12-1-1970

Securities Regulation -- Allowance of Attorneys' Fees in 14(a) Derivative Suits

James Marius Bell

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Recommended Citation

James M. Bell, Securities Regulation -- Allowance of Attorneys' Fees in 14(a) Derivative Suits, 49 N.C. L. Rev. 204 (1970).

Available at: http://scholarship.law.unc.edu/nclr/vol49/iss1/22
allowed as evidence of substantial expenditure; however, the question of what dollar amount is required to make these expenditures substantial was not fully discussed. Although the issue is normally left to the jury, the court indicated that the mere purchase of property, no matter what the cost, will not suffice. Thus, the jury is left with almost unlimited latitude in determining the dollar amount of expenditure necessary for the creation of a vested right. Perhaps a better solution than leaving so much discretion with the jury would be to establish a certain minimum percentage of the estimated total cost of building as the necessary requirement for a vested right to complete construction. The main disadvantage in establishing a fixed minimum percentage is readily observed when one considers large-scale enterprises. Such undertakings would be required to expend greater sums in order to satisfy the percentage requirement. If they fall short, the right to complete construction is lost. Meanwhile, less expansive enterprises can easily satisfy the requirement with a proportionately smaller expenditure, thus acquiring a vested right to complete construction. A suggested minimum percentage would, however, provide a useful rule-of-thumb in many instances.

Despite some unanswered questions, the area of vested rights is now much clearer in North Carolina. A permittee now knows that money expended on anything incidental to the proposed use—building contracts, equipment, purchase money—will be allowed as evidence of substantial expenditures, a position that prior cases have only intimated. Whether the court must now determine the enforceability of contracts as part of the test of substantial expenditures is unclear. Exactly how much of the total cost of construction must be expended before the vested right accrues is left to the jury’s discretion and will probably change with each set of facts. In any event, it is safe to predict that future permittees will have an easier task in acquiring a vested right.

Elizabeth Lynne Pou

Securities Regulation—Allowance of Attorneys’ Fees in 14(a) Derivative Suits

With the recognition of an implied private right of action under section 14(a) of the 1934 Securities Exchange Act, individual shareholders

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46 276 N.C. 55, 170 S.E.2d at 909.

2 Securities Exchange Act of 1934 § 14(a), 15 U.S.C. § 78n(a) (1964) [hereinafter cited as 14(a)], provides:
became potentially important agents in the enforcement of federal proxy rules and policy. Indeed, the court in *J. I. Case Co. v. Borak* considered such private enforcement "a necessary supplement" to government action. This private enforcement may take the form of a shareholder derivative suit, but such suits are particularly costly, and recovery is generally had by the corporation exclusively. Recognizing this, the Supreme Court in *Mills v. Electric Auto-Lite Co.* made an interim award of attorneys' fees to successful plaintiff-shareholders when they established a management violation of the federal proxy rules.

In *Mills*, plaintiff-shareholders brought an action under 14(a) and Securities Exchange Commission rule 14a-9 promulgated thereunder.

It shall be unlawful for any person, by the use of the mails or by any means or instrumentality of interstate commerce or of any facility of a national securities exchange or otherwise, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors, to solicit or to permit the use of his name to solicit any proxy or consent or authorization in respect of any security (other than an exempted security) registered pursuant to section 78f of this title.


*Id.* at 432.

Derivative and direct actions may be brought under 14(a) by private parties. *Id.* at 431.


SEC Rule 14a-9, 17 C.F.R. § 240.14a-9 (1970), provides:

(a) No solicitation subject to this regulation shall be made by means of any proxy statement, form of proxy, notice of meeting or other communication, written or oral, containing any statement which, at the time and in the light of the circumstances under which it is made, is false or misleading with respect to any material fact, or which omits to state any material fact necessary in order to make the statement therein not false or misleading or necessary to correct any statement in any earlier communication with respect to the solicitation of a proxy for the same meeting or subject matter which has become false or misleading.

(b) The fact that a proxy statement, form of proxy or other soliciting material has been filed with or examined by the Commission shall not be deemed a finding by the Commission that such material is accurate or complete or not false or misleading, or that the Commission has passed upon the merits of or approved any statement contained therein or any matter to be acted upon by security holders. No representation contrary to the foregoing shall be made.

The plaintiffs in *Mills* asserted that their action was derivative and on behalf of all minority shareholders as a class. 403 F.2d 429, 431 (7th Cir. 1968).

*Plaintiffs alleged that management had carried on a materially misleading proxy solicitation which resulted in shareholder approval of a proposed corporate merger. Plaintiffs sought to set aside the merger. The district court held the proxy solicitation to be materially misleading, and the Seventh Circuit agreed, but decided if management could show the merger would have occurred in any event, plaintiffs...*
No question of attorneys' fees was presented in the lower courts, but when Mills reached the Supreme Court the issue was injected into the litigation by the federal government as amicus curiae. The government maintained that once a violation of 14(a) had been established, plaintiff-shareholders should be entitled to litigation expenses, including reasonable attorneys' fees, to "enable them to go forward with the trial on the issue of appropriate relief and ... for their efforts in establishing the violation." The government contended that private actions under 14(a) would be "seriously inhibited" if such fees were not awarded. The government thus requested the Court to decide in favor of two awards: the first for the expense of establishing the 14(a) violation; the second for the future expense of litigating the remanded relief issue. Surprisingly, the corporate defendant did not contest the proposition that attorneys' fees should be awarded successful plaintiff-shareholders in 14(a) litigation. Instead, it chose to stress its particular situation as militating against such an award.

would be entitled to no relief. Moreover, the Seventh Circuit held management need only show that the merger was fair to establish that it would have occurred in any event. The Supreme Court held that since plaintiffs had shown the proxy statements to be materially misleading, no actual effect on the voting process need be demonstrated to entitle plaintiffs to relief. While not deciding what, if any, relief should be given, the Court stated that plaintiffs' cause of action was established under the federal proxy rules; to hold otherwise would encourage necessary private actions and substitute judicial judgment for shareholder judgment as to the desirability of management proposals. In this posture, the case was remanded on the issue of relief. For a discussion of the materiality problem in Mills see, Note, Shareholder Derivative Suits Under Rule 14a-9, 49 N.C.L. REV. 215 (1970).

The district court opinion is reported at 281 F. Supp. 826 (N.D. Ill. 1967); the circuit court opinion is reported at 403 F.2d 429 (7th Cir. 1968).

The amicus brief was filed by the Justice Department in October 1969, however, SEC counsel participated in its preparation.


In asking the Court to decide whether plaintiffs should be entitled to recover attorneys' fees for future litigation on the issue of relief, the government recognized the potential for abuse and suggested that plaintiffs be required to show a substantial possibility that defendants' proof of fairness might be successfully controverted. Id. at 21. The Court, however, declined to decide whether plaintiffs would be entitled to an award for future expenses. That decision was reserved for the lower courts after trial could be had on the relief issue. 396 U.S. 375, 390 n.13 (1970).

 Basically, the corporate defendant contended that the plaintiff-shareholders had deliberately chosen to withhold their complaint until after the merger and that an award of attorneys' fees in such a case would "encourage plaintiffs to lie in wait until it is too late to rectify alleged deficiencies [in the proxy material] ..." On the other hand, the defendant stressed that had suit been brought before the share-
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As a general rule, litigants may not recover attorneys' fees absent specific statutory authorization or contractual agreement. An exception to this rule has developed in derivative suits, however, where a fee award is now generally held recoverable if the successful shareholder's suit has "substantially benefited" the corporation. Courts have traditionally recognized that it is inequitable for one party to bear the entire expense of securing a group benefit. This equitable recognition is firmly grounded in the policy against unjust enrichment. An early illustration of its operation is creditor litigation where often one creditor would procure or protect funds out of which other creditors found satisfaction. In such cases courts have uniformly held that it is only fair that the benefited creditors share the litigation expenses. Corporate derivative suits are particularly suited for such treatment since derivative theory envisions plaintiff-shareholders as champions defending the rights of their corporation. The totality of shareholders is generally recognized as constituting the corporation, and since it is the corporation that recovers in a successful derivative suit, then logically litigation expenses should be apportioned among all the shareholders. This apportionment can be mechanically accomplished by an award of attorneys' fees against the corporation.

holder meeting the proxy statements could have easily been corrected, or if necessary, the meeting could have been postponed. Had such been the case, the corporate defendant submitted, "[a]warding of attorneys' fees . . . would serve as an additional incentive to prompt assertion of claimed violations of the Proxy Rules." Brief for Respondents at 29-33, Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1970).

E.g., Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 717 (1967).

See, e.g., Bosch v. Meeker Co-op Light & Power Ass'n, 257 Minn. 362, 101 N.W.2d 423 (1960).


It has also been suggested that where one party secures a judgment benefiting a group, that party may have acquired an implied representative status whereby he was authorized by the group to retain counsel and proceed to judgment. Another theory holds that property which has been secured by an attorney's services should bear the cost thereof. See, Hornstein, Legal Therapeutics: The "Salvage" Factor in Counsel Fee Awards, 69 HARV. L. REV. 658 (1956).

See, e.g., Trustees v. Greenough, 105 U.S. 527 (1881); In re Williams, 29 F. Cas. 1324, 1325 (No. 17704) (C.C.D.S.C. 1868).


State ex rel. Weede v. Bechtel, 244 Iowa 785, 806, 56 N.W.2d 173, 187 (1952).

Id.

An interesting question to consider is whether in 14(a) litigation the corpo-
Yet, on the other hand, it would seem most undesirable if attorneys' fees against the corporation were awarded plaintiff-shareholders in every derivative suit. Since one major policy underlying such awards is unjust enrichment, the corporation must, at the very least, be enriched. Early cases required an enrichment taking the form of a "pecuniary benefit," but the modern view holds a "substantial benefit" will suffice. The difficulty today is discovering what benefits will be deemed substantial; modern cases display much uncertainty. In *Saks v. Gamble,* for instance, the defendant corporation withheld information concerning its ownership of a second corporation. Shareholders, unaware of the ownership, brought a derivative action for diversion of corporate opportunities. Thereafter, the defendant corporation disclosed its ownership and was held to have substantially benefited thereby. On the other hand, shareholders successfully precluded directors from serving competing corporations simultaneously in *Schechtman v. Wolfson,* but were held not to have substantially benefited their corporation. In *Bosch v. Meeker Co-op Light and Power Association,* the Minnesota Supreme Court held that the determination of substantial benefit is for the trial court but enunciated this guide for the lower courts to follow:

[A] substantial benefit must be something more than technical in its successful consequence and be one that accomplishes a result which corrects or prevents an abuse which would be prejudicial to the rights and interests of the corporation or affects the enjoyment or protection of an essential right to the shareholder's interest.

One fairly clear condition precedent to a finding of substantial benefit is a court victory by the plaintiff-shareholder. Not infrequently, how-

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24 See, e.g., Trustees v. Greenough, 105 U.S. 527 (1881).
26 38 Del. Ch. 504, 154 A.2d 767 (Ch. 1958).
27 Id. at 507, 154 A.2d at 770.
28 244 F.2d 537 (2d Cir. 1957).
29 Id. at 540.
30 257 Minn. 362, 101 N.W.2d 423 (1960).
31 Id. at 366-67, 101 N.W.2d at 426-27.
32 State ex rel. Weede v. Bechtel, 244 Iowa 785, 810, 56 N.W.2d 173, 198 (1952).
ever, management will render a pending case moot by performing essentially as the complaint demands prior to trial.\textsuperscript{33} In such cases, attorneys' fees may still be awarded if the plaintiff-shareholder can show a causal relationship between the beneficial management performance and the institution of the derivative suit.\textsuperscript{34} In \textit{Kahan v. Rosenstiel},\textsuperscript{35} the court held that if attorneys' fees were to be awarded after the suit had been rendered moot, there must be some demonstration of the meritorious nature of the suit; this merit may be shown by proof that the suit would have withstood a motion to dismiss.\textsuperscript{36}

The Court in \textit{Mills} experienced little difficulty finding a substantial benefit. This finding was largely based on congressional policy favoring an informed corporate electorate.\textsuperscript{37} Private actions vindicating that policy were described as "corporate therapeutics."\textsuperscript{38} Since the finding is based on congressional policy, it is clear that the "substantial benefit" requirement will be satisfactorily met in all derivative actions under 14(a) once plaintiff-shareholders establish a violation of the federal proxy rules. Relying on \textit{Mills}, all plaintiff-shareholders will undoubtedly seek attorneys' fees in 14(a) derivative suits. Presumably the Court could have reached the same result by simply holding federal policy sufficiently strong to necessitate a fee award. Such a holding would have obviated the substantial benefit analysis in \textit{Mills}, but it would seem a proper and logical holding in light of \textit{Borak}.\textsuperscript{39}

The mechanical finding of a substantial benefit once the 14(a) violation has been established may be attacked in many cases as illogical. In

\textsuperscript{33} \textit{E.g.}, Schechtman v. Wolfson, 244 F.2d 537 (2d Cir. 1957), where suit was brought to break an interlocking board of directors and the board voluntarily unlocked prior to trial; Yap v. Wah Yen Kituk, 43 Hawaii 37 (1958), where suit was brought alleging a corporate loan to be ultra vires and the loan was voluntarily returned prior to final decree; Greenough v. Coeur D'Alenes Lead Co., 52 Idaho 599, 18 P.2d 288 (1932), where suit was brought to compel a director to return certain stock allegedly wrongfully sold him and the stock was voluntarily returned prior to trial.


\textsuperscript{36} \textit{Id.} at 450.

\textsuperscript{37} "[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." 396 U.S. 375, 396 (1970).

\textsuperscript{38} \textit{Id.}

\textsuperscript{39} Regarding 14(a), the Court in \textit{Borak} stated that "it is the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose." 377 U.S. 426, 433 (1966).
Mills itself, for instance, management owned a majority of the Electric Auto-Lite stock.\textsuperscript{40} If the merger which took place is ultimately held fair, it may be argued that Electric Auto-Lite could not logically be said to have "substantially benefited" from years of costly litigation. One answer to such an argument is as follows: If the vindication of federal law and policy is beneficial, then the question of whether a benefit accrues in actions such as Mills is quickly answered in the affirmative. The more difficult question is who benefited. Clearly, the enforcement of any public law should produce a public benefit and the pertinent question is whether this benefit extends to corporations like Electric Auto-Lite. It is submitted that even if Electric Auto-Lite were not directly benefited, it received a substantial indirect benefit in that future proxy solicitations are less likely to include misleading statements. At the very least, management, having paid a heavy price for what was probably a wholly unnecessary nondisclosure, will certainly be made more cognizant of shareholders' rights. This type of benefit is clearly what the federal proxy rules are designed to produce, and the award of attorneys' fees in such actions enhances the viability of those rules. Thus, the Court's finding of a substantial benefit in Mills is probably correct, but the analysis could have been avoided by a holding based exclusively on federal policy and Borak.

The award of attorneys' fees in derivative suits, however, has not gone without criticism even where a substantial benefit is clear. A number of reasons have been suggested for applying the general rule of no fee awards to derivative litigation. One of these reasons is essentially ethical. It has been argued that the availability of fee awards in 16(b)\textsuperscript{41} suits tempts lawyers to engage in champerty.\textsuperscript{42} Closely associated with this consideration is the fear that fee awards may increase the presence of "strike suits,"—suits instituted mainly for their nuisance value.\textsuperscript{43} It has not been demonstrated, however, that fee awards in derivative suits have substantially increased unethical behavior. Were this shown, it would still be necessary to determine whether the policies against such behavior out-

\textsuperscript{40} 396 U.S. 375, 379 (1970). It is interesting to speculate on how the Court in Mills would have held had management owned sufficient stock to have rendered the proxy solicitation unnecessary. Presumably in such a case federal policy would indicate a similar substantial benefit analysis, but the good faith of plaintiffs would doubtless be a serious consideration.

\textsuperscript{41} Securities Exchange Act of 1934 § 16(b), 15 U.S.C. § 78p(b) (1964) [hereinafter 16(b)].

\textsuperscript{42} See 2 L. Loss, SECURITIES REGULATION 1051-54 (2d ed. 1961).

\textsuperscript{43} See Bosch v. Meeker Co-op Light & Power Ass'n, 257 Minn. 362, 101 N.W.2d 423 (1960).
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weigh those in favor of fee awards. The court in *Magida v. Continental Can Co.* was presented with the question of whether alleged champertous conduct on the part of an attorney who brought suit for a plaintiff-shareholder under 16(b) would preclude a fee award. While the court found that the party raising the question had no standing to do so, it nevertheless stated:

Whatever the ethics of the situation ... presumably Congress is aware of the opportunity presented to attorneys to finance suits for their benefit, but apparently it regards public policy against ... violations of fiduciary responsibility by corporate officers at the expense of the public more detrimental to public good than the violation of generally accepted ethics by attorneys.

The court in *State ex rel. Weede v. Bechtel* maintained that since derivative suits are the chief regulators of corporate management, and strike suits comparatively rare, fee awards to successful plaintiff-shareholders are hardly too much inducement. The court in *Bechtel* pointed out that in order to receive such an award the plaintiff-shareholder must first win his suit, and even victory will net him no more than his fellow shareholder. Thus it is unlikely an attorney would desire to support a derivative suit unless victory was substantially certain, and even if that were the case, it is doubtful that a shareholder would be susceptible to such a champertous attorney since the shareholder would generally stand to win nothing individually. Consequently, ethical considerations seem a questionable basis for opposition to the derivative rule.

More forceful reasons for denying attorneys' fees found expression in a recent Eighth Circuit case, *Missouri Pacific Railroad v. Slayton.* In *Slayton,* management had proposed a consolidation plan to be voted on

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45 Id. at 782.
46 Id. at 783. On the other hand, some courts have expressed much doubt as to whether an attorney-shareholder should be allowed a fee award as attorney pro se in a derivative action if his holdings in the corporation are small. In such an action "considerable doubt is cast upon his good faith ... ." Eisenberg v. Central Zone Property Corp., 1 App. Div. 2d 353, —, 149 N.Y.S.2d 840, 842 (1956), aff'd n.1, 3 N.Y.2d 729, 143 N.E.2d 516, 163 N.Y.S.2d 968, cert. denied, 355 U.S. 884 (1957). But see Giesecke v. Pittsburgh Hotels, Inc., 82 F. Supp. 64 (W.D. Pa. 1949), aff'd, 180 F.2d 65 (3d Cir. 1950).
47 244 Iowa 785, 56 N.W.2d 173 (1952).
48 Id. at 804, 56 N.W.2d at 183.
49 Id. at 807, 56 N.W.2d at 185.
50 Id.
51 407 F.2d 1078 (8th Cir. 1969).
collectively. The stock situation was such that a collective vote would have effectively disfranchised Class "B" shareholders. The Class "B" shareholders promptly instituted a class action to compel class voting and were ultimately successful in the Supreme Court. Plaintiff-shareholders thereafter sought attorneys' fees and were initially successful against the corporate defendant in federal district court. The court of appeals reversed the fee award, however, reasoning that the unpredictability of litigation should not unnecessarily penalize one for bringing or defending a lawsuit and that courts should not be saddled with the burden of determining reasonable attorneys' fees.

The difficulty with the Slayton rationale is that it loses sight of the equitable basis for fee awards, which is not to penalize anyone, but rather to distribute the expense of litigation among those who can be said to have benefited therefrom. While calculating reasonable attorneys' fees may be a difficult task, it is one which can and has been performed. But even assuming awarding attorneys' fees to be a difficult task, the result to be reached certainly outweighs the burden.

A somewhat different problem which the Court in Mills addressed is whether the absence of statutory provision should preclude 14(a) fee awards. Section 14(a) of the Securities Exchange Act prescribes no

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62 The voting shares stood as follows:
Class A 1,856,277 shares
Class B 39,731 shares
Total 1,896,008 shares

64 279 F. Supp. at 526.
65 407 F.2d at 1082.
66 Id.
67 In many cases there may be no difficulty in calculating reasonable attorneys' fees. Where a fund is recovered, for instance, a percentage thereof can easily be awarded. The value of an attorney's services in other cases can be ascertained by taking into consideration these factors: time necessarily spent on the case; amounts involved; amounts recovered; and the standing of the attorney(s) in the profession. See, e.g., State ex rel. Weede v. Bechtel, 244 Iowa 785, 833-35, 56 N.W.2d 173, 199-202 (1952); Hornstein, Legal Therapeutics: The "Salvage" Factor in Counsel Fee Awards, 69 HAW. L. REV. 658 (1956). Another factor that should perhaps be taken into consideration in awarding attorneys' fees is whether the corporation needed the proxy solicitation in order to go forward with the planned change. If, for instance, management has over the two-thirds votes necessary for the impending merger but decides to go ahead with a proxy solicitation which proves to be in violation of 14(a), shouldn't the fact that the proxy solicitation was an unnecessary formality be taken into consideration by the court awarding attorneys' fees?
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attorneys' fees, whereas other sections of the Act make express provision therefor.\textsuperscript{58} The Court resolved this problem by relying on a Second Circuit decision that awarded attorneys' fees in an action brought under section 16(b) which, like 14(a), contained no attorneys' fees provision.\textsuperscript{69} Yet the Court considered it necessary to distinguish \textit{Fleischman Corp. v. Maier Brewing Co.}\textsuperscript{60} where it had disallowed a fee award for not being statutorily prescribed by the Lanham Act. \textit{Fleischman}, however, was not a derivative suit and could easily have been distinguished on that ground. The Court was certainly correct in holding an absence of statutory provision should not be determinative of a fee award since such awards are traditionally equitable and have become the rule in derivative suits.

It should be borne in mind, however, that plaintiff-shareholders in \textit{Mills} sued both derivatively and as a class. While the Court neglected to stress this distinction, it nonetheless relied on derivative cases to support its substantial benefit analysis.\textsuperscript{61} On the other hand, 14(a) suits may be brought \textit{directly}.\textsuperscript{62} The question of whether a fee award may be granted in a direct action which substantially benefits the corporation has not been clearly decided.\textsuperscript{63} Professor Henn indicates uncertainty in his treatment of the issue which suggests the following:

\textsuperscript{58} Securities Exchange Act of 1934 §§9(e) & 18(a), 15 U.S.C. §§78i(e) & 78r(a) (1964), specifically provide for an award of reasonable attorneys' fees in cases involving manipulation of security prices and misleading statements in documents filed with the SEC. Of course, the fact that a statute fails to make some specific provision has rarely restrained the Court from implying such a provision or otherwise reaching a result consistent therewith. The Court in \textit{Mills} stated that "sections 9(e) and 18(a) should not be read as denying to the courts the power to award counsel fees in suits under other sections of the Act when circumstances make such an award appropriate . . . ." 396 U.S. 375, 390-91 (1970) (emphasis added).

\textsuperscript{59} Smolowe v. Delendo Corp., 136 F.2d 231 (2d Cir. 1943).

\textsuperscript{60} 386 U.S. 714 (1967). In \textit{Fleischmann}, the Supreme Court affirmed an appellate court decision reversing a lower court award of attorneys' fees in a suit brought under the Lanham Act for trademark infringement. The opinion by Chief Justice Warren stated that where a statute creating the cause of action expressly provides remedies, other remedies should not readily be implied. The Court in \textit{Mills} distinguished \textit{Fleischmann} as involving a statute which meticulously detailed its remedies unlike the Securities Exchange Act of 1934.

\textsuperscript{61} 396 U.S. 375, 395 (1970).


\textsuperscript{63} Compare Riddell v. Cascade Paper Co., 56 Wash. 2d 663, 355 P.2d 3 (1960) (court found no substantial benefit in an individual shareholder action to determine voting rights) with Benson Co-op Creamery Ass'n v. First District Ass'n, 276 Minn. 520, 151 N.W.2d 422 (1967) (court noted plaintiff's action was for his \textit{sole} benefit and "under these circumstances [did] not believe [it] should extend the right to recover attorneys' fees to this type of action.") \textit{Id.} at 531, 151 N.W.2d at 429.
Where the shareholder brings a direct . . . action and recovers a fund in behalf of a class, he should be reimbursed from such fund. Absent a class fund, presumably the normal rule that a litigant pays his own litigation expense should apply. 64

Yet attorneys' fees should be recoverable in direct suits, provided the corporation substantially benefits. The problem with direct actions is that generally the benefits conferred thereby are purely individual. Certainly, the corporation will be substantially benefited by derivative actions more frequently than by direct actions due to the individual nature of the latter. If, however, a substantial benefit is shown accruing to the corporation as a result of a direct action, the fact that the action was not derivative should be no reason for denying a fee award. The essential quaere should be whether the corporation substantially benefited from the litigation, not whether the litigation producing the substantial benefit was direct or derivative. It is thus interesting to question whether 14(a) direct actions fall within the Mills rationale. Clearly, federal policy is not contingent upon the form in which a 14(a) claim is brought; and since the Court in Mills based its finding of a substantial benefit on federal policy, it should make no difference whether the 14(a) violation is uncovered derivatively or directly.

The next obvious step is an application of Mills to Section 10 of the 1934 Securities Exchange Act. 65 The core of this section and Rule 10b-5, promulgated thereunder, is "the implementation of the congressional purpose that all investors should have equal access to the rewards of participation in securities transactions." 66 It is presently the most dynamic tool in federal corporation law, and the federal policy is therefore certainly as strong behind 10b-5 as it is behind 14(a). When shareholders bring a successful 10b-5 derivative action, then, courts should have little difficulty finding a substantial benefit based on federal policy. Arguably, this finding should not differ in direct 10b-5 suits, since the federal policy does not change with the pleading form. Consequently, courts may transpose the federally grounded substantial benefit analysis in Mills to 10b-5 actions and thereby significantly develop federal corporation law.

JAMES MARIUS BELL

64 H. HENN, LAW OF CORPORATIONS 798 (2d ed. 1970) (emphasis added).