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## Proceeding in Forma Pauperis in Federal Court: Can Corporations Be Poor Persons

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PROCEEDING IN FORMA PAUPERIS IN FEDERAL COURT:  
CAN CORPORATIONS BE POOR "PERSONS"?

Concern that inability to pay fees and costs barred poor litigants from the federal courts<sup>1</sup> prompted passage of the in forma pauperis statute of 1892.<sup>2</sup> The present provision for in forma pauperis proceedings (which permits a party to sue or defend without prepayment of filing fees or posting of security for an opponent's potential recovery of costs) is found in section 1915 of title 28 of the United States Code. The section provides that any federal court may permit

the commencement, prosecution or defense of any suit, action or proceedings . . . without prepayment of fees and costs or security therefor, by a *person* who makes affidavit that he is unable to pay such costs or give security therefor.<sup>3</sup>

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1. This bill proposes to open the United States Courts to a class of American citizens who have rights to be adjudicated, but are now excluded practically for want of sufficient money or property to enter the courts under their rules.

. . . .  
It is no answer to say that [these persons] can sue in State courts, for the defendant can remove the cause to the United States court. And besides, some States do not have such a law. Others who have construed it to apply to their own citizens and not to nonresidents.

And if these people are not allowed in the United States courts, why admit the wealthy, who can take care of themselves in the State courts better than the poor.

In short, this bill presents the question whether this Government, having established courts to do justice to litigants, will admit the wealthy and deny the poor entrance to them to have their rights adjudicated.

H.R. REP. NO. 1079, 52nd Cong., 1st Sess. 1 (1892).

2. Act of July 20, 1892, Ch. 209, 27 Stat. 252.

That any citizen of the United States, entitled to commence any suit or action in any court of the United States, may commence and prosecute to conclusion any such suit or action without being required to prepay fees or costs, or give security therefor before or after bringing suit or action, upon filing in said court a statement under oath, in writing, that, because of his poverty, he is unable to pay the costs of said suit or action which he is about to commence, or to give security for the same, and that he believes he is entitled to the redress he seeks by such suit or action, and setting forth briefly the nature of his alleged cause of action.

. . . and wilful false swearing in any affidavit provided for in this or the previous section, shall be punishable as perjury as in other cases.

. . . .  
That the court may request any attorney of the court to represent such poor person, if it deems the cause worthy of a trial, and may dismiss any such cause so brought under this act if it be made to appear that the allegation of poverty is untrue, or if said court be satisfied that the alleged cause of action is frivolous or malicious.

That judgment may be rendered for costs at the conclusion of the suit as in other cases.

3. 28 U.S.C. § 1915 (1971) (emphasis added). The full text of the statute reads:

Individuals are the usual petitioners under the statute, but on two occasions corporations have attempted to proceed in forma pauperis as poor "persons." In one case, a profit-making corporation claimed antitrust violations by its competitors;<sup>4</sup> in the other, a "public-interest" corporation appealed as inadequate a consent decree entered by the Federal Trade Commission (FTC) on a claim of unfair advertising practices.<sup>5</sup> While neither case held that corporations could never proceed in forma, each was denied leave to proceed on the ground that it was an inappropriate party for statutory relief.<sup>6</sup> This Comment will argue that the relief provided by the federal in forma statute is appropriate for and should be extended to corporations.

Determining who should be permitted to proceed in forma pau-

(a) Any court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceedings, civil or criminal, or appeal therein, without prepayment of fees and costs or security therefor, by a person who makes affidavit that he is unable to pay such costs or give security therefor. Such affidavits shall state the nature of the action, defense or appeal and affiant's belief that he is entitled to redress.

An appeal may not be taken in forma pauperis if the trial court certifies in writing that it is not taken in good faith.

(b) In any civil or criminal case the court may, upon the filing of a like affidavit, direct that the expense of printing the record on appeal, if such printing is required by the appellate court, be paid by the United States, and the same shall be paid when authorized by the Director of the Administrative Office of the United States Courts.

(c) The officers of the court shall issue and serve all process, and perform all duties in such cases. Witnesses shall attend as in other cases, and the same remedies shall be available as are provided for by law in other cases.

(d) The court may request an attorney to represent any such person unable to employ counsel and may dismiss the case if the allegation of poverty is untrue, or if satisfied that the action is frivolous or malicious.

(e) Judgment may be rendered for costs at the conclusion of the suit or action as in other cases, but the United States shall not be liable for any of the costs thus incurred. If the United States has paid the cost of a stenographic transcript or printed record for the prevailing party, the same shall be taxed in favor of the United States.

4. *Honolulu Lumber Co. v. American Factors, Ltd.*, 265 F. Supp. 578 (D. Hawaii 1966), *aff'd on other grounds*, 403 F.2d 49 (9th Cir. 1968).

5. *S.O.U.P., Inc. v. F.T.C.*, 449 F.2d 1142 (D.C. Cir. 1971).

6. In light of the statute governing in forma pauperis appeals, 28 U.S.C. Section 1915(a), which we are bound to construe reasonably, assuming arguendo that a corporation may proceed in forma pauperis, we think it would be inconsistent with the congressional intent to hold that *this* corporation should be allowed to proceed in that manner in view of the financial data submitted since it is likely that the costs of proceeding would not exceed \$100.00. *S.O.U.P., Inc. v. F.T.C.*, 449 F.2d 1142 (D.C. Cir. 1971) (emphasis added).

An examination of the statutory language and legislative history of 28 U.S.C. § 1915 indicates that Congress never intended to include corporations as a "person" within the meaning of this statute. . . .

Even if the statute were construed as authorizing corporations to sue in forma pauperis, this court would nevertheless, for the reasons indicated hereafter, in its discretion, deny plaintiff's petition in this case.

*Honolulu Lumber Co. v. American Factors, Ltd.*, 265 F. Supp. 578, 580-81 (D. Hawaii 1966), *aff'd on other grounds*, 403 F.2d 49 (9th Cir. 1968) (dismissal of an antitrust suit for lack of prosecution not an abuse of discretion).

peris is a problem of statutory construction. Part I examines the history and language of the federal statute and concludes that it ought to be read as a legislative confirmation of the courts' discretion in regulating access to the courts. Part II contains a description of the judicial system which attempts to isolate and analyze the values protected by the statute so that its application to corporations can be appraised in light of those values. Part III surveys the traditional technique for depriving corporations of the benefits of their entity status in the litigation context ("piercing the corporate veil") to see whether it offers further clues to the appropriateness of corporations proceeding in forma pauperis as "persons." The costs of such proceedings are predicted for a variety of hypothetical cases and a formulation of net benefits extracted from the predictions. Finally, Part III concludes with a discussion of some judicial tools which, because they permit the courts to prevent abuse by corporate in forma litigants, resolve lingering doubts about the risks of expanding the statute's application. Part IV applies the analysis to the two corporations which attempted to proceed in forma as "persons" and concludes that each corporation could have been allowed to proceed in forma pauperis had the court chosen to decide the question of the applicability of the in forma statute to corporations.

## I

### HISTORY AND LANGUAGE: A FRAMEWORK FOR STATUTORY CONSTRUCTION

#### A. *The In Forma Pauperis Tradition*

The federal in forma pauperis statute codifies a tradition of facilitating access to the courts by the poor. That tradition began, not with a statute, but with the early English courts' holdings that it was within their discretion to permit parties to proceed without payment of fees.<sup>7</sup> As long as twenty years before the 1495 law of Henry VII, "A Mean to Help & Speed Poor Persons in their Suits,"<sup>8</sup> English courts of both law and equity would enter pleadings without charge from parties who swore they could not pay.<sup>9</sup>

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7. 1 E.R. DANIELL, A TREATISE ON THE PRACTICE OF THE HIGH COURT OF CHANCERY 44 (1837).

8. 11 Hen. 7, c.12 (1495).

9. But, after all, is the 11 H. 7, c. 12, any thing [sic] more than confirmatory of the common law? . . . [A] case . . . occurred in the 15 Ed. 4, twenty years before the passing of that act [1495], from which it appears that at common law if a party would swear that he could not pay for entering his pleadings, the officer was bound to enter them gratis . . .

Brunt v. Wardle, 133 Eng. Rep. 1254, 1257 (C.P. 1841). See also, Note, *Proceedings in Forma Pauperis*, 31 HARV. L. REV. 485 (1918); Annot., 6 A.L.R. 1281, 1282 (1920).

The pre-statutory availability of in forma proceedings implies that the first in forma statute corroborated judicial discretion to provide for such proceedings. It seems logical that the courts' discretion to regulate such a procedure would be approved by the legislature—the courts' competence to determine who should be allowed to appear before them is very great. In forma pauperis statutes can therefore be construed as legislative confirmations of judicial discretion to resolve issues of access to the courts by those who cannot pay.

In the United States, however, courts in various jurisdictions have disagreed on whether the right to proceed in forma pauperis may be granted in the court's discretion or whether it requires statutory authorization. The California Supreme Court, for instance, has held that the right to proceed without fees exists without regard to and is not limited by statute.<sup>10</sup> The court reasoned that the discretion of the courts to allow proceedings in forma pauperis is part of the state common law because the California Constitution of 1850 expressly adopted the English common law as the law of the state, and the English common law permitted such proceedings without statutory assent.<sup>11</sup> Rhode Island, because of the peculiar wording of its constitution, has held that the right to proceed in forma is constitutionally protected.<sup>12</sup> Other states have held that in forma proceedings must be authorized by statute.<sup>13</sup>

In cases decided before passage of the federal statute in 1892, the federal courts, interestingly, did both. Even before the statute was passed, in forma proceedings were common and unremarkable in admiralty, but the reason for that is not clear.<sup>14</sup> Perhaps this was

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10. California law on this point was settled by the decision in *Martin v. Superior Court*, 176 Cal. 289, 168 P. 135 (1917), where the court held that because the right to proceed in forma pauperis was part of English common law adopted by California in the constitution of 1850, enforcement of statutes setting fees for judicial services was discretionary with the courts and parties could be allowed to proceed in forma pauperis—i.e., without payment of those fees. The case is discussed in Note, *Procedure: Suits in Forma Pauperis*, 6 CALIF. L. REV. 226 (1918). Pennsylvania follows the California reasoning. *Willis v. Willis*, 20 Pa. Dist. 720 (C.P. 1910); Note, *Forma Pauperis Suits in California*, 27 CALIF. L. REV. 352, 354 (1939). See also, Note, *Aid for Indigents in the Federal Courts*, 58 COLUM. L. REV. 832 (1958).

11. See note 9 *supra*.

12. Every person within this state ought to find a certain remedy, by having recourse to the laws, for all injuries or wrongs which he may receive in his person, property, or character. He ought to obtain right and justice freely and without purchase, completely and without denial; promptly and without delay; conformably to the laws.

R.I. CONST., art. 1, § 5 (emphasis added); *Lewis v. Smith*, 43 A. 542, 21 R.I. 324 (1899). See also, Annot. 6 A.L.R. 1281, 1285 (1920).

13. See Note, *Forma Pauperis Suits in California*, 27 CALIF. L. REV. 352, 354 (1939).

14. Note, *Aid for Indigent Litigants in the Federal Courts*, 58 COLUM. L. REV. 832, 833 n.8 (1958). The following justification for the special rule for seamen is

just another respect in which the commercial realities of admiralty dictated more flexible procedures in resolving disputes.<sup>15</sup> At least one federal circuit court, however, thought in forma proceedings were available in other than admiralty cases without statutory authorization. In *Bradford v. Bradford*,<sup>16</sup> the court held that the plaintiff could not proceed in forma in federal court under the provisions of state law, but went on to say:

. . . [C]ases may arise possessing merits, in favor of persons too poor to secure costs. For such cases some provision ought to be made. The rule of the English courts adopted and acted on by some of the American courts commends itself . . . . If the applicant will supplement his affidavit by the certificate of any reputable attorney, to the effect that . . . the applicant has a good cause of action, he will be permitted to bring and prosecute his suit in forma pauperis.<sup>17</sup>

Five years later the same court held that in federal equity proceedings either plaintiff or defendant could proceed in forma pauperis.<sup>18</sup>

Until 1888, then, the Federal Circuit Court for the Western District of Tennessee exercised its discretion and permitted parties to proceed in forma pauperis in federal court. In that year, however, that same court decided the case of *Roy v. Louisville N.O. & T.R. Co.*<sup>19</sup> in which

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of interest:

Common seamen are often transient persons, having no fixed place of residence, and generally of no pecuniary responsibility, and therefore unable to give security. It is upon this presumed inability that the exception [to the rule of giving security for costs] is founded. To require them to give security in all cases would be a virtual denial of justice and would place them at the mercy of their employers.

The Arctic, 1 F. Cas. 1089, 1090 (E.D. Mich. 1871). See also, *Wheatley v. Hotchkiss*, 29 F. Cas. 861 (D. Mass. 1854); *Brown v. The Henry Pratt*, 4 F. Cas. 384 (S.D.N.Y. 1843).

The tradition of distinguishing seamen as litigants to whom the payment of fees or posting of security for costs presents unique problems continues in section 1916 of title 28 of the United States Code which makes specific provision for seamen to sue without prepaying fees or costs or posting security therefor. 28 U.S.C. § 1916 (1971).

15. Exemplary of the procedures fostered by the "commercial realities" of the maritime industry is suit by libel naming the ship as defendant with jurisdiction founded on physical presence of the ship [G. GILMORE & C. BLACK, *THE LAW OF ADMIRALTY* 483-88 (1957)], and rules limiting liability to the value of the ship [*id.* at 663-748]. Because the ship owner may be far away and not subject to jurisdiction or service of process when a cause of action arises from the operation of his vessel, jurisdiction based on physical presence of the ship facilitates adjudication of liability. Similarly, because the risks and benefits of shipping are both so great, limiting liability is a rational means of encouraging owners to run risks which can only materialize to the extent of a particular ship, leaving the rest of the owner's fleet intact.

16. 3 F. Cas. 1129 (C.C.W.D. Tenn. 1878).

17. *Id.* at 1129.

18. *Ferguson v. Dent*, 15 F. 771, 773-74 (C.C.W.D. Tenn. 1883).

19. 34 F. 276 (C.C.W.D. Tenn. 1888). The analysis used in *Roy* has not been extended beyond the specific situation described. See notes 85 & 86 *infra* and accom-

it ruled that an infant could not avoid posting security for costs by suing in forma pauperis by its next friend. The court explained that the purpose of requiring an infant to sue by its next friend was to ensure that someone be active in the suit who could be made responsible for costs or posting security for costs. To allow a next friend to proceed in forma pauperis would undercut that purpose and could not be permitted. The court disapproved the holding in *Bradford*<sup>20</sup> and framed its decision in such broad language that the case has come to stand for the proposition that in forma pauperis proceedings are dependent on statutory authorization.<sup>21</sup> Had the holding in *Roy* been recognized for what it was—only a statement limiting the circumstances in which the court could exercise its discretion over in forma proceedings—and had the precedent not become ossified, no federal statute might ever have been needed or, at least, any that was passed could have been viewed as confirmatory of the courts' discretion and thus subject to flexible interpretation.

The legislative history of the original federal statute confirms that at least the 52nd Congress (1892) viewed in forma proceedings as precluded only by the courts' own rules, rather than by their lack of authority to provide for those proceedings without statutory assent. The House Committee on the Judiciary, in recommending federal in forma pauperis legislation, argued that the statute was necessary to open the federal courts to those citizens "now excluded practically . . . [by] the courts *under their rules*."<sup>22</sup> The implication of this language is that had the courts changed their rules to broaden access of poor persons, legislative action would not have been necessary.

The subject of the federal in forma pauperis statute—whether or not fees and costs will be charged to a party in federal court—is one the courts are highly competent to administer. These are issues relating to the internal conduct of the courts' affairs. No other institution has greater competence than they to assess the impact of foregoing fees or broadening access on the interests entrusted to judicial protection. Furthermore, such a subject looks very much like others which are managed by the courts rather than the legislature, such as the designation of criteria for determining the manageability of a class action.<sup>23</sup>

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panying text, for examples of analogous situations in which the courts have permitted in forma appearances.

20. See text accompanying note 16 *supra*.

21. The plaintiff not being entitled to sue in forma pauperis under the state statute or under the general law, in suits at law, *we cannot by judicial action confer the privilege*.

34 F. at 278 (emphasis added).

22. H.R. REP. NO. 1079, 52nd Cong., 1st Sess. 1 (1892) (emphasis added).

23. See FED. R. CIV. P. 23(b).

These considerations tend to confirm that the courts could remain responsible for determining who may proceed in forma pauperis without the need for a legislative judgment on the issue.

The federal in forma statute should be interpreted with regard to the tradition and decisions which conceive it to be within the courts' discretion to permit such proceedings and also with regard to the characterization of the subject of the statute as a matter of high competence for the courts. Both factors support a flexible interpretation of the statute. The only limits on its application should be sought in the statutory language and the values which the courts are charged with protecting.

### B. *Language of the Federal Statute*

The language of section 1915 of title 28 of the United States Code is remarkable for its permissive tone: "[A]ny court of the United States *may* authorize . . . ."<sup>24</sup> "[I]n any civil or criminal case the court *may* . . . direct . . . ."<sup>25</sup> "[T]he court *may* request an attorney to represent any such person . . . ."<sup>26</sup> "[J]udgment *may* be rendered for costs . . . ."<sup>27</sup> The legislature's failure to require the courts to take these steps (*e.g.*, "the court shall" or "the court must") implies that, like the first English in forma statute, the federal statute delegates discretion to the courts to administer these proceedings in their best judgment and approves judicial preeminence in this area. Should an appraisal of the values vindicated by in forma proceedings indicate that implementation of those values requires broader application of the statute, such a step would appear to be an appropriate one for the court to take on its own initiative, subject only to the limits clearly imposed by the statutory language.

Prior to amendment in 1959, the language of the federal statute limited its application to any "citizen."<sup>28</sup> In that year, the subject of the statute was changed to any "person."<sup>29</sup> According to the House Committee reports,<sup>30</sup> the purpose of the amendment was to make the statute available to aliens resident in the United States who had, by a series of treaties between the United States and other countries, been

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24. 28 U.S.C. § 1915(a) (1971) (emphasis added). For the full text of the statute, see note 3 *supra*.

25. 28 U.S.C. § 1915(b) (1971) (emphasis added).

26. *Id.* § 1915(d) (emphasis added).

27. *Id.* § 1915(e) (emphasis added).

28. Act of July 20, 1892, ch. 209, 27 Stat. 252, *as amended*, Act of June 25, 1910, ch. 435, 36 Stat. 886, *as amended*, Act of June 27, 1922, ch. 246, 42 Stat. 666, *as amended*, Act of January 31, 1928, ch. 14, 45 Stat. 54.

29. Act of September 21, 1959, Pub. L. 86-320, 73 Stat. 590.

30. H.R. REP. NO. 650, 86th Cong., 1st Sess. (1959).

guaranteed access to our courts equal to that of American citizens. This amendment had the support of the United States Attorney General,<sup>31</sup> the Judicial Conference of the United States,<sup>32</sup> and the Department of Justice.<sup>33</sup> No other reason was assigned or suggested for the change, and congressional debate on the amendment dealt solely with its effect on aliens.<sup>34</sup>

The amendment to section 1915 did, however, raise the possibility that corporations could now proceed under the statute. Although the courts have consistently refused to recognize corporations as "citizens"<sup>35</sup> for purposes of statutory interpretation, they have as consistently held that they are "persons."<sup>36</sup> In fact, section 1 of title 1 of the United States Code, defining terms used generally in the Code, indicates that corporations are to be included whenever a statute speaks of persons.<sup>37</sup> Since this statute was in force in 1959, it is difficult to argue that Congress was not aware of the effect of this amendment.

Congress could have precluded any question of the statute's application to corporations by replacing "citizen" with "any individual," "any natural person," or "any citizen or resident alien."<sup>38</sup> It did not. The absence of restrictive language does not prove that Congress intended to open the statute up to corporate application. All that is certain is that either insufficient consideration was given to the effect of the amending language, or that Congress assumed pre-1959 cases<sup>39</sup>

31. 1959 U.S. Code Cong. & Ad. News 2663, 2665.

32. *Id.*

33. *Id.* at 2666.

34. H.R. REP. No. 650, 86th Cong., 1st Sess. (1959); S. REP. No. 947, 86th Cong., 1st Sess. (1959). For the full text of the House and Senate debates, respectively, see 105 CONG. REC. 13714 (1959) and 105 CONG. REC. 18909 (1959).

35. See, e.g., *Bank of the United States v. Deveaux*, 9 U.S. (5 Cranch) 61 (1809).

36. See, e.g., *United States v. Amedy*, 24 U.S. (11 Wheat.) 392 (1826); *Beaston v. Farmers' Bank of Delaware*, 37 U.S. (12 Pet.) 102 (1838); *Bank of Augusta v. Earle*, 38 U.S. (13 Pet.) 517 (1839).

37. 1 U.S.C. § 1 reads in pertinent part:

In determining the meaning of any Act of Congress, unless the context indicates otherwise—

. . . .  
the words "person" and "whoever" include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals. . . .

1 U.S.C. § 1 (Supp. 1973).

38. One jurisdiction has done just that. Louisiana has a statute which authorizes in forma proceedings only by "an individual who is a resident of this state, or an alien domiciled therein for more than three years." LA. CODE CIV. PRO. § 5181. The language was held to preclude extension of in forma pauperis proceedings to corporations on the grounds that they are not individuals. *Stump v. City of Shreveport*, 255 So. 2d 210 (La. App. 1971).

39. *Atlantic S.S. Corp. v. Kelley*, 79 F.2d 339 (5th Cir. 1935); *Quittner v. Motion Picture Producers & Distrib.*, 70 F.2d 331 (2nd Cir. 1934).

had settled the inavailability of in forma proceedings for corporations. In any event, neither statutory language nor legislative history justifies summary preclusion of corporate in forma proceedings.

This Part has set out the background against which the federal in forma pauperis statute operates. That background—comprised of the English common law tradition, the federal and state judicial traditions which show the high competence nature of the subject matter, the legislative history of the original federal statute, and the permissive language of the current federal statute—affords guidelines for construing the statute. Part II will elaborate a descriptive theory of the function of the courts, focusing on the values served by the judicial system which bear on the interest in access, including access by the poor. The appropriateness of construing the statute to apply to corporations can then be appraised in light of that descriptive theory as well as the background developed in this Part.

## II

### A DESCRIPTIVE THEORY OF THE JUDICIAL SYSTEM: FURTHER GUIDANCE FOR STATUTORY CONSTRUCTION

A rational description of the judicial system, focusing on the values protected by that system, should provide further guidelines for construing the federal in forma pauperis statute. The primary value protected by in forma proceedings is access to the courts. If values central to the judicial system will be enhanced by increased access, a strong argument will have been made for broadening the application of the in forma pauperis statute through judicial interpretation.

#### *A. Government and Individual Interests Protected by the Judicial System*

The government's main interest in creating a judicial system is substituting peaceful, official dispute resolution for private dispute resolution achieved through force or violence. The increase in public order which results from that substitution allows the reallocation of government resources from control of violence to delivery of public services. As a result, the state can govern a larger area with fewer resources. Protection of this government interest in bureaucratic efficiency is enhanced when the official dispute-resolution system is a monopoly. Because individuals can resolve their disputes peacefully only if they go to court, they will necessarily rely on and be loyal to the government which has created those courts.

Official dispute resolution permits the government to guide conduct as well as to impose sanctions for certain behaviors. Through

their decisions of individual disputes the courts define what is considered appropriate behavior in a form which reaches beyond the individual litigants. The judicial system also gives the government a means of vindicating specific government policies—a way to tell people what to do. Because most people will comply without being brought into court in order to avoid the sanctions which the court has the power to impose, the system is an efficient one.

Comparably strong individual interests are protected by an official dispute-resolution system. The judicial system resolves disputes in a peaceful manner and increases the chance that the merits will determine the outcome. Because individuals perceive that official dispute resolution is principled—*i.e.*, the outcome will not turn on factors such as wealth or race—they will be willing to entrust their disputes to the courts. Through the judicial system an individual may also vindicate his interests, and protect himself from others who seek to impose their interests at his expense. Official dispute resolution substitutes authoritative enforcement by the state for enforcement by limited individual resources.

Individuals may, of course, seek a resolution of their conflict from a neutral but unofficial party—for instance, a neighbor may agree to arbitrate a dispute over property lines. But third parties are not bound by an unofficial resolution and the resolution cannot be enforced if one party subsequently rejects it. Authoritative enforcement of a private resolution would itself require recourse to the courts. As there is no alternative of commensurate force and finality, the interest of individuals in gaining access to the courts is very high.

What do the government and individual interests protected by the judicial system reveal about access to that system? The individual's interests would obviously be promoted by broadened access. The easier it is to gain access to the judicial system, the less likely it is that an individual involved in a dispute will be denied official, authoritative resolution of his claim. Increased access would appear similarly to promote the government interests protected by the judicial system. It would increase the opportunities for peaceful dispute resolution and promote an orderly society. The more individuals can rely on peaceful, official dispute resolution through the courts, the less private, violent dispute resolution will occur and the more public order will be promoted. The job of governing will be easier and more efficient, since more individuals will be exposed to the conduct regulative expressions of the judicial system.

Finally, broadened access to the courts will enhance the perceived legitimacy of the dispute resolution that does occur. The broader the spectrum of society which avails itself of official dispute resolution,

the less likely it will be that an individual will consider himself exempt from its influence and authority. The more likely it is that any individual can gain access to the dispute-resolution system when he needs to, the more likely it will be that he will respect and defer to the judgments of that system out of self-interest.

Broad access to the judicial system is thus important to promote the individual and government values vindicated by the courts. Since in forma pauperis statutes permit access to the courts by individuals who would be otherwise excluded from them by inability to pay fees, those statutes assist in protecting a broad range of individual and government interests. The benefits of a flexible interpretation of in forma statutes would be increased access to the courts for those who would otherwise be excluded because of inability to pay and thus enhanced protection of the individual and government interests which are the focus of the judicial system.

The benefits are but one side of the appraisal, however; the costs of increasing access through expanded in forma pauperis proceedings must also be considered. The literal "cost" of increased in forma access (including extending the benefits of the statute to corporations)—the loss of fees otherwise paid by litigants—will be appraised in the next section to see if it is great enough to require revision of the tentative conclusion arrived at here.

*B. Interests Protected by In Forma Pauperis Proceedings:  
Increased Access at the Cost of Uncollected Fees*

Two competing interests are accommodated in the federal in forma pauperis statute—the individual's interest in access to the judicial system and the government's interest in collecting fees from those who rely on the courts for dispute resolution. The value of increased access has been discussed above. The focus now shifts to the government's interest in collecting fees from those who use the courts. An attempt will be made accurately to characterize those fees so that the effect of waiving them in certain cases can be appraised. If the government funds the federal court system solely by charging fees, for example, enlarging the group of persons statutorily exempt from having to pay may defeat that reason for charging fees. If fees serve some other purpose and are not the sole support of the system, however, an increase in the class of parties who do not have to pay may be more easily justified.

One of the ways the in forma statute lowers financial barriers to the judicial system is by providing that a person qualifying under that statute may pursue "the prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment

of fees . . . ."<sup>40</sup> This means that the party does not have to pay fees, for example, for filing the action, filing or amending pleadings, obtaining a judgment, or for any other service rendered by the court in connection with instituting or pursuing the litigation.<sup>41</sup> Normally a litigant must pay these fees at the time a service is rendered to him by the court. They are the price for court assistance and reflect a value judgment that those who benefit from reliance on the courts should defray the cost of the judicial system. The party appearing in forma may defer payment of fees, and if he is ultimately unable to pay, he may escape paying them altogether.

One justification for litigation fees, then, would focus on them as a rational means of defraying the cost of the judicial system.<sup>42</sup> Parties should pay fees because dispute resolution is costly and their fees can defray the costs of providing a judicial system. But if fees do not offset at least a substantial portion of the system's cost, they are not performing this function and objection to expanding in forma access cannot be predicated on a claim that to do so would make it substantially more difficult for the government to achieve its goal of financing the judicial system by filing fees.<sup>43</sup> In the federal judicial

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40. 28 U.S.C. § 1915(a) (1971). For text of the statute, see note 3 *supra*.

41. The full panoply of financial relief provided by the in forma statute includes relieving the litigant of prepaying fees, prepaying costs, posting security for an opponent's costs, and the cost of printing the record on appeal (either because the United States assumes the cost, or because under its rules, the court allows the party to proceed in forma pauperis on a typewritten record). Of course, in the event the in forma party prevails, all of these charges will be taxed to the losing party, thereby reimbursing the system for the foregone fees. 28 U.S.C. § 1920 (1971). See text accompanying notes 72-77 *infra*.

42. In *United States v. Kras*, 409 U.S. 434 (1973), the majority opinion held that payment of statutorily imposed fees was a necessary condition of a discharge under the federal bankruptcy statute and went out of its way to characterize the fees charged under that statute as a means Congress had devised to make the federal bankruptcy system self-supporting—paid for by those who claim its services. The Court cited figures showing that for the first five years of the decade ending 1959, the federal bankruptcy system had shown a surplus [*id.* at 448 n.7] implying that the attempt had been successful. The contrast between Congress' success with the bankruptcy system and its failure to finance the federal court system as a whole by means of fees is striking and sufficient to distinguish the bankruptcy system from the federal court system as a whole. See text accompanying note 44 *infra*. The issue in *Kras* is also distinguishable from the issue discussed by this Comment on another ground: provision for proceeding in forma in bankruptcy proceedings had been removed from the federal bankruptcy statute by congressional amendment and the statute explicitly conditioned relief on payment of fees. 409 U.S. at 439-40. Thus a narrow reading of *Kras* would not present any barrier to broadening in forma access where statutory approval of such proceedings exists. But a broader reading of *Kras* is possible: access to authoritative dispute resolution can be conditioned on payment of fees. This reading does conflict with both the analysis in this Comment and that suggested by the reasoning in *Boddie v. Connecticut*, 401 U.S. 371, 375-76 (1971). See note 51 and text accompanying notes 51-53 *infra*.

43. Not only are there alternative means by which the government can vindicate

system, court fees are neither individually nor cumulatively scaled to the cost of the judicial system. In any one year, the cumulative revenues from those fees only offset about three percent of the total cost of the federal court system.<sup>44</sup> And any particular fee is not necessarily scaled to the cost of the service provided an individual litigant. The filing fee for a trial which lasts ten days is the same as for one which lasts one day,<sup>45</sup> despite the differences in cost to the system of these two trials. A trial before a three-judge panel requires payment of the same filing fee as does a trial before a single judge, yet obviously the costs of these two trials are not the same. Because they fail realistically to be either individually or cumulatively cost-related, court fees cannot accurately be justified as a device to defray the costs of the judicial system.<sup>46</sup>

Another justification of court fees might be predicated on their characterization as the price of a benefit received by the litigant. Because the litigant benefits, it is appropriate for him to pay. A plaintiff may receive some monetary or other judgment which vindicates his interests; a defendant may establish his right not to have to pay a plaintiff. Either party benefits from the opportunity to vindicate his interests by use of the coercive authority of the courts. Whether he prevails or not, it is this opportunity for which he pays.

To the extent that fees are the price of access to authoritative

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its interest in financing the court system (*e.g.*, taxation), but the means chosen by the government (charging fees) is not adequate to its alleged purpose. See text accompanying note 44 *infra*. And, in fact, other sources of revenue are exploited to defray the costs of the federal courts. See text accompanying notes 81 & 82 *infra*.

44. In 1972, the "fees for legal and judicial services" paid to the federal judiciary amounted to \$3,647,000. To reach a figure for all "fees" paid for the year, amounts from "Sale of publications & reproductions not otherwise classified" (\$2,000) and "Fees and other charges for other administrative services" (\$65,000) were added to arrive at a total 1972 income from fees figure of \$3,714,000. UNITED STATES BUREAU OF THE BUDGET, STATEMENT OF RECEIPTS—THE JUDICIARY (Form 108) 1-2 (available from Edward Garabedian, Assistant Chief for Finance, Business Administration Division, Administrative Office of the United States Courts; also on file with the California Law Review). The cost of operating the federal courts in 1972 was \$168,263,546. ADMIN. OFFICE OF THE U.S. COURTS, 1972 ANNUAL REPORTS OF THE DIRECTOR III-1. The ratio of income from fees to costs comes out at 2.2% and, if the underlying source material can be relied upon, the figure should be in error only on the high side.

45. The fee for filing an action in federal district court is \$15.00 for "instituting any civil action, suit or proceeding in such court, whether by original process, removal or otherwise. . . ." 28 U.S.C. § 1914(a) (1971).

46. Objection to expanding in forma access could be predicated on the government's interest in having at least three percent of the cost of the federal court system defrayed by filing fees. But there seems to be no principled distinction between three percent and whatever lower proportion of costs revenues from filing fees would defray if corporations were permitted to proceed in forma pauperis. And given the strong interest of the parties and of society in access, the government could be denied the choice of drawing its line at three percent.

dispute resolution, the cost of access is scaled to the benefit conferred by such access. Every litigant pays the same fee to file suit—to gain access to the courts—irrespective of the particular benefit he seeks.<sup>47</sup> Congruency between frequency of use and total contribution to costs is also preserved in the courts. The more suits one files or pages of record one has reproduced, the more one is charged and the more one contributes to defraying the total cost of the system. But if one particularizes the benefit to the party in terms of the specific remedy he is seeking, the congruency between benefit received and the cost of that benefit declines. The cost of filing suit in federal court does not vary with the remedy or size of the judgment sought in the litigation. No matter whether an injunction or a declaratory judgment is sought, or whether significant or token damages are claimed, the filing fee is the same. The fee is the same whether the claim is important—*e.g.*, recovery for the loss of life—or relatively trivial—*e.g.*, recovery for loss of a toe. Therefore only if one generalizes the benefit sought from the judicial system as “access to authoritative dispute resolution” does the uniformity of fees not violate congruency between benefit received and the cost of obtaining that benefit.

Court fees thus make only an insignificant contribution to defraying the cost of the judicial system and cannot be justified because they make the court system self-supporting. Furthermore, court fees cannot be justified as proportional to the benefit gained from dispute resolution, if one characterizes the benefit as the particular remedy sought by the litigant. And although fees are proportional to the benefit sought when that benefit is characterized generally as authoritative dispute resolution, that characterization raises other analytic problems which relate to the importance to the individual of obtaining such access.

The state protects its own interests when it undertakes to provide a system for dispute resolution. Giving that system a monopoly on authoritative dispute resolution secures the government's interests by ensuring that everyone will have to rely on it. Every time an individual brings his dispute to the judicial system for resolution, the government is benefited. The legitimacy of the judicial system is enhanced because one more person has provided the government with an opportunity to guide conduct, enforce its preferred policies, or gain an incremental increase in societal reliance. The rest of society has benefited because the threat of violence posed by individual dispute resolution has been reduced and social order has been preserved. Whatever interests of the party are vindicated—his interest in having his injury redressed or in not having to pay for an injury for which he is not liable, *i.e.*,

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47. See note 45 *supra* and accompanying text.

his interest in being returned to his predispute state—in the face of the government's benefit from making the individual dependent on its official dispute-resolution system, it seems not inaccurate to characterize access to the system as the party's "right" or "due."<sup>48</sup> As a sporting matter, the state has an obligation to allow an individual access to the judicial system when he cannot go elsewhere for effective and authoritative dispute resolution because the government gains by preventing him from doing so. Viewed from that perspective, his remedy, and the access necessary to seek that remedy, is the individual's due, rather than a benefit conferred on him by the government, and the government should be assumed to intend that access be given to all claimants, absent specific statutory denial.<sup>49</sup>

How, then, can court fees be justified? They are not cost-related at any level of analysis. They are benefit-related only if one generalizes the benefit as access to authoritative dispute resolution. They do contribute some small portion of the revenues needed to defray the costs of the court system. A minimal fee does deter at least some frivolous litigation. Court fees are traditional and usually impose only a *de minimis* burden on users of the courts. But when a party cannot pay them, fees are not *de minimis*. They then become an insurmountable barrier to the vindication of an important individual interest—access to dispute resolution. When inability to pay a small government charge precludes an important individual activity, the assertion by the government of its power to impose such a charge is unreasonable and payment must be forgiven.<sup>50</sup>

There are two analogous situations in which the imposition of even a small charge on the exercise of an important activity has been held unconstitutional.<sup>51</sup> While the analysis of court fees attempted in

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48. See *United States v. Kras*, 409 U.S. 434, 457 (1973) (Stewart, J., dissenting); *id.* at 462-63 (Marshall, J., dissenting); *Boddie v. Connecticut*, 401 U.S. 371, 375-76 (1971); *id.* at 387 (Brennan, J., concurring in part).

49. Cf. *United States v. Kras*, 409 U.S. 434 (1973). See note 42 *supra*.

50. See J. BRENNAN, *THE COST OF THE AMERICAN JUDICIAL SYSTEM* 104-05 (1966).

51. *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966); *Nippert v. Richmond*, 327 U.S. 416 (1946).

The analogy to *Nippert* and *Harper* is not asserted as a basis for claiming that failure to allow certain parties, *e.g.*, corporations, to proceed in *forma pauperis* is a denial of constitutional dimensions, although if one were sufficiently impressed with the importance of the value of access to the courts to make such an argument, constitutional language could be found to buttress that conclusion. For an example which relies on the fourteenth amendment, see *Boddie v. Connecticut*, 401 U.S. 371, 375 (1971). In *Boddie*, the majority stopped but one step short of taking the position that all denials of access to the dispute resolution system were unconstitutional. The one step was the Court's characterization of divorce as unique because the state has a monopoly on dissolving marriages. But, as this Comment argues, the state has a comparable monopoly on all dispute resolution since authoritative dispute resolution is available only from the courts. Parties may resolve their disputes informally, but

this Comment is not predicated on values that have explicit constitutional protection, the analogy is informative.

In *Nippert v. Richmond*<sup>52</sup> the United States Supreme Court reaffirmed that a local licensing fee imposed on an out-of-state business was an unjustifiable assertion of state power. The reasoning of the decision was that the states could not burden the activities of interstate commerce with such a discriminatory fee. The right of access to the courts is not anywhere specifically protected by the Constitution, and this Comment does not argue that court fees are unconstitutionally burdensome on access. But the judicial power is given explicit constitutional protection, as are such specific judicial processes as the right to trial by jury in certain cases. In terms of the magnitude of the personal right at stake, access to the courts is at least as important as conducting interstate commerce. A burden which can make it impossible to exercise that right should be lifted when it does so.

Another analogous privilege charge is the poll tax which was held unconstitutional in *Harper v. Virginia Board of Elections*.<sup>53</sup> There the Court said that the burden imposed on the right to vote by a poll tax was impermissible in view of the high value of the right being exercised and the lack of relation between the state's interest in burdening that right (by setting voter qualifications) and the means by which it did so (the voter's wealth). Without making a claim that the Constitution requires a comparable result with court fees, it seems clear that by the same reasoning such fees stand on weak ground. The individual has an equally high interest in access, and there is the same lack of relation between the state's interest in burdening that interest (to defray the cost of the courts) and the means by which it has chosen to do so (charging fees). At the least, the same analysis would indicate that court fees be waived whenever they are not de minimis, *i.e.*, when they threaten to preclude vindication of the interests protected by access to the courts.

The analysis so far has indicated that the crucial value protected by the *in forma pauperis* statute is access to the courts, and that broad access to the judicial system promotes a combination of highly valued governmental and individual interests. Extending application of the *in forma pauperis* statute to corporations would increase access and

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coercive enforcement of such informal resolution can only be obtained from the courts. Parties may also live apart from their spouses without a decree of divorce. It is only when they wish to remarry (to have the state act authoritatively to recognize their separation and new relationship) that they must seek access to the court to obtain a divorce. Others have taken this point of view. *See, e.g.*, *United States v. Kras*, 409 U.S. 434, 462-63 (Marshall, J., dissenting).

52. 327 U.S. 416 (1946).

53. 383 U.S. 663 (1966).

enhance the protection of those values. The other interest protected by the in forma statute, the contribution to the cost of the judicial system represented by court fees, is simply not vindicated by the present fee system. Since fees fail fully to be cost- or benefit-related, and since the activity dependent on the payment of fees is so important, fees should be waived whenever inability to pay them would preclude access to the courts. Part III will examine the corporation as litigant to determine whether the conclusion of the analysis so far—that the in forma statute should be interpreted to apply as broadly as possible—requires revision when the party seeking the protection of the statute is a corporation.

### III

#### CORPORATE ENTITIES AS APPROPRIATE IN FORMA PAUPERIS LITIGANTS

Corporations are often considered to be persons. In fact, it is common to include corporations in any statutory class labeled “persons,” and is appropriate except where a statute provides otherwise or where the values served would not be vindicated by applying the statute to corporations.<sup>54</sup> Applying this reasoning, corporations have been held to be “persons” for purpose of the constitutional protections of due process and the equal protection of the laws.<sup>55</sup> In arguing for the full effectuation of this principle, one commentator has said, “in its primary legal sense, the word ‘person’ applies to a corporation as literally and as fully as to an individual.”<sup>56</sup>

Because its entity status usually entitles a corporation to proceed in court just as an individual does, it is possible to conclude that proceedings in forma pauperis should not be an exception. The statute regulating such proceedings does not exclude corporations from its coverage, and the values protected by it would seem to be enhanced by any increment in access to the dispute-resolution system. There are, however, circumstances in which corporations are not allowed to maintain their status as entities in judicial proceedings, and these should be examined to see if they shed any light on whether corporations should be allowed to proceed in forma pauperis as “persons.”

#### *A. Disregarding the Corporate Entity—A Relevant Sanction?*

In certain circumstances, courts have felt it appropriate to “pierce the corporate veil” and deal, not with the corporate entity, but with

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54. Green, *Corporations as Persons, Citizens, and Possessors of Liberty*, 94 U. PA. L. REV. 202, 210 (1946).

55. N. LATTIN, *THE LAW OF CORPORATIONS* § 23, at 99 (2d ed. 1971).

56. Green, *supra* note 54, at 203.

the individuals who stand behind the entity—usually the shareholders, sometimes the officers or directors. One discussion of this process begins as follows:

One of the practical conveniences of the corporation is that the law has considered it a jural person capable of . . . suing and being sued as an entity distinct from its owners, the shareholders, . . . in much the same manner as a natural person . . . .

. . . [U]nder [certain] circumstances. . . , courts will treat the owners, or a part of them, as if they had acted in their own behalf. Colorful language is frequently used to describe this judicial action, such as “piercing the corporate veil” to see who is behind it . . . . This language has been used more to explain the results of certain types of action than to ascertain what results follow when certain types of action have occurred.

. . . [C]ourts exercise wide discretionary power in preventing the use of the corporate device for purposes which are foreign to the privilege of doing business in this form, that is, for the abuse of this legal personality.<sup>57</sup>

The policy behind this discretionary exercise of judicial power appears to be that disregard of the corporate entity serves to sanction a corporation and its owner or directors for violating the rules which the corporation must obey as a *quid pro quo* of its entity status. It is an appropriate, or relevant, sanction because it requires the people behind the corporation to assume the losses resulting from the creation of risks from which those same people have benefited. That the sanction is judicially imposed indicates that the courts are competent to take account of the factors to be considered in deciding if a corporation should be allowed to appear in forma or whether the entity should be disregarded, since the same sort of balancing of interests is involved in both.

An examination of the circumstances in which the courts have applied this sanction will indicate whether and when a corporation's attempt to proceed in forma pauperis will run afoul of the rules of corporate behavior and thus be sanctioned by disregarding its entity status and denying its capacity to proceed in forma pauperis as a “person.”

Depriving the owners of a corporation of their organization's entity status often results in removing from them the shield of limited personal liability.<sup>58</sup> Other results may include lumping the resources of one corporation with those of a parent and/or related organization, thereby creating a fund sufficient to recompense an injured party,<sup>59</sup> ignoring the organizational distinction between a parent and subsidiary

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57. N. LATTIN, R. JENNINGS & R. BUXBAUM, *CORPORATIONS: CASES AND MATERIALS* 138 (4th ed. 1968).

58. *See, e.g.*, *Minton v. Cavaney*, 56 Cal. 2d 576, 364 P.2d 473 (1961).

59. *See, e.g.*, *Walkovsky v. Carlton*, 18 N.Y.2d 414, 223 N.E.2d 6 (1966).

corporation for the purpose of making service of process on an in-state subsidiary sufficient to obtain personal jurisdiction over the out-of-state parent,<sup>60</sup> or enforcing against a parent an injunction issued against a subsidiary<sup>61</sup> on the ground that the subsidiary is not a separate entity but only an extension of its parent.

If a court pierced the corporate veil where a corporation moves to proceed in forma pauperis, the shareholders', rather than the corporation's, resources would be appraised<sup>62</sup> to determine whether they were poor enough to satisfy the statutory standard.<sup>63</sup> If the shareholders had the resources to afford the litigation, the corporation would not be allowed to proceed in forma.<sup>64</sup> If the shareholders could not afford the costs of the litigation, however, the court would have no reason to deny the corporation's motion to proceed in forma pauperis.

But a court cannot pierce the corporate veil in any of these cases simply because it desires to achieve one of these results. In each case, the result must be warranted by the corporation's breach of a rule created by the state (perhaps through its courts) as a condition of jural personality and by the relevance of piercing the corporate veil as a sanction for that breach. It would be unprincipled for a court to hold the shareholders of a corporation personally liable to pay a judgment against the corporation just because the corporation does not have the funds with which to pay the claim. What makes such an exercise of judicial power justified is breach of a rule of corporate behavior, which rule may itself be judicially imposed, for instance, the rule against undercapitalizing a corporation, breach of which has rendered the corporation unable to pay for a loss for which it is liable. The court will not permit the corporation to have the benefit of entity status but still avoid liability resulting from profitable risk-creation.

Analogously, if the court is to disregard the corporate entity when it attempts to proceed in forma pauperis, some principle must underlie

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60. See, e.g., *Empire Steel Corp. v. Superior Court*, 56 Cal. 2d 823, 366 P.2d 502 (1961).

61. See, e.g., *Wirtz v. Ocala Gas Co.*, 336 F.2d 236 (5th Cir. 1964).

62. The Court of Appeals for the District of Columbia did this in *S.O.U.P., Inc. v. F.T.C.*, 449 F.2d 1142 (D.C. Cir. 1971), and the District Court for Hawaii implied that it was doing so in *Honolulu Lumber Co. v. American Factors, Ltd.*, 265 F. Supp. 578, 581 (D. Hawaii 1966).

63. The "statutory standard" articulated by the cases is that to proceed in forma one must be too poor to afford the anticipated expenses of the litigation and still provide oneself and one's family with the necessities of life. See, e.g., *Adkins v. E.I. DuPont de Nemours & Co.*, 335 U.S. 331 (1948).

64. The implication is clear: if they have resources shareholders must devote them to defraying the costs of the litigation. *S.O.U.P., Inc. v. F.T.C.*, 449 F.2d 1142 (D.C. Cir. 1971) (Fahy, J., supporting statement).

that decision other than the desire to reach the resources of the shareholders to pay the corporation's fees. If a corporation normally is treated as a person and that treatment is only denied as a sanction for breach of a rule, then one would expect to see a corporation allowed to proceed in forma pauperis in all but the circumstances where to do so would dissuade the values vindicated by relevant rules of corporate behavior.

A corporation must have sufficient financial resources to defray the reasonably expected expenses of doing its business, including reasonably anticipated losses which will be suffered by persons as a result of its operations. This rule requires the corporation to be "adequately capitalized."<sup>65</sup> It reflects the reality that corporations create risks of injury from the conduct of their businesses (*e.g.*, transit corporations contribute to the risk of motor vehicle accidents) and that they profit by creation of those risks. If a corporation does not have the funds with which to compensate a plaintiff it has injured, and if the lack of funds is attributable to the shareholders' failure to provide the corporation with capital adequate for those purposes, it is a relevant sanction to make the shareholders pay the plaintiff. The shareholders do not risk personal liability, however, if the corporation's inability to pay results from an unprofitable period of operations rather than a failure to have capital adequate to compensate for reasonably anticipated injuries. The corporation is equally unable to pay the claim in both cases, but only where the inability results from breach of a rule of corporate behavior is shareholder liability a relevant sanction. There is no rule against corporations operating unprofitably.

If the shareholders were not made to pay when the corporation has been inadequately capitalized, people would be encouraged to create corporations, fail purposely to provide adequate capital, and then shelter their personal resources behind the shield of limited liability. The rule and the sanction exist in order to discourage this behavior and to maximize the possibility that the corporation will be able to bear the losses that it creates in the course of earning profits for its shareholders.

Are there situations where a corporation moves to proceed in forma pauperis which share the characteristics of a traditional piercing situation? By proceeding in forma pauperis, does the corporation or its shareholders benefit or profit from the creation of a risk of loss or injury to another? If the answers to these questions are in the affirmative, it would be appropriate to let the principles which control disregarding the corporate entity determine whether a corporation

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65. For a good introduction to the rule against inadequate capitalization, see LATTIN ET AL., *supra* note 58 at 151-54,

should be allowed to proceed in forma pauperis. By applying these principles to a range of hypothetical situations, the answers should emerge.

Consider first the case of what might be called a "public interest" or "litigating corporation." A group of people form a corporation in order to litigate issues in which they have an interest or to participate in litigation which has already begun between other parties but to which they think they can bring special expertise or a voice for theretofore unrepresented interests. A group of students at Georgetown Law School formed S.O.U.P., Inc., for example, to represent public interest issues before the FTC.<sup>66</sup> The Sierra Club is a membership corporation with special interest in preserving national recreational and wild-life areas which has participated in litigation over proposed development of some of those areas.<sup>67</sup> These corporations, and others like them, may be said to be in the business of litigation. If such a corporation were to seek to proceed in forma pauperis, the entity's right to do so could be challenged on the ground that since its business is litigation, it should have been capitalized adequately to pay court fees for litigation it might participate in. The principles which allow piercing the corporate veil when a corporation has failed adequately to capitalize to pay the costs of profitable risk-creation would seem to be applicable here as well. One could fairly characterize the corporation's inability to pay its fees as the result of its members' decision to do business in the corporate form without being willing to ensure that the corporation could assume the costs of doing its business. If permission is granted to proceed in forma, by creating the corporation the members have shifted the cost of the corporation's activities to the state (which bears it by the loss of the revenue from the corporation's court fees), so perhaps the members' financial resources should be appraised in ruling on its motion to proceed in forma pauperis.

Consider also a profit-making corporation which has a contract claim against another but which is in poor enough financial condition to be unable to afford the anticipated litigation costs necessary to vindicate the claim. This corporation is not in the business of litigating and unless there were reason to believe that the corporation should have anticipated the need to vindicate this claim in court, the principles of undercapitalization would not necessarily be served by piercing the corporate veil. But the shareholders are asking the state (by foregoing the corporation's fees) to finance corporate risk-taking (the litigation) which may bring benefits to the shareholders—if the corporation wins its suit either it will be awarded damages which will be passed on

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66. See text accompanying notes 92-103 *infra*.

67. See, e.g., *Sierra Club v. Morton*, 405 U.S. 727, 735 n.8 (1972).

to its shareholders in the form of dividends or vindication of the claim will improve its business position and allow it to earn profits that will become dividends or raise the market value of the shareholders' investment. If the corporation loses its suit, the shareholders have not risked anything and have not lost anything. Even though the shareholders have not broken a rule of corporate behavior (*e.g.*, the rule against undercapitalization), it is questionable whether it is appropriate to shift the risk of that litigation from the shareholders to the state by allowing a profit-making corporation to proceed in forma pauperis. Perhaps in this situation as well, then, the shareholders should have to expose their personal resources to court appraisal in ruling on the corporation's motion to proceed in forma, that is, the corporate veil should be pierced and its entity status disregarded.

Finally, consider the case of a profit-making corporation attempting to assert an antitrust claim in forma pauperis. Here the corporation is attempting to vindicate both an interest of its own in being free from the effects of its competitors' anticompetitive practices and the interests of the economy at large in promoting competition. Because part of the claim is in the shareholders' interest (just as was vindication of the contract claim), perhaps shareholder resources similarly should be appraised on the motion to proceed in forma. But an equally important part of the claim will benefit the public at large—the vindication of the interest in promoting competitive practices. Because the corporation is not in the business of litigating, there seems to be no reason to impose on the corporation a duty to have capital sufficient to vindicate such claims. Therefore there seems to be no reason to apply principles such as undercapitalization to support piercing the corporate veil. This case, then, has elements which make it both appropriate and inappropriate for the application of traditional piercing principles.

On a motion to proceed in forma pauperis by a corporation in any of the above three situations, disregarding the entity would mean appraising shareholder as well as corporate resources to see whether the corporation and its shareholders were poor enough to be allowed to proceed without prepayment of fees. Two of the hypotheticals seem to lend themselves to piercing; the third does not. Consideration of what the effect of piercing the corporate veil would be might give further guidance as to whether to let that technique alone be dispositive of the problem of whether the corporation may proceed in forma pauperis. Since entity status is the norm in corporate judicial proceedings, the effect of abandoning that norm should be predicted to see whether it alters or confirms the decision made on traditional principles for piercing.

Piercing the corporate veil when a corporation attempts to proceed in forma pauperis has a great impact on the normal procedures of corporate governance. Some agent of the corporation decides whether to institute a suit. In all but a close corporation,<sup>68</sup> that decision will have been made by a vote of the board of directors.<sup>69</sup> If the corporation moves to proceed in forma and the court denies its motion on the ground that the financial resources of its shareholders are too great for them to qualify under the statute, the shareholders will have to decide whether or not to put their personal resources at the disposal of the corporation. If the shareholders refuse to do so, the corporation cannot prosecute its suit and the board's decision to sue will have effectively been overruled by the shareholders. This results in the normal rule of corporate governance, that the corporation shall be managed by its Board of Directors, not having effect when the corporation is denied permission to sue in forma pauperis.<sup>70</sup>

In addition, when the court moves to appraise shareholder resources on a corporate motion to proceed in forma, the court has raised problems which it is not competent to administer. In a routine piercing-the-corporate-veil case, for instance, where the plaintiff is attempting to make a shareholder personally liable for a tort judgment against

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68. See DEL. CORP. CODE § 351 (1971) (shareholders may manage a corporation which the certificate of incorporation declares to be a "close corporation" and the stock of which is held by less than thirty persons).

69. See, e.g., CAL. CORP. CODE § 800 (West Supp. 1973); 8 DEL. C. § 141 (1971); N.Y. GEN. CORP. LAW § 77 (McKinney Supp. 1972-73).

70. It can, perhaps, be argued that disruption of corporate governance and frustration of corporate decisions is no greater when a corporation cannot sue because its shareholders will not pay than when a corporation board votes to build a bridge, finds it does not have the funds, and cannot build because its shareholders will not put up the money. But there are distinctions.

The frustration of corporate governance associated with a decision to sue is distinguishable because it is the court telling the corporation that its shareholders' resources will determine whether or not it can sue. In the bridge case, no institution in any fashion limits the alternatives to the corporation in obtaining the funds for construction. Furthermore, by its policy of appraising shareholder resources on a corporate motion to proceed in forma, the government is putting the impecunious corporation to a choice: allow the appraisal of shareholders' resources and risk veto of the board's decision to sue, or forego access to dispute resolution. Such a governmentally imposed choice between two interests, one of which is highly (one might argue, constitutionally) valued, has been found to offend constitutional principles. *Shapiro v. Thompson*, 394 U.S. 618 (1969). In *Shapiro*, the Court refused to enforce a state welfare residency requirement on the grounds that requiring a poor person to choose between his constitutionally protected interest in travel and his interest in obtaining financial assistance from the state was impermissible. If one accedes to the high value which the analysis in this Comment places on the individual's interest in access to authoritative dispute resolution, a comparable governmentally required choice between access and traditional patterns of corporate governance would be similarly indefensible. The analogy is drawn not to frame a constitutional argument but to show the application of the kind of reasoning used in *Shapiro* to a different, important individual interest.

the corporation, the court does not have to decide on whom to impose that liability but only whether to impose it on the party the plaintiff has named in his action. The court does not have to decide who among all the shareholders or all the directors has done an act for which the appropriate sanction is personal liability; it only has to weigh the evidence the plaintiff presents as to the appropriateness of sanctioning the particular defendant before the court. Because decentralization is a traditional norm of the adversary system, the court is competent to impose liability once its choice is narrowed to a particular defendant.

In a motion by the corporation to proceed in forma, however, the court cannot rely on a plaintiff to single out the appropriate party to bear the sanction of personal liability. It must decide whether all, or only some, and if so, which shareholders shall make their personal resources available to the corporation to defray the costs of its litigation. The court will have to consider whether it has the power to order all shareholders to contribute and whether to let the corporation proceed if some one shareholder refuses to file an affidavit listing his personal resources. If one shareholder refuses to reveal his assets to the court, and the others are poor enough to qualify to proceed under the statute, the court must decide whether or not to let the recalcitrance of one shareholder bar the corporation's suit in forma, in effect giving one shareholder a veto over a corporate decision to sue. Both divergence of the parties from the traditional two-party adversarial alignment, and the serious departure from normal patterns of corporate governance which a decision to disregard will involve reduce the court's competence to decide these questions.

Furthermore, if the court does find a way to decide which of the shareholders shall contribute their resources to the corporation's litigation, the court will be required to characterize that contribution in such a way that it can be taken account of as are other contributions of money to a corporation—*e.g.*, either as a contribution to capital, or as a loan to the corporation. Any decision to characterize these contributions one way or another will have serious ramifications for the shareholders: there may be tax consequences attendant on characterizing them as contributions to capital; there may be priority-of-creditor problems attendant on characterizing them as debt.

Whatever the court's particular decision on any of these points, it is clear that piercing the corporate veil on a motion to proceed in forma has a serious impact on normal patterns of corporate governance, raises questions which the court is not competent to resolve, and affects the interests of others (*e.g.*, creditors and the Internal Revenue Service) who are not before the court. These effects of a decision to appraise shareholder resources should be kept in mind. If the analy-

sis fails clearly to indicate the preferred result, the serious drawbacks of piercing the corporate veil may be a decisive factor in the court's choosing to appraise only corporate resources on a motion to proceed in forma pauperis.

The analysis so far indicates that the principles of piercing the corporate veil would be vindicated by subjecting shareholders' resources to appraisal on corporate motion to proceed in forma pauperis where the corporation either is undercapitalized with respect to its business of litigation or where its shareholders are attempting to shift the risk of the litigation to the state. It is not clear that these principles would be vindicated by doing so where the corporation is pursuing a claim which will benefit both itself (and its shareholders) and a broader class, perhaps the general public. In addition, piercing the corporate veil to make the shareholders liable for the costs of the corporate litigation has been seen to raise serious questions of judicial competence which have a major impact on normal patterns of corporate governance and financial structure. It would advance the analysis, in the face of these mixed analytic conclusions, to go on and consider the costs of allowing anyone to proceed in forma pauperis. If the cost of allowing a party to proceed in forma pauperis is low, it will be easier to decide to avoid the serious problems that piercing the corporate veil will raise by expanding the class of eligible in forma movants to include corporate entities.

## B. *Costs and Benefits of Permitting Corporate Entities to Litigate In Forma Pauperis*

### 1. *The Costs, and Who Pays Them*

An earlier part of this Comment analyzed the justifications for court fees and the interest of the government and individuals in access.<sup>71</sup> Proceeding under the in forma statute allows a party to sue or defend or appeal without paying such fees—including charges for filing complaints, amendments to pleadings, answers, judgments, and so forth—at the time that services of the court are rendered. It was these items which earlier were characterized as a burden on access. But relief from fees is only part of the federal in forma statutory package. The statute also provides for court-appointed counsel for indigents.<sup>72</sup> It relieves a party proceeding in forma pauperis from having to prepay or post security for costs.<sup>73</sup> "Costs" are an allowance the court directs one party to pay the other partially to offset expenses

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71. See text accompanying notes 40-50 *supra*.

72. 28 U.S.C. § 1915(d) (1971).

73. *Id.* § 1915(a).

incurred in the preparation and prosecution of the case.<sup>74</sup> They usually include the other party's court fees and some payments to witnesses.<sup>75</sup> Where one party has reason to question his opponent's ability to pay a potential cost judgment as loser, he may move to have his opponent compelled to post security for or prepay costs. Usually, however the issue of costs receives attention by the court only at the close of the litigation. Costs may be allocated by agreement of the parties or an order of the court, and will be taxed in accordance with that agreement or order. The assessment of items of cost not allocated by agreement or court order is controlled by federal statute, rule of court, or custom in the particular district.<sup>76</sup> The usual rule, however, is that the winner may be given a judgment for his costs against the loser. The loser in a particular suit will pay his own fees, his other expenses (which would be his "costs"), and the winner's costs, which include an amount for the latter's fees. In American practice a judgment for costs usually does not include attorneys' fees.<sup>77</sup>

What appears to be significant relief from the financial burdens of litigation, however, may not turn out that way. The statute provides only that an in forma party need not *prepay* fees and costs or post security for them; it also provides that "[j]udgment may be rendered for costs at the conclusion of the suit or action as in other cases . . . ."<sup>78</sup> Rule 54(d) of the Federal Rules of Civil Procedure sets out what it means to tax costs "as in other cases"—costs shall be taxed in favor of the prevailing party unless another pattern of taxation is designated by a federal statute or a specific order of the court.<sup>79</sup> The federal in forma statute explicitly adopts the usual rule of taxation in favor of the prevailing party. Thus an in forma party who loses his suit may have his own and his opponent's costs taxed against him "as in other cases." If this occurs, the statutory scheme will have worked only a postponement rather than a relief from the burden of fees and costs. That this was the intended result, however, is apparent from the reassurance given by the Committee on the Judiciary of the House of Representatives in recommending passage of in forma legisla-

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74. 6 MOORE'S FEDERAL PRACTICE ¶ 54.70 (1972).

75. *Id.*

76. *Id.* at ¶ 54.77.

77. In this respect, American practice differs from English practice where a judgment for costs routinely includes an amount to reimburse the prevailing party for his attorneys' fees. Inroads on the American failure to give judgment for attorneys' fees are being made, however. For a good discussion of the values which would be maximized by awarding attorneys' fees and the cases which have struggled with the problem, see 6 MOORE'S FEDERAL PRACTICE ¶ 54.77[2] (1972). *Cf.* CAL. CIV. CODE § 1717 (West 1973).

78. 28 U.S.C. § 1915(e) (1971).

79. FED. R. CIV. P. 54(d).

tion in 1892 that "to avoid possibility of imposition[,] judgment may be rendered for costs as in other cases, *so that if the party succeed in the suit, or failing should afterwards acquire property, the costs may be made out of him.*"<sup>80</sup>

How much, then, can it "cost" to allow a corporation to proceed in forma pauperis in federal court? It costs the court system nothing. The amounts which are paid to the courts as fees are paid into the United States Treasury as general revenues.<sup>81</sup> They are not earmarked as a credit to the account of the federal court system. The expenses for the system are projected each year and a congressional appropriation sought for the amount needed.<sup>82</sup> Only "need," and not whether the court system is paying its own way, is at issue. In light of this, a party's failure to pay its fees, or to repay to a successful opponent his fees, does not reduce the revenue to the court system from which it can finance its operations. In that respect, a judgment against an in forma party which never is paid does not "cost" the court system anything. It does "cost" the public, however, in the amount by which any appropriation for the federal court system is not offset by general revenues which would otherwise have resulted from payment of that portion of a judgment which reflects fees. And, as we all know, to the extent that federal revenue does not cover costs, the taxpayer eventually pays in the form of higher taxes and higher prices reflecting higher taxes. The "cost" of proceeding in forma pauperis which must be appraised, then, is a cost to the public.

In appraising the cost to the public from allowing corporations to proceed in forma pauperis, a prediction of whether the corporate party wins or loses makes a difference. If a claim for a dollar amount is at stake, and the corporation prevails in litigation in which it is allowed to proceed in forma pauperis, the corporation's fees can be recovered from two sources: they may either be paid from the amount of the judgment in the corporation's favor,<sup>83</sup> or taxed to the losing opponent "as in other cases." The losing party will pay its own fees and costs in both cases. With two sources of payment if the corpora-

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80. H.R. REP. No. 1079, 52nd Cong., 1st Sess. 2 (1892) (emphasis added).

81. 28 U.S.C. § 751(e) (1971).

82. Telephone conversation with Edward Garabedian, Assistant Chief for Finance, Business Administration Division, Administrative Office of the United States Courts, April 12, 1973.

83. The statutory provision for appointment of counsel has been interpreted to provide, by implication, for the remuneration of such counsel out of any judgment awarded an in forma pauperis party. *United States ex rel. Randolph v. Ross*, 298 F. 64 (6th Cir. 1924). Although attorney's fees would not usually be taxed against the losing party [see note 77 *supra*], it is reasonable that the in forma party would be expected to reimburse the court for the costs of his attorney's fees if he later became able to do so, even if he received no money recovery.

tion wins, there is no need to fear that the corporation's fees, which have been postponed by allowing it to proceed in forma pauperis, will go unpaid and become a cost to the public. Even where no dollar judgment is recovered from which the corporation's fees can be deducted, the corporation may have a judgment for its costs against its opponent from which it can, in turn, repay the court its fees. Or if no money judgment is given, but, for instance, an injunction is issued, the benefit to the corporation may enable it to pay its costs at a later time, even if its opponent is not taxed for its costs. If the corporation wins its suit, then, its proceeding in forma pauperis probably will not cost the public anything.

If a corporation sues in forma pauperis and loses, however, there is a risk that the public will have to bear some of the costs of its litigation. Since the corporation is not the prevailing party, its costs cannot be taxed against its opponent and thereby recovered. There is likewise no dollar recovery from which those costs can be made out. Although the corporation's costs can be taxed against it, if the corporation did not have the resources to pay its fees at the outset of the litigation there remains the possibility that it will not be able to do so at any future point. In cases where that is true, a judgment against the corporation for costs may go unpaid with the public having to make up the amount of lost general revenue in higher taxes. The losing corporation's opponent, too, may bear some of the cost of the corporation's litigation in that he will not be able to recover his own costs as the prevailing party usually can. He, too, may have a judgment against the corporation, but it may remain unpaid. The cost, then, of allowing a corporation to litigate a "losing" claim in forma may well be borne by the public and the corporation's opponent.

## 2. *Netting Out the Benefits*

The analysis so far has indicated that allowing corporate entities to proceed in forma pauperis will have both benefits and costs. The statutory language, the tradition underlying the statute, and the value of access vindicated by the statute, all tend to the conclusion that corporations, like individuals, should be allowed to proceed in forma pauperis in federal court, providing their resources are insufficient to defray the anticipated costs of the litigation. This conclusion gains support from the characterization of court fees as a burden on the vindication of the very important values protected by the judicial system which should be waived whenever it will preclude access to that system.<sup>84</sup> Substituting shareholder resources for corporate resources in the appraisal of the corporation's qualifications to proceed under the statute

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84. See text accompanying notes 50-53 *supra*.

appears to be appropriate under the principles of "piercing the corporate veil" in only some cases. And even where it is analytically appropriate, it raises such serious problems of corporate governance that the courts should require a clear indication that piercing is necessary to vindicate the values protected by the in forma statute before they do so. Finally, an analysis of the extent of statutory relief indicates that only where the corporation loses its case and never acquires enough assets to pay its costs (or the prevailing party's) may corporate proceedings in forma pauperis result in an eventual shouldering of litigation costs by the public.

In order to net out the benefits of allowing corporate proceedings in forma pauperis, the discussion will return to consider the three hypothetical corporate claims introduced earlier. This time, however, all of the tentative conclusions summarized above will be fed into the analysis with the goal of arriving at a full-factored appraisal of the corporate in forma litigant.

1. The "poor" profit-making corporation with a contract claim. Applying the principles of piercing the corporate veil to this situation gave a mixed result: where there was no reason to believe that the corporation had been undercapitalized with respect to the risk of this litigation, piercing did not seem appropriate; however, when proceeding in forma pauperis was characterized as an attempt to shift to the state the risks of the litigation, piercing did seem reasonable. Doubts about which result to prefer can be resolved by relying on the other factors of this analysis, all of which favor allowing the corporation to proceed on the strength of an appraisal only of its own resources, *e.g.*, the statutory language does not specifically exclude corporations; access is such an important value that fees can be foregone as an unreasonable burden on a very important activity. In addition, if the corporation wins its suit, its fees may be recovered from two sources: from any judgment for the corporation or from its opponent by taxation of costs. Even if it loses, a judgment against it for costs may result in reimbursement for its own fees and its opponent's costs in the future, and although this is true with all of the hypotheticals here discussed, this corporate litigant may be in the greatest need of access to the dispute resolution system precisely because vindication of its claim may make the difference between its survival and its economic death. The values which underlie characterization of fees as a burden on access favor waiving payment whenever access might be precluded, but particularly where the survival of the party may turn on resolution of the dispute for which access is sought. Furthermore, assuming the corporation is not a close corporation, normal patterns of corporate governance will have been preserved by permitting appearance in forma and

important questions about characterizing shareholder contributions which the court has little competence to resolve will have been avoided.

The netting-out process in this hypothetical reveals only one problem with allowing the corporation to proceed in forma: if the corporation loses, the public may have to bear the cost of the litigation. The answer is that even where a litigant is on the losing side of a dispute, the public and the state benefit from its reliance on governmental dispute resolution. Until a claim has been adjudicated a party has no reason to lose faith in the merit of his position and so access to the official dispute-resolution system is still necessary to minimize private, violent solutions. The importance of these benefits, and the critical need of this party for authoritative dispute resolution combine with the fact that the public pays 97 per cent of the costs of maintaining the court system anyway to suggest that it may be justifiable to subject the public to this risk that the corporation may lose and be unable to pay.

2. The "public interest" or "litigating" corporation. With a corporation that is in the business of litigating claims in which it has no greater interest than do other members of the public (*e.g.*, the Sierra Club litigating the proposed Mineral King development), appraising member rather than corporate resources becomes a more appealing analytic result. If the litigating corporation cannot afford court fees, it may be evidence that its members failed to provide their corporation with the resources necessary to conduct its activities. If the corporate entity is not disregarded when this is the case, the members have succeeded in shifting both the risk that they might lose their suit and the cost of their activity to the public.

The nonself-interested character of the corporation's claim, however, casts doubt on the wisdom of subjecting member resources to appraisal on a motion to proceed in forma. As with any other corporation, if the litigating corporation wins its suit, its fees may be paid either by the corporation from a judgment rendered in its favor or by its opponent by taxation of costs.

The risk that the public will have to eventually absorb some of its costs if the corporation loses must also be appraised in light of the nonself-interested nature of its claim. Undeniably, the members of such a corporation are litigating their particular claim because they think it is important. But they are litigating issues that allegedly are of interest to someone besides themselves. Since it may be impossible to identify the specific individuals whose interests are at stake in the litigation (and who therefore could reasonably be asked to defray the cost of the litigation), and since over time there theoretically will be a trade-off between nonself-interested litigants and the beneficiaries of

that litigation, it is an administerable, defensible choice to let the risk of assuming some of these costs remain with the public.

Even if the corporation loses its suit, it cannot be said that there was no public interest in having this litigation occur. The corporation's reliance on governmental dispute resolution to decide the issues does have benefits for all. Success in securing widespread reliance on official dispute resolution depends on convincing society's members that the system will hear and resolve their claims. Furthermore, litigating corporations vindicate the values served by such judicial tools as the private attorney general and the class action—the resolution of diffused claims where no one individual is sufficiently aggrieved to be motivated to initiate litigation.

Each of these predicted results of allowing a litigating corporation to proceed in forma pauperis increases its value as a tool for securing reliance on governmental dispute resolution. If the effect of appraising the personal resources of the corporation's members is either to preclude the litigation (because they do not have the funds or have them but choose not to expend them) or to make the members bear more than their pro-rata share of the cost of the litigation (in proportion to the benefit which they as members of the public gain from the litigation), then reliance on the dispute-resolution system to resolve nonself-interested claims will be discouraged, the perceived adequacy of the system will be lowered, and the government will have fewer opportunities to regulate the substantive behavior in question. Because access to and the perceived legitimacy of the dispute-resolution system appear to be the principle values at stake, the courts are competent to prefer that interpretation of the in forma pauperis statute which will maximize those values.

3. The profit-making corporation with a mixed self-interested and nonself-interested claim (*e.g.*, antitrust). The analytic appeal of disregarding the corporate entity in this case is mixed: the corporation is not in the business of litigation so there seems to be no basis for claiming that the corporation should have been capitalized with respect to pursuing this antitrust claim; the shareholders, however, could be attempting to shift the risk of their litigation to the public. But the private attorney general value which is protected by antitrust litigation makes it seem appropriate that the public should have to run a small risk that the corporation will lose its suit and be unable to pay its fees. Allowing a corporation to litigate this kind of claim in forma pauperis, then, adjusts competing values. It serves the value of promoting dependence on the government dispute-resolution system for vindicating claims which have a public interest element. It disserves, however, the value protected by making shareholders pay fees when they are trying to

shift the risk of litigation to the public. Whether such a corporation should be allowed to proceed in forma pauperis as an entity will ultimately depend on which of these values is preferred by the courts who must resolve the issue. In order to predict the result, some cases where the court has similarly chosen between values in the in forma setting will be examined.

*C. Resolving Doubts About Allowing Corporations to Litigate  
Nonsell-Interested Claims In Forma Pauperis*

*1. "Primary Beneficiary" Arguments*

The courts will have to decide whether to allow litigating corporations to proceed in forma pauperis on the basis of their preference between conflicting values. They can find guidance, however, from decisions in in forma cases involving private individuals in which they have faced a similar choice between competing values. Those cases have dealt with the problem of allowing a litigant to proceed in forma pauperis to vindicate a claim which promised to benefit someone else. In those cases, the courts have concluded that it is the financial resources of the "primary beneficiary" of the litigation which must be appraised in determining whether the litigation may be conducted in forma pauperis. If, in the case of the corporation with a nonsell-interested claim, it is accurate to characterize the public as the "primary beneficiary" of the litigation, either because the claim raises issues in which the public has an interest or because depending on official dispute resolution to decide these issues is itself in the public interest, application of the analysis in the cases above would compel the conclusion that member resources are not relevant to whether a corporation should be allowed to pursue its claim in forma pauperis.

The courts developed the primary beneficiary analysis in resolving the propriety of in forma proceedings by estate administrators<sup>85</sup> and trustees in bankruptcy.<sup>86</sup> In both these situations, the court began with the premise that the litigation was not for the benefit of the named party, the administrator or trustee, but for someone else. It is that someone else, the courts then held, who must file an affidavit of pauperacy and show that he is too poor to afford the costs of the litigation and still provide himself with the necessaries of life.

The financial resources of the named party are irrelevant to the issue. For example, where a trustee in bankruptcy sues to challenge

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85. See e.g., *Carter v. Kuhn*, 120 F.2d 261 (8th Cir. 1941); *Boggan v. Provident Life & Accident Ins. Co.*, 79 F.2d 721 (5th Cir. 1935).

86. See, e.g., *In re American Mounting & Die Cutting Co.*, 126 F.2d 419 (8th Cir. 1942); *Roche v. New Hampshire Nat. Bank*, 97 F. Supp. 61 (D.N.H. 1951).

a judgment against the bankrupt, and moves to proceed in forma pauperis, the courts have declared that because the primary beneficiaries of the litigation are the bankrupt's creditors, they must file affidavits and must be unable to afford to pay the fees associated with the litigation. If they can afford the fees, the motion to proceed in forma will be denied and, by implication, they must finance the suit if it proceeds. If the administrator of an estate files an action which will result in the recovery of a dollar judgment by the estate which will be channeled to the beneficiaries, then they must establish their indigency in order to succeed on a motion to allow the administrator to proceed in forma pauperis.

In making these decisions, the courts chose between competing values just as I have argued that they must when a corporation attempts to pursue a nonself-interested claim in forma pauperis. In the case of the administrator and the trustee, the court chose between the value to the judicial system of having someone to administer the affairs of the estate or the bankrupt and the value of having those who benefit from the trustee's and the administrator's litigation minimize the cost to the public of that litigation. In the case of the corporation pursuing a nonself-interested claim, the competition is between the value to the public of having the dispute-resolution system utilized and having the public's interest in the specific claim represented by the corporation, on the one hand, and on the other, the value of preventing people from shifting the cost of the corporation's activity to the public.

Like the administrator or trustee, the litigating corporation with a nonself-interested claim is bringing a suit which will benefit parties other than itself—the public at large or some segment of it. Since “the public” cannot sue, the litigating corporation is vindicating its interests. It may be, in fact, that one of the values of having corporations formed to pursue “public-interest” claims will be to cross the “standing” barrier which courts have erected before individual litigants. A corporation whose *raison d'être* is to litigate, e.g., consumer protection claims, may have a more convincing claim to “standing” than an individual.<sup>87</sup> The

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87. *But see* Sierra Club v. Morton, 405 U.S. 727 (1972), where the Court held that the Sierra Club did not have standing to challenge the proposed Sierra development at Mineral King on the ground that it had not alleged that its members used Mineral King or that they used it in any way that would be affected by the proposed development. The Court expressly deprecated the argument made in the text saying:

[A] mere “interest in a problem,” no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem, is not sufficient by itself to render the organization “adversely affected” or “aggrieved.” . . . [I]f any group with a bona fide “special interest” could initiate such litigation, it is difficult to perceive why any individual citizen with the same bona fide special interest would not also be entitled to do so.

*Id.* at 739-40. Blackmun, J., dissented and asked rhetorically whether

[O]ur law [must] be so rigid and our procedural concepts so inflexible that

“primary beneficiary” analysis indicates that because the public stands to reap the gains of the litigation—either from vindication of the particular claim or from reliance on the dispute-resolution system for the adjudication of nonself-interested claims—the court may make it run the risk of paying the costs by allowing the corporation to proceed in forma pauperis.

## 2. *Fail-Safes of the Judicial Process*

Further encouragement for a judicial decision to allow any corporation to proceed in forma pauperis as an entity may be gleaned from considering how certain “fail-safes” of the judicial process operate to minimize the risks of permitting such appearances. The tools of demurrer and dismissal provide the courts with a range of discretion within which they may preclude the litigation of frivolous, vexatious, or unmeritorious claims.<sup>88</sup> A “losing” claim which survives a demurrer or motion for dismissal theoretically falls somewhere between a valid or “winning” claim and a frivolous or vexatious claim. Because the court did not find it necessary to preclude the litigation, it can be assumed that the claim has some merit. To the extent that it is valuable to encourage people to seek dispute resolution of possibly valid claims, their potential cost to the public<sup>89</sup> (which will materialize only if the corporation loses and cannot pay a judgment against it for its own and its opponent’s costs) is justified. Moreover, to the extent that no party can predict whether he will win or lose in court, all claims are “questionable.”

The discussion of access has shown that values of citizen dependence, loyalty, and nonviolent dispute resolution are all served by allowing people to litigate their claims. Because those values are so important, and are served by allowing the resolution of even questionable claims, allowing a corporation to proceed in forma pauperis at the risk that the public may bear some of the cost appears justifiable where the corporation survives such threshold challenges as a demurrer or motion for dismissal but then loses its suit.

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we render ourselves helpless when the existing methods and the traditional concepts do not quite fit and do not prove to be entirely adequate for new issues?

*Id.* at 755-56 (Blackmun, J., dissenting).

88. The United States Code acknowledges the relevance of these tools to the proper administration of the in forma statute:

The court . . . may dismiss the case if the allegation of poverty is untrue, or if satisfied that the action is frivolous or malicious.

28 U.S.C. § 1915(d) (1971).

89. Since the public bears 97 per cent of the costs of the federal court system now, if we assume corporations lose half of their in forma cases, we are increasing the public’s burden by 1.5 per cent, to 98.5 per cent.

## IV

*S.O.U.P., Inc. AND Honolulu Lumber: AN APPLICATION OF THE ANALYSIS*

Since the amendment of the federal in forma pauperis statute in 1959 to read "persons," only two corporations have attempted to proceed under its provisions.<sup>90</sup> One was a profit-making corporation with a self-interested claim<sup>91</sup> and the other was a nonprofit, litigating corporation with a nonself-interested claim.<sup>92</sup> This Part will apply the analysis developed in this Comment to the facts of these cases to show how they should have been decided and why the conclusion reached here—that corporations should be allowed to retain their entity status when they proceed in forma pauperis—is a sound one.

S.O.U.P., Inc. (hereinafter SOUP) was formed by students at Georgetown Law School to represent the public's interests in Federal Trade Commission proceedings.<sup>93</sup> In 1969 SOUP sought to intervene in an FTC action brought against Campbell Soup Co., Inc. for deceptive advertising practices,<sup>94</sup> on the ground that a consent decree which was entered by the FTC in that action was inadequate to protect the public interests which were threatened.<sup>95</sup> SOUP asked the FTC to withdraw its approval of the consent order, to allow SOUP to contest the adequacy of the order at a hearing, and to allow SOUP to proceed in forma pauperis at that hearing.<sup>96</sup> The FTC heard SOUP's motion to intervene based on the inadequacy of the consent decree, but on May 25, 1970 issued an order accepting the decree.<sup>97</sup>

SOUP appealed the FTC order to the Court of Appeals for the District of Columbia and moved to proceed in forma pauperis on the

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90. Prior to the 1959 amendment the statute applied only to "citizens". Holding that a corporation was not a citizen, federal in forma relief was denied corporations in *Atlantic S.S. Corp. v. Kelley*, 79 F.2d 339 (5th Cir. 1935) and *Quittner v. Motion Picture Producers & Distribs.*, 70 F.2d 331 (2d Cir. 1934).

91. *Honolulu Lumber Co. v. American Factors Ltd.*, 265 F. Supp. 578 (D. Hawaii 1966), *aff'd on other grounds*, 403 F.2d 49 (9th Cir. 1968).

92. *S.O.U.P., Inc. v. F.T.C.*, 449 F.2d 1142 (D.C. Cir. 1971).

93. *Id.* at 1143 (Bazelon, C.J., dissenting).

94. Campbell was charged by the F.T.C. with having placed clear glass marbles in a bowl of soup causing a deceptively large amount of solid material to appear at the surface of the soup in advertising photographs. *Campbell Soup Co.*, [1967-1970 Transfer Binder—Complaints and Orders] TRADE REG. REP. ¶ 19,261, at 21,421, 21,422 (FTC 1970).

95. The FTC order to which Campbell consented prohibited them from using false advertising to sell soup. SOUP sought to include a provision requiring Campbell to run corrective advertisements admitting their former deception in an effort to alleviate the erroneous impressions earlier advertisements had left with the public. *Id.* at 21,423.

96. *Id.* at 21,422, 21,424.

97. *Id.*

appeal.<sup>98</sup> That motion was denied in a per curiam opinion which said only:

[A]ssuming arguendo that a corporation may proceed in forma pauperis, we think it would be inconsistent with the congressional intent to hold that this corporation should be allowed to proceed in that manner in view of the financial data submitted since it is likely that the costs of proceeding would not exceed \$100.00.<sup>99</sup>

The "financial data" in view of which the court denied SOUP's motion to proceed in forma consisted of affidavits of their personal finances submitted upon court request by the five members of the corporation. In support of the result reached by the court, Judge Fahy wrote an opinion in which he remarked:

SOUP is not prevented by our order from proceeding with the litigation. It can easily arrange for the small item of costs by assessment or voluntary contribution of its members. The corporate form is a convenient, organizational vehicle, but its convenience does not justify turning it into a vehicle also for avoiding the costs involved in a lawsuit as if it were a pauper.<sup>100</sup>

SOUP was a litigating corporation, and its claim in the FTC proceedings was a nonself-interested one—it was trying to protect consumers' rights to fair and honest advertising.<sup>101</sup> Without articulating this in its opinion, it is apparent that the court, in seeking to appraise SOUP's members' resources, was applying the undercapitalization principle and piercing the corporate veil. Judge Fahy was clearly troubled by the prospect of a corporation being formed by individuals who wanted to litigate certain issues but did not want to commit their personal resources to finance the litigation.<sup>102</sup> The analysis of this Comment, however, suggests that the only risk from letting SOUP proceed was that it might lose its case and be unable to recoup its fees from its opponent or repay them itself. Only if SOUP had lost, and a judgment against it for its fees had gone unpaid, would the public eventually have had to absorb the cost of the litigation, which, as the court pointed out, would have been less than \$100.

The analysis also points out, however, that it is appropriate for the public to run the risk of bearing the costs of this kind of nonself-interested litigation. The public, or some segment of it, benefits from it either directly because of the nature of the claim (in SOUP's case, the public's interest in fair advertising), or indirectly from the litigant's reliance on government dispute resolution. It is therefore acceptable

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98. *S.O.U.P., Inc. v. F.T.C.*, 449 F.2d 1142 (D.C. Cir. 1971).

99. *Id.* at 1142.

100. *Id.* Cf. *id.* at 1144 (Bazelon, C.J., dissenting).

101. *Id.* at 1143 (Bazelon, C.J., dissenting),

102. *Id.* at 1142.

and, in view of the reduction in access which discouraging such litigation might have, preferable to let the public bear some of the costs.

The litigation was not frivolous; as some measure of its merit, the FTC had permitted SOUP to proceed before it in forma pauperis. In a dissent to the FTC's decision not to hear further argument by the corporation, two Commissioners even charged that the decision would preclude a full appraisal of issues which only SOUP had raised.<sup>103</sup> If the claim raised by SOUP had been frivolous, the court could have dismissed the claim on that ground and avoided the broader impact of this ruling denying access.

Finally, the court's justification of its decision by pointing to the small sum at stake misapprehended the force of its own argument: because of its inability to pay a privilege charge of \$100.00, SOUP was denied the opportunity to raise issues of merit in the public's interest. Judge Fahy's comment that the \$100.00 could be raised from the corporate members<sup>104</sup> also indicated a willingness to ignore normal patterns of corporate governance, a step which has been seen to present serious questions of judicial competence. If the analysis presented here had been applied to the situation, the motion of SOUP to proceed in forma pauperis would have been granted.

Honolulu Lumber Company was a profit-making corporation which had filed an antitrust suit seeking treble damages from its competitors—a self-interested claim in that it promised a large dollar damage judgment for the corporation, a nonself-interested claim in that it sought to vindicate the public's interest in promoting free competition.<sup>105</sup> Five years after filing, defendants moved to dismiss the action for failure to prosecute. Counsel for plaintiff failed to appear on three dates set for hearing the motion for dismissal, and the motion was finally granted.<sup>106</sup> The corporation then appealed the dismissal and moved to proceed on appeal in forma pauperis, requesting court-appointed counsel.<sup>107</sup> The District Court for Hawaii denied the motion

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103. *Id.* at 1144 n.4 (Bazelon, C.J., dissenting).

104. *Id.* at 1142 (Fahey, J. supporting statement).

105. *Honolulu Lumber Co. v. American Factors Ltd.*, 265 F. Supp. 578 (D. Hawaii 1966), *aff'd on other grounds*, 403 F.2d 49 (9th Cir. 1968) (dismissal of an antitrust suit for lack of prosecution not an abuse of discretion).

106. Counsel first failed to appear at the hearing of defendants' motion to dismiss for failure to prosecute. Plaintiff then moved to vacate the dismissal, his counsel again failed to appear, but counsel's message of explanation was construed by the court as a motion for continuance and was granted. Counsel again failed to appear on the date granted in the continuance. The court then denied plaintiff's motion to vacate the dismissal, denied a rehearing on defendants' motion for dismissal and ordered the action dismissed with prejudice. *Id.* at 579-80.

107. The United States Code authorizes such appointment of counsel. 28 U.S.C. § 1915(d) (1971).

on the grounds that even if the statute did apply to corporations, a wise exercise of discretion in this case would be to deny the motion. The court pointed out that the corporation's few stockholders would benefit directly from any treble-damage recovery and that the corporation had had more than sufficient time in which to move to proceed in forma thus showing lack of due diligence in prosecuting the claim.<sup>108</sup>

The result in *Honolulu Lumber* was, perhaps, correct, but the court's justification for it was unnecessarily broad. It is appropriate for a court to dismiss an action in which the party has moved to proceed in forma if the court finds the action frivolous, vexatious, or without merit. If the court in *Honolulu Lumber* thought that counsel's repeated failure to appear demonstrated bad faith in prosecuting the claim, and if they had found that counsel's actions were not independent of corporate complicity, then dismissal on that basis was within the sound discretion of the court. Dismissal was not, however, an appropriate tool to deal with the court's fear that nonindigent shareholders would benefit from a treble-damage recovery. If the corporation did not have the resources to finance the litigation, its motion to proceed in forma should have been granted. If the corporation then won a dollar judgment, its fees and compensation for court-appointed counsel could have been recovered from that judgment. If the corporation had prevailed but no damages were awarded, its fees and compensation for counsel could have been recovered by taxing its opponents for the corporation's costs. If the corporation had lost the litigation, a judgment against it could have been obtained for its fees which might have been paid from future operations. If the judgment were never paid and the public bore the costs of the litigation, the resulting vindication of the value of access, and avoidance of the court assessing the shareholders and characterizing their contributions would make such a result acceptable. Because the claim was in anti-trust, some elements of a nonself-interested claim were presented by the litigation. The antitrust laws are predicated on a private attorney-general notion and the public interest quality of such a claim further justifies the public risking assumption of some of the costs of the litigation. Without a clearer indication that the case was dismissed solely for failure to prosecute or lack of good faith, it is not certain that the court's decision in *Honolulu Lumber* was correct. Certainly its analysis would have been more satisfying had it been more complete.

#### CONCLUSION

This Comment has attempted to construe a statute by analyzing

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108. 265 F. Supp. at 581.

common law tradition, statutory language, legislative history, values protected, and predictions of results of broadening its application. In an effort to check the accuracy of the conclusion, the analysis has been applied to various hypothetical and two real cases. One major conclusion seems to survive that process: the federal in forma pauperis statute should be construed by the courts to apply to corporations. Values central to the purpose of the judicial system are vindicated because access to dispute resolution is maximized, and traditional judicial tools exist to prevent abuse. Moreover, because the costs charged to parties finance only three per cent of the cost of running the federal courts, and because the costs will eventually be paid if the party appearing in forma wins, the ultimate charge to the public is small. Section 1915 says the court "may" authorize proceedings in forma pauperis. Discretion of the court with traditional, equitable limitations is what "may" means, and what this Comment concludes is appropriate.

*E. Elizabeth Summers*