Kuchel of California wrote the amendment which with some modification, including the words "including injunctions," subsequently became the basis for section 102. *See* 2 NLRB, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959, at 1232 (1959) [hereinafter cited as LEGISLATIVE HISTORY].

23. 29 U.S.C. §§ 461-66 (1971).

24. *Id.* § 464.

> labor organization *for such relief* (including injunctions) *as may be appropriate.*[25]

The question of whether or not the general and vague criterion of "appropriate" relief authorizes the recovery of attorney's fees was answered in the negative by early decisions[26] which purported to rely on the legislative history of the LMRDA. *Vars v. International Brotherhood of Boilermakers,*[27] the first case to rule on the propriety of attorney's fees under section 102,[28] involved a union member who was unlawfully expelled from union membership for allegedly violating a union bylaw which forbade the discussion of religious matters during union meetings.[29] Although the union member successfully established a violation of section 101(a)(2),[30] a Connecticut federal district court refused to award attorney's fees and held that Congress had intentionally excluded such a remedy in Title I litigation.[31] The court was persuaded by a House Minority Report which had urged that attorney's fees be specifically authorized in all successful actions involving substantive rights created by the LMRDA.[32]

> One of the most serious inadequacies of the Senate Bill is the lack of any effective enforcement procedure to protect union members from those few union officials who fail to recognize that a union belongs to its members. Under that bill, the individual member must shoulder

25. *Id.* § 464(a) (emphasis added). Section 301 discusses the procedures of drafting reports pursuant to the establishment of a trusteeship over a subordinate labor organization. *Id.* § 461(a).

26. *See, e.g.*, Cole v. Hall, 35 F.R.D. 4, 8 (E.D.N.Y. 1964), *aff'd on other grounds, and remanded for trial,* 339 F.2d 881 (2d Cir. 1965), 66 CCH Lab. Cas. ¶ 22,011 (E.D.N.Y. 1971), *aff'd,* 462 F.2d 777 (2d Cir. 1972), *aff'd,* 412 U.S. 1 (1973); McCraw v. United Ass'n of Journeymen & Apprentices of Plumbing, 341 F.2d 705, 710 (6th Cir. 1965); Jacques v. Local 1418, Int'l Longshoremen's Ass'n, 246 F. Supp. 857, 860 (E.D. La. 1965); Magelsson v. Local 518, Operative Plasterers' & Cement Masons' Int'l Ass'n, 240 F. Supp. 259, 263 (W.D. Mo. 1965); Leonard v. M.I.T. Employees' Union, 225 F. Supp. 937, 940 (D. Mass. 1964); Vars v. International Bhd. of Boilermakers, 215 F. Supp. 943, 952 (D. Conn. 1963), *aff'd on other grounds,* 320 F.2d 576 (2d Cir. 1963).

27. 215 F. Supp. 943, 952 (D. Conn.), *aff'd on other grounds,* 320 F.2d 576 (2d Cir. 1963).

28. 29 U.S.C. § 412 (1971), *quoted in* text accompanying note 18 *supra.*

29. 215 F. Supp. at 945.

30. 29 U.S.C. § 411(a)(2) (1971), *quoted in* note 16 *supra.*

31. 215 F. Supp. at 952.

32. H.R. REP. No. 741, 86th Cong., 1st Sess. 95 (1959). Nine of the members of the House Committee on Education and Labor opposed the Elliott Bill (HR 8,342) which contained the same language pertaining to relief as found in section 102 of Title I of the Landrum-Griffin Bill (HR 8,400) which was eventually passed by the House. *See* Gartner v. Soloner, 384 F.2d 348, 351-52 n.5 (3d Cir. 1967), *aff'g in part, rev'g in part,* 220 F. Supp. 115 (E.D. Pa. 1963), *cert. denied,* 390 U.S. 1040 (1967).

> the burden of litigation costs himself. The union officer [sic], on the other hand, have the entire resources of the union at their disposal. . . .[33]

Despite the House Minority Report, a provision explicitly authorizing recovery of fees was not included in Title I of the Act as passed,[34] although fee recoveries were explicitly authorized for violations of Titles II and V.[35] The court, therefore, determined that Congress had intended to make available an award of attorney's fees only where expressly stated.[36]

In *McGraw v. United Association of Journeymen & Apprentices of Plumbing*,[37] a Tennessee federal district court also relied on the apparent congressional refusal in order to deny a successful union member reasonable attorney's fees.[38] The suit involved a wage earner who was illegally fined and later suspended from the union for refusing to pay that fine.[39] The court referred to the legislative testimony of Senator Goldwater who had commented:

> Although the bill permits the union member himself to sue for infringement of his rights, the nature of the suit is such as to promise, even if successful, little in the way of monetary damages except in the rare case where the plaintiff's job rights or job tenure have been adversely affected. Moreover, the bill does not grant him, even where successful in his suit, reasonable counsel fees or other costs.[40]

Following *Vars* and *McGraw*,[41] a New York federal district court also denied recovery of attorney's fees.[42] Since Congress had spe-

33. LEGISLATIVE HISTORY, *supra* note 22, at 2492, *quoted in Gartner*, 384 F.2d at 350.

34. 29 U.S.C. § 412 (1971), *quoted in* text accompanying note 18 *supra*.

35. *See* note 43 *infra*.

36. 215 F. Supp. at 952. See note 43 *infra*.

37. 216 F. Supp. 655 (E.D. Tenn. 1963), *aff'd*, 341 F.2d 705 (6th Cir. 1965).

38. *Id.* at 710-11.

39. *Id.* at 707-09. The union unsuccessfully alleged that the union member had filed a discrimination charge with the National Labor Relations Board without first exhausting his remedies within the local and international unions and that this constituted grounds for his suspension from the union. *Id.* at 711.

40. LEGISLATIVE HISTORY, *supra* note 22, at 1281, *quoted in* 216 F. Supp. at 664 n.3. The court was persuaded by the remarks of Senator Goldwater which were not expressed as part of a floor debate on the Act in the Senate, but rather as testimony before the Committee on Education and Labor of the House of Representatives on June 3, 1959, and printed in the Congressional Record without objection at the suggestion of Senator Goldwater.

41. See text accompanying notes 27-40 *supra*.

42. Cole v. Hall, 35 F.R.D. 4 (E.D.N.Y. 1964), *aff'd on other grounds and remanded for trial*, 339 F.2d 881 (2d Cir. 1965), 66 CCH Lab. Cas. ¶ 22,011 (E.D.N.Y. 1971), *aff'd*, 462 F.2d 777 (2d Cir. 1972), *aff'd*, 412 U.S. 1 (1973).

cifically provided for such a remedy in Titles II and V of the LMRDA,[43] the court believed that if Congress had intended to include such relief in all titles of the Act, it would expressly have done so.[44] Absent such express language in section 102, the court found a deliberate congressional intent to omit the award of attorney's fees from Title I litigation.[45]

Thus a line of federal cases transformed congressional silence into an absolute prohibition against the award of attorney's fees in Title I actions. What these courts failed to recognize was that most of the enforcement sections were finally added to the LMRDA as congressional floor compromises and were not subjected to intensive prior committee deliberation.[46] This explains in part the sparsity of affirmative statements by those members of Congress in favor of granting attorney's fees.[47] The affirmative responses actually expressed by the sponsors of the Act conveyed the notion that the language was purposely written broadly to give the courts "wide latitude to grant relief according to the necessitites of the case,"[48] to cover any loss suffered by a union member.[49] In fact, there is no suggestion in the legislative history of the Act that any member of Congress was *opposed* to the remedy of attorney's fees.[50] The only conflict was whether or not specific statutory language was necessary to express such a con-

43. Section 201(c) provides for the award of attorney's fees in a suit brought by a union member who obtains access to union books, records and accounts to verify annual financial statements. "The court in such action may, in its discretion, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action." 29 U.S.C. § 431(c) (1971). Section 501(b) authorizes the award of attorney's fees in a suit brought by a union member against a union official to recover damages or for an accounting for the benefit of the union on the premise that the union official is violating his duties.

> The trial judge may allot a reasonable part of the recovery in any action under this subsection to pay the fees of counsel prosecuting the suit at the instance of the member of the labor organization and to compensate such member for any expenses necessarily paid or incurred by him in connection with the litigation.

29 U.S.C. § 501(b) (1971).

44. 35 F.R.D. at 8.

45. *Id.*

46. *See* Cole v. Hall, 66 CCH Lab. Cas. ¶ 22,011, at 22,013, 22,015 (E.D.N.Y. 1971). *See also* Cox, *Internal Affairs of Labor Unions Under the Labor Reform Act of 1959*, 58 MICH. L. REV. 819, 852 (1960).

47. 66 CCH Lab. Cas. at 22,015.

48. 105 CONG. REC. 15547-48 (1959) (remarks of Representative Elliott), *quoted in* 384 F.2d at 352-53 and in LEGISLATIVE HISTORY, *supra* note 22, at 1584. See note 74 *infra* and Hall v. Cole, 412 U.S. 1 (1973).

49. 412 U.S. at 11.

50. *Id.* at 12-13.

gressional intent.[51]

The first decision to controvert the early cases[52] which had relied on the legislative history of the Act for support in denying attorney's fees under the LMRDA[53] was the Third Circuit decision in *Gartner v. Soloner*.[54] The case involved a union member who was fined and suspended from union membership for protesting a denial of voting rights to other union members.[55] In finding the remedy of attorney's fees permissible in Title I litigation, the court concluded that Congress has neither expressly limited nor narrowly defined the scope of recovery available under section 102.[56] The court maintained that Congress had been aware that if remedies such as attorney's fees were specifically spelled out in the enforcement provision, the "danger that those [other remedies] not listed might be proscribed . . . [would] result [in] the courts be[ing] fettered in their efforts to grant relief according to the necessities of the case."[57] Although the court concurred with the earlier decisions which had discerned a congressional reluctance to specifically enumerate the right to attorney's fees in circumstances where a union member resisted the deprivation of rights guaranteed by Title I,[58] *Gartner* reasoned that such a remedy was in no way precluded by the purposely general and vague words "appropriate relief."[59] The court declared:

> That phrase, while it avoided spotlighting the making available of necessary material assistance to a single unionist fighting his lonely battle for justice, did take care of the situation by means of the deliberately general language used. . . . [I]f the Congress had concluded to reverse its field . . . , it would have stated that there would be no counsel fees allowed. Absent this, "appropriate relief" fairly construed must be held to include proper counsel fees.[60]

Gartner dismissed prior contrary decisions as being "too readily and too strongly [relied upon] . . . for the proposition that the courts are without power to grant counsel fees under Section 102."[61]

51. Gartner v. Soloner, 384 F.2d 348, 352 (3d Cir. 1967), *cert. denied*, 390 U.S. 1040 (1968).
52. *See* cases cited in note 26 *supra*.
53. *Id.*
54. 384 F.2d at 351-56.
55. *Id.* at 348-49.
56. *Id.* at 353. 29 U.S.C. § 412 (1971), *quoted in* text accompanying note 18 *supra*.
57. 384 F.2d at 353.
58. *Id.* at 355.
59. *Id.*
60. *Id.*
61. *Id.* at 353. The court also felt that *Vars* was not, in fact, meant to be too

The court also emphasized that Titles II (section 201(c)) and V (section 501(b)) of the Act,[62] which expressly authorize the award of attorney's fees, in no way control the interpretation of other titles of the Act, nor do they justify the hypothesis that the LMRDA statutorily denies the award of fees in Title I litigation.[63]

The Third Circuit also found it appropriate to distinguish the Supreme Court holding of *Fleischmann Distilling Corp. v. Maier Brewing Co.*,[64] a decision which had denied attorney's fees to a respondent who successfully alleged a patent trademark infringement.[65] Pointing out that Congress had limited and meticulously detailed the available remedies to a litigant who successfully sues under the Lanham Act,[66] the Court in *Fleischmann* had stated:

> When a cause of action has been created by statute which expressly provides the remedies for vindication of the cause, other remedies should not be readily implied . . . . A judicially created compensatory remedy in addition to the express statutory remedies is inappropriate in this context.[67]

Gartner emphasized that the language of section 102 was not as restrictive as that found in the Lanham Act and thus could not prevent

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restrictive in that the case seemed to indicate that exemplary damages might include the recovery of attorney's fees where the union's action was motivated by willful malice. *Id.*

62. 29 U.S.C. §§ 431(c), 501(b) (1971). *See* statutes *quoted in* note 43 *supra.*

63. 384 F.2d at 353. The court said that, in attempting to extract the legislative purpose, primary concern should always be given to the views expressed by the sponsors of the legislation and that in this respect the statements of Senator McClellan and Representative Elliott should be viewed as representing the true spirit of section 102. See note 74 *infra.*

64. 386 U.S. 714 (1967), *discussed in* 384 F.2d at 353-54.

65. 386 U.S at 721.

66. *Id.* at 719. In the Lanham Act, Congress meticulously details the remedies available to a plaintiff who can prove that his valid trademark has been infringed. The statute provides not only for injunctive relief, but also for compensatory recovery, measured by the profits accrued to the defendant by virtue of his infringement, costs of litigation, and other damages as may be appropriate under the circumstances. 15 U.S.C. §§ 1116-17 (1971). The Court pointed out that it has long been established that attorney's fees are not usually granted in the absence of a statute or enforceable contract and that exceptions to the rule were not developed in the context of statutory causes of action for which the legislature had prescribed intricate remedies. 386 U.S. at 717, 719.

67. 386 U.S. at 720-21. The Court had also stated that if plaintiff's argument that "costs" (for which recovery was statutorily provided) included attorney's fees were accepted, it "would require us to ascribe to Congress a purpose to vary the meaning of that term without either statutory language or legislative history to support the unusual construction." *Id.* at 720.

a union member from successfully seeking a judicially created remedy in addition to the express statutory remedies which the Act did provide.[68] The earlier cases had maintained that either statutory language or explicit legislative history was required to authorize an award of attorney's fees. However, *Gartner* recognized that there was no express or implied Congressional purpose in the LMRDA to restrict the inherent equity powers of the federal courts[69] and that the mere absence of statutory authorization would not revoke a court's inherent ability to grant fees in appropriate circumstances.[70] *Gartner* construed the LMRDA to permit an award of attorney's fees when equity would require it, since statutory language or a congressional intent disallowing such relief was entirely absent.[71]

The Third Circuit thus assumed the role of arbiter of both legal and equitable relief by granting the successful union member reasonable attorney's fees.[72] Stressing congressional approval, the court concluded that, given the court's legal and equitable jurisdiction, "[t]he scope of authority under Section 102 and the flexibility with which that power may be exercised is practically unlimited . . . ."[73] Section 102 was designed to be enforced by union members aided by the court's wide latitude "to grant relief . . . as it deemed equitable under all the circumstances."[74]

68. 384 F.2d at 354.

69. *Id.*

70. *Id.* at 355. Gilbert v. Local 701, Hoisting & Portable Eng'rs, 390 P.2d 320 (Ore. 1964), was the first state court case in union-member litigation to award attorney's fees where the award was not statutorily enumerated. The case dealt with litigation where there already existed state procedures by which a union member could enforce fiduciary duties of union officers. *Id.* at 320-21. The court announced:

> If those who wish to preserve the internal democracy of the union are required to pay out of their own pockets the cost of employing counsel, they are not apt to take legal action to correct the abuse. The elimination of improper practices in union affairs benefits not only the [member] who initiates the suit, but also inures to the members of the union and the public as well. The cost of employing counsel should not be visited upon the persons who bring the suit and prevail. . . . No obstacles should be placed in the path of union members who, acting in good faith, seek the aid of the courts in an effort to correct abuses of power by union officials.

Id. at 321.

71. 384 F.2d at 353.

72. *Id.*

73. *Id.* at 354.

74. 105 CONG. REC. 6717 (1959) (remarks of Senator Kuchel). *See* LEGISLATIVE HISTORY, *supra* note 22, at 1233 (remarks of Senator Clark commenting on Senator Kuchel's proposal that section 102 "takes the Federal bureaucracy out of this bill of rights and leaves its enforcement to union members, aided by the courts."). Senator McClellan, the author of Title I, reiterated Senator Clark's remarks in a supplement to his own testimony before the House Education and Labor Committee, LEGISLATIVE HISTORY, *supra* note 22, at 1294; Hall v. Cole, 412 U.S. 1, 13 (1973); 29 U.S.C. §§

The court noted the development of limited court-developed exceptions to the conservative American rule[75] that attorney's fees are not ordinarily recoverable in the absence of explicit statutory language.[76] One such exception applies when a plaintiff's suit results in a substantial benefit to members of an ascertainable class.[77] Awarding attorney's fees is justifiable in these cases because equitable considerations require that those who profit or benefit from plaintiff's successful litigation should share the expense incurred by plaintiff in bringing the suit.[78] It has been concluded that the easiest and most logical way to

413, 523(a) (1971). *See also* the remarks of Representative Elliott who said, "[T]he court's jurisdiction . . . 'to grant such other and further relief as may be appropriate' gives it a wide latitude to grant relief according to the necessities of the case." LEGISLATIVE HISTORY, *supra* note 22, at 1584; note 48 *supra*; and the remarks of Representative O'Hara of Michigan who stated:

> These rights [in Title I] are enforced effectively and fairly by civil actions in the Federal courts. In such suit the court can award money damages to compensate *any loss* suffered by a member through denial of any of the enumerated rights and can enjoin any repetition of actions which deprive the member of his rights.

LEGISLATIVE HISTORY, *supra* note 22, at 1632 (emphasis added).

75. 384 F.2d at 354-55. *See, e.g.*, Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1970); Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S 714 (1967); Sprague v. Ticonic Nat'l Bank, 307 U.S. 161 (1939).

76. Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 717, *cited in* 384 F.2d at 354. The American rule is more conservative and restrictive than the fee-shifting rules adopted in most countries and a broad revision of the American rule has been widely advocated. *See, e.g.*, Ehrenzweig, *Reimbursement of Counsel Fees and the Great Society*, 54 CALIF. L. REV. 792 (1966); Stoebuck, *Counsel Fees Included in Costs: A Logical Development*, 38 COLO. L. REV. 202 (1966); Comment, *Attorneys' Fees in Shareholder Derivative Suits: The Substantial Benefit Rule Reexamined*, 60 CALIF. L. REV. 164 (1972); Comment, *Allowance of Attorneys' Fees in Civil Rights Actions*, 7 COLUM. J.L. SOC. PROB. 381 (1971); Comment, *The Allocation of Attorney's Fees After Mills v. Electric Auto-Lite Co.*, 38 U. CHI. L. REV. 316 (1971); Comment, *Counsel Fees in Stockholders' Derivative and Class Actions—Hornstein Revisited*, 6 U. RICHMOND L.J. 259 (1972); Comment, *Attorneys' Fees: What Constitutes a "Benefit" Sufficient to Award Fees From Third Party Beneficiaries*, 1972 WASH. U.L.Q. 271. Statutes which expressly provide for the recovery of attorney's fees include the Clayton Act, § 4, 15 U.S.C. § 15 (1971); Communications Act of 1934, § 206, 47 U.S.C. § 206 (1971); Interstate Commerce Act, § 16, 49 U.S.C. § 16(2) (1971); Securities Exchange Act of 1934, § 9(e), 18(a), 15 U.S.C. §§ 78i(e), 78r(a) (1971).

77. Mills v. Electric Auto-Lite Co., 396 U.S. 375, 396 (1970). A substantial benefit is "one that accomplishes a result which corrects or prevents an abuse which would be prejudicial to the rights and interests of the corporation or affect the enjoyment or protection of an essential right to the stockholder's interest." Bosch v. Meeker Cooperative Light & Power Ass'n, 101 N.W.2d 423, 426-27 (Minn. 1960). For a discussion of the substantial benefit rule in a union context, see text accompanying notes 129-52 *infra*. Another situation in which courts have ordered a litigant to pay the attorney's fees of his successful opponent exists when a suit has been filed and litigated "in bad faith, vexatiously, wantonly, or for oppressive reasons." 6 J. MOORE, FEDERAL PRACTICE 1352 (1966). *See also* Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400, 402 n.4 (1968).

78. *See* 396 U.S. at 392-94.

avoid the unjust enrichment of those benefited is to make them contribute equally to the litigation expenses.[79]

It was the Supreme Court decision of *Sprague v. Ticonic National Bank*[80] which formulated the American rule that the "allowance of such costs in appropriate situations is part of the historic equity jurisdiction of the federal courts."[81] *Sprague* involved a successful litigant who had vindicated her rights to a trust fund. Although she had never even purported to sue on behalf of a class,[82] the Court recognized that her successful suit would by stare decisis[83] entitle fourteen other persons similarly situated to recover from the same fund.[84] Advocating that "[i]ndividualization in the exercises of a discretionary power will alone retain equity as a living system and save it from sterility,"[85] the Court ordered that the non-parties to the suit contribute to plaintiff's litigation costs out of the assets from which their recovery would also accrue.[86]

Thus the *Gartner* court, relying on the historic precedent of *Sprague*, merely acknowledged what it perceived to be its already existent equitable power[87] and exercised it in the way which it felt would best serve the interests of justice.[88] The court found "appropriate" an equitable award of attorney's fees to a union member who successfully pursued his substantive rights under the LMRDA in a good-faith private suit enforcing the duties and responsibilities of those guilty of abuse.[89] This justified its departure from the traditional judicial custom in the United States of not awarding attorney's fees to a successful plaintiff.[90]

79. Wyatt v. Stickney, 344 F. Supp. 387, 409 (N.D. Ala. 1972).
80. Sprague v. Ticonic Nat'l Bank, 307 U.S. 161 (1939).
81. *Id.* at 164-65.
82. *Id.* at 166.
83. *Id.* at 167.
84. *Id.*
85. *Id.*
86. *Id.* at 170.
87. 384 F.2d at 354.
88. *Id.* at 356.
89. *Id.* at 355. The court said that, in construing the statute, "the court must consider the purpose of its enactment, the evil to be eradicated, the object to be obtained, and recognize the construction that would best effectuate those standards." *Id.*
90. *Id.* *See* note 76 *supra.* Opponents to fee-shifting argue that the evil to be eradicated does not merit the remedy urged. It is their contention that the award of attorney's fees in the occasionally successful and meritorious case will not be worth the litigation. Summers, *The Law of Union Discipline: What the Courts Do in Fact,* 70 YALE L.J. 175, 222 (1960). Since most litigation involves not solely individual efforts but intra-union political faction power struggles, the burden of litigation costs is lightened by the pooling of finances of these opposition groups. But, "[t]he very fact that so few cases involve individuals unsupported by factional groups suggests that the lone member's rights go by default." *Id.* The availability of factional support

Prompted by the fact "[t]hat stark reality might slam the door in [the] litigant's face when confronted with the insurmountable obstacle of prohibitive legal expenses,"[91] *Gartner* was the first case to conclude that a denial of attorney's fees in Title I litigation would virtually close a wage earner's access to the federal judicial system when his rights had been infringed by his union. It recognized the inequality of resources between an individual union member who shoulders the burden of litigation costs himself and a union officer who commands the entire treasury of the organization.[92]

> "[I]t is untenable to assert that in establishing the bill of rights under the Act Congress intended to have those rights diminished by the [inescapable] fact that an aggrieved union member would be unable to finance litigation . . . ."[93]

Further, a union has less incentive to extend and complicate the litigation through costly procedural devices and appeals to the point where the struggle becomes inherently unequal and the financial burden impossible for the rank-and-file union member if successful individual litigants will be granted attorney's fees. More importantly, when seeking an injunction or reinstatement to the union under section 102,[94] an award of attorney's fees encourages individuals to engage in the risks of litigation and to vindicate congressional statutory policy by deterring future acts of union management mistreatment[95] although the financial stake in the outcome may be relatively small.[96] Since most wage

"should not conceal the obvious necessity for requiring a guilty union to indemnify a lone member who is forced into litigation to protect his guaranteed rights." *Counsel Fees, supra* note 10, at 580.

91. 384 F.2d at 355.

92. *Id.*

93. *Id.*

94. 29 U.S.C. § 412 (1971), *quoted in* text accompanying note 18 *supra.*

95. See text accompanying notes 89-94 *supra.*

96. This situation exists because, although monetary damages may be available to the wage earner who can substantiate bad faith or malice on the part of union management, in most cases either there will be no bad faith to demonstrate or damages will be difficult to prove. If a union member were awarded substantial monetary damages, the court would probably deny the additional remedy of attorney's fees since such an additional award, if granted, might well destroy any therapeutic value through depletion of union funds to such an extent as "might impair the union's ability to operate as an effective collective bargaining agent . . . ." 412 U.S. at 15 n.13. Thus, if the damages award were sizable, but would not itself impair the union's ability to operate effectively, the union's financial capabilities, in light of the award, would still be a proper subject for consideration by the trial court in a subsequent exercise of its discretion as to what recovery of attorney's fees, if any, the union member would be entitled. See text accompanying notes 170-71 *infra.* In any event, courts *will not* award attorney's fees for that portion of the union member's effort which conferred special benefits upon himself over and above that conferred on the union and its other

earners are hesitant to incur great expense in order to vindicate intangible rights,[97] the potential remedy of attorney's fees would ease the initial reluctance to sue.

The court was also sensitive to the fact that an attorney contemplating whether or not to represent a union member might well deem such litigation a poor risk and refuse the case if the individual's assets constituted the only potential source for his fee.[98] The assurance that attorneys will be reimbursed for their legal services upon the success of the lawsuit would thus increase private enforcement of the Act.[99]

The enforcement provision of Title IV[100] of the Act is not only silent on the question of attorney's fees, but also lacks the language "[s]uch relief (including injunctions) as may be appropriate" which had been held to justify the grant of attorney's fees in *Gartner*. Nevertheless, in *Yablonski v. United Mine Workers of America*,[101] the District of Columbia Court of Appeals extended the reasoning of *Gartner* to Title IV by granting attorney's fees to a successful union member who had exposed union election abuses by private suit.[102]

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members. Dillon v. Berg, 351 F. Supp. 584, 588 (D. Del. 1972), *discussing Mills* and *citing* Kahan v. Rosenstiel, 424 F.2d 161, 166 (3d Cir. 1970). *See* text accompanying note 109 *infra*.

97. 105 CONG. REC. 10094, 10095 (1959) (remarks of Senator Goldwater).

98. *See* Summers, *The Law of Union Discipline: What the Courts Do in Fact*, 70 YALE L.J. 175, 221 (1960).

99. See text accompanying notes 158-65 *infra*.

100. Section 402(b) reads:

> The Secretary of Labor shall investigate such complaint and, if he finds probable cause to believe that a violation of this subchapter has occurred and has not been remedied, he shall, within 60 days after the filing of such complaint, bring a civil action against the labor organization as an entity in the district court of the United States in which such labor organization maintains its principal office to set aside the invalid election, if any, and to direct the conduct of an election or hearing and vote upon the removal of officers under the supervision of the Secretary and in accordance with the provisions of this subchapter and such rules and regulations as the Secretary may prescribe. The court shall have power to take such action as it deems proper to preserve the assets of the labor organization.

29 U.S.C. § 482(b) (1971).

101. 466 F.2d 424 (D.C. Cir. 1972), *cert. denied*, 412 U.S. 918 (1973).

102. 29 U.S.C. § 481 (1971). Although Title IV only discusses the judicial enforcement of election violations by the Secretary of Labor, Trbovich v. United Mine Workers of America, 404 U.S. 528 (1972), held that a suit by the Secretary was not the exclusive post-election remedy for a violation of the title. The Court held that no bar was imposed to *intervention* by a union member, provided the intervention is limited to the claims of illegality originally presented by the Secretary of Labor. Since the union has already been summoned into court to defend the legality of the election and the union member is not initiating a new cause of action, his joinder in the lawsuit subjects the union to little additional burden. *Id.* at 530-37. Relying on the holding of *Trbovich*, Yablonski had intervened in a suit initially filed by the Secretary of Labor. 466 F.2d at 426.

Similarly qualifying *Fleischmann*[103] as not involving a suit where the burdens of litigation were carried by an individual for the benefit of a larger class,[104] *Yablonski* determined that the wage earner was not vindicating his own rights alone, but those of every union member as well, since the election violations affected every union member at least in a general way.[105] The successful Title IV suit therefore conferred a benefit on the union and its other members in a way similar to that in *Gartner*.[106] "The relevant question is whether or not the trouble [plaintiff] takes results in the actual conferring of benefits on others than himself."[107] The *Yablonski* court concluded that the exposure of an election violation conferred a benefit on the union and its members substantial enough to merit the awarding of attorney's fees.[108] Although conceding that the primary motive of the plaintiff was to aid his own election candidacy, the court still found the situation appropriate for an award of fees, since, in all litigation of this nature, the plaintiff is pursuing his own interests as well as those of others.[109] Indeed, if defeated candidates did not initiate lawsuits exposing election violations, it is difficult to determine who would.

Agreeing with *Gartner* that the absence of explicit statutory authorization does not nullify the power of a federal court to grant attorney's fees,[110] the *Yablonski* court was motivated by the belief that it is often

103. See text accompanying notes 64-67 *supra*.

104. 466 F.2d at 429.

105. *Id.* at 431.

106. *Id.* at 430-31, *discussing* Mills v. Electric Auto-Lite Co., 396 U.S. 375, 392-96 (1970).

107. 466 F.2d at 431.

108. *Id.* Since the actions taken by the union were political reprisals designed to undermine the rights of the litigating union member, the political slate he supported, and its supporters, "appropriate relief" included an award of attorney's fees because of the indirect benefit to the union and its members as a whole. The indirect benefit was Yablonski's judicial promotion of fair election practices. *See also* Cefalo v. United Mine Workers of America, 311 F. Supp. 946, 955 (E.D. La. 1970).

109. 466 F.2d at 430-31.

110. *Id.* at 429-30. The court felt that Senator Goldwater's testimony regarding section 102 "hardly amounts to a definitive and absolute setting of congressional intent against the giving of such incidental relief by the courts where compatible with sound and established equitable principles." See text accompanying note 34 *supra*. Other federal cases following the trend that a court has the discretionary power to award attorney's fees to a successful union member include: Nix v. International Ass'n of Machinists & Aerospace Workers, 479 F.2d 382, 386-87 (5th Cir. 1973); Kerr v. Screen Extras Guild, Inc., 466 F.2d 1267, 1270 (9th Cir. 1972); Semancik v. United Mine Workers of America, 466 F.2d 144, 155-56 (3d Cir. 1972); Burch v. International Ass'n of Machinists, 454 F.2d 1170, 1171 (5th Cir. 1971); Robins v. Schonfeld, 326 F. Supp. 525, 531 (S.D.N.Y. 1971); Cefalo v. United Mine Workers of America, 311 F. Supp. 946, 955 (E.D. La. 1970); Local 2, International Bhd. of Tel. Workers v. International

necessary to grant a judicial remedy to give legislation its intended function.

> It seems to us most unlikely that the Congressional perceptions of the needs for greater democracy and fair dealing in internal union affairs, which sparked the passage of the LMRDA, did not extend as well to the vital role of the equity powers of the judiciary in meeting those needs.[111]

By thus granting attorney's fees, the court used its equitable powers to spread the cost of implementing the congressional policy of preserving and advancing internal union democracy among the union's members.[112]

In *Mills v. Electric Auto-Lite Co.*,[113] the United States Supreme Court announced a decision which, although it did not involve a LMRDA action, contained principles similar to those in *Gartner* and *Yablonski*. Indeed in *Mills*, the Court extended the circumstances in which the award of attorney's fees is "appropriate" to situations where the "suit has not . . . produced, and may never produce, a monetary recovery from which the fees could be paid."[114] This was expansive language since the prior rationale, stemming from *Sprague*,[115] had never clearly discussed the nature or the potential adequacy of a non-pecuniary benefit.[116]

Mills involved a lawsuit to set aside a merger initiated by minority shareholders both derivatively on behalf of the corporation and as representatives of the class of minority shareholders. The corporation had mailed an illegal management proxy statement to all shareholders in violation of rule 14(a) of the Securities Exchange Act.[117] The

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Bhd. of Tel. Workers, 295 F. Supp. 1178, 1180 (C.D. Mass. 1969); Sands v. Abelli, 290 F. Supp. 677 (S.D.N.Y. 1968); *cf.* White v. King, 319 F. Supp. 122 (E.D. La. 1970).

111. 466 F.2d at 429.

112. *Id.* at 431.

113. 396 U.S. 375, 389-97 (1970).

114. *Id.* at 392. *Mills* extended the rationale of *Sprague* (*supra* notes 75-81) to litigation "which corrects or prevents an abuse which would be prejudicial to the rights and interests" of others. *Id.* at 396, *quoting* Bosch v. Meeker Cooperative Light & Power Ass'n, 101 N.W.2d 423 (Minn. 1969). *Bosch* involved a stockholder who was reimbursed for his expenses in successfully obtaining a judicial declaration that a corporate directors' election was invalid. The court awarded attorney's fees even though no monetary fund was created, cautioning only that the benefit must be "substantial." *Id.* at 427.

115. See text accompanying notes 80-86 *supra.*

116. *Id.*

117. 15 U.S.C. § 78n(a) (1971). Rule 14(a) is silent on the question of attorney's

Court first distinguished the remedial provisions of the Securities Exchange Act from all-inclusive provisions such as those of the Lanham Act dealt with in *Fleischmann*.[118] Interpreting a congressional silence similar to that involved in Titles I and IV of the LMRDA as a tacit authorization, rather than a prohibition, of attorney's fees,[119] the Court announced:

> While the general American rule is that attorneys' fees are not ordinarily recoverable as costs, both the courts and Congress have developed exceptions to this rule for situations *in which overriding considerations indicate the need for such a recovery.* A primary judge-created exception has been to award expenses where a plaintiff has successfully maintained a suit, usually on behalf of a class, that [substantially] benefits a group of others in the same manner as himself.[120]

The "substantial benefit" conferred in *Mills* was the plaintiffs' private effectuation of the congressional goal of a "fair and informed corporate suffrage"[121] within the national policy against securities violations. This non-monetary benefit, one involving "corporate therapeutics,"[122] was believed by the Court to be "substantial" in that it provided all shareholders an important means of exposing and preventing management misconduct.[123]

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fees although Rules 9(e) and 18(a) specifically provide for the remedy of attorney's fees.

118. 396 U.S. at 391. 15 U.S.C. § 1117 (1971).

119. 396 U.S. at 390-97.

120. *Id.* at 391-92 (emphasis added and footnote omitted). The Court said that "[t]o 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." *Id.* at 392.

121. *Id.* at 396. "[T]he stress placed by Congress on the importance of fair and informed corporate suffrage leads to the conclusion that, in vindicating the statutory policy, petitioners have rendered a substantial service to the corporation and its shareholders." *Id.* See also Lee v. Southern Home Sites, 444 F.2d 143, 145 (5th Cir. 1971), which held, in discussing *Mills*, that attorney's fees are a "court-created remedy justified as necessary to further the 'corporate therapeutics' called for in Congress' strong policy favoring fair and informed corporate suffrage." *See* note 122 *infra.*

122. 396 U.S. at 396. See Hornstein, *Legal Therapeutics: The "Salvage" Factor in Counsel Fee Awards*, 69 HARV. L. REV. 658 (1956). Hornstein advocated that in a derivative suit, "[e]ffective enforcement mandated the shifting of attorneys' fees to the successful plaintiff as a necessary concomitant . . . which is vital to the exposure and redress of corporate abuse." *Id.* at 816. Hornstein described the problem as David v. Goliath, with David unable to afford the slingshot. *Id.* at 791. He labeled the remedy of fee-shifting to promote fair conduct in the corporate world "legal or corporate therapeutics."

123. 396 U.S. at 396. Sims v. Amos, 340 F. Supp. 691, 694-95 (M.D. Ala. 1972), *discussing* Lee v. Southern Home Sites, 444 F.2d 143 (5th Cir. 1971), note 116 *supra*,

In essence, *Mills* suggests that the conditions prerequisite to an award of attorney's fees in the corporate context are satisfied when a securities act violation is discovered and a means of enforcement provided.[124] Thus, those who establish a violation of the securities laws by their corporation or its officers, according to *Mills*, should be reimbursed for their costs in so doing.[125]

Intent on distributing litigation costs proportionately among those who benefited from the suit, *Mills* stressed that an award of litigation costs was not an additional penalty against the wrongdoers.[126] The Court explained:

> [T]he expenses incurred by one shareholder in the vindication of a corporate right of action can be spread among all shareholders through an award against the corporation, regardless of whether an actual monetary recovery has been obtained . . . .[127]
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> . . . .
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> . . . To award attorneys' fees . . . is not to saddle the unsuccessful party with the expenses but to impose them on the class that has benefited from them and that which would have had to pay them had they brought the suit.[128]

Whether or not the expansive "substantial benefit" requirement of corporate suits was to apply in litigation brought to enforce the provisions of the LMRDA was finally and authoritatively decided in the 1973 United States Supreme Court decision of *Hall v. Cole*.[129] The Court in *Hall* expanded the language of "appropriate relief" in section 102[130] by awarding attorney's fees, within the discretion of the court,

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which stated that "the award of [attorney's fees] . . . becomes a part of the effective remedy a court should fashion to encourage public-minded suits and to carry out congressional policy . . . and it is of no consequence that the statute under which plaintiffs filed this suit is silent on the availability of attorneys' fees." *Id.* at 145.

124. 396 U.S. at 396. *See, e.g.*, deHass v. Empire Petroleum Co., 435 F.2d 1223, 1231 (10th Cir. 1970). *See also* Walker v. CBS, Inc., 443 F.2d 33 (7th Cir. 1971), which held, in discussing *Mills*, that plaintiff's action "involved corporate therapeutics and furnished a benefit to all shareholders by providing an important means of enforcement of the proxy statute." *Id.* at 36.

125. 396 U.S. at 396. See also Lee v. Southern Home Sites, 444 F.2d at 145, which noted, in commenting upon *Mills*, that "[t]hose who establish a violation of the securities laws by the corporation and its officials should be reimbursed by their corporation for the costs of establishing the violation, including attorneys' fees."

126. 396 U.S. at 396-97.

127. *Id.* at 394.

128. *Id.* at 396-97. Justice Black dissented, stating that "[i]f there is a need for the recovery of attorneys' fees to effectuate the policies of the Act here involved, that need should . . . be met by Congress, not by this Court." *Id.* at 397.

129. 412 U.S. 1 (1973).

130. 29 U.S.C. § 412 (1971), *quoted in* text accompanying note 18 *supra.*

whenever "[o]verriding considerations indicate the need for such recovery."[131] The respondent in *Hall* had been expelled from the union for condemning union management practices as being undemocratic and shortsighted.[132] The union contended that the wage earner's actions had constituted malicious vilification which justified his expulsion from the union. The district court[133] and the Court of Appeals for the Second Circuit,[134] however, ruled that the union member had been unlawfully expelled from the union for exercising his right to free speech guaranteed by section 101(a)(2) of the Act[135] and ordered his permanent reinstatement to union membership. Additionally, the courts sustained his motion for attorney's fees in the sum of $15,500 against the defendant union.[136] Limiting its review on appeal solely to the question of the propriety of the award of attorney's fees, the Supreme Court affirmed the lower federal courts' rulings by granting the successful union member his litigation expenses.[137]

The Court rejected petitioner's argument that, since an award of fees was specifically authorized in Titles II and V of the LMRDA,[138] Congress intended that recovery of fees be excluded from actions under all other titles of the Act, including the one in question.[139]

Distinguishing *Fleischmann*[140] as involving a statute with meticulously detailed remedies marking "[t]he boundaries of the power to award monetary relief in cases arising under the [Lanham] Act,"[141] the Supreme Court for the first time ratified the Third Circuit's holding in *Gartner* that section 102 of the LMRDA does not meticulously detail the remedies available but broadly authorizes courts to grant relief "as may be appropriate."[142]

The Court determined that "[n]ot to award counsel fees . . .

131. 412 U.S. at 9. See text accompanying notes 114-16 *supra.*

132. 412 U.S. at 2.

133. 66 CCH Lab. Cas. ¶ 11,953 (E.D.N.Y. 1971).

134. Cole v. Hall, 462 F.2d 777 (2d Cir. 1972).

135. 29 U.S.C. § 411(a)(2) (1971), *quoted in* note 16 *supra.*

136. 412 U.S. at 3.

137. *Id.* at 4.

138. *See* statutes discussed in note 43 *supra.*

139. 412 U.S. at 12-13. Agreeing with *Gartner* and *Yablonski,* the Court distinguished these two sections (§§201(c) and 501(b)) as involving narrowly defined remedies and recognized that the relief necessary in Title I litigation cannot be as easily foreseen nor meticulously specified. *Id.* This, the Court held, accounts for the vague and broad language "as may be appropriate." 29 U.S.C. § 412 (1971), *quoted in* text accompanying note 18 *supra.*

140. See text accompanying notes 64-67 *supra.*

141. 412 U.S. at 10, *citing* 386 U.S. at 721.

142. 29 U.S.C. § 412 (1971), *quoted in* text accompanying note 18 *supra.*

would be tantamount to repealing the Act itself by frustrating its basic purpose."[143] Without such a remedy, "[a]n individual union member could not carry such a heavy burden . . . . [and] [t]he grant of federal jurisdiction [would be] but an empty gesture for few union members could avail themselves of it."[144] Since the award of attorney's fees is not determined by the mechanical operation of a statute, the Court stressed that the allowance of the equitable remedy must be predicated on the existence of an "appropriate" factual situation.[145]

"[B]y vindicating his own right of free speech guaranteed by [section] 101(a)(2) of Title I of the LMRDA,[146] respondent *necessarily rendered a substantial service* to his union as an institution . . . and to all of its members."[147] Although the specific relief sought was only the reinstatement of an individual union member, the *Hall* Court concluded that the effect of the wage earner's suit furthered the right of free expression, benefiting the union and its members as a whole.[148] The Court explained:

> When a union member is disciplined for the exercise of any of the rights protected by Title I, the rights of all members of the union are threatened. And, by vindicating his own right, the successful litigant dispels the "chill" cast upon the rights of others. Indeed, to the extent that such lawsuits contribute to the preservation of union democracy, they frequently prove beneficial "not only in the immediate impact of the results achieved but in their implications for the future conduct of the union's affairs" . . . . We must therefore conclude that an award of counsel fees to a successful plaintiff. . . falls squarely within the traditional equitable power of federal courts to award such fees whenever "overriding considerations indicate the need for such recovery."[149]

143. 412 U.S. at 13, *quoting Cole v. Hall*, 462 F.2d at 780-81.

144. 412 U.S. at 13.

145. *Id.* at 10. The Court noted that the case had been pending for 10 years. In accordance with *Gartner* and *Yablonski*, the Court found a lack of congressional intent to deny to the courts the historic equitable power to grant counsel fees in appropriate situations. *Id.* at 12-13. In an action to enforce a union member's rights, "the relief must be tailored to fit facts and circumstances admitting of almost infinite variety." 384 F.2d at 353.

146. 29 U.S.C. § 411(a)(2) (1971), *quoted in* note 16 *supra.*

147. 412 U.S. at 8 (emphasis added). *See also* Comment, *Allowance of Attorneys' Fees in Civil Rights Actions*, 1 COLUM. J.L. SOC. PROB. 381, 382 (1971) [hereinafter *Allowance*].

148. 412 U.S. at 8.

149. *Id.* at 8-9, *quoting* 466 F.2d at 431 and 396 U.S. at 391-92. Dissenting, Justices White and Rehnquist voiced the same sentiments as Justice Black's dissent (note 128 *supra*) in *Mills* in advocating that a "far clearer signal from Congress" was needed in order to award attorney's fees. 412 U.S. at 16. The dissent gives insufficient attention to the fact that Congress has remained silent on this controversy for 14 years, despite extensive litigation on the subject.

Such language reaffirmed the position taken in *Mills* that the service rendered, whether immediate or future, need not be pecuniary.[150] When no pecuniary benefit need be demonstrated, "[i]t . . . becomes exceedingly difficult to trace the benefits of litigation to their ultimate beneficiaries, so as to apportion the attorney's fees amongst them."[151]

In order to further the goals of the Act and avoid inequitable allocation of fees, courts need to adopt a formula which is consistent with both the purposes of the LMRDA and considerations of fairness[152] in selecting the group that should bear the union member's counsel fees. A "substantial benefit" connotes the conveyance of an immediate benefit upon third parties to the lawsuit. In *Sprague*, for example, the plaintiff's initial pecuniary recovery created an immediate right to a similar recovery in those whose situations were identical with hers prior to suit.[153] A "substantial service," however, connotes merely a potential substantial benefit which will be conferred if and when another union member should later find himself in the same position as the union member who initially vindicated his own right. An example of such a substantial service was found in *Hall* where an *immediate* and *substantial* benefit was received only by the individual union member who was ordered reinstated in the union. All other union members, however, received the substantial service of a *potential* substantial benefit:[154] the stare decisis effect of *Hall* should their rights ever be similarly infringed. By contrast, the entire union in *Yablonski*, in addition to the individual litigant, had been the recipient of an *immediate* substantial benefit since the election violation adversely affected every wage earner in the union. Thus, regardless of whether the benefit conveyed to non-litigants is immediate or prospective, *Hall* treats the two as equally valid for purposes of determining that the benefit conferred is of adequate substantiality to create an "appropriate" situation for an award of attorney's fees.[155]

150. 412 U.S. at 6 n.7.

151. La Raza Unida v. Volpe, 57 F.R.D. 94, 97 (N.D. Cal. 1972), *discussing Mills v. Electric Auto-Lite Co.*, 396 U.S. at 396.

152. *See* Comment, *Counsel Fees in Stockholders' Derivative and Class Actions—Hornstein Revisited*, 6 U. RICHMOND L.J. 259, 270 (1972).

153. See text accompanying notes 80-86 *supra*.

154. 412 U.S. at 8.

155. *Id.* at 7-8. If the union member loses the litigation, he is not entitled to attorney's fees since his action has produced neither an immediate nor a potential substantial benefit. The stare decisis effect is only created by a successful suit but query whether fees would be totally denied to a party whose valid complaint, though ultimately defeated on a procedural matter, triggered a subsequent *and* successful action by another individual similarly situated.

Hall, however, failed to define the limits of a substantial service. The Court never did clearly manifest what "overriding considerations" are required or how substantial the service need be for an award of fees. Although the Supreme Court did use substantial service terminology when speaking of the service rendered to the union and its members by the individual union member, it spoke only of benefits accruing to the union and its members generally. Consequently, when the Court cited "overriding considerations" as justifying an award of attorney's fees, it was in reference to its own acknowledgment that private suits under the LMRDA are necessary to protect individual employee rights.[156]

Hall stands for the basic proposition that the purposes of the LMRDA must not be weakened by forcing the costs of attorney's fees upon the union member who successfully enforces his statutory rights by private lawsuit.[157] The individual member is the litigant least able to afford

156. *Id.* at 8. The Court insisted that because a substantial service *was* rendered by a union member in *Hall*, it became unnecessary for the Court to discuss alternative theories which would merit the award of counsel fees. *Id.* at 6 n.7. The Court could have reached the same result by holding federal policy sufficiently strong to necessitate a fee award when a union member acts in the capacity of a "private attorney general" vindicating a congressional policy of the highest priority in seeking to enforce the rights of the class he represents. *See, e.g.*, Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400, 402 (1968). Involving the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(g), the Court granted an injunction and attorney's fees to a successful plaintiff since, when he obtained the injunction, he did so not for himself alone but also as a private attorney general vindicating a policy that Congress considered of the highest priority. *See also* NAACP v. Allen, 340 F. Supp. 703, 708-09 (N.D. Ala. 1972), which held that, in instituting the suit, plaintiffs served in the capacity of private attorneys general seeking to enforce the rights of the class they represented. "If pursuant to this section, plaintiffs have benefited their class and have effectuated congressional policy, they are entitled to attorneys' fees." *See also* Lee v. Southern Home Sites, 444 F.2d 143, 148 (5th Cir. 1971), which said that "[t]o insure that individual litigants are willing to act as private attorney generals to effectuate the public purposes of the statute, attorneys' fees should be . . . available . . . ." Thus, even absent a statutory provision for recovery of fees, a private attorney general should be awarded attorney's fees when, by enforcing a strong congressional policy, he has benefited a large class of people and the necessity and financial burden of private enforcement are such as to make the award essential. *See* 340 F. Supp. at 710. Thus, through the grant of counsel fees when union members are functioning as "private attorneys general," the judicial purpose is to encourage private suits, and thereby effectuate the purposes of the LMRDA. *See also* Cox, *Internal Affairs of Labor Unions Under the Labor Reform Act of 1959*, 58 MICH. L. REV. 819, 852 (1960).

157. 412 U.S. at 10. This is consistent with early federal decisions which used an assortment of equitable tools to award relief "appropriate" to the necessities of each particular case in which a union had violated a member's statutory right under the LMRDA. Forms of relief which have been recognized under section 102 include: strike benefits, Vars v. International Bhd. of Boilermakers, 215 F. Supp. 943, 952 (D. Conn. 1963), *aff'd on different grounds*, 320 F.2d 576 (2d Cir. 1963); punitive damages,

counsel fees. If forced to bear his own litigation expenses, he would hardly ever be in a position to invoke the power of the federal courts to effectuate the congressional policy by litigating legitimate claims.[158] Thus, instead of beginning with the traditional rule denying attorney's fees and then ascertaining whether an exception to the rule had been established, the *Hall* Court continued the recent trend of immediately recognizing the courts' equitable power to grant fees in "appropriate" situations with the burden of showing statutory language, legislative history, or policy considerations to the contrary placed unequivocably on the opponents of the award.[159] This change of court policy would appear to make fee shifting the rule instead of the exception in litigation under Titles I and IV. *Hall*, however, does not expressly grant a license for an award of attorney's fees in *all* cases arising under the LMRDA. Instead, the Supreme Court addressed the matter to the discretion of the trial court,[160] inviting varying, if not discordant, interpretations of "appropriateness." Thus courts, within their broad discretion, can even yet deny attorney's fees to a union member who successfully sues union management.[161] Such a judicial posture still conflicts with the policy of encouraging private enforcement and works a serious hardship on the wage earner who has a valid dispute but inadequate financial resources to sue.[162] The fact that the union member seeking attorney's fees will have to win not only the merits of his case, but the sympathy of the court as well,[163] can only serve to discourage the initiation of meritorious litigation. "A rule that acts to discourage the filing of meritorious claims is of dubious value"[164] and should be

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Farowitz v. Local 802, Associated Musicians of Greater N.Y., 241 F. Supp. 895, 909 (S.D.N.Y. 1965); injury to reputation with accompanying mental anguish, Simmons v. Avisco, Local 713, Textiles Workers Union, 350 F.2d 1012, 1019 (4th Cir. 1965).

158. 466 F.2d at 431. *See, e.g.*, 110 CONG. REC. 6541 (1964) (remarks of Senator Humphrey).

159. *See Lee*, 444 F.2d at 147, a civil rights case which held that courts *should* award attorney's fees to successful plaintiffs unless special circumstances exist which would render such an award unjust. *See also*, Comment, *The Allocation of Attorneys' Fees After Mills v. Electric Auto-Lite Co.*, 38 U. CHI. L. REV. 316, 325 (1971) [hereinafter Comment].

160. 412 U.S. at 15.

161. *See* Comment, note 159 *supra*, at 319, and *Benefit*, note 162 *infra*, at 281.

162. *See* Comment, *Attorneys' Fees: What Constitutes a "Benefit" Sufficient to Award Fees from Third Party Beneficiaries*, 1972 WASH. U.L.Q. 271, 279 [hereinafter *Benefit*] and Comment, note 159 *supra*, at 336.

163. *See* Note, *Attorneys' Fees in Shareholder Derivative Suits: The Substantial Benefit Rule Reexamined*, 60 CALIF. L. REV. 164, 165 (1972) [hereinafter *Substantial Benefit*].

164. *Id.* at 187.

replaced by a rationale strictly equating "appropriate" situations with successful litigation.[165]

Nevertheless, the substantial service test of *Hall* provides wide boundaries and the principles it embraces may lend themselves in future litigation to the most expansive judicial development. By failing to articulate the requirements of a substantial service other than the successful disclosure and enforcement of a Title I violation, the Court opened the judicial doors for a potential grant of attorney's fees in every lawsuit terminating in a finding of liability. Instead of burdening the union member with worrying whether a potential service of adequate substantiality exists to later justify an award of fees, courts should interpret *Hall* as broadly advocating that winning on the merits *always* establishes an adequate service to warrant an award. Any lawsuit successfully enforcing a statutory obligation under the LMRDA has sufficient therapeutic value[166] to justify an award of fees under the *Hall* test.[167]

Since all successful suits thus provide an adequate benefit or service, the court's discretion should be exercised only as to the amount of fees awarded not to the question of whether they should be granted.

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165. See text accompanying notes 166-71 *infra*. Success is not solely limited to a final adjudication on the merits. *See Mills v. Electric Auto-Lite Co.*, 396 U.S. at 389. The filing of a complaint, the holding of a hearing on a preliminary injunction, and action ending in settlement, or an action rendered moot by the union's unilateral action is deemed successful if it was responsible for procuring all the relief required. *See* Kahan v. Rosenstiel, 424 F.2d 161, 166 (3d Cir. 1970), and Fletcher v. A.J. Indus., Inc., 266 Cal. App. 2d 313, 325, 72 Cal. Rptr. 146, 154 (1968), where attorney's fees were awarded in a suit which terminated in a settlement. *See also* Schechtman v. Wolfson, 244 F.2d 537, 540 (2d Cir. 1957), where fee-shifting was allowed in a suit rendered moot by defendant's unilateral action. The litigation stage attained is only significant as to the amount of attorney's fees granted, and not as to the issue of whether or not they should be awarded at all. *See Substantial Benefit*, note 163 *supra*, at 183.

166. See text accompanying notes 7, 9, and 122 *supra*.

167. See text accompanying notes 154-56 *supra*. One could even read *Hall* to advocate that the very existence of the LMRDA establishes that its attempted, although unsuccessful, enforcement has a substantially beneficial effect. *See* Comment, note 159 *supra*, at 334. A service may be substantial although it does not, and may never, confer an actual substantial benefit on the union or its other members. To award fees in all bona fide assertions of rights guaranteed by the Act, irrespective of success or failure, would recognize that it is really the totality of attempts at enforcement, and not merely the successful actions, which provide the paramount substantial service of a vigorous campaign of enforcement which best protects those rights guaranteed by the LMRDA. Such a course of action would also eliminate from each individual action the uncertain discretionary factor of a determination of adequate substantiality which can only serve to inhibit the filing of legitimate claims. See text accompanying notes 160-65 *supra*.

The court's discretionary powers should not be permitted to interfere with the effective enforcement of the LMRDA but should only be employed to vary the amount of fees granted to conform to the evil proven and the costs incurred. If a union member is successful in vindicating important statutory policies, his suit should be deemed meritorious per se, and he should be awarded at least minimal fees,[168] with any additional amounts being dependent on what is reasonable under the circumstances.[169] Such a limitation on judicial discretion would assure adequate attorney's fees for all successful actions. The possibility of recovering a larger amount (proportional to the benefit conferred or service rendered) would provide an added incentive to union members and their attorneys to initiate litigation that supports responsible union management.

It must, however, be recognized that if such a "successful-equals-appropriate" rationale were extended to include successful defendant unions, the private enforcement that *Hall* attempted to promote would be frustrated. If a wage earner were to be penalized for a good faith error through liability for the union's counsel fees, legitimate lawsuits would be discouraged, rather than encouraged, in all but the most clear-cut cases.[170] However, a justifiable concern for unions could be effectuated by allowing them to recover counsel fees, but only in cases of bad faith or frivolous conduct on the part of a union member.[171] Such a construction of *Hall* would avoid the imposition of an unnecessary hardship on poor plaintiffs and, at the same time, protect the policy of encouraging litigation.[172]

Opposition to the judicial expansion of "substantial service" stems from the fear that union members will be encouraged to file unmeritor-

168. See *Substantial Benefit*, note 163 *supra*, at 190, and *Benefit*, note 162 *supra*, at 284.

169. *See, e.g.*, Wyatt v. Stickney, 344 F. Supp. 387, 409 (N.D. Ala. 1972), which enumerated several factors to be considered by courts in determining the amount of the award. These include: the intricacy of the case, the difficulty of proof, time reasonably expended in the preparation and trial of the case, degree of competence displayed by the attorney, benefit inuring to the public, and personal hardships suffered by plaintiff and his attorney.

170. *See* Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. at 718, which recognized that the remedy of attorney's fees is used sparingly because "[t]he poor might be unjustly discouraged from instituting actions to vindicate their rights if the penalty for losing included the fees of their opponents' counsel."

171. *See, e.g.*, Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400, 402. *See also Allowance*, note 147 *supra*, at 394-95, and *Benefit*, note 162 *supra*, at 284. *See also* note 77 *supra*.

172. *See Benefit*, note 162 *supra*, at 289.

ious strike suits[173] merely for harassment purposes at the union's expense. Such a fear deserves some discussion.

Present statutory requirements that a union member first exhaust his intra-union remedies under Title I,[174] or file a complaint with the Secretary of Labor under Title IV,[175] before filing a private action should successfully discourage most strike suits at their inception. Additionally, union members and their attorneys will only file suit where there is a realistic possibility for success and will not assume the costs of litigation when there is no realistic potential for achieving the success on the merits required to receive an award of attorney's fees. Both the requirement that the litigation prove successful and the expense involved in bringing an unsuccessful suit provide deterrents to the filing of strike or nuisance suits.[176] Courts could also impose the added burden of the union's counsel fees on those union members who do initiate frivolous suits.[177] Although the above-mentioned procedures will not eliminate every harassing action, the few frivolous suits that will be filed by union members must be balanced against the recognized value of awards of attorney's fees as a means of ensuring responsible union management. The cost for such a worthwhile objective would still be more than acceptable.

CONCLUSION

Hall was an attempt to reconcile outdated judicial theories regarding awards of attorney's fees with enlightened congressional policies concerning the relations between unions and their members. Its holding draws wide new boundaries for the permissible award of fees to individual union members in suits protecting the rights guaranteed them by the LMRDA. As such, the case provides a tool to achieve the congressional aim. For the tool to be truly effective, however, such awards must be made mandatory in every successful suit. If *Hall* did not follow this path, it at least left the way unobstructed. The only remaining question is whether the work advanced by *Hall* will yet be finished.

Robert D. Vogel

173. A "strike suit" is an action begun with the hope of winning large attorney's fees or a private settlement with no intention of directly or indirectly benefiting the corporation or class on behalf of which suit is theoretically brought. Shapiro v. Magaziner, 210 A.2d 890, 894 (Pa. 1965).

174. *See* statute *quoted in* note 16 *supra* (§ 101 (a) (4) proviso).

175. *See* notes 101-02 *supra.*

176. *See Benefit*, note 162 *supra*, at 284.

177. *See* note 77 *supra.*