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Standing to Sue in the Charitable Sector

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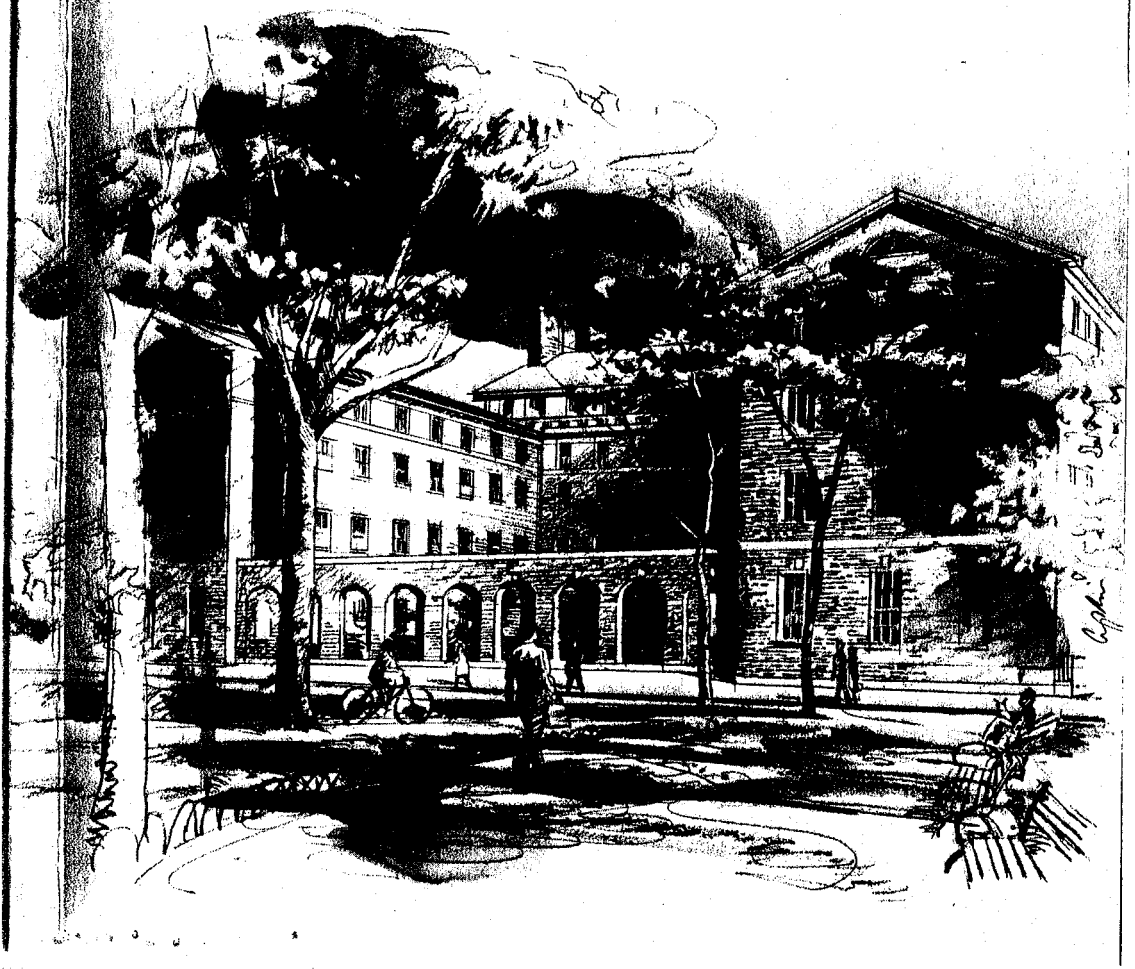

Standing To Sue In The Charitable Sector*

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I) Introduction[1]

This article examines the peculiar and important issue of the standing of private parties to initiate litigation against charitable organizations for mismanagement, fraud, or corruption. Charities[2] have a profound and positive role in American society, and in recent years it seems as if much of the responsibility for providing social services and aid has been increasingly fulfilled by the charitable sector instead of the government.[3] Despite the importance of the charitable sector[4] government oversight of the conduct of its

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The authors wish to express their special thanks to Professor Harvey P. Dale, Director, Program on Philanthropy and the Law, New York University School of Law, for first proposing this topic and for his guidance and insight in directing the authors' efforts. The authors also wish to thank Professor Richard H. Levenson and Professor Jill B. Schatman of the Program for their editorial assistance. Additionally, the authors thank Leslie M. Bock for his assistance in the initial stages of this article, and Carol J. Petitmaire and Sandra K. Agan for their invaluable assistance and technical expertise.

2 Charities can be organized as corporations, trusts, or unincorporated associations. For the purpose of this article, "charity" will mean organizations that qualify for tax-exempt status under 26 U.S.C. § 501(c)(3), which is consistent with the definition in John Simon, *The Tax Treatment of Nonprofit Organizations: A Review of Federal and State Policies*, in W. POWELL, ED., THE NONPROFIT SECTOR: A RESEARCH HANDBOOK 67 (1987); and in VIRGINIA ANN HODGKINSON ET AL., NONPROFIT ALMANAC 1992-1993: DIMENSIONS OF THE INDEPENDENT SECTOR 15 (1992) [hereinafter NONPROFIT ALMANAC].

3 Ironically, charities were once considered increasingly unnecessary as the welfare state came into being, and were thought needed only to supplement government programs or to "fill in the gaps". *Cf. Report of the Committee on the Law and Practice Relating to Charitable Trusts*, 1952, Cmd 8710, at 14-15 [hereinafter THE NATHAN COMMISSION REPORT]. *See also* Kenneth L. Karst, *The Efficiency of the Charitable Dollar: An Unfulfilled State Responsibility*, 73 Harv. L. Rev. 433 (1960) [herinafter Karst, *The Efficiency of the Charitable Dollar*], where even that influential analyst noted that "[in] a time of ever-expanding state welfare service, perhaps the very institution of private philanthropy is wasteful." *Id.* at 483. Neither of these predictions have been fulfilled, and in an age of de-regulation and government cutbacks, charitable institutions have expanded significantly. NONPROFIT ALMANAC, *supra* note 2, at 5.

4 The charitable sector's size, work, and growth is admirably described in NONPROFIT ALMANAC, *supra* note 2. The Independent Sector contains 983,000

management rests largely with the attorneys general of the fifty states, who often lack the resources to watch closely for possible misconduct. A possible remedy for inconsistent governmental oversight would be to allow private parties to bring suit for managerial malfeasance, but the Anglo-American common law has a long tradition of preventing such private actions. It is the aim of this article to analyze the continuing limits on the rights of private parties to sue the management of charities, and the circumstances under which courts are likely to be flexible in interpreting these limits or even to depart from the traditional limits.

We begin this article with a discussion of the traditional analysis of standing to sue in the charitable sector, followed by an explanation of the common law background of charitable standing to sue. We continue with a brief survey of state systems of supervision of charities, with an emphasis on attorney general enforcement: its sources of authority, limitations, problems, and existing alternatives. We then turn to a detailed discussion of how private party standing to sue has evolved in the charitable sector. Thereafter, we discuss the derivative suit as applied to charitable corporations. In derivative cases, members of a charity typically sue to enforce fiduciary duties for the benefit of the corporation. The main area of this article's concentration is our examination of the "special interest" doctrine, which courts sometimes use to relax traditionally strict standing rules. The article will proceed with a case study of how private party standing has evolved in one particular jurisdiction, New Jersey. We conclude by presenting several hypotheticals designed to illustrate how and why standing to sue a charity might now be granted or denied. This article thus will present a comprehensive analysis of standing to sue in the charitable sector, with an emphasis on the problems of existing enforcement systems and the consequent growth of private party standing via the "special interest" doctrine.

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entities that takes 6.8% of the national income (up from 4.9% in 1977), accounts for 10.4% of total national employment, had the total annual funds in 1989 of $408 billion (of which only 26% came from governmental entities), had total assets in 1988 of about $700 billion, and had current operating expenditures of $327 billion. *Id.* at 4-11, 17. The Almanac's National Taxonomy of Exempt Entities provides an overview of the broad range of activities — Arts, Culture, Humanities (Group A) to Health, General, and Rehabilitative (Group E) to Youth Development (Group O) to Religion Related (Group X). *Id.* at 195. In the popular imagination, the Independent Sector includes the Sierra Club, the Red Cross, the American Cancer Society, the Ivy League Universities, the Boy Scouts, and most religious groupings.

A) Standing to Sue: The Traditional Analysis

In theory, the state attorneys general, as guardians of the public interest, supervise charities and enforce their legal responsibilities. Therefore, the courts traditionally have seen state attorneys general as the appropriate parties to bring suit to enforce fiduciary duties which charitable entities owe the public. For example, the attorney general of New Mexico recently filed suit against the Sierra Club Foundation in order to obtain an accounting of the Frontera del Norte Fund, a branch of the Sierra Club.[5] The suit alleges that the Frontera del Norte Fund, a charity, misused $100,000 donated for the purchase of a piece of property to be used as grazing land by impoverished northern New Mexico ranchers.[6] The attorney general, however, only became involved in the dispute after the original donor of the funds, a wealthy Albuquerque businessman, filed suit in federal court to enforce the purposes of his donation.[7] This episode, although involving attorney general enforcement in protecting funds dedicated to the public benefit, also hints at the practical disadvantages of the system, since the attorney general only acted after a private party, and a prominent local citizen at that, filed suit.[8]

In many areas, the federal tax laws bar a total abrogation of charitable activities, but do not address a partial failure. Attorney

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5 *New Mexico ex rel. Udall v. Sierra Club*, No. SF92-1248(C) (D.C.N.M. filed June, 1992); *see also* Roberto Suro, *20-Year-Old Gift Leads to Dispute With Sierra Club*, N.Y. TIMES, May 13, 1992, at A16 [hereinafter Suro, *Sierra Club*].

6 Suro, *Sierra Club*, *supra* note 5.

7 *Id.*

8 That abuses can occur even at a functioning and successful charity is made clear by the scandal involving William Aramony, long time president of United Way, who enjoyed benefits and perquisites widely believed to be improperly lavish. Given the relative ease with which such misconduct can crop up and evade detection, it is necessary that society have effective means of scrutinizing and challenging suspect conduct. *See* Kathleen Teltsch, *United Way Awaits Inquiry on Its President's Practices*, N.Y. TIMES, Feb. 24, 1992, at A12; Felicity Barringer, *United Way Head is Forced Out in a Furor over his Lavish Style*, N.Y. TIMES, Feb. 28, 1992, at A1; Felicity Barringer, *United Way Head Tries to Restore Trust*, N.Y. TIMES, Mar. 7, 1992, at A8; William Celis III, *Leaders Say Charity May Be Dismantled*, N.Y. TIMES, Mar. 23, 1992, at A10; Carla Rivera, *United Way Scandal Puts Charities Under Scrutiny*, L.A. TIMES, Mar. 30, 1992, at A1; Deborah Sontag, *Affiliates Feeling Pinch of United Way Scandal*, N.Y. TIMES, Apr. 22, 1992, at A10; Felicity Barringer, *Justice Department Seeks Records of United Way and Its Companies*, N.Y. TIMES, May 28, 1992, at A16.

general enforcement is problematic on a practical level for several specific reasons. Given the current, and indeed recurrent, budgetary constraints facing almost all state governments,[9] the effectiveness of attorney general enforcement is likely to be sporadic, at best. Lack of money, along with the obligation to discharge the other important duties of the attorney general's office, contributes to inadequate staffing for the purpose of supervising charities.[10] This often results in a necessarily selective prosecution of only the most egregious of abuses.[11,12]

Although the deficiencies in the current system of charitable supervision and regulation have become painfully more apparent,[13] and the cry for enhanced means of enforcement has intensified,[14] state governments have not responded.[15] Of course,

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9 *Cf.* U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 1991, at 288-89 (1991).

10 *See infra* text accompanying notes 164-171.

11 EDITH L. FISCH, CHARITIES AND CHARITABLE FOUNDATIONS § 723 (1974) [hereinafter FISCH, CHARITIES].

12 The Internal Revenue Service also oversees the activities of charities by means of granting or denying tax-exempt status, but the IRS's power and jurisdiction is limited. 26 U.S.C. § 501(c)(3) and its accompanying Treasury regulations, which contain the key definition of charitable-type activity, impose fairly specific requirements for tax-exemption that do not cover many potential sources of abuse or impropiety. The Internal Revenue Code bars certain kinds or levels of private benefits and political activity and insists on *some* degree of charitable activity, but it does not address many kinds of poor performance. Thus, various kinds of *ultra vires* acts, denials of benefits to appropriate persons, improper terminations of a charity or of particular activities, incompetent management, and failures to take action, may escape the scrutiny or regulation of the IRS, as long as the organization engages in some charitable activities. Even the more stringent rules that apply to the subset of charities known as private foundations, under 26 U.S.C. § 509, have many of the same gaps in coverage. Moreover, the penalty of denial or revocation of tax-exempt status will not necessarily prevent charitable managers from improper activity. The IRS's limited remedy of imposing taxes does not enable it to petition a court to direct that certain improper activity cease or that certain required action commence, or to provide benefits to injured persons or return property to a charity.

13 *See* Comment, *Supervision of Charitable Trusts*, 21 U. CHI. L. REV. 118, 128 (1953). *See also* FISCH, CHARITIES, *supra* note 11, § 723.

14 *See, e.g.*, George Bogert, *Proposed Legislation Regarding State Supervision of Charities*, 52 MICH. L. REV. 633 (1954) [hereinafter Bogert, *State Supervision of Charities*]; Karst, *The Efficiency of the Charitable Dollar*, *supra* note 3; James J. Fishman, *The Development of Nonprofit Corporation Law and an Agenda for Reform*, 34 EMORY L.J. 617 (1985) [hereinafter Fishman, *The Development of Nonprofit Corporations Law*].

their task would be a delicate one, as they would have to balance the still vital societal interest in promoting charitable work, as reflected in centuries of English and American legislation and common law,[16] with the inextricably intertwined need to maintain public confidence in, and financial support of, that work by ensuring honest and competent management. A loss of confidence in the administration of private charity either by individual donors to charitable corporations or by those planning to establish charitable trusts is likely to be as devastating as over-regulation of philanthropy or exposing it to increased litigation, if not more so.[17]

The courts, thus faced with conflicting demands and priorities and acting without legislative guidance, have found themselves in a precarious situation. They have made some effort to create a more readily accessible and easily applicable body of law specifically addressing the issues raised by abuses of the charitable dollar.[18] But a preferred approach has been to re-examine and expand the availability of a legal forum in which private parties can challenge the behavior of those charged with administering charities. Given the case-by-case nature of this approach, as well as the tension inherently present in judicial activism of any sort, the results vary widely and often appear inconsistent on initial examination.

Most legal scholars have attempted to analyze judicial expansion of the standing doctrine in the charitable sector by categorizing the different types of potential plaintiffs, usually settling upon three

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15 *See infra* text accompanying notes 191-207.

16 *See infra* text accompanying notes 56-70.

17 Many charities might welcome increased openness and enhanced supervision of their activities, but they fear that such supervision would destroy public confidence by giving the impression of rampant corruption. Carla Rivera, *United Way Scandal Puts Charities Under Scrutiny*, L.A. TIMES, Mar. 30, 1992, at A1.

18 *Cf. American Center for Education, Inc. v. Cavnar*, 80 Cal. App. 3d 476, 486 (2d Dist. 1978) (directors of charitable corporations are considered to be charitable trustees with respect to the performance of their duties); *MacCurdy-Salisbury Educational Fund v. Killian*, 309 A.2d 11, 14 (Conn. Super. 1973) (doctrines of deviation and cy pres are equally applicable to charitable trusts and charitable corporations); *Blocker v. State*, 718 S.W.2d 409, 415 (Tex. Ct. App. 1986) (gifts to a charitable corporation, just as gifts to a charitable trust, only can be used for the intended purpose). *But see Oberly v. Kirby*, 592 A.2d 445, 466-467 (Del. 1991) (charitable corporations and trusts *can*, depending on the context, be treated differently).

distinct classifications: officers and trustees; members and beneficiaries; and donors.[19] They then address the courts' reasoning for either granting standing or failing to do so by reference to the category into which the plaintiff fits.[20] A category-based analysis, however, can unintentionally lead readers toward the only marginally accurate conclusion that certain plaintiffs are more or less likely to be recognized by courts solely by virtue of their formal relationship to the defendant charity alone. The courts themselves are rarely so direct or organized in their treatment of potential plaintiffs.

While useful as a point of departure, categorizing potential plaintiffs so formally results in an oversimplification of the theory and reasoning behind most courts' decision-making. For example, one can correctly conclude under such an analysis that donors are unlikely to have standing in any court under current law.[21] But one cannot simply say that the potential plaintiff's financial nexus to the charity she seeks to sue is the determinative factor in the court's decision.[22] The fact that an individual's only connection with a charity is his or her financial support of that institution is a significant factor in the court's evaluation of a claim to standing. But other

19 *See, e.g.*, RESTATEMENT (SECOND) OF TRUSTS (1959) [hereinafter RESTATEMENT (SECOND)] § 391. "A suit can be maintained for the enforcement of a charitable trust by the Attorney General or other public officer, or by a co-trustee, or by a person who has a special interest in the enforcement of the charitable trust, but not by persons who have no special interest or by the settlor or his heirs, personal representatives or next of kin." *Id.*

20 *Cf.* GEORGE G. BOGERT & GEORGE T. BOGERT, THE LAW OF TRUSTS AND TRUSTEES §§ 412-415 (2d ed. 1977) [hereinafter BOGERT ON TRUSTS]; AUSTIN W. SCOTT & WILLIAM F. FRATCHER, THE LAW OF TRUSTS § 391 (4th ed. 1989) [hereinafter SCOTT ON TRUSTS].

21 *See Marin Hospital District v. Department of Health*, 92 Cal. App. 3d 442, 448 (2nd Dist. 1979); *Fairbanks v. Appleton*, 24 N.W.2d 893, 897 (Wis. 1946).

22 *Cf. Judkins v. Hyannis Public Library Association*, 19 N.E.2d 727, 729 (Mass. 1939) (the heirs of the settlor cannot call upon a court of equity to end a trust for charitable uses since the courts will sustain such a trust whenever possible). *See also Ass'n for the Relief of Indigent Females v. Beekman*, 21 Barb. 565, 570 (N.Y. Sup. Ct. 1854), where a New York Court, in a memorable turn of phrase, reasoned that even if a plaintiff was a possible beneficiary of a charity, allowing that plaintiff to maintain an action to enforce the trust would be like allowing "the heir expectant [to] bring an action to establish his inheritance before the death of his ancestor."

important theoretical and policy considerations may be equally important to the ultimate denial[23] or grant[24] of standing.

In fact, the formal categorization of plaintiffs is in many ways illusory. The category into which a prospective plaintiff falls, if he can even be categorized,[25] does not determine whether a court will grant standing. Instead, courts try to evaluate the actual interest a prospective plaintiff has in challenging the actions of a charity, the circumstances which led the plaintiff to attempt such a challenge, and even the likelihood that the alleged abuses might be detected or corrected without his or her intervention. Ultimately, the courts weigh all of these factors in order to decide whether or not the plaintiff possesses a legally cognizable "special interest" sufficient to overcome the substantial policy considerations that traditionally counsel against expansion of standing.

Recognizing both the strengths and the weaknesses of the traditional method for analyzing the question of standing of private parties in the charitable sector, this article proposes a new point of departure. Rather than first dividing plaintiffs into formal categories, we conclude that, in the absence of clear statutory authority,[26] courts rely primarily on an extremely broad application of the "special interest" doctrine (as well as more limited use of derivative actions) when assessing whether a plaintiff deserves to be granted standing in any particular case. This doctrine, while sometimes incorporated into state charitable trust statutes,[27] has, in general,

23 *Cf. Kemper v. Trustees of Lane Seminary*, 17 Ohio 293, 328-29 (1848) (allowing a donor to sue would open the doors to never-ending litigation when there are multiple donors).

24 *Cf. Woman's Hospital League v. City of Paducah*, 223 S.W. 159 (Ky. App. 1920) (Woman's Hospital League can maintain a suit for breach of trust because it would be inequitable to allow the city to divert property donated for a contagious disease ward to use as housing for student nurses).

25 At common law, for example, a relator need not have any interest whatsoever in the charity being sued. *Attorney General v. Vivian*, 38 Eng. Rep. 88, 92 (Ch. 1826).

26 For statutes allowing corporate-style derivative suits against nonprofits, *see generally infra* text accompanying notes 247-254. For statutes specifying who can enforce a trust, *see, e.g.*, WIS. STAT. ANN. § 701.10(3)(a) (West 1981) (allowing a settlor or settlors who contributed one half of the property to maintain a suit).

27 *See, e.g.*, MD. EST. & TRUSTS CODE ANN. § 14-301(a) (1991); MONT. CODE ANN. § 72-33-503 (1991).

passed into the common law.[28] In this article we attempt to present an extensive, though certainly not exhaustive, examination of the foundations of the doctrine, its evolution, and its current application, in order to provide an accurate method for analyzing past, present, and prospective judicial action on the question of the standing of private litigants in the charitable sector.[29]

B) Historical Background: Standing to Sue at the Common Law

Charities have existed at the common law since at least the Middle Ages,[30] but only starting with the Statute of Charitable Uses[31] in 1601 did Britain begin to develop a formalized system for the regulation of charities. The 1601 statute attempted to "redress the mis-employment of lands, goods and stocks of money heretofore given to certain charitable uses"[32] and authorized the appointment of charity commissioners with broad supervisory authority over charities and charitable trusts.[33] In practice, however, since the crown appointed Charity Commissioners only haphazardly,[34]

28 *See* RESTATEMENT (SECOND), *supra* note 19, § 391.

29 Our analysis of standing as it relates to charities is limited to the issues mentioned above — primarily the expansion of standing to new plaintiffs on the basis of the "special interest" doctrine. We do not attempt to delve into the complex areas of taxpayer standing, standing in the context of public utilities, or the special case of the Internal Revenue Service's standing to challenge the actions of charities. For a discussion of IRS standing in particular, *see* MARION FREMONT-SMITH, FOUNDATIONS AND GOVERNMENT 158-93 (1965) [hereinafter FREMONT-SMITH, FOUNDATIONS].

30 SCOTT ON TRUSTS, *supra* note 20, § 348.2.

31 43 Eliz., ch. 4 (1601) (Eng.).

32 *Id.*

33 For an explanation of what the Statute of Charitable Uses was supposed to accomplish and a description of how it worked, with case examples, *see* GEORGE DUKE, THE LAW OF CHARITABLE USES (London, W. Clarke & Sons 1805).

34 In Wales, the practice of appointing Charity Commissioners ended in the reign of Queen Anne, while in England the practice finally came to an end in 1803 after a long period of disuse. *See* THE NATHAN COMMISSION REPORT, *supra* note 3, at 18.

responsibility for enforcing the trusts rested with the courts of equity[35] and the attorney general.

The courts of equity administered charitable trusts and protected the interested parties whenever an abuse was brought to their attention.[36] Responsibility for bringing abuses to the attention of the court, however, lay with the attorney general. That officer initiated proceedings at the request of the Charity Commissioners, or a third party, or on his own initiative. This proceeding was called an "information," rather than a bill of complaint, and generally was brought at the behest of a third party called a "relator."[37] The attorney general retained control of the conduct of the action, but the relators were responsible for court costs.[38]

Over time, in fact, the attorney general became the only party able to enforce a charitable trust. The courts stated quite simply that when a public evil (i.e., the maladministration of a charity) existed, it was the duty and the prerogative of the Crown to remove it.[39] The Crown, as *parens patriae*, superintended all charities (just as it protected infants and lunatics[40]) since no one else had the immediate and peculiar interest necessary to prefer a complaint.[41] Additionally, the courts seemed to have assumed that no individual would be found *willing* to assert the interest of the public at

35 Suits for enforcement of a charity almost never seek money damages; instead they try to compel the charity to perform or not perform certain actions. Equity insists on the "conscientious obligations" of the parties and "may compel specific performance where law would only give damages for the breach of it, and stop a wrong by injunction where law would only give damages for the commission of it." JOWITT'S DICTIONARY OF ENGLISH LAW 713 (2d ed. 1977).

36 *Cf. Attorney General v. Kell*, 48 Eng. Rep. 1305, 1306-07, 2 Beav. 575, 579-80 (M.R. 1840).

37 3 WILLIAM BLACKSTONE, COMMENTARIES 427 (1775).

38 *Attorney General v. Vivian*, 38 Eng. Rep. 88, 92 (Ch. 1826). The main object of the relator was to secure to the defendants the costs of the case, in the event that they won, since the Crown was never liable for costs. *Id.*

39 *Attorney General v. Brown*, 36 Eng. Rep. 384, 394 (Ch. 1818).

40 SPENCER G. MAURICE, TUDOR ON CHARITIES 2 (7th ed. 1984) [hereinafter TUDOR ON CHARITIES].

41 *See Brown*, 36 Eng. Rep. at 394. *See also Wellbeloved v. Jones*, 57 Eng. Rep. 16, 17 (V.C. 1822).

large.[42] Responsibility for enforcement fell, by necessity, on the Crown.[43] Exclusive attorney general enforcement of charities thus became a part of the common law.[44]

In 1853 Parliament took steps to regulate further the enforcement of charities and, since that time, "[i]n the United States we have lagged far behind England in the matter of supervision of administration of charitable trusts".[45] The Charitable Trusts Act of 1853[46] regularized the positions of the Charity Commissioners, via the creation of a four-member Charity Board, and provided for private suits against charities.[47] After further statutory enactments, the process of reform produced the Charities Act of 1960.[48] This Act provides the Charity Commissioners with the power to establish a register of charities,[49] institute inquiries,[50] and perform certain judicial functions.[51] The Board also must authorize any suits against a charity.[52] Enforcement in Great Britain was recently further strengthened by the 1992 Charities Act.[53] This Act increased the investigative powers of the Charity Commissioners, introduced controls over the activities of professional fundraisers,

42 *See Attorney General v. Compton*, 62 Eng. Rep. 951, 955 (V.C. 1842).

43 *Cf. Strickland v. Weldon*, 28 L.R.-Ch. 426, 430 (1885).

44 For a brief history of the charitable trust in Great Britain, *see* SCOTT ON TRUSTS, *supra* note 20, § 348.2. *See also* ROBERT L. FOWLER, THE LAW OF CHARITABLE USES, TRUSTS AND DONATIONS 1-42 (1896).

45 SCOTT ON TRUSTS, *supra* note 20, § 391.

46 16 & 17 Vict., ch. 87 (1853) (Eng.).

47 *Id.*

48 8 & 9 Eliz. 2, ch. 58 (1960) (Eng.).

49 *Id.* § 4.

50 *Id.* §§ 6-7.

51 These functions include approving schemes for the administration of charities, appointing or removing trustees, etc. *Id.* § 18.

52 Such a suit may be maintained by the charity, by any trustees, by a party with an interest in the charity, or (in the case of a local charity) by two or more inhabitants of the area served by the charity. *Id.* § 28.

53 Charities Act of 1992, ch. 41 (Eng.).

and made new provisions for regulation of public collections.[54] Great Britain thus no longer relies solely on the attorney general to determine when force is needed and to supervise charitable trusts. Instead, there is a highly centralized system of supervision based around the Charity Commissioner.[55]

1) Conceptual Underpinnings of Common Law Limitations

The common law rule of standing, as developed in both the U.S. and Great Britain, had and continues to have strong theoretical foundations. State enforcement of charities is based upon the role of the Crown (or, in America, the state) as *parens patriae*, with a duty to enforce charitable trusts, and the lack of any other party in real interest who *could* enforce the trust. The Crown, at English common law, represented the interests of the public, since the Queen was mother of her nation (hence *parens patriae*) and had the duty to protect her subjects.[56] The various American states almost unanimously adopted this principle, and reasoned that "the state, as *parens patriae*, superintends the management of all public charities or trusts, and, in these matters, acts through her attorney general".[57]

The state, moreover, had a *preclusive* power of enforcement; private citizens or organizations could not sue to enforce charities.[58] The Supreme Court confirmed this reasoning early on, in the *Dartmouth College* case.[59] Chief Justice Marshall, while deciding that statutes passed by the New Hampshire Legislature could not alter the charter of Dartmouth College without violating the United States Constitution, also asked if there were truly any party "at interest" in an eleemosynary corporation.[60] His opinion

54 *Halsbury's Laws of England Monthly Review*, Apr. 1992, at 8 (Elizabeth Heathfield ed. 1992).

55 For a general discussion of British charities regulation, *see* FREMONT-SMITH, FOUNDATIONS, *supra* note 29, at 409-23.

56 *See Attorney General v. Brown*, 36 Eng. Rep. 384, 394 (Ch. 1818); *Wellbeloved v. Jones*, 57 Eng. Rep. 16, 17 (V.C. 1842).

57 *E.g., People ex rel. Ellert v. Cogswell*, 45 P. 270, 271 (Cal. 1896).

58 *Miller v. Alderhold*, 184 S.E.2d 172, 177 (Ga. 1972) (Grice, J., concurring).

59 *Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 641 (1819).

60 *Id.* at 641.

on this issue is important not so much because it decided who can represent the interest of the charitable beneficiaries, but because it decided who cannot. He reasoned that the founders and donors had parted with their property when they gave it to the corporation and had no further interest in it.[61] The students were also a fluctuating body, and no individual student had a vested interest in the corporation.[62] Justice Marshall's opinion goes on to say that:

> In every literary or charitable institution, unless the objects of the bounty be themselves incorporated, the whole legal interest is in the trustees, and can be asserted only by them. The donors, or claimants of the bounty, if they can appear in court at all, can appear only to complain of the trustees. In all other situations, they are identified with, and personated by, the trustees; and their rights are to be defended and maintained by them. Religion, Charity, and Education, are, in the law of England, legatees or donees, capable of receiving bequests or donations in this form. They appear in Court, and claim or defend by the corporation.[63]

The potential rights of the students (the beneficiaries) in the aggregate, however, amounted to a very substantial interest.[64] If the corporation (or the trustees) refused to defend this interest (which was not the situation in the *Dartmouth College* case), perhaps the beneficiaries, as an "incorporated" group, could complain of the trustees. The Court's reasoning, however, leads to the conclusion that only a trustee or the attorney general has an interest that allows a suit.[65]

Both judicial and scholarly commentators have given more pragmatic reasons for the exclusivity of attorney general enforcement. Observers were concerned that charities would be embroiled in "vexatious" litigation, constantly harassed by suits brought by

61 *Id.*

62 *Id.*

63 *Id.* at 645-46.

64 *Id.* at 642-43.

65 In a concurring opinion, Justice Story discusses an equity court's jurisdiction to review a charity's activities and cites in support a number of cases to which the attorney general was a party. *Id.* at 676-77.

parties with no stake in the charity.[66] Trustees who administer a public charity should not be called upon to answer to proceedings by private, and therefore presumably disinterested, parties.[67] To put it bluntly, "[i]f a third party were permitted to sue as a matter of right, the charity could be subjected to frequent, unreasonable and vexatious litigation, the court dockets could become clogged, and the trust assets could be wasted in unnecessary attorney fees."[68] The concern that the corpus of the charity might be dissipated in litigation[69] also has encouraged standing limitations, and for the public good courts try to protect charitable resources so that charitable dollars can be spent on the charity's philanthropic purpose.[70]

Attorney general enforcement of trusts thus rests on a very sound theoretical foundation. Conceptually a public charity is for the benefit of the public, and needs to be protected, because of its worthy purposes, from harassment and loss. But some mechanism for enforcement is required to remedy cases of maladministration of a charity. Power to enforce charities thus has come to rest with the attorney general, as representative of the Crown, the state, or the public, the true party at interest. Exclusive enforcement by the attorney general meets the dual concerns of the public in simultaneously enforcing the charity yet protecting it from interference.

66 The equivalent of a "strike" suit in a for-profit corporate setting.

67 *See Kirby v. Kirby*, 1989 WL 110541 at 1 (Del. Ch. 1989); *Olesky v. Sisters of Mercy of Lansing*, 253 N.W.2d 772, 774 (Mich. App. 1977); *Dillaway v. Burton*, 153 N.E. 13, 17 (Mass. 1926); *Matter of De Long*, 169 A.D.2d 1005, 1006 (N.Y. App. Div.) *appeal denied*, 575 N.E.2d 398 (1991); *Coffee v. William Marsh Rice University*, 403 S.W.2d 340, 343 (Tex. 1966).

68 *Sarkeys v. Independent School District No. 40, Cleveland County*, 592 P.2d 529, 534 (Okl. 1979).

69 *Cf. Concord National Bank v. Town of Haverhill*, 145 A.2d 61, 63 (N.H. 1958) (the court has a duty to protect the charity from "vicarious generosity" in the matter of paying the opposing party's attorney's fees).

70 Despite a considerable trend away from charitable immunity, the possibility that charitable funds will be diminished defending harrassing lawsuits remains a concern. Telephone Interview with Catherine Wells, Prof. of Law, University of Southern California, Former Member, Nat'l Comm. of Charity Information Officers (Jan. 15, 1992). Note, as well, that at least two states, Arkansas and Maine, have retained the common law immunity of charities to tort suits for precisely this reason. *See* HOWARD L. OLECK, NONPROFIT CORPORATIONS, ORGANIZATIONS, AND ASSOCIATIONS § 172 (5th ed. 1988) [hereinafter OLECK, NONPROFIT CORPORATIONS].

2) Adaptation of the Common Law in the U.S.

In practice, as well as in theory, the American states all adopted both the common law standing limitations on suits against charities and the system of state enforcement. Some debate as to the status of charities existed in the early years of the nation,[71] but most states either decided that charities existed at the common law, independent of statute,[72] or passed legislation specifically validating charities[73] or adopting English Law.[74] The role of the attorney general at common law, as the representative of the public, also was retained by most states, while a few passed explicit statutes[75] giving the attorney general authority to enforce charities. The public generally was denied standing except in exceptional cases.[76] Conversely, neither the Charities Act of 1853 nor the Charities Act of 1960 has been adopted or imitated by any state. The foundations of the American law of charities rest squarely in the 17th century.[77]

As befits a creation of the common law, however, standing to sue in the U.S. has evolved over time. A still frequently cited general rule is that the attorney general is the only appropriate party to

71 *Trustees of Philadelphia Baptist Association v. Hart's Executors*, 17 U.S. (4 Wheat.) 1 (1819) was interpreted by some states as denying the existence of charities at the common law. This case was later overturned by *Vidal v. Girand's Executors*, 43 U.S. (2 Howard) 127 (1844) which confirmed the existence of charitable trusts at common law, regardless of state statutes abolishing English law. *See* FREMONT-SMITH, FOUNDATIONS, *supra* note 29, at 37-38.

72 *See, e.g., Chambers v. City of St. Louis*, 26 Mo. 543, 592 (1860).

73 *See, e.g.*, CONN. GEN. STAT. §§ 45-79, 47-2 (1958).

74 *See, e.g.*, MASS. CONST. ch. 6, § 6 (1780).

75 *See, e.g.*, MASS. GEN. L. ch. 186, § 8 (1849).

76 For a comprehensive summary of major cases dealing with standing to sue in the 19th and early 20th centuries (generally denying standing to members of the public while granting it to the attorney general), *see Dickey v. Volker*, 11 S.W. 278 (Mo. 1928), *cert. denied*, 279 U.S. 839 (1929), wherein the court claimed that "counsel have briefed the whole of the law relating to charitable trusts."

77 For a history of the charitable trust in the United States, *see* SCOTT ON TRUSTS, *supra* note 19, § 348.3. For a history of the charitable corporation, *see* Fishman, *The Development of Nonprofit Corporation Law*, *supra* note 14, at 630-637.

enforce a charity.[78] In New York[79] and Massachusetts,[80] for example, the attorney general is the only appropriate representative of the public.[81] At the common law, as understood in some states, the attorney general's powers are no longer preclusive.[82] A minority trustee or director can sue to secure proper administration of a charity.[83] Further, it is now recognized that a private party can have a "special interest" in a charity that justifies granting standing.[84] Courts have seized upon this "special interest" doctrine, and it is the primary tool for a relaxation of the limitations on standing.[85] Nonetheless, state attorneys general remain the most important actors, both in theory and in practice, in charities regulation. Before turning to the role of the "special interest" doctrine and the expansion of standing, it is necessary to look at systems for state supervision and regulation of charities and the scope and limitations of such systems.

78 *Kirby v. Kirby*, 1989 WL 110541 at 1 (Del. Ch. 1989); *Sarkeys v. Independent School District No. 40, Cleveland County*, 592 P.2d 529, 533-34 (Okl. 1979); *Nacol v. State*, 792 S.W.2d 810, 812 (Tex. Ct. App. 1990).

79 In New York, even where standing is granted to other parties, the attorney general must always be a party to the suit to represent the public interest. *See, e.g., Grace v. Carroll*, 219 F. Supp. 270, 272 (S.D.N.Y. 1963); *Matter of De Long*, 169 A.D.2d 1005, 1006 (N.Y. App. Div. 3d Dep't 1991), *appeal denied*, 575 N.E.2d 398 (1991).

80 *Cf. Lopez v. Medford Community Center*, 424 N.E.2d 229, 232 (Mass. 1981).

81 The New York Attorney General's Office does not interpret the applicable New York statute as requiring its active participation in all cases involving charities. Telephone Interview with Pamela Mann, Assistant Attorney General, New York State Department of Law, Charities Bureau (June 29, 1992).

82 Those jurisdictions which have adopted an expansive view of private party standing include California, the District of Columbia, and New Jersey. *See San Diego County, Council, Boy Scouts of America v. City of Escondido*, 14 Cal. App. 3d 189 (4th Dist. 1971); *Hooker v. Edes Home*, 579 A.2d 608 (D.C. App. 1990); *Township of Cinnaminson v. First Camden Nat'l Bank and Trust Co.*, 238 A.2d 701 (N.J. Super. Ch. 1968). Massachusetts and Vermont, on the other hand, have fairly recently restated their adherence to exclusive attorney general enforcement. *See Leonard Morse Hospital v. Attorney General*, No. 91-367, slip op. at 2 (Mass. 1991); *Wilbur v. University of Vermont*, 270 A.2d 889 (Vt. 1970).

83 *See Holt v. College of Osteopathic Physicians and Surgeons*, 394 P.2d 932, 937, (Cal. 1964).

84 RESTATEMENT (SECOND), *supra* note 19, § 391.

85 *See infra* text accompanying notes 296-310.

II) State Supervision of Charities

For almost four centuries, the crown and the state, acting through their attorneys general, have regulated and protected charities. This system of enforcement has both strong philosophical foundations (the role of the state as *parens patriae*) and practical foundations (the need to avoid vexatious litigation). Nevertheless, levels of enforcement vary widely from state to state. Some states are very active and spend substantial amounts of time, energy and money on charities regulation.[86] Other state attorneys general's offices focus only on deceptive fundraisers.[87] Some states apparently have almost no interest in enforcement.[88] The irregular levels of regulation, as well as the problems inherent in attorney general enforcement,[89] have contributed to the expansion of private party standing. When the attorney general does not fulfill his supervisory duties, the courts look for alternative means of charities regulation. The need for alternatives has led to an expansion, mainly via the "special interest" doctrine, of private party standing in the charitable sector. This expansion, however, is a relatively recent development, and any discussion of charities supervision still must begin with a survey of state systems of enforcement via the attorney general's office.

To present an example,[90] the Connecticut Attorney General's Office has one of the more highly developed state enforcement systems.[91] It employs four attorneys and one accountant for charities regulation.[92] The attorney general relies on his common law authority to regulate charities, although charitable solicitation is governed by statute. Interestingly, the attorney general lacks authority even to compel the production of documents by trusts and foundations which do not solicit.[93] The office handles about 100 cases a year[94] and would handle many more if it had more staff.[95]

Such a state enforcement system is fairly typical, but most reformers have tried to improve upon state enforcement, rather than discard it. In Great Britain, parliament has formalized and strengthened the roles and powers of the Charity Board and the Charity Commissioners.[96] In America as well, scholars often have called for the creation of a state supervisory board, like that of Great Britain,[97] or for increased vigor in attorney general enforcement.[98] Although some states have provided for the creation of charity boards,[99] the authority and effectiveness of these boards remains as yet unclear. Other states have reorganized their attorney general offices to provide increased supervision.[100] But most states remain content with existing levels of activity, or inactivity. This section discusses existing state enforcement systems and their inherent problems.

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86 Telephone Interview with Richard Allen, Assistant Attorney General, Massachusetts Office of the Attorney General, Division of Public Charities (Jan. 20, 1992).

87 *Id.*

88 The Virginia Attorney General's Office, for example, apparently launched no actions for enforcement of a charitable trust between 1832 and at least 1970. *See* Note, *Charitable Trust Enforcement in Virginia*, 56 VA. L. REV. 716, 720 (1970).

89 *See infra* text accompanying notes 155 to 171.

90 For discussion of the New York Attorney General's Office, *see infra* text accompanying notes 168-171.

91 Telephone Interview with David Ormstedt, Assistant Attorney General, Connecticut Attorney General's Office (June 23, 1992) [hereinafter Ormstedt Interview].

92 *Id.*

93 *Id.*

94 Connecticut has 809 grantmaking foundations alone. GIVING USA 78 (Nathan Weber ed., 1991).

95 Ormstedt Interview, *supra* note 91.

96 *See supra* text accompanying notes 46-55.

97 *Cf.* Karst, *The Efficiency of the Charitable Dollar*, *supra* note 3.

98 *Cf.* Stephen Powers & John E. Watkins, Jr., *The Enforcement of Charitable Trusts*, 18 SYRACUSE L. REV. 618 (1967) [hereinafter Powers & Watkins, *The Enforcement of Charitable Trusts*].

99 *See, e.g.*, W. VA. CODE § 29-19-3 (1966); S.C. CODE ANN. § 33-55-30 (Law Co-op. 1976).

100 Notably New Hampshire, whose model reforms, enacted in 1943, contain provision for the appointment of an assistant attorney general to act as Director of Charitable Trusts. *See* N.H. REV. STAT. ANN. § 7-20 (1988).

A) Attorney General Enforcement

The attorney general remains the most important arm of state enforcement and the center of most state enforcement schemes. That officer does *not*, under any circumstances, have the power to govern trusts or corporations, but she does have the power to bring suit to enforce the charitable purposes of the organization. This power derives from two sources: common and statutory law. Almost all, if not all, states[101] recognize that, under the common law, the attorney general has standing to sue charities to protect the public interest. In fact, the common law considers the attorney general an indispensable party to actions involving charities, although the exact meaning and significance of the word "indispensable" vary from state to state. Some states, moreover, have codified and expanded the common law powers of the attorney general. These states now grant standing to sue by statute, and in some cases have clarified the attorney general's status as an "indispensable" party. This section discusses in detail both sources of the attorney general's authority, and the limitations on his power.

1) Authority of the Attorney General at Common Law

The most important source of the attorney general's authority to sue to enforce charities is the common law. A 19th century Supreme Court decision, *Vidal v. Girard's Executors*,[102] both confirmed the existence of charities at common law and recognized the attorney general's powers of enforcement.[103] Recent court decisions continue to accept this power.[104] Courts routinely dismiss challenges to the attorney general's standing.[105] The Restatement (2nd) of Trusts concludes that "a suit can be maintained for the enforcement of a charitable trust by the Attorney General or other

101 A few states, including Alaska, have no reported court decisions on point.

102 43 U.S. (2 Howard) 127 (1844).

103 *Id.* at 195.

104 *See, e.g., Collier v. Board of National Missions of the Presbyterian Church, U.S. of America*, 464 P.2d 1015, 1018 (Ariz. App. 1970); *Van de Camp v. Gumbiner*, 221 Cal. App. 3d 1260, 1269 (2d Dist. 1990).

105 *See, e.g., Matter of the Will of Grassman*, 561 A.2d 1210, 1211 (N.J. Super. Ch. 1989); *Commonwealth v. The Barnes Foundation*, 159 A.2d 500, 505 (Pa. 1960).

public officer,"[106] and most commentators[107] agree. Independent of statute, the attorney general has standing to sue charities.

Originally, the attorney general had exclusive power of enforcement over charities,[108] and a few jurisdictions still pay at least lip service to this model.[109] In many of the states which generally adhere to this exclusivity rule,[110] however, the courts have modified the common law so as to create an idea of the attorney general as a "necessary" or "indispensable" party.[111] Simply put, the attorney general need no longer be the plaintiff, but must at least be afforded an opportunity to be heard.[112] So long as the attorney general is present to protect the public interest, the proper parties are before the court and "it is immaterial that the Attorney General is defendant instead of complainant."[113] Most states thus have acknowledged the changing role of the attorney general.

In fact, some jurisdictions have decided to dispense altogether with the attorney general's compulsory involvement. They reason that, despite the "indispensable party" label, there is no need to make the attorney general a party to every case involving a charity.[114] The parties to the action must give the attorney general notice, and she has the option to intervene, but in the absence of a

106 RESTATEMENT (SECOND), *supra* note 19, § 391.

107 *See, e.g.*, BOGERT ON TRUSTS, *supra* note 20, § 411; SCOTT ON TRUSTS, *supra* note 20, § 391.

108 *See supra* text accompanying notes 71-81.

109 *See, e.g., Weir v. Howard Hughes Medical Institute*, 407 A.2d 1051, 1057 (Del. Ch. 1979).

110 *See supra* text accompanying notes 78 and 102-144.

111 *See, e.g., Carlisle v. Delaware Trust Co.*, 99 A.2d 764, 775 (Del. Supr. 1953); *Horse Pond Fish and Game Club, Inc. v. Cormier*, 581 A.2d 478, 482 (N.H. 1990); *In re Pruner's Estate*, 136 A.2d 107, 109 (Pa. 1957).

112 *See Trustees of New Castle Common v. Gurdy*, 91 A.2d 135, 136 (Del. Supr. 1952).

113 *Bible Readers' Aid Soc. of Trenton v. Katzenbaugh*, 128 A.2d 628, 628 (N.J. Ch. 1925).

114 *See Bertram v. Berger*, 274 N.E.2d 667, 670 (Ill. App. 1971); *In the Matter of the Estate of Max Yablick*, 526 A.2d 1134 (N.J. Super. A.D. 1987).

statute saying otherwise, the case can proceed without her.[115] The Massachusetts Supreme Judicial Court recently ruled, in *Loring v. Marshall*,[116] that although a statute currently makes the attorney general an indispensable party,[117] she had not been indispensable to those charity-related cases preceding the statute.[118,119] Thus, under the common law of Massachusetts, the attorney general is a proper party, but she need not participate in all cases.[120] She is a necessary party only if public interests are "directly and essentially," as opposed to "remotely and accidentally," at issue.[121] In the absence of a statutory mandate, the attorney general retains standing to sue and is a proper party to litigation involving charities, but is no longer, in the strict sense of the word, "indispensable."

2) Authority of the Attorney General in Statutory Law

Given the changing nature of the common law, many states have taken steps to codify and regularize the attorney general's powers. State codes now usually include some provision for attorney general enforcement of charities in either their charitable trusts statutes or in the enumeration of powers of the attorney general. Although a comprehensive study of the various code sections providing for the enforcement of charities and charitable trusts is beyond the scope of this article,[122] a few generalizations are possible. Most state codes contain some provision to the effect that the attorney general shall be deemed an interested party,[123] represents

115 *Bertram*, 274 N.E.2d at 670.

116 484 N.E.2d 1315 (Mass. 1985).

117 MASS. GEN. L. ch. 12, § 8G (1986).

118 *Loring*, 484 N.E.2d at 1319.

119 The court specifically affirmed the reasoning of *Eustace v. Dickey*, 132 N.E. 852 (Mass. 1921).

120 *Id.* at 863.

121 *Id.*

122 For a comprehensive summary, although now somewhat dated, *see* FREMONT-SMITH, FOUNDATIONS, *supra* note 29, at 464-490.

123 *See, e.g.*, N.C. GEN. STAT. § 36A-48 (1991); R.I. GEN. LAWS § 18-9-5 (1988).

the beneficiaries,[124] can intervene,[125] or is generally authorized to bring enforcement actions.[126] Those state codes that do not explicitly mention attorney general regulation of charities usually at least preserve "unimpaired" the rights and common law powers of the attorney general.[127] Only a few states, notably Alaska and Louisiana, are totally silent on the subject.

Some states, on the other hand, have extensive code provisions authorizing the attorney general to investigate abuses,[128] to bring and defend actions,[129] and to initiate any appropriate proceedings.[130] The Ohio statute, to present an example, specifically provides, on the issue of enforcement, that:

> [the] attorney general may investigate transactions and relationships of a charitable trust for the purpose of determining whether property held for charitable, religious, or educational purposes has been and is being properly administered...[and] shall institute and prosecute a proper action to enforce the performance of any charitable trust, and to restrain the abuse of it whenever he considers such action advisable or if directed to do so by the governor, the supreme court, the general assembly or either house of the general assembly. Such action may be brought in his own name, on behalf of the state, or in the name of a beneficiary of the trust.[131]

124 *See, e.g.*, MINN. STAT. ANN. § 501B.31(5) (West 1990); S.D. CODIFIED LAWS ANN. § 55-9-5 (1991).

125 *See, e.g.*, NEV. REV. STAT. § 163.120(2) (Michie 1991).

126 *See, e.g.*, ILL. REV. STAT. ch. 14, para. 62, § 12 (1991); IND. CODE ANN. § 30-4-15-12(c) (West 1991); IOWA CODE ANN. § 633.303 (West 1992); ME. REV. STAT. ANN. tit. 5, § 194 (West 1991); MONT. CODE ANN. § 72-33-503 (1991); OR. REV. STAT. § 128.710(1) (1991); UTAH CODE ANN. § 59-18-108 (1953); WIS. STAT. ANN. § 701.10(3) (West 1991).

127 *See, e.g.*, HAW. REV. STAT. § 554-10(e) (1985); WYO. STAT. § 17-7-116(e) (1977).

128 *See, e.g.*, N.M. STAT. ANN. § 57-22-9(A) (Michie 1978).

129 *See, e.g.*, GA. CODE ANN. § 53-12-115 (Michie 1991).

130 *See, e.g.*, MASS. GEN. LAWS ANN. ch. 12, §§ 8A-8M (West 1986); N.Y. EST. POWERS & TRUSTS LAW § 8-1.4 (McKinney 1979); N.C. GEN. STAT. § 36A-48 (1991).

131 OHIO REV. CODE ANN. § 109.24 (Baldwin 1991).

This provision gives the attorney general wide powers to investigate and enforce, although not control,[132] charitable trusts. It also supplements, without replacing, the common law ability to inquire into the abuse of charitable donations and to seek to impose constructive trusts,[133] for example.

Such statutory enactments deal not only with charitable trusts, but with charitable corporations as well. Many states, including New York,[134] California[135] and others,[136] have provisions in their nonprofit corporations codes allowing for attorney general enforcement. The Revised Model Nonprofit Corporation Act[137] also gives wide supervisory and enforcement powers to the attorney general. That officer may seek injunctive or other relief[138] and may intervene as of right in any proceeding affecting a nonprofit corporation.[139] Both charitable trusts and charitable corporations thus are often statutorily subject to the attorney general's jurisdiction.

State statutory power also has been brought to bear on the question of whether the attorney general is an indispensable party to litigation. Massachusetts[140] and New York[141] command by statute that the attorney general be made a party to certain proceedings involving a charity's management or discharge of charitable fiduciary duties. A Texas statute forbids similar malfeasance suits

132 *See infra* text accompanying notes 145-154.

133 *Cf. Bell v. Straight, Inc.*, 707 F. Supp. 325, 328-29 (S.D. Ohio 1989).

134 *See* N.Y. NOT-FOR-PROFIT CORP. LAW § 112 (McKinney 1977). *See also* E.P.T.L. § 8-1.4(a)(2) and (3).

135 *See* CAL. CORP. CODE § 5142 (West 1990).

136 *See, e.g.*, GA. CODE ANN. § 14-3-170 (Michie Supp. 1991); IDAHO CODE § 67-1401(4) (1991).

137 REVISED MODEL NONPROFIT CORPORATION ACT (1988) [hereinafter RMNCA]. Note that 37 states had enacted nonprofit corporations acts based on the original Model Act. Boykin, *The Nonprofit Corporation, infra* note 231, at 1001 n.14.

138 RMNCA, *supra* note 137, § 1.70(b)(1).

139 *Id.* § 1.70(b)(2).

140 *See* MASS. GEN. L. ch. 12, § 8G (1986).

141 *See* N.Y. EST. POWERS & TRUSTS LAW § 8-1.4(m) (McKinney 1977). "No court shall modify or terminate the powers and responsibilities of any trust, corporation or other relationship unless the attorney general is a party to the proceeding." *Id.*

against charities unless the parties have notified the attorney general,[142] and failure to join the attorney general can render a court's judgment void.[143] Most states, however, have not spoken on the issue, and the sheer number of cases decided without attorney general participation suggests that the attorney general is still not strictly necessary to all litigation.[144]

3) Limitations to the Attorney General's Authority

It is important to remember that this enumeration of the attorney general's powers relates exclusively to statutory and common law authority to oversee charities. The duty to protect the public interest by litigation *does* imply broad investigatory and supervisory powers. Reporting statutes,[145] which provide the needed information about charities,[146] in practice enhance these powers. The attorney general does *not*, however, have a right to regulate the actions of a charity or to direct its day-to-day affairs. Courts have denied the attorney general authority to intervene in suits contesting wills involving charities,[147] to enforce obligations owing to charities,[148] to intervene or appear for the establishment of an invalid charitable trust,[149] or to authorize deviations from

142 *See* TEX. PROP. CODE ANN. § 123.004(a) (Supp. 1992).

143 *Moore v. Allen*, 544 S.W.2d 448, 452 (Tex. Ct. App. 1976).

144 *See, generally,* FREMONT-SMITH, FOUNDATIONS, *supra* note 29, at 208-214.

145 *See, e.g.*, THE UNIFORM SUPERVISION OF TRUSTEES FOR CHARITABLE PURPOSES ACT, 7B U.L.A. 727 (1978).

146 The New York reporting statute requires trustees to file, with the attorney general, a copy of the instrument providing for their title, powers and duties, to provide written reports setting forth the nature of the assets held for charitable purposes and the administration thereof, and to provide copies of any annual tax returns filed with the New York Department of State or the U.S. Treasury Department. N.Y. EST. POWERS & TRUSTS LAW §§ 8-1.4(d), 8-1.4(f) (McKinney 1979).

147 *See Commonwealth ex rel. Ferguson v. Gardner*, 327 S.W.2d 947, 948-49 (Ky. 1959).

148 *See Lefkowitz v. Lebensfeld*, 415 N.E.2d 919 (N.Y. 1980).

149 *See Humphreys v. Shriver*, slip op. (Tenn. App. Dec. 28, 1984) (LEXIS, States library, Tenn. file).

trust provisions.[150] As a California court put it, in *In re Horton's Estate*,[151] the attorney general is not a super-administrator of charities.[152] He has "no control over, or right to participate in, the contractual undertakings of charities."[153] The attorney general has standing to seek redress for demonstrated abuse of trust management, but cannot control or manage the everyday affairs of charities.[154]

B) Disadvantages of Attorney General Enforcement and Alternate Supervisory Plans

Although most states rely on the attorney general to enforce charitable obligations, this system of state enforcement is not without its disadvantages. This section will discuss the problems inherent in attorney general enforcement, including lack of resources and possible conflicts of interests. We will then turn to possible alternatives to attorney general enforcement. One such alternative, relator actions, traditionally has supplemented attorney general enforcement. In recent years, moreover, a few states have turned entirely away from attorney general enforcement. These states use systems based on enforcement by county prosecutors and by state supervisory committees. We shall look at these systems as examples of how states try to enforce charitable obligations while avoiding the pitfalls of attorney general enforcement.

1) Problems Inherent in Attorney General Enforcement

Attorney general enforcement of charities, although of great antiquity, has come under increasing attack in recent years as the disadvantages of the system have become apparent. In Great Britain, the Nathan Commission Report[155] exposed centuries of neglect, and transferred the main responsibility for charities to the Charities

150 *See Midkiff v. Kobayashi*, 507 P.2d 724, 745 (Haw. 1973).

151 11 Cal. App. 3d 680 (2d Dist. 1970).

152 *Id.* at 685.

153 *Id.*

154 *Id.*

155 *See supra* note 3.

Board.[156] In the United States scholars also have pointed out the shortcomings of attorney general enforcement.[157] In general, early authorities put a great deal of blame on inadequate reporting.[158] They explained haphazard enforcement by reasoning that attorneys general were unaware of wrongful conduct or unable to appreciate its impact.[159] Although this problem cannot be considered solved (only four states, for example, have adopted the Uniform Supervision of Trustees for Charitable Purposes Act[160]), numerous states do have reporting statutes of some sort.[161] These statutes generally require some version of the IRS 990 form to be filed with the state attorney general or the Department of State.[162] The availability of these reports, along with the fact that many alleged wrongdoings are reported to the attorney general by minority trustees or beneficiaries,[163] forces us to look elsewhere for causes

156 *See supra* text accompanying notes 45-54.

157 *See* Bogert, *State Supervision of Charities*, *supra* note 14, at 634-36; FISCH, CHARITIES, *supra* note 11, § 695; Karst, *The Efficiency of the Charitable Dollar*, *supra* note 3, at 449-60.

158 *Cf.* Bogert, *State Supervision of Charities*, *supra* note 14, at 635; Powers & Watkins, *Enforcement of Charitable Trusts*, *supra* note 98, at 625.

159 *See Holt v. College of Osteopathic Physicians and Surgeons*, 394 P.2d 932, 935 (Cal. 1964).

160 THE UNIFORM SUPERVISION OF TRUSTEES FOR CHARITABLE PURPOSES ACT provides for the attorney general to keep a register of charities, for trustees to file copies of their instruments of title, and for the filing of periodic reports. *See supra* note 145, §§ 4, 6. It also gives the attorney general investigative and enforcement powers. *Id.* §§ 8-11. California, Illinois, Michigan, and Oregon have adopted the Act. *See* 7B U.L.A. 179 (Supp. 1992).

161 Lisa M. Bell & Robert B. Bell, *The Supervision of Charitable Trusts in California*, 32 HASTINGS L.J. 433, 438 (1980) [hereinafter Bell & Bell, *Supervision of Charitable Trusts*].

162 The IRS form 990, "Return of an Organization Exempt from Income Tax," requests information about support and revenue (including contributions), functional expenses (including salaries), a statement of program services rendered, and other miscellaneous information about the charity's operations. For a copy of the form, *see* BUREAU OF NATIONAL AFFAIRS, TAX MANAGEMENT IRS FORMS 23 (May 17, 1993); and MARILYN H. PHELAN, 3 NONPROFIT ENTERPRISES: LAW AND TAXATION, App. A at 64 (1991). Most charities must file a 990 form or a variant thereof with the IRS annually.

163 Bell & Bell, *Supervision of Charitable Trusts*, *supra* note 161, at 450.

of the current inefficient enforcement of charities by attorneys general.

Unfortunately, we do not need to look very far. Attorney generals' offices are traditionally understaffed and underfunded,[164] and have many pressing concerns aside from charities.[165] In 1977, which seems to be the last year for which statistics are available, only eight states had one or more full time attorneys monitoring charities, 31 had one or two attorneys working part time, and eleven had no attorneys assigned at all.[166] In California, which has a relatively good reputation for enforcement, staff limitations prevent the Attorney General's Office from prosecuting all of the complaints it receives.[167] In New York, the Attorney General's Office assigns approximately 14 attorneys and 6 accountants to charities regulation.[168] But even if the office had three times the staff, it would still be overburdened.[169] There are so many not-for-profits operating in New York that the staff cannot review all of the annual reports that they receive,[170] and if reports cannot be reviewed, abuse cannot readily be detected. The office must rely not only on official reports, but also on written complaints,

164 *Cf.* Note, *Charitable Trust Enforcement in Virginia, supra* note 88, at 720; Karst, *The Efficiency of the Charitable Dollar, supra* note 3, at 478.

165 In California, for example, the Attorney General's Office has charge of all legal matters in which the state is interested. It represents state agencies and American Indians, institutes and conducts tax actions, and institutes actions against other states. CAL. GOV'T CODE § 12511 (West 1992). The attorney general must give his opinion on questions of law related to government offices or criminal matters. *Id.* § 12519. The Attorney General's Office has a health quality enforcement section. *Id.* § 12529. It supervises district attorneys. *Id.* § 12550. It supervises sheriffs. *Id.* § 12560. It conducts environmental and false claims actions. *Id.* §§ 12600, 12650.

166 NATIONAL ASSOCIATION OF ATTORNEYS GENERAL, STATE REGULATION OF CHARITABLE TRUSTS AND SOLICITATIONS 8 (1977).

167 Bell & Bell, *Supervision of Charitable Trusts, supra* note 161, at 458.

168 Telephone Interview with Pietrina Scareglino, Staff Attorney, New York State Department of Law, Charities Bureau (June 18, 1992) [hereinafter Scareglino Interview].

169 Telephone Interview with Pamela Mann, Assistant Attorney General, New York State Department of Law, Charities Bureau (June 29, 1992).

170 Scareglino Interview, *supra* note 168.

referrals from other agencies, and even news reports.[171] State attorney general offices do not have the resources adequately to monitor and regulate charities.

A second potential reason for deficient enforcement is that attorneys general are political officials. They may well see no point to a muck-raking investigation of charges against respectable trustees and corporate officers.[172] California, in fact, does not publicize its investigations, or even its successful lawsuits, so as to avoid creating an impression of rampant charitable mismanagement.[173] Lack of resources and lack of interest thus both contribute to the current insufficiency of attorney general enforcement.[174]

2) Relator Actions

Given these problems, many states sought to supplement attorney general enforcement with other means. Although not, strictly speaking, an alternative, relator actions[175] can enhance the state's ability to oversee charities. California, in particular, has begun to employ the relator action as a tool for better enforcement in the charitable context. A relator is a party who is allowed to proceed in the name of the people or the attorney general when the power to sue otherwise resides wholely in that official.[176] The relator is,

171 *Id.*

172 Karst, *The Efficiency of the Charitable Dollar, supra* note 3, at 478.

173 Bell & Bell, *Supervision of Charitable Trusts, supra* note 161, at 458.

174 When the state itself is the trustee of a charity, the attorney general will have a clear conflict of interest. *Cf. Fitzgerald v. Baxter State Park Authority*, 385 A.2d 189, 195 (Me. 1978). In such a situation, she represents both the beneficiary, the public, and the trustee, the state, at the same time. In Great Britain, this is no longer a problem, because when the attorney general must protect the private interests of the crown, the solicitor general acts on behalf of the beneficiaries of the charity. TUDOR ON CHARITIES, *supra* note 40, at 328-29.

175 Note that some confusion is possible since the attorney general is sometimes himself described as the proper relator to maintain an action by the state. *See, e.g., State ex rel. Emmert v. Union Trust Co. of Indianapolis*, 74 N.E.2d 833, 836 (Ind. Ct. App. 1947). For the purposes of this discussion, a relator is a private party who has informed the attorney general of abuse and who has been allowed to proceed on her behalf.

176 *Brown v. Memorial Nat'l Home Foundation*, 329 P.2d 118, 133 (Cal. App. 1958), *cert. denied, Memorial Nat'l Home Foundation v. Brown*, 358 U.S. 943 (1959).

strictly speaking, a statutory creation.[177] There is authority to support the fact that, even in the absence of a statute, private actors may be allowed to file suit in the name of the attorney general.[178] In a suit by a relator, the relator generally takes an active part in the proceeding and is responsible for court costs,[179] but the attorney general retains control of the action and can withdraw, dismiss, or compromise it at any time.[180] In principle, the use of a relator allows the attorney general to bring suit in absentia, as it were: to draw upon private resources for the conduct of the suit, but simultaneously to retain ultimate control of the proceeding.

The attorney general's enforcement of charitable obligations is discretionary, based on the state's prerogative as *parens*, rather than his duty, *mandatarius*.[181] Relators cannot maintain an action if the attorney general declines to proceed.[182] Nor, as *Ames v. Attorney General*[183] indicates, can private parties force the attorney general to allow use of his name or to institute proceedings against a charity.[184] The *Ames* court professed itself "appalled at the prospect that the multitude of executive and administrative decisions which must be made daily are subject to attack in court by self appointed members of the public without private interest."[185] The use, or non-use, of relator actions rests entirely within the executive discretion of the attorney general.[186]

177 9 Anne, ch. 20 (1710) (Eng.).

178 *Memorial Nat'l Home Foundation*, 329 P.2d at 133.

179 *Sarkeys*, 592 P.2d at 534.

180 *Cf. People ex rel. Southwest Exploration Co. v. City of Huntington Beach*, 275 P.2d 601, 604 (Cal. App. 1954).

181 *See* D.W.M. WATERS, LAW OF TRUSTS IN CANADA 633 (2d ed. 1984).

182 *See People ex rel. Vivisection Investigation League v. American Soc. for the Prevention of Cruelty to Animals*, 20 A.D.2d 762 (N.Y. App. Div.) *aff'd*, 202 N.E.2d 561, (N.Y. 1964).

183 124 N.E.2d 511 (1955).

184 *Id.* at 514.

185 *Id.* at 515.

186 *Id.*

One commentator has viewed California's relator statute and regulations[187] as expanding the availability of relator actions in that state, which may encourage "public spirited citizens" to supplement the attorney general's efforts while still protecting the charity from frivolous suits.[188] The mere existence of relator status, however, cannot eliminate all the ills of attorney general enforcement. The attorney general's decision to grant or not to grant relator status can be influenced by extraneous factors.[189] The potential relator may be deterred by the expense of attorney's fees. Even more significantly, the limited resources available to attorneys general's offices makes investigation of relators' complaints and supervision of their suits difficult.[190] Relator actions, although useful in complementing attorney general enforcement, do not alleviate the system's inherent problems.

3) Alternate State Enforcement Systems

A few states, responding to these problems[191] and to the cries of reformers,[192] have tried to legislate alternate systems for enforcing charities. Two states, South Carolina and West Virginia, have created "Commissions on Charitable Organizations" to supervise charities. The West Virginia commission is composed of the Secretary of State, the Attorney General, and other state officials and appointees.[193] It holds investigations, makes policy recommendations, and can request that the attorney general take

187 In California, a potential relator must submit to the attorney general an application for leave to sue, a verified complaint, and a statement of facts. CAL. CODE REGS tit. 11, §§ 1-2 (1991). If the application is granted, the relator need only post a $500 bond and agree to pay court cost and expenses. *Id.* at tit. 11, §6. The attorney general still retains control of the action at all times. *Id.* at tit. 11, §8.

188 Fishman, *The Development of Nonprofit Corporations Law*, *supra* note 14, at 674 (discussing at length the relator action and its possible enhancement of charitable enforcement).

189 *Cf.* Bell & Bell, *Supervision of Charitable Trusts*, *supra* note 161, at 447.

190 *Cf.* Bogert, *State Supervision of Charities*, *supra* note 14, at 534.

191 *See supra* text accompanying notes 155-166.

192 *See supra* text accompanying notes 96-100.

193 W. VA. CODE § 29-19-3(a) (1966).

legal action.[194] The South Carolina commission consists of the Secretary of State and six representatives of the public, including donors, charity recipients, and a representative of a charitable organization.[195] It too makes rules and regulations and distributes information on charities to the public.[196] These commissions, however, are largely advisory and administrative in nature. Although they promulgate regulations, they do not seem to have the quasi-judicial powers of the British Charity Board.[197] They still rely on the attorney general (or, in the case of West Virginia, the prosecuting attorney of the county[198]) actually to bring suit.

Most other states that have tried to diminish the attorney general's role while strengthening state enforcement have done so by investing other state officials with enforcement powers. For example, in addition to granting standing to the attorney general, North Carolina,[199] North Dakota,[200] and Nebraska[201] allow district attorneys to sue; Arizona grants standing to county attorneys;[202] and Missouri allows suits by circuit attorneys.[203] These states have tried to increase enforcement by expanding the roster of those state officials with standing. In contrast, Georgia made the State Revenue Commissioner, rather than the attorney general, the official responsible for the administration of charitable trusts.[204] The Georgia courts consequently allowed the Revenue Commissioner to maintain, despite a compromise agreed to by the trustees and the district

194 *Id.* §§ 29-19-3(b)(1) to 29-19-3(b)(4).

195 S.C. CODE ANN. § 33-55-30 (Law Co-op. 1976).

196 *Id.*

197 *See supra* note 51.

198 W. VA. CODE § 29-19-3(b)(2) (1966).

199 N.C. GEN. STAT. § 36A-48 (1991).

200 N.D. CENT. CODE § 59-04-02 (1985).

201 NEB. REV. STAT. § 30-240 (1989).

202 ARIZ. REV. STAT. ANN. § 44-6553B (Supp. 1991).

203 MO. ANN. STAT. § 352.240 (Vernon 1991).

204 GA. CODE ANN. § 53-12-97 (Michie 1981).

attorney, a suit challenging the modification of a charitable trust.[205] Georgia then amended the statute, preserving the Revenue Commissioner's supervisory powers,[206] but reinstating the attorney general and the district attorney as legal representatives of the beneficiaries.[207]

In summary, devices such as county and district attorney standing and state commissions supplement attorney general enforcement. In the end, however, the main responsibility for state enforcement, despite problems, continues to lie with the attorney general. Moreover, as discussed above, the standing of private parties to sue charities has taken on importance in charities regulation only because of the continuing limitations of attorney general enforcement.

III) Evolution of Private Party Standing to Sue

Important policy considerations, as discussed above,[208] encourage state courts to maintain the often strict standing limitations which vest in the attorney general exclusive power to enforce charitable obligations. In view of the apparent lack or inadequacy of state supervision, however, the courts of many states have responded (to one degree or another) to the situation by relaxing standing requirements. These states allow limited classes of private parties to sue charitable entities either derivatively or directly. An examination of precedent across these jurisdictions reveals broad similarities in the conceptual justifications for this flexibility.

Without exception, courts which grant standing to private parties suing charities justify their innovations by recourse to private and charitable trust law and corporate law. Unsurprisingly, the key issue for the courts is the "interest" a plaintiff has in a charity. Strict standing rules were designed to prevent "vexatious" litigation by "disinterested" parties.[209] Gradually, however, as the faults of

205 *Collins v. Citizens and Southern Trust Company*, 373 S.E.2d 612, 615 (Ga. 1988).

206 GA. CODE ANN. § 53-12-116 (Michie Supp. 1991).

207 *Id.* § 53-12-115.

208 *See supra* text accompanying notes 56-70.

209 *See supra* text accompanying notes 66-71.

existing enforcement systems have become ever more obvious,[210] the courts have begun to recognize that certain private parties can have an "interest" in a charity.[211] They have realized that members of a charitable corporation are involved and "interested" in the corporation and that corporate law can be adapted to allow them to enforce and protect this interest. But further, some courts now acknowledge that a limited class of charitable beneficiaries in general, if they meet certain conditions, have what has come to be called a "special interest" in the charity. The development of what we have labelled the "special interest" doctrine has been used by some courts to expand standing to sue both charitable trusts and corporations.

In an age of deregulation, courts have used the flexibility of the common law to make up for a lack of governmental supervision in the charitable sector. They have done so by alleviating harsh standing restrictions and, through use of the derivative suit and the "special interest" doctrine, by allowing private, rather than state, actors to maintain enforcement actions against charities. This section of the article therefore will discuss how courts have used both corporate and trust principles to allow certain private plaintiffs to sue, and what attributes courts have looked for in these plaintiffs. We will then turn to the expansion of standing in the charitable sector in one particular jurisdiction, New Jersey, and use it as an example of the influence of the "special interest" doctrine. We will finish by proposing several hypotheticals to show how courts would evaluate a plaintiff's "special interest" in a charity. This discussion should explain the tools most commonly used by courts to expand enforcement opportunities for private plaintiffs in the charitable sector.

A) Corporate Law and the Derivative Suit

Corporate law, although not as important as trust law to the expansion of standing in the charitable sector, has nonetheless provided courts with some useful tools. The most important of these has been the derivative suit. In the for-profit corporate setting, a combination of common and statutory law vests shareholders with the power to bring a derivative suit to check alleged disloyal

210 *See supra* text accompanying notes 155-165.

211 *See infra* text accompanying notes 306-310.

managerial behavior, as a sort of policeman for other shareholders.[212] Derivative suits are brought to redress an injury sustained by, or to enforce a duty owed to, the corporation itself.[213] Any damages recovered as a function of the suit go to the corporation, never to those who brought the suit.[214] Shareholders bring derivative suits to correct abuses (usually committed by a director or officer of the corporation) such as the waste of corporate assets, self-dealing, gross negligence, extreme over-compensation, or usurpation of a corporate opportunity.[215] The derivative action has two purposes: deterrence of managerial misdeeds and compensation for corporate loss.[216] When used properly, derivative suits provide a mechanism, external to the corporation, for the enforcement of fiduciary duties[217] and reduce the need for governmental enforcement and bureaucratic oversight.[218] Ideally, the derivative suit provides a means for shareholders to redress injuries suffered indirectly, as a result of injuries to the corporation.[219]

Although derivative actions are most commonly associated with for-profit corporations (hence "shareholder derivative suits"), members of nonprofit corporations,[220] as well, often can use

212 ROBERT C. CLARK, CORPORATE LAW § 3.12 (1986) [hereinafter CLARK, CORPORATE LAW].

213 AMERICAN LAW INSTITUTE, PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS § 7.01(a) (Proposed Final Draft 1992) [hereinafter PRINCIPLES OF CORPORATE GOVERNANCE].

214 *Id.* § 7.16.

215 CLARK, CORPORATE LAW, *supra* note 212, § 15.9.

216 PRINCIPLES OF CORPORATE GOVERNANCE, *supra* note 213, at part VII intro. note, reporter's note 2.

217 *Id.* at part VII, intro. note.

218 *Id.*

219 Shareholders in a corporation can also bring direct, non-derivative suits alleging personal injury, to enforce voting rights, compel dividends, challenge the issuance of stock, enjoin *ultra vires* acts, prevent the oppression of minority shareholders, inspect corporate books and records, require the holding of shareholders' meetings, etc. The line between direct and derivative action is often unclear and there is considerable overlap. PRINCIPLES OF CORPORATE GOVERNANCE, *supra* note 213, § 7.01 cmt. c.

220 The Revised Model Nonprofit Corporations Act defines a "member" as "any person or persons who on more than one occasion, pursuant to a provision of a

derivative suits to enforce the rights and purposes of the organization. In this article we shall concentrate on those nonprofit corporations which are charitable in nature, but many other types of nonprofit corporations exist, and members of these corporations have similar rights. New York permits the creation of four types of not-for-profit corporations.[221] Members (if any) of all of these types of nonprofits can bring derivative actions in the right of the corporation.[222] California, which also allows for several types of nonprofit corporations,[223] permits members of mutual and public benefit corporations, including homeowners associations,[224] to sue a nonprofit in a derivative capacity.[225] Members of unincorporated associations,[226] including unions,[227] generally have the right to sue derivatively as well. The idea of a derivative suit by representative members of an organization has thus spread far beyond its original for-profit corporate context.[228]

As for charitable corporations, many states have incorporated the derivative suit as a matter of right into their non-profit corporation acts,[229] while in others the courts have borrowed the procedure directly from corporate law, without any legislative codification.[230] In either case, the basic idea that a member brings the suit as a representative of other members on behalf of the charity underlies the action,[231] much as in the corporate setting. A member of a charity does not expect the same return as an investor in shares of stock, but she nonetheless has an interest in the purposes of the corporation as set forth in its charter.[232] Derivative suits allow a member to protect these interests (which are the interests of the corporation itself) and to enforce the corporate purpose.[233] For-profit corporate law has been analogized to allow for derivative suits in a nonprofit setting.

B) Charitable Corporations and the Derivative Suit

Many jurisdictions allow members of charities to use derivative suits, just as shareholders have used them in the for-profit corporate setting, to protect the corporation, particularly against directorial malfeasance.[234] Charities, of course, do not have shareholders, but some charitable corporations[235] have members with power to elect directors, etc.[236] Although members do not have "pecuniary interests" in a charitable corporation,[237] it has

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corporation's articles or bylaws, have the right to vote for a director or directors." RMNCA, *supra* note 137, § 1.40(23). More generally, members can be defined as those contributors or activists who play a role in managing the charity.

221 N.Y. NOT-FOR-PROFIT CORP. LAW § 201(b) (McKinney 1977).

222 *Id.* § 623.

223 A corporation formed for public or charitable purposes is a public benefit corporation. CAL. CORP. CODE § 5111 (1990). A nonprofit mutual benefit corporation may be formed for any lawful purpose, except exclusively charitable, religious, or public purposes. CAL. CORP. CODE § 7111 (1990). Other types of nonprofit corporations also exist in California. *Cf.* CAL. CORP. CODE §§ 9110-9690 (1991).

224 *See, e.g., Gantman v. United Pacific Insurance Co.*, 232 Cal. App. 3d 1560, 1566 n.4 (6th Dist. 1991).

225 CAL. CORP. CODE §§ 5710, 7710 (1990).

226 FED. R. CIV. P. 23.1.

227 *Cf. Woodley v. Butler*, 101 Misc. 2d 670, 674 (N.Y. Sup. Ct. 1979), *appeal dismissed*, 75 A.D.2d 756 (N.Y. App. Div. 1980).

228 Note that at least one court has somewhat confusedly analogized a suit brought by beneficiaries on behalf of a trust to a stockholders' derivative suit, instead of vice-versa. *Velez v. Feinstein*, 87 A.D.2d 309, 314 (N.Y. App. Div.), *appeal dismissed*, 440 N.E.2d 1342 (N.Y. 1982).

229 *See infra* text accompanying notes 245-254.

230 *See infra* text accompanying notes 255-262.

231 *See* Brenda Boykin, *The Nonprofit Corporation in North Carolina*, 63 N.C. L. REV. 999, 1003-04 (1985) [hereinafter Boykin, *The Nonprofit Corporation*].

232 *Id.* at 1012.

233 *Id.* at 1013.

234 *See supra* text accompanying notes 212-219.

235 There is no requirement that a charitable corporation have members, and many do not. *See* RMNCA, *supra* note 137, § 6.03.

236 Membership in nonprofit corporations, unlike shares of stock, do not necessarily represent anything of value. Memberships in charitable and religious corporations reflect a contribution to or a commitment to participate in or support the organization and its objectives. RMNCA, *supra* note 137, § 6.02 official cmt. The articles and bylaws of each corporation establish the criteria and procedures for membership in that corporation. *Id.* § 6.01(a).

237 *Voelker v. St. Louis Mercantile Library Ass'n*, 359 S.W.2d 689, 695 (Mo. 1962).

gradually been recognized that they do have an "interest" in the corporation distinct from that of the general public. And since this interest is in some ways analogous to that of a shareholder in a for-profit corporation, it can be protected by the same means: the derivative suit.

The idea that shareholders in for-profit corporations can sue derivatively, in right of the corporation, has been accepted in this country since the middle of the last century.[238] Although the idea of member derivative suits against nonprofits is of more recent origin, a significant number of jurisdictions now allow member derivative suits against charities.[239] They derive the authority for such suits, however, from many different sources. Some states have statutory provisions specifically allowing for member derivative suits. In others, the courts have permitted similar suits based on statutes allowing members to inspect records or enjoin *ultra vires* acts. In a few states, the courts have adopted the derivative suit on their own initiative.

Originally, members of a charitable corporation were given no more consideration than any other beneficiaries of a charity. Due to their perceived lack of interest in the corporation, they were generally denied standing. The courts reasoned that members are not charged with any particular duties toward the charity, nor do they have any right distinct from that of the general public.[240] Massachusetts, in *Dillaway v. Burton*,[241] denied a member (also a co-trustee) of a hospital (a charitable corporation) the right to question the administration of the hospital because the issues raised in his suit challenging the administration of the hospital did not implicate his private interests.[242] The court said that "[t]he plaintiff has no interest in the trust fund after it has been paid to the hospital, other than that of the general public."[243] Questions as to the administration of the hospital pertained only to the public

238 *See* PRINCIPLES OF CORPORATE GOVERNANCE, *supra* note 213, at Part VII, ch. 1, intro. note.

239 *See infra* notes 245-254 and accompanying text.

240 *Cf. Carroll v. City of Beaumont*, 18 S.W.2d 813, 819-20 (Tex. Civ. App. 1929).

241 256 Mass. 568, 153 N.E. 13 (Mass. 1926).

242 *Id.* at 16.

243 *Id.*

interest, and only the attorney general could protect the public.[244] This restrictive standing rule evidences the court's extreme unwillingness to permit any private party to sue, even if the private party had an official status with the hospital. Statutory schemes were similarly restrictive: the Model Nonprofit Corporations Act of 1964, for example, made no provision for member derivative suits.

Statutory reform, however, has brought members of nonprofit corporations many of the rights enjoyed by their for-profit counterparts,[245] among them the right to sue derivatively. The Revised Model Nonprofit Corporation Act, published in 1988, specifically provides for member derivative suits.[246] While the Revised Model Act was under consideration or shortly thereafter, several states passed statutory provisions allowing members of nonprofit corporations to sue derivatively.[247]

Both the Model Act and state statutory schemes are modeled closely on business corporations law, although with a few important differences.[248] The Tennessee Nonprofit Corporation Act,[249] which is very similar to the Revised Model Act, allows for derivative suits by directors or by groups of 50 or more members or by members collectively holding 5% or more of the voting power.[250] Members who bring derivative suits must be such at the time of the proceedings,[251] must have made a prior demand for action on the

244 *Id.*

245 For the rights and liabilities of members of nonprofit corporations generally, *see* RMNCA, *supra* note 137, §§ 6.01 to 7.30.

246 RMNCA, *supra* note 137, § 6.30.

247 *See, e.g.*, GA. CODE ANN. § 14-3-742 (Michie Supp. 1991); ILL. ANN. STAT. ch. 32, para. 107.80 (Smith-Hurd Supp. 1992); MICH. COMP. LAWS ANN. §§ 450.2491-450.2493 (West 1990); MISS. CODE ANN. § 79-11-193 (1989); N.C. GEN. STAT. § 55A-28.2 (1990); OR. REV. STAT. § 65.174 (1990); WIS. STAT. ANN. § 181.295 (West 1992).

248 Some of these differences flow from the different purposes of charities and for-profits. Under the Revised Model Nonprofit Corporation Act, for example, complaining members of a charity cannot receive anything of economic value as a result of the suit. *See* RMNCA, *supra* note 137, § 6.30 cmt. 5.

249 TENN. CODE ANN. § 48-51-101 (1988).

250 *Id.* § 48-56-401(a).

251 *Id.* § 48-56-401(b).

directors,[252] cannot discontinue or settle a proceeding without permission of the court,[253] and must notify the attorney general of the suit.[254] These provisions balance the need to discourage vexatious or irresponsible litigation with the desire to permit some more active supervision of the affairs of the charity by concerned members. Thus, some states have explicit statutory schemes which expand standing while simultaneously protecting charities from undue harassment.

Many states, however, do not have statutes which specifically vindicate the right of a member to sue a charitable corporation. In these states, the courts' task is considerably more difficult. Most state codes which do not discuss derivative suits at the very least discuss the possibility of proceedings in the event of an *ultra vires* act[255] by a nonprofit (and, by implication, charitable) corporation.[256] These code sections typically provide, among other things, for proceedings by members in a representative suit against any incumbent or former director or officer of the corporation in right of the corporation.[257] Connecticut courts have used such a provi-

252 *Id.* § 48-56-401(c) (in the alternate, the plaintiffs must explain why they did not make such a demand — presumably because it would be useless, as in standard corporate law).

253 *Id.* § 48-56-401(d).

254 *Id.* § 48-56-401(g).

255 An *ultra vires* act is an act beyond that which is authorized by the governing corporate statute and the articles of incorporation. In the United States, the *ultra vires* problem is mainly of historical interest, since modern corporations have legal powers almost identical to those of natural persons. *See* CLARK, CORPORATE LAW, *supra* note 212, § 16.1. But because nonprofit corporations are generally organized for specific purposes, i.e. charitable, the attorney general, corporate directors, and members of the corporation can still sue to enjoin unauthorized (*ultra vires*) activities, although only in those situations where third parties have not acquired rights. *See* RMNCA, *supra* note 137, § 3.04.

256 *See, e.g.*, ALA. CODE § 10-3A-21 (1991); ALASKA STAT. § 10.20.016 (1991); ARIZ. REV. STAT. ANN. § 10-1006 (1992); COLO. REV. STAT. § 7-22-102 (1991); HAW. REV. STAT. § 415B-13 (1991); IOWA CODE § 504A.5 (1991); LA. REV. STAT. ANN. 12:208 (West 1991); ME. REV. STAT. ANN. tit. 13-b, § 203 (West 1991); NEB. REV. STAT. § 21-1905 (1990); N.M. STAT. ANN. § 53-8-6 (Michie 1991); N.D. CENT. CODE § 10-24-06 (1991); S.D. CODIFIED LAWS ANN. § 47-22-70 (1992); VA. CODE ANN. § 13.1-828 (Michie 1989); WASH. REV. CODE § 24.03.040(2) (1969).

257 A proceeding to enjoin an *ultra vires* act is generally considered a direct, rather than a derivative, action. PRINCIPLES OF CORPORATE GOVERNANCE, *supra* note 213, § 7.01 cmt. c. But, presumably, since the members of a charitable corporation cannot recover directly from their suit (ie. any recovery would go directly to the corporation) such a suit does have some derivative elements. *See* RMNCA, *supra* note 137, § 6.30 cmt. 5; PRINCIPLES OF CORPORATE GOVERNANCE, *supra* note 213, § 7.01 cmt. d. *See also Jackson v. Stuhlfire*, 547 N.E.2d 1146, 1148 (Mass. App. Ct. 1990).

sion[258] to allow members to sue nonprofit corporations.[259] For example, in *Cross v. The Midtown Club, Inc.*,[260] the court allowed a member of a nonprofit corporation (a luncheon club) to sue the corporation over its refusal to admit women as members and guests, in violation of its charter.[261] Although there seem to be no cases on point dealing with purely charitable corporations, most state codes do not distinguish between charitable and other nonprofit corporations.[262] Courts thus presumably could allow for suits against charitable corporations based on members' ability to sue to enjoin (or to recover, in the name of the corporation, for the effects of) an *ultra vires* act.

Another area where the courts can and have brought statutory schemes into play is the right of members, analogous to the right of shareholders, to inspect corporate records.[263] Many state Nonprofit

258 CONN. GEN. STAT. ANN. § 33-429 (West 1987).

259 *Cf. Sterner v. Saugatuck Harbor Yacht Club, Inc.*, 450 A.2d 369, 371 (Conn. 1982).

260 365 A.2d 1227 (Conn. Super. 1976).

261 *Id.* at 1230-31.

262 It should be noted that a few states, notably New York and California, *do* divide nonprofits into various categories. Most states do not distinguish between charitable corporations and other nonprofits in their nonprofit corporations acts. *See, e.g.*, ALA. CODE § 10-3A-43 (1991); ARK. CODE ANN. § 4-48-218 (Michie 1991); FLA. STAT. ch. 617.01-617.21 (1977); GA. CODE ANN. § 14-3-1602 (Michie 1991); IND. CODE ANN. § 33-17-27-2 (West 1991); MICH. COMP. LAWS ANN. § 450.2487 (West 1990); MINN. STAT. § 317A.461 (1992); NEV. REV. STAT. ANN. § 82.186 (Michie 1991); N.Y. NOT-FOR-PROFIT CORP. LAW § 621 (McKinney 1977); TENN. CODE ANN. §§ 48-51-101 to 48-51-701 (1988); TEX. CORPS. & ASS'NS CODE ANN. § 1396-2.23 (West 1980).

263 Under the RMNCA, a member has the right to inspect, at any reasonable time or place, the articles of incorporation, bylaws, resolutions adopted by the board of directors, minutes of all meetings of members, all written communications to members generally, a list of the current names and addresses of officers and directors, and annual reports of the Corporation. *See* RMNCA, *supra* note 137, § 16.02(a). A member also may have a right to examine accounting reports and membership lists for "a proper purpose." Such a purpose may include an effort to find out if "improper transactions have occurred or a

Corporation Acts contain provisions granting members the right to inspect records[264], and the courts have been willing to enforce these rights.[265] Louisiana, for example, not only allows members to inspect records, but does not require that they give any reason for doing so,[266] and extends the same privilege to members of religious nonprofit corporations.[267] Such authority stems from "the member's interest as a member, which may be broader than a shareholder's interest in a business corporation."[268] Although these statutes do not explicitly grant members the right to sue to correct abuses,[269] they do at the least imply a legally cognizable "interest" in corporate affairs on the part of the members. These Nonprofit Corporation Acts thus provide a tool members can use to help secure the proper administration of a charitable corporation.

Although statutory reform has provided welcome relief for members of nonprofit corporations, a more interesting development in the expansion of standing to sue charitable corporations has come through judicial action. The courts have begun to recognize that members hold their positions by virtue of being "interested in the objects and purposes of the organization."[270] A charitable corporation must, of course, be managed on behalf of its beneficiaries.[271] But, as the Delaware Supreme Court concluded "[i]n light of the role

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charitable trust breached." *See id.* § 16.02 official cmt. 2.

264 *See, e.g.*, ALA. CODE § 10-3A-43 (1991); ARK. CODE ANN. § 4-48-218 (Michie 1991)); GA. CODE ANN. § 14-3-1602 (Michie 1991); IND. CODE ANN. § 33-17-27-2 (West 1991); MICH. COMP. LAWS ANN. § 450.2487 (West 1990); MINN. STAT. § 317A.461 (1992); NEV. REV. STAT. ANN. § 82.186 (Michie 1991); N.Y. NOT-FOR-PROFIT CORP. LAW § 621 (McKinney 1977); TEX. CORPS. & ASS'NS CODE ANN. § 1396-2.23 (West 1980).

265 *Cf. Stueve v. Northern Lights, Inc.*, 797 P.2d 130, 131-32 (Idaho 1990).

266 *Bourgeois v. Landrum*, 396 So. 2d 1275, 1277 (La. 1981).

267 *Id.*

268 RMNCA, *supra* note 137, § 16.02 official cmt. 2.

269 An action to inspect records is, once again, in and of itself a direct action. PRINCIPLES OF CORPORATE GOVERNANCE, *supra* note 213, § 7.01 cmt. d. Nevertheless, it is often a necessary first step to any further action on behalf of the corporation or against the directors.

270 *Oberly v. Kirby*, 592 A.2d 445, 458 (Del. Supr. 1991).

271 *Id.*

of members in creating the foundation and electing its directors [it is] clear that the members' power was intended to resemble that of stockholders."[272] Admittedly, some charitable corporations call anyone who makes contributions above a certain amount a "member,"[273] and courts generally have not granted standing to such "members."[274] They have, however, acknowledged that those members accorded special rights by the corporation stand in a different position; those members active in the affairs of the corporation have a right to sue.[275] Such members stand in much the same position as shareholders, and have an interest in the proper administration of the nonprofit corporation.[276]

Several jurisdictions have used this analogy to allow members to bring suit in the right of the corporation. Tennessee, before the passage of a nonprofit corporation act providing specifically for member derivative suits,[277] allowed members to sue derivatively based on general corporate law.[278] The Tennessee courts reasoned that the term "shareholder" included by implication a "member" of a nonprofit corporation.[279] Idaho as well, by virtue of a statute

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272 *Id.*

273 The only connection of many of the "members" of museums, zoological societies, etc., with the organization is an annual contribution.

274 *Cf. Skokie Valley Professional Building, Inc. v. Skokie Valley Community Hospital*, 393 N.E.2d 510, 513 (Ill. App. Ct. 1979).

275 *Id.* at 514. The court said that the question of the plaintiff's standing depended upon whether he was "a person having membership rights in a corporation in accordance with the provisions of its articles of incorporation or by-laws." The plaintiff is denied standing because he does not allege any membership "rights" but instead relies on his "classification" as a founder member of (i.e. original donor to) the hospital. *Id.* at 513-14.

276 *See also* RMNCA, *supra* note 137, § 1:40(21) (defining "members" as persons who have the right to vote for directors, as opposed to those called "members" by an organization's articles or by-laws).

277 *See supra* note 249.

278 *See Hannewald v. Fairfield Communities, Inc.*, 651 S.W.2d 222, 225 (Tenn. App. 1983).

279 *See Bourne v. Williams*, 633 S.W.2d 469, 472 (Tenn. App. 1981). The court based its reasoning on the fact that in other parts of the corporate code the legislature had used the language "shareholder and member" and on the fact that it would be "unconscionable" for the court to assert that "simply because the corporate entity was organized as a corporation not for profit as opposed to

applying general corporate law to nonprofits,[280] would apparently allow members of nonprofits to sue in the same fashion as shareholders.[281] New Jersey[282] and New York[283] have allowed members of charitable corporations, as well as other nonprofits, to sue derivatively in the absence of a statutory grant. These jurisdictions have analogized members to shareholders and have allowed derivative suits on that basis.

A few decisions go even further and would allow members of charitable corporations to sue in all situations in which derivative suits are not expressly barred. A federal decision, *Wickes v. Belgian American Educational Foundation, Inc.*,[284] interpreted New York and Delaware law as allowing member derivative suits simply because they did not bar such suits.[285] The court ruled that a New York statute, allowing members of a charitable corporation to require directors to account for their acts, and a Delaware decision, allowing a derivative suit brought by members of a charitable corporation to be decided on the merits, provided a sufficient basis for the case to go forward.[286] Both a New York trial court[287] and two dissenting judges in the resultant appeal[288] seized upon this reasoning to find a common law right of members to sue, thereby avoiding a New York law requiring at least 5% of the members to participate

a corporation for profit, that there would be no forum available to members of the corporation who believe that the Corporation was being harmed and damaged by alleged illegal and unauthorized acts by its officers." *Id.* at 473.

280 IDAHO CODE § 30-303 (1980).

281 *Kidwell ex rel. Penfold v. Meikle*, 597 F.2d 1273, 1292 (9th Cir. 1979).

282 *See Leeds v. Harrison*, 72 A.2d 371, 377 (N.J. Super. 1950).

283 *Cf. Atwell v. Bide-a-Wee Home Ass'n*, 59 Misc. 2d 321, 323-24 (N.Y. Sup. Ct. 1969). This case preceded the passage of N.Y. NOT-FOR-PROFIT CORP. LAW § 623 (McKinney 1977).

284 266 F. Supp. 38 (S.D.N.Y. 1967).

285 *Id.* at 42.

286 *Id.*

287 *Hoffert v. Dank*, 86 Misc. 2d 384, 386 (N.Y. Sup. Ct. 1976).

288 *Hoffert v. Dank*, 55 A.D.2d 518, 519, (N.Y. App. Div. 1976) (Kupferman, J., dissenting).

in a derivative suit.[289] The judges reasoned that "members of a not-for-profit corporation could have the right to bring suit if there were no specific statute."[290] Such decisions go far beyond allowing derivative suits on the basis of an analogy between members and shareholders. Instead, they imply the court's recognition of a common law right to member derivative suits which can only be removed by statute.

Although the logic allowing for member derivative suits in the absence of a statute certainly has not been accepted by all jurisdictions,[291] it has been influential in many. Even those jurisdictions with extremely restrictive standing limitations have at times implied that members might have a right, under appropriate circumstances, to sue derivatively.[292] An Arkansas Court of Appeals, although it specifically ruled only that one who was an officer, director, and member of a nonprofit corporation had standing to sue derivatively, has implied that members in general (even if not directors or officers) should have standing.[293] The court justified this reasoning by seeing the public "as having a clear interest in nonprofit corporations from the standpoint of the faithful administration of the affairs of the corporation."[294] This implies, at the least, that an expansion of standing to allow for member derivative suits would be in the public interest since it would allow for better supervision of nonprofits.

State jurisdictions can thus be placed on a continuum according to how far a member of a nonprofit corporation is authorized to intervene to enforce charitable obligations. Some state codes explicitly empower members to sue by allowing for derivative suits against nonprofit corporations. Other states statutorily allow members to sue to enjoin *ultra vires* acts or to inspect a nonprofit's records, which imply some supervisory authority on the parts of

289 N.Y. NOT-FOR-PROFIT CORP. LAW § 623(a) (McKinney 1977).

290 *Hoffert*, 55 A.D.2d at 519.

291 *Cf. Lopez v. Medford Community Center*, 424 N.E.2d 229, 232-33 (Mass. 1981) (the attorney general is the only party who can litigate to correct abuses in a public charity; alleged members have standing only to litigate the denial of membership).

292 *Cf. Jackson v. Stuhlfire*, 547 N.E.2d 1146, 1147-48 (Mass. App. Ct. 1990).

293 *Morgan v. Robertson*, 609 S.W.2d 662, 665 (Ark. Ct. App. 1980).

294 *Id.* at 664-65.

members. Still other states are legislatively silent about derivative suits as applied to charitable corporations. In some of these jurisdictions, courts have recognized that members can have an interest in the affairs of a charitable corporation and thus have allowed lawsuits, analogous to derivative lawsuits, to correct abuses. In the absence of state supervision, the courts have sometimes taken matters into their own hands and, by recourse to analogous law, have expanded standing to sue in the charitable sector.

C) Trust Law and the "Special Interest" Doctrine

The "special interest" doctrine goes beyond the limits inherent in extending the derivative suit into the charitable sector, where its most effective results in expanding the plaintiff class eligible to sue a charity for malfeasance occur when used in conjunction with a charitable membership corporation.[295] Private trust law has provided a less direct, yet more commonly referred to, basis for determining who has standing to sue throughout the charitable sector. While corporate law is often applied directly by courts in the particular context of a derivative-type suit against a nonprofit corporation, private trust law serves as more of a backdrop for courts in their evaluation of the standing issue as it applies to both charitable trusts and charitable corporations. In a private trust, where the beneficiaries are usually specifically identified, the trustees are bound by law to a fiduciary relationship with those beneficiaries.[296] Thus, unlike in the charitable sector where the beneficiaries are necessarily difficult to identify precisely,[297] the private trust vests enforcement rights in specified individuals at the time of its creation.[298] Those individuals have automatic standing to bring suit for breach of trust because of their interest in the trust's administration and management.[299]

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295 According to RMNCA, directors of a nonprofit corporation can sue to enforce fiduciary duties regardless of whether the nonprofit corporation is a membership corporation, and, if it is a membership corporation, regardless of membership status of such directors. RMNCA, *supra* note 137, § 6.30.

296 RESTATEMENT (SECOND), *supra* note 19, § 2 cmt. b.

297 *Id.* § 364.

298 *Id.* § 112.

299 *Id.* §§ 197-199.

In many cases, courts draw upon the private trust law to help evaluate a plaintiff's claim to standing in the charitable sector. For example, consider the California decision of *Holt v. College of Osteopathic Physicians and Surgeons.*[300] This case involved a suit brought by minority trustees to prevent the college from changing its charter so as to teach allopathic, instead of osteopathic, medicine.[301] The court specifically declined to apply corporations law to the college[302] since "[t]he differences between private and charitable corporations make the consideration of such an analogy valueless."[303] Instead, the court compared the college trustees to the trustees of a private trust, and granted them standing to sue on that basis.[304] The court found that "the charity's own representative has at least as much interest in preserving charitable funds as does the attorney general," who usually enforces such trusts.[305] California thus expanded standing to sue charities to include co-trustees in most cases, based on analogy with private trust law and the logic that a trustee had a sufficient "interest" in the trust to maintain the suit.

Courts which allow private parties to sue charities basically transplant this doctrine of an "interest" in a trust into the philanthropic setting (with a few modifications). Traditionally, beneficiaries and trustees have the requisite standing to sue for enforcement of a private trust.[306] In the charitable sector, trustees are now almost universally conceded standing to sue.[307] Beneficiaries of a charity,

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300 394 P.2d 932 (Cal. 1964).

301 According to Judge Traynor, osteopathic medicine constitutes a distinct and separate profession, one based upon the diagnosis and treatment of all human ailments. *Id.* at 937.

302 It is worth noting that the court also implies that the right of minority directors of a corporation to sue on behalf of the corporation was apparently not well established at the time. *Id.* at 936 n.4.

303 *Id.*

304 *Id.* at 937.

305 *Id.* at 935. (quoting Karst, *The Efficiency of the Charitable Dollar, supra* note 3, at 444).

306 *See* RESTATEMENT (SECOND), *supra* note 19, § 200 cmts. a, e. The donor may *not* maintain a suit unless he retained an interest in the trust property. *Id.* at cmt. b. An incidental beneficiary cannot maintain suit either. *Id.* at cmt. c.

307 *See* RMNCA *supra* note 137.

however, are in a more ambiguous position. The beneficiary of a private trust has a very well defined interest, and thus very well defined rights. The identity of charitable beneficiaries, however, is by its very nature, uncertain.[308] In order to broaden standing to include such beneficiaries, the courts have seized upon the concept of a "special interest" in a charity. A plaintiff with a "special interest" stands in much the same position vis-a-vis a charity as a beneficiary stands in relation to a private trust,[309] and has equal rights of enforcement.

Using the special interest analysis to broaden the class of parties eligible to sue a charity has a strong and understandable appeal. Theoretically, the exception provides access to the courts only to those with a particularized and justified involvement in the accomplishment of charitable objectives.[310] If the private party successfully demonstrates the requisite special interest in a charity's philanthropic goals, the action is not likely to be frivolous or needlessly vexatious. The "specially interested" plaintiff presumably is seeking to uphold the best interests of the charity, and may be able adequately to represent those interests and the interests of the charitable beneficiaries. Correctly applied, the exception creates enforcement opportunities for private parties, enabling them to act essentially as private attorneys general, while still avoiding the most important policy pitfalls associated with lax standing rules.

D) Elements of the Special Interest According to Case Law

Research across state jurisdictions indicates that certain factual elements consistently influence a court's willingness to allow a private party to sue for the enforcement of charitable obligations. Courts use these elements to determine if a potential plaintiff has a sufficient "special interest" in the charity to justify a grant of standing. These elements include: a) the extraordinary nature of the acts complained of and the remedy sought by the plaintiff, b) the presence of fraud or misconduct on the part of the charity or its directors, c) the state attorney general's availability or effectiveness, and d) the nature of the benefitted class and its

308 *See supra* text accompanying note 297.

309 *See supra* text accompanying notes 297-298.

310 For a discussion of what constitutes a judicially noticed "special interest" in a charity, *see infra* text accompanying notes 311-372.

relationship to the charity. In this section, we shall examine each of these four elements, together with a fifth — subjective and case-specific factual circumstances — and explain the parts they play in a court's decision-making processes. The presence of any one of these factors by itself can lead a court to decide that the plaintiff has a "special interest" in a charity. If a combination of elements is present, then a court can balance them against one another and thus reach a decision. But these five elements are in any event the key to determining whether or not a private party actually has a "special interest" and is thus eligible to maintain suit against a given charity.

1) The Extraordinary Nature of the Acts Complained of and the Remedy Sought

The nature of the acts complained of or the remedy sought affects the probability that a court will allow a private plaintiff to proceed against a charity for breach of fiduciary duty. For instance, courts have routinely refused to recognize standing to sue for the award of monetary damages to intended beneficiaries.[311] Conversely, both requests for limited remedies and petitions alleging extraordinary violations of the express philanthropic purpose of a given charity have prompted courts to grant standing and to reach the merits of private claimants' suits. The courts seem influenced from the outset by the nature and extent of the remedy requested.

An action brought by a party for the purpose of gaining access to a charity's financial or administrative records may be allowed regardless of whether the attorney general has moved to enforce any charitable obligations. Requiring the charity to present its records for inspection does not generally cause great administrative inconvenience, nor are there likely to be persuasive privacy arguments about the propriety of keeping such information secret.[312] Legislative

311 *See, e.g., Stern v. Lucy Webb Hayes National Training School for Deaconesses and Missionaries*, 367 F. Supp. 536, 537 (D.D.C. 1973) (wherein the court held that the plaintiffs, who were recipients of hospital services, lacked the capacity to sue for treble damages under anti-trust laws, but also ruled that the plaintiffs could maintain a class action to enjoin the trustees' alleged self-dealing and hospital mismanagement).

312 *See Lopez v. Medford Community Center*, 424 N.E.2d 229 (Mass. 1981) (wherein the attorney general declined to act, yet the court allowed the complainants to maintain suit for access to the organization's corporate records and to litigate their claims to be "members" of the nonprofit corporation).

judgment, as embodied in state nonprofit corporations law and the federal tax code, generally comports with this policy analysis.[313] A private suit which seeks a modest remedy cannot easily be dismissed through an appeal to the policy of preventing harassing legislation against a charity.[314]

If the plaintiff complains of extraordinary acts which pervert the settlor's charitable intent and which may terminate the charity, the plaintiff enjoys a much better chance of defeating a motion to dismiss for lack of standing. In *Alco Gravure v. Knapp Foundation*,[315] the employees of Alco Gravure objected to an amendment of the Foundation's certificate of incorporation. The Foundation's original primary purpose was to aid employees of the founder's companies and their families. A 1927 amendment to the original certificate of incorporation allowed the trustees to donate unused income to other charitable entities. The challenged 1983 amendment would have established a "successor corporation" whose trustees had complete discretion to channel the Foundation's res and income to any other charitable corporation founded by the deceased donor, Joseph Knapp.

The New York Court of Appeals found that the amendment was subject to a "quasi-cy-pres" principle articulated in New York's Not-for-Profit Corporations Law, and held that the corporate entity, as well as individuals from the class of intended beneficiaries, had standing to sue for equitable relief from such a drastic change in the nature of the charity.[316] The court realized that the consequence of a dismissal for lack of plaintiff standing would be "the complete elimination of the individual plaintiffs' status as preferred beneficiaries of the funds originally donated by Joseph Knapp."[317] Confronted with the possibility of corporate dissolution and the

313 Federal tax legislation requires the filing of IRS 990 forms, which are open to public inspection, and several state not-for-profit corporation codes require charities to file detailed financial reports, which are also public record. *See supra* sources cited notes 160-162.

314 *See Gray v. Saint Matthews Cathedral Endowment Fund*, 544 S.W.2d 488, 491 (Tex. 1976) (noting that a private plaintiff who does not initiate an action, but seeks to intervene in a suit for the purpose of determining his rights or personal liability, is not guilty of pursuing harassing litigation against a charity).

315 479 N.E.2d 752 (N.Y. 1985).

316 *Id.* at 756.

317 *Id.*

destruction of all rights of the potential beneficiary class, the court granted the plaintiff beneficiaries, as specially interested parties, standing to sue for declaratory and injunctive relief.[318]

In a case where the existence of the charity itself was at stake, *Valley Forge Historical Society v. Washington Memorial Chapel*,[319] the Supreme Court of Pennsylvania found it relatively easy to hold that the private plaintiff Historical Society had a "special interest" in a charitable trust. The Historical Society was housed in a portion of the Chapel property donated and held in trust for "religious and patriotic" purposes.[320] By the time the case reached Pennsylvania's highest court, the Chapel had endeavored for some years to force the Historical Society's offices and gift shop to move off the Chapel premises.[321] By virtue of the long and defined relationship between the Chapel and the Historical Society, and in recognition of the trust instrument's definition of charitable goals, the court rejected the defendant's argument that the issue at hand was a landlord-tenant issue, and found that the plaintiff had a "special interest" in the trust which conferred standing to sue for injunctive and declaratory relief.[322] As the court explained, the Historical Society, "by its origins, its very real link to the Washington Memorial, and its professed purpose has that special interest which distinguishes it from any other historical society."[323] The Historical Society was easily identifiable and would have suffered a particularized injury from the Chapel trustees' intended course of action. The defined nature and interest of the society and the directness of the potential injury rendered the society eligible to maintain suit.[324]

318 *But cf. Township of Cinnaminson v. First Camden National Bank*, 238 A.2d 701 (N.J. Super. 1968) (wherein the court refused to fashion a remedy which would have upset settled expectations and approximated cy pres, even though the petitioners sought a result which more closely fulfilled the testator's philanthropic intentions).

319 426 A.2d 1123 (Pa. 1981).

320 *Id.* at 1126.

321 *Id.* at 1125.

322 *Id.* at 1127.

323 *Id.*

324 The District of Columbia Court of Appeals also has held that standing will more readily be granted to private plaintiffs if the suit addresses major issues

Thus, a prayer for relief limited to examination of books or records, or an allegation that a charity is about to terminate the rights of a class, are both factors that will favor a recognition of standing.

2) Presence of Bad Faith

Another factor which may influence a court's decision to grant standing is the presence of fraud or other deliberate misconduct. Although the two conditions may seem unrelated, a demonstration by the putative plaintiff that charitable funds have been misapplied intentionally often contributes to a finding that the plaintiff is sufficiently interested to maintain a suit against a charity. Courts are particularly sensitive to abuses of fiduciary responsibilities or fraud and they will more readily allow a private actor to protect the public interest in situations where such abuses are apparent. This is not to say that a court will explicitly acknowledge that accusations of fraud have influenced its decision. Instead, a close examination of the case law reveals simply that courts have a tendency to grant standing more often in cases where fraud or misconduct is alleged than in those where it is not. The presence of fraud thus is not a factor which courts discuss when evaluating a plaintiff's special interest, but it is nevertheless an element which influences their decisions.

A set of cases which serves as an excellent example of this tendency is that involving university students suing for breach of trust.[325] In most cases, courts deny standing to university students, primarily because of the amorphous and fluctuating nature of the class of students.[326] In a few instances, however, courts have granted standing to sue. *Jones v. Grant*,[327] a decision by the Alabama Supreme Court, demonstrates how allegations of fraud or misconduct can tip the balance in favor of a grant of standing. The *Jones* case involved a suit by members of the faculty, staff, and

and is not simply confined to matters of day-to-day administration. *Hooker v. Edes Homes*, 579 A.2d 608, 614-616 (D.C. 1990).

325 For a detailed analysis of the university student cases, *see infra* text accompanying notes 387-396.

326 *See, e.g., Miller v. Alderhold*, 184 S.E.2d 172 (Ga. 1971); *Associated Students of the University of Oregon v. Oregon Investment Council*, 728 P.2d 30 (Or. App. 1986), *review denied*, 734 P.2d 354 (Or. 1987).

327 344 So. 2d 1210 (Ala. 1977).

student body alleging that the directors of the college had misused college funds and federal grants and seeking injunctive relief and a money judgment for the misused funds.[328] Alabama precedent had described the attorney general as "the proper party" to bring an action challenging the administration of a charitable trust.[329] Nevertheless, the court found that these plaintiffs did have the right to maintain a suit against the university. It reasoned that "the interest of students, staff and faculty as beneficiaries in the financing of the educational association with which they are associated is a sufficient special interest to entitle them to bring suit."[330] The Alabama court stated as a general rule that beneficiaries with a "special interest" in a charitable trust can maintain a suit.[331] But in this situation, the "special interest" seems to have been based on the allegations of directorial misconduct which had directly injured the plaintiffs.[332] The allegations of fraud appear to have differentiated this case from other university student cases and permitted the court to find that the students had a "special interest."

Two Michigan cases demonstrate how in one jurisdiction courts have come to different results in similar cases, apparently based on the presence of fraud or misconduct. In *Olesky v. Sisters of Mercy of Lansing*,[333] the Michigan Court of Appeals held that only the attorney general had standing to sue a charity, and that private plaintiffs could not sidestep this by adding the attorney general as a defendant.[334] The court excluded not only private plaintiffs, but even held that a county prosecutor did not have standing to bring

328 *Id.* at 1211.

329 *See State ex rel. Garmichael v. Bibb*, 173 So. 74, 79 (Ala. 1937). This case, which essentially confirmed the right of the attorney general to sue to enforce charitable obligations, also involved allegations of fraud.

330 *Jones*, 344 So. 2d at 1212.

331 *Id.*

332 *Id. But see Miller*, 184 S.E.2d 172 (the court refused to grant the plaintiff students standing to sue the university, even given allegations of "malfeasance, misfeasance and nonfeasance." The accusations, however, claimed that the directors had refused to promote the objectives and purposes of the charter rather than that they had misused funds).

333 253 N.W.2d 772 (Mich. Ct. App. 1977).

334 *Id.* at 774.

suit when the attorney general refused to act.[335] The *Olesky* case thus strongly restated Michigan's adherence to the traditional rule that only the attorney general had standing to sue a charity. The plaintiffs there alleged only that the hospital was "not operated in a Christian atmosphere under a pro-life philosophy."[336] They did not allege any fraud or malfeasance on the part of the hospital, nor did they claim to have suffered any harm due to the hospital's misconduct.

In contrast, the Michigan Court of Appeals did allow the beneficiaries of a charitable trust to sue a charity in a case which involved allegations of misconduct.[337] The court itself noted that "this case concerns objections by the charitable trust beneficiaries to Jaffe's and his law firm's conflict of interest in representing both buyer and seller," i.e., the lawyer's simultaneous activities as trustee, legal representative of the trust, and legal representative of the buyer of the trust property.[338]

Despite the clear statement in *Olesky* that only the attorney general could sue on behalf of the beneficiaries of a charity, the court allowed the beneficiaries to represent themselves in this suit and reached a decision on the merits of the case.[339] Although most jurisdictions would have granted standing to the beneficiaries named in the trust instrument, the court's previous statement in *Olesky* that "Michigan public policy also requires that the Attorney General have exclusive authority to enforce charitable trusts,"[340] would seem to have required some explanation.[341] The *Olesky* plaintiffs sued over

335 *Id.* at 776.

336 *Id.* at 773.

337 *In re Green Charitable Trust*, 431 N.W.2d 492 (Mich. Ct. App. 1988).

338 *Id.* at 495.

339 The attorney general was a plaintiff in the case "as a necessary party in interest to estate proceedings involving charitable trusts." *Id.* The charitable beneficiaries, however, seem to have both brought the initial complaint and to have represented themselves at the trial (their standing did not seem to come from acting as relators, which would be the normal procedure in such a case).

340 *Olesky*, 253 N.W.2d at 774.

341 The *Olesky* court's decision might be interpreted as allowing this result since it also stated that the attorney general "must represent the beneficiaries of a trust where they are uncertain or indefinite." *Id.* In *Green Charitable Trust* the beneficiaries were instead easily identifiable.

a policy dispute, while the *Green Charitable Trust* plaintiffs sued because they had been harmed by the trustees' misconduct.[342] In one case the court dismissed the suit, while in the other it allowed the plaintiffs to seek removal of the trustees. The allegations of misconduct may not have been decisive in the courts' decisions, but the court was probably influenced by this factor, given the unexplained departure from recent precedent.

Once again, the notion that allegations of fraud play a part in judicial decision-making owes more to deduction than to explicit statements by the courts. Nevertheless, there are cases where the presence of fraud seems to have played a role in convincing a court to allow a private plaintiff to sue a charity.[343] Since such plaintiffs are generally defined as having a "special interest" in the charity, it thus seems proper to describe the presence of fraud or misconduct as one of the elements which can make up a plaintiff's "special interest."

3) Attorney General's Availability and Effectiveness

By the time a private plaintiff attempts to hail a charitable organization into court, the state attorney general often has become aware of the dispute.[344] The plaintiffs generally make the attorney general a party defendant,[345] but she can also intervene as an interested party or as a plaintiff,[346] or can opt to do nothing at all.[347] How appropriate it is to grant a plaintiff standing will

342 *Green Charitable Trust*, 431 N.W.2d at 505-06.

343 *Cf. Gray v. St. Matthew's Cathedral Endowment Fund, Inc.*, 544 S.W.2d 488, 492 (Tex. Civ. App. 1976) (although the civil courts would not normally intervene in the internal affairs of a church, they will see to it that the property rights of trust beneficiaries are preserved); *Stern v. Lucy Webb Hayes National School for Deaconesses and Missionaries*, 367 F. Supp. 536, 540 (D.D.C. 1973) (the plaintiffs were granted permission to sue for injunctive relief and for damages to be paid to the hospital in a case alleging mismanagement on the part of the hospital directors).

344 For a brief discussion of state reporting statutes, *see supra* text accompanying notes 159-163. For a discussion of attorney general enforcement in general, *see supra* text accompanying notes 86-207.

345 So that she may defend the public interest in the charity.

346 *See supra* text accompanying notes 122-125.

347 *Cf. Olesky v. Sisters of Mercy of Lansing*, 253 N.W.2d 772, 774 (Mich. Ct. App. 1977); *People ex rel. Vivisection Investigation League v. American Soc. for the Preven-*

depend to some degree on the action taken by the attorney general when the suit comes to her attention. Depending on the jurisdiction and the facts of the case, the nature and level of the attorney general's involvement can profoundly influence a court's decision to grant or deny standing.

In *Coffee v. William Marsh Rice University*,[348] for example, the Texas Attorney General adopted a neutral position on the merits of the case in which a group of alumni challenged a cy pres application by the college trustees. The attorney general expressed a desire "to see that this case is fully decided on its merits both as to the law and as to facts, for the protection of the public at large."[349] At trial, Rice University had made the attorney general the defendant.[350] The state official remained neutral regarding the dispute over whether to admit minorities, and allowed two groups of alumni to intervene as advocates. The court accepted the amended trust instrument.

The opposing intervenors appealed the verdict, the attorney general remained silent, and the Texas Court of Civil Appeals raised the issue of the intervenors' standing sua sponte and dismissed the appeal for lack of standing.[351] The Supreme Court, however, reversed the appellate court's decision. The court deferred to the attorney general's own judgment that Texas law made him a necessary party, but not the only or preclusive party.[352] The attorney general wanted the case tried on the merits, but did not actively participate in the trial. In such a situation, the court, faced with the support of the attorney general for allowing the lawsuit to go forward, granted standing to the involved private parties.[353]

tion of Cruelty to Animals, 20 A.D.2d 762, 762, (N.Y. App. Div.), *aff'd*, 202 N.E.2d 561 (1964).

348 403 S.W.2d 340 (Tex. 1966).

349 *Id.* at 342.

350 Among other changes, the amended trust instrument eliminated the specifications that the university was for the benefit of white citizens and should be tuition-free for all students. *Id.*

351 *Id.* at 341.

352 *Id.* at 342.

353 *But see Fuchs v. Bidwill*, 359 N.E.2d 158, 161 (Ill. 1976) (the attorney general filed an amicus brief urging that the plaintiffs be allowed to bring the action, but the court denied standing).

Once the trial court had deemed the plaintiff intervenors appropriate parties in the original suit, the Texas Supreme Court would not deny their right to appeal, even in the absence of attorney general participation on the merits.

In those jurisdictions which maintain vigilant, active, and effective official enforcement systems through their attorneys general,[354] courts understandably give great weight to the attorney general's evaluation of a private party's claim. When the attorney general in such a jurisdiction declines to comment or act on the merits of a particular case, the courts are reluctant to allow a private party to proceed, even if the attorney general does not take a position on the standing of the private plaintiff involved. The Massachusetts Attorney General's Office, for instance, has a division dedicated to charities enforcement,[355] and the Massachusetts courts, presumably not by coincidence, have a long history of denying private plaintiff standing in favor of exclusive official enforcement. *Dillaway v. Burton*[356] demonstrated the judiciary's considerable confidence in the attorney general's enforcement efficacy. The Supreme Judicial Court recognized that the legislature had granted the attorney general enforcement power in recognition not only "of his fitness as a representative of the public in cases of this kind, but of the necessity of protecting public charities from being called upon to answer to proceedings instituted by individuals."[357] The Massachusetts courts have since affirmed this reasoning numerous times,[358] most clearly in *Lopez v. Medford Community Center*.[359] The attorney general had investigated the allegations made by the *Lopez* plaintiffs and had decided to take no action.[360]

354 New York, Massachusetts, Ohio and California, among others. *Cf.* OLECK, NONPROFIT CORPORATIONS, *supra* note 70, § 12.

355 The Massachusetts attorney general was made a necessary party to all charities litigation in 1954, by the passage of MASS. GEN. L. ch. 12, § 8G (1986).

356 153 N.E. 13 (Mass. 1926).

357 *Id.* at 16.

358 *See, e.g., Leonard Morse Hospital v. Attorney General*, No. 91-367, slip op. at 2 (Mass. 1991).

359 424 N.E.2d 229 (Mass. 1981).

360 *Id.* at 232.

In the *Lopez* case, the attorney general was not properly joined as a party,[361] and he appeared at a trial to assert that "the public interest would not be served by his participation."[362] The Attorney General apparently did not comment on the plaintiff's capacity to bring the suit. The court reaffirmed the exclusivity of attorney general enforcement and consequently denied the plaintiffs standing to challenge the alleged improper administration of the charity.[363] When the attorney general is available, courts are likely to deny standing to alternate plaintiffs, particularly in those states with a tradition of effective attorney general enforcement.

When the courts perceive sporadic or inadequate official enforcement, however, their opinions sometimes acknowledge the attorney general's lack of resources and interest in charities.[364] The California Supreme Court, in *Holt v. College of Osteopathic Physicians and Surgeons*,[365] used the ineffectiveness of the attorney general as one of the main reasons for allowing co-trustees to sue a charity.[366] The New Jersey Superior Court also seized upon the lack of attorney general enforcement to justify an expansion of standing to include private parties.[367] Other jurisdictions have followed suit.[368] Courts have acknowledged that sound policy favors the relaxation of standing restrictions when the attorney general is unavailable. If a court determines that the attorney general is substantially ineffective, the probability increases that a private party will be allowed to represent, in litigation, the public's beneficial interest in a charity.[369]

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361 *Id.*

362 *Id.*

363 *Id.*

364 It is interesting to note that the New Jersey and California opinions referred to here both cite Karst, *The Efficiency of the Charitable Dollar, supra* note 3, as one of the sources for their statements.

365 394 P.2d 932 (Cal. 1964).

366 *Id.* at 936.

367 *City of Paterson v. Paterson General Hospital*, 235 A.2d 487, 495 (N.J. Super. Ch. 1967).

368 *See, e.g., Jones v. Grant*, 344 So. 2d 1210, 1212 (Ala. 1977).

369 The availability of the attorney general also has been a significant factor in a cognate but distinguishable area involving suits regarding public parks. Courts have been willing to grant standing to members of the public who seek to challenge government use of parkland held in trust for the public. *See City of Reno v. Goldwater*, 558 P.2d 532 (Nev. 1976); *Fitzgerald v. Baxter State Park*, 385 A.2d 189 (Me. 1978); *Kapiolani Park Preservation Soc. v. City and County of Honolulu*, 751 P.2d 1022 (Haw. 1988); *Parsons v. Walker*, 328 N.E.2d 920 (Ill. App. Ct. 1975); *Hiland v. Ives*, 257 A.2d 822 (Conn. Super. 1966).

The public park cases tend to fall into a unique procedural posture because, although courts sometimes treat these cases as suits against charitable trusts, the cases generally involve suits brought against a government or an entity closely related to a government, often acting as a trustee, rather than against a charity. Although other factors discussed in this article also may have been considered by the courts in these cases, it is clear that the most decisive factor in the public parks cases is that the attorney general, as an officer or employee of the government being challenged, is not likely to take action against the government to protect the public's interest in the park in question. Whatever the rationale, it is clear that courts in the public parks cases have granted standing to members of the public who often are mere "users" of the parks and who do not have a conventional "special interest" requisite for standing in suits against a charity or a trust *not* administered by a government.

In short, the public parks cases are essentially distinguishable from suits against charities because of the presence of a direct governmental connection. Accordingly, these decisions cannot properly be analyzed within the context of this article. In these cases, however, courts have seized upon the unavailability of the attorney general to weaken standing restrictions which might otherwise bar suits by private parties. These cases do, therefore, elucidate the significance of attorney general availability in a court's decision to grant standing.

A court's evaluation of the availability and effectiveness of the attorney general thus will weigh heavily in its decision to grant or deny standing to a private party. In those jurisdictions where the attorney general is heavily involved in charities regulation, courts generally will take a dim view of private parties attempting to step into the attorney general's role and to seek enforcement of charitable fiduciary duties. Conversely, in those states which do not have effective enforcement systems, or in those special situations where the attorney general is unavailable, a court is much more likely to relax standing restrictions and to allow private parties to supplement the attorney general's actions on behalf of the public.

4) Nature of the Benefitted Class and Its Relationship to the Charity

The fourth factor considered by the courts in evaluating a plaintiff's eligibility to maintain an enforcement suit is the nature of the connection between the potential plaintiff and the charitable

entity. A potential plaintiff, if she claims a "special interest" as the beneficiary of a charity,[370] should show that she is a member of a small identifiable class which the charity is designed to benefit. The charity's failure to fulfill its obligations should expose the plaintiff directly to injury based on the nature of the benefitted class and the plaintiff's membership in it. Accordingly, a plaintiff should have a direct and defined interest, distinct from that of the general public, in the enforcement of the charitable obligations at issue. Such an interest plays an important role in determining whether a plaintiff has a "special interest" in the charity.

The District of Columbia Court of Appeals, in *Y.M.C.A. of the City of Washington v. Covington*,[371] allowed a suit to go forward against a charity with specific reference to the plaintiffs' "special interest." Members of the local Y.M.C.A. had brought suit, claiming that the Y.M.C.A. had breached a charitable trust by allowing the building to deteriorate and by closing it.[372] The court decided that as members of the Y.M.C.A., with certain privileges at the local branch, the plaintiffs benefitted from the charity in ways that the general public did not.[373] The court also ruled that, since these plaintiffs received special benefits, "[t]he closing of that building injures them in particular."[374] These plaintiffs, as members of a small and well-defined group of beneficiaries, the members of a local Y.M.C.A., were particularly and directly injured by the breach of trust. They thus had a direct and defined interest, a "special interest," in enforcing the charity's obligations.

Some years after the *Covington* decision, the District of Columbia Court of Appeals gave, in *Hooker v. Edes Home*,[375] what is probably the clearest statement to date about how the nature of the benefitted class and its relationship to a charity lead to a "special interest" in the charity. The court, again with specific reference to their "special interest," gave four elderly women standing to bring

370 Trustees also are considered to have an "interest" in a charity sufficient to justify a grant of standing, but this interest differs from that of a beneficiary claiming a "special interest." *See supra* text accompanying notes 306-309.

371 484 A.2d 589 (D.C. 1984).

372 *Id.* at 591.

373 *Id.* at 592.

374 *Id.*

375 579 A.2d 608 (D.C. 1990).

a class action suit objecting to the closure and relocation of a free home for elderly indigent Georgetown widows.[376] Although it reversed a lower court's dismissal for lack of standing, the opinion first focused on the sound policy reasons for limiting enforcement to official action.[377] The court then explained, however, why these reasons should not and do not apply in cases where the challenging beneficiaries are members of a small identifiable class potentially entitled to trust benefits.[378] The court directly stated that "a particular class of potential beneficiaries has a special interest in enforcing a trust if the class is sharply defined and its members are limited in number."[379] Since in this case the benefitted class was limited to elderly and indigent Georgetown widows,[380] the plaintiffs represented a very limited and defined class of beneficiaries.[381]

The nature of the benefitted class alone, however, did not mark the *Hooker* plaintiffs as having a "special interest," since "even when a class of potential beneficiaries is small and distinct enough that its members appear to have an interest distinguishable from the public's, the problem of subjecting the trustees to recurring vexatious litigation may exist."[382] The District of Columbia court clarified the "special interest" doctrine by requiring that the complaining plaintiffs also show an immediate threat of injury.[383] A plaintiff must be directly injured by a charity's breach of its duties, and "[a] suit by a representative of a class of potential beneficiaries should aim to vindicate the interests of the entire class and should be

376 *Id.* at 608-09.

377 Such reasons include the "large and constantly shifting nature" of the benefitted class and the danger of "vexatious litigation." *Id.* at 612.

378 *Id.* at 613-14.

379 *Id.* at 614. The court also may have been concerned with the fact that without the suit, the plaintiffs would forever lose access to the charity. *See supra* text accompanying notes 315-324.

380 The trustees apparently cited as one of the reasons for sale and transfer of the Edes Home the drop in the number of applications from the group of possible beneficiaries. *Id.* at 615.

381 The court also was influenced by the fact that the suit addressed major issues of policy. *See supra* note 324.

382 *Id.* at 614.

383 *Id.*

addressed to trustee actions that impair those interests."[384] The trustees' actions had placed the Edes Home at a crossroads; if the plaintiffs could not bring their suit to prevent the home from moving, they would be denied and could never recover the benefits of the charity.[385] The court thus emphasized the nature and extent of the possible injury to private claimants as well as the distinctiveness of the benefitted class in determining that the plaintiffs did have a "special interest" in the charity.

In contrast, courts often have found that certain classes of beneficiaries, by their very nature and the nature of their relationship with the charity, do not have standing to conduct an enforcement suit. Some courts have categorically denied standing to university students. The class of students as potential beneficiaries is too large, amorphous and fluctuating to support a conclusion that student plaintiffs have a special interest in the charitable institution.[386] The university cases also present good examples of the type of relationship between plaintiff and charity which generally fails to show that the plaintiff might suffer particularized injury from the alleged maladministration of the charitable entity. In these cases, therefore, both the nature of the benefitted class and its relationship to the charity fail to justify a "special interest" exception to strict exclusionary standing rules.

In *Kania v. Chatham*,[387] for example, the plaintiff student, who was nominated for but ultimately not selected to receive an academic scholarship, lacked standing to sue for the removal of the trustees of the scholarship fund. The Supreme Court of North Carolina found that the student claimant could not demonstrate that he had a special interest in the proper administration of the scholarship trust simply by proving his status as a member of the group from which scholarship recipients were chosen.[388] The court

384 *Id.* at 615.

385 *Id.* at 617.

386 *See, e.g., Dartmouth College v. Woodward, supra* notes 59-65. *See also Associated Students of the University of Oregon v. Oregon Investment Council*, 728 P.2d 30 (Or. Ct. App. 1986), *review denied*, 734 P.2d 354 (Or. 1987) (holding that students do not have a "sufficient" special interest in a university to seek declaratory relief for a failure to divest from South Africa).

387 254 S.E.2d 528 (N.C. 1979).

388 *Id.* at 530. Only in *Hooker, see supra* note 375, has a court expressly granted standing to *potential* beneficiaries.

first noted that the fact that a person "may" receive a scholarship indicates that he is only a potential beneficiary.[389] Secondly, it was recognized that "[t]o grant plaintiff standing to maintain this action would only open the door to similar actions by other unsuccessful nominees now and in the future."[390] The court refused to grant the plaintiff standing because he had no real interest as the potential beneficiary of a scholarship and because to allow him to sue would open the door to vexatious litigation conducted by all other disappointed applicants. A university student did not have a "special interest" in the university's management of a scholarship because of his belonging to a broad class and his lack of a particularized injury.

Miller v. Alderhold[391] also rejected students' standing to sue for enforcement of university trustees' fiduciary duties. A group of students who attended Atlanta Baptist College sought to maintain an action against the trustees based on alleged malfeasance in the trustees' management of college funds. The Georgia Supreme Court, citing the *Dartmouth College* case,[392] said that:

> [i]t is inconceivable that one 18-year-old boy or girl the day after his or her admission to a private college could go into court or through the State's Attorneys, and seek to enjoin the trustees in the management and operation of the college, and ask for a receiver solely because he or she was a student.[393]

The relationship between the college and the students was held to be essentially contractual in nature.[394] The court scoffed at the notion that the students, a continually fluctuating group, had any vested interest in the institution.[395] As part of a large fluctuating class, with no direct interest in the charity, students do not have standing to enforce a school's charitable obligations.

389 *Id.*

390 *Id.*

391 184 S.E.2d 172 (Ga. 1971).

392 *See supra* notes 59-65.

393 *Miller*, 184 S.E.2d at 175.

394 *Id.* at 174.

395 *Id.* at 175.

It is notable, however, that several cases have relaxed the traditional limitations on student standing. In *Jones v. Grant*,[396] the Supreme Court of Alabama granted standing to members of the faculty, staff and student body of Daniel Payne College in a suit alleging misuse of funds by the President.[397] The Court specifically found that students of a charitable institution were beneficiaries of a charitable trust and that they had sufficient "special interest" in enforcing the trust to be able to institute a suit as to that trust.[398]

The recent controversy involving the Barnes Foundation also indicates a new-found willingness to grant student standing. The trustees had brought an action asking for changes in the terms of the document establishing the Barnes Foundation trust, which operates an art institute near Philadelphia. Although no reported decisions are available, the Philadelphia Orphans' Court apparently allowed both another charitable foundation (the De Mazia trust) and students at the Barnes Foundation to intervene in the action in an attempt to preserve the institution's unique character attributable to its founder's very individual views of art.[399] The suit did not prevent a national tour of the Foundation's masterworks, but the paintings may never again leave their home, exactly as Dr. Barnes specified in setting up the Foundation.[400] The full implications of these decisions are unclear, but they establish precedent for courts to examine suits even by student plaintiffs to see if the plaintiffs have the requisite "special interest" in the charity.

In general, potential plaintiffs must have a clear and direct interest in the charity they hope to sue. As beneficiaries or potential beneficiaries, successful plaintiffs must be members of a small identifiable class directly at interest and thus directly harmed by a breach of trust or charitable duty. In addition, the courts have implicitly limited standing to those breaches which are outside the

396 344 So. 2d 1210 (Ala. 1977).

397 *Id.* at 1211.

398 *Id.* at 1212.

399 *See, e.g.*, Julia M. Klein, *Barnes Ends Legal Efforts to Ease Its Restrictions*, PHILA. INQUIRER, Jan. 14, 1992, at CO1; Julia M. Klein, *Suit Aims to Oust Barnes' Trustees*, PHILA. INQUIRER, Jan. 17, 1992, at AO1; Julia M. Klein, *Judge Won't Let Barnes Withdraw Lawsuit*, PHILA. INQUIRER, Jan. 24, 1992, at DO3.

400 *See* Amei Wallach, *The Shyest Museum in America Finally Goes Public*, NEWSDAY, Oct. 4, 1992, at 12.

day-to-day operations of the charity, thus reducing the possibility of vexatious litigation. If the class of beneficiaries is large and amorphous, or if the plaintiffs are not complaining of an extraordinary act which directly damages their specific interests, the courts generally will not grant standing. The nature of a plaintiff's interest in a charity, whether it is direct and defined, is a key element that courts consider in deciding whether this plaintiff has a "special interest" in that charity.

5) Subjective Factors and Social Desirability

Although its importance should not be overemphasized, there is a fifth element which the courts take into consideration when deciding whether to grant standing to a particular plaintiff. This element is composed of the various case-specific facts and subjective factors which can influence a court's decisions. Because the law regarding standing to sue in the charitable sector is in an uncertain state, it seems that the courts have more room than usual to decide the issue based on whether a judge feels that a plaintiff deserves a chance to present her case. Although courts rarely acknowledge it, the social desirability of a suit, the "need" for the suit, will often play a role in the decision-making process.

Originally, courts used restrictive standing rules as a weapon against potential plaintiffs when they disapproved of the suit being brought. The California court which decided *George Pepperdine Foundation v. Pepperdine*[401] denied standing to successor trustees who were suing the founder and first president of a charitable foundation to recover the millions he had allegedly squandered while president. The court, in a decision generally felt by commentators to be badly reasoned,[402] extolled Mr. Pepperdine's civic virtue, sympathized with administrative problems (and his increasing age), and concluded that "[r]eason, justice, equity and law stand aghast" at the lawsuit.[403] Consequently, the court ruled that only the attorney general could maintain such a suit.[404] When it

401 271 P.2d 600 (Cal. Ct. App. 1954).

402 *See* Karst, *The Efficiency of the Charitable Dollar*, *supra* note 3, at 444; Bell & Bell, *Supervision of Charitable Trusts*, *supra* note 161, at 444.

403 271 P.2d at 605.

404 *Id.* It will be noted that this statement by a Court of Appeals seems to directly contradict the Supreme Court's holding in the *Dartmouth College* case

became apparent, however, that granting trustees standing would benefit charities, the courts showed no hesitation in striking down the *Pepperdine* rule in *Holt v. College of Osteopathic Physicians and Surgeons*,[405] and decisively confirming that charitable trustees had standing to sue.

In fact, the courts have used the "special interest" doctrine to grant standing in those cases where there seemed to have been an egregious wrong which would otherwise go uncorrected. Although the courts themselves do not say so, they seem to be influenced, at least in part, by the fact that such suits are socially desirable and fulfill praiseworthy goals.

Another notable example of a case-specific grant of standing is the decision of a District of Columbia court to certify a class of 10,000 plaintiffs, users of a hospital's services, suing the hospital's trustees for misconduct and breach of trust. The court granted the plaintiffs standing to sue "to prevent continued injury to the Hospital caused by the trustees' self-dealing and overreaching."[406] The court specifically recognized the plaintiffs' "special interest,"[407] but the decision seemed to be based more on the social desirability of granting *someone* standing to prosecute this action[408] rather than on the unique and special interests represented by the plaintiffs.

Ideally, a court considering standing will evaluate a plaintiff's "special interest" based on the relatively objective factors discussed earlier. But in some situations where these considerations would not weigh in favor of standing, courts still may extend recognition to the plaintiffs because of the obvious social desirability of the suit. In effect, the general policy concern that charities not be harassed by suits brought by a near-infinite number of potential beneficiaries (i.e., plaintiffs) sometimes gives way to a court's concern that an improper action will not be challenged. In such cases, the courts

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that the assets of a charity belong to the charity, on whose behalf the trustees act. *See supra* text accompanying notes 59-65.

405 394 P.2d 932 (Cal. 1964) (partially overruling *Pepperdine*).

406 *Stern v. Lucy Webb Hayes National School of Deaconesses and Missionaries*, 367 F. Supp. 536, 540-41 (D.D.C. 1973).

407 *Id.* at 540.

408 *See Christiansen v. National Savings Bank and Trust Company*, 683 F.2d 520, 527-29 (D.C. Cir. 1982) (explaining why the *Stern* court granted standing to the prior plaintiffs and how the relief ran to the hospital).

justify their recognition via the "special interest" doctrine, regardless of the presence of the factors described above, and because of the presence of a fifth factor, the social desirability of the suit.

6) Weighing the Elements

The elements of the "special interest" doctrine discussed above, including the remedy sought, the presence of fraud, the availability of the attorney general, and the nature of the benefitted class, have all been weighed by courts to justify granting standing to previously unrecognized plaintiffs. Most of the cases we have discussed feature one factor or another as dominant in the court's decision-making processes. A more interesting, although rarer, situation is when a court balances or weighs these factors while evaluating a plaintiff's "special interest." We will therefore examine several cases in which the courts have weighed all of the elements which normally make up a "special interest" before granting or denying standing.[409]

An excellent example of how courts may evaluate the elements making up a "special interest" and then grant standing is the California decision of *San Diego County Council, Boy Scouts of America v. City of Escondido*.[410] In this case the County Council of the Boy Scouts and several individual scouts brought suit to enjoin a proposed sale by the city of a piece of property held in trust for the benefit of the scouts.[411] The plaintiffs did not allege fraud or

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409 In *Sarkeys v. Independent School District No. 40, Cleveland County*, 592 P.2d 529 (Okl. 1979), a private plaintiff convinced the attorney general to bring suit against a charity his father had established and then, after the attorney general accepted a compromise, he attempted to intervene and appeal the decision. The plaintiff's failure to intervene in the original action as well as the absence of any "allegation of fraud or collusion concerning the settlement" carried weight with the court. Of more importance was the fact that the plaintiff did not represent the benefitted class and was not directly injured by the breach of trust. The absence of fraud, the extreme remedy sought (allowing the plaintiff to appeal a case to which he was not a party), and the plaintiff's lack of a direct and defined interest in the charity all weighed against recognizing his standing. The Oklahoma Supreme Court did acknowledge the right of a person with a "special interest" in a trust to bring suit. But based on the various factors summarized above, it denied standing to this plaintiff, who purported to be a "visitor" to the trust. *Id.* at 535.

410 14 Cal. App. 3d 189 (Cal. Ct. App. 1971).

411 *Id.* at 191-93.

deliberate misconduct.[412] The remedy sought by the plaintiff was equitable (an injunction), since a trustee cannot apply property to a wider or broader public use than that provided for in the original trust document.[413] The attorney general had not yet taken part in the action, and the court was not "influenced by the Attorney General's statement, made for the first time at oral argument, that he has now filed an action to enforce the trust."[414] All of these factors were considered by the court and all weighed slightly in favor of granting standing.

The factor which tipped the scale for the *Escondido* court, however, was the relationship between the plaintiffs and the charity. This court, interpreting the *Holt* decision,[415] reasoned that "the administration of charitable trusts stands only to benefit if in addition to the Attorney General other suitable means of enforcement are available."[416] The court pointed out that the plaintiff, the San Diego Council of Boy Scouts, was charged by its articles of incorporation and bylaws with protecting and representing its district and the scouts within.[417] The judges specifically said that they could "think of no more responsive or responsible party to represent the boy scouts of the Palomar District in such litigation."[418] In short, the property was held in trust for the Boy Scouts, who would have been directly injured by a breach of trust. Although there were many boy scouts who individually might not have had standing, there was also a representative council which brought suit in their name. The "benefitted class" (or rather its representative) was thus small and identifiable. The closeness of the relationship between the plaintiff and the charity, the plaintiff's status as an identifiable beneficiary, and the plaintiff's representative and responsible nature allowed the court to justify a grant of standing. Although the *Escondido* court itself did not use the term

412 They did note, however, that the city claimed to hold the property free and clear, in violation of the trust agreement. *Id.* at 196.

413 *Id.*

414 *Id.* at 196 n.1.

415 *See supra* note 300.

416 *Escondido*, 14 Cal. App. 3d at 195.

417 *Id.* at 196.

418 *Id.*

"special interest," it allowed the plaintiff to sue in a representative capacity and justified its relaxation of traditional standing limitations by recourse to the elements of the "special interest" described above.

Another example of how courts analyze the "special interest" elements to grant standing is the New York decision of *Alco Gravure, Inc. v. Knapp*.[419] Although New York has a very restrictive standing rule,[420] the Court of Appeals permitted private plaintiffs to sue a charitable foundation based on a "special interest" after weighing the elements discussed in this article. In *Alco Gravure*, several possible beneficiaries[421] sued to prevent a nonprofit corporation from transferring its assets to another charity with a similar, but not identical, purpose. In that case, the plaintiffs alleged no fraud. The court first noted that both the attorney general and a Supreme Court judge[422] had approved the transfer of assets.[423] (The court did conclude, however, that the "pro forma" approval of the transfer was clearly inadequate to immunize it from scrutiny.)[424] These factors thus militated against granting standing to the plaintiffs.[425]

On the other hand, both the extraordinary nature of the acts complained of and the nature of the benefitted class weighed heavily in favor of allowing the suit to go forward. Although the Court of Appeals implied that it would deny standing to a private plaintiff challenging the administration of a charity, it recognized that this case concerned "not the ongoing administration of a charitable corporation, but the dissolution of that corporation and the complete elimination of the individual plaintiffs' status as preferred beneficia-

419 479 N.E.2d 752, (N.Y. 1985).

420 *See supra* text accompanying notes 79-81.

421 The Knapp Foundation was established to assist employees of the founder's corporations and their families and to make contributions to charitable and nonprofit foundations. The plaintiffs were a "successor" corporation and two employees. *Alco Gravure*, 479 N.E.2d at 754-55.

422 In New York, the Supreme Court is the trial court.

423 *Id.* at 756.

424 *Id.* at 757.

425 The court, in fact, refused to pass on the merits of the transfer. *Id.* at 759. It also required that the attorney general be given notice of the action before it proceeded further. *Id.* at 756.

ries."[426] The court found in the remedy sought — the preservation of the charity itself — a reason to allow the litigation to go forward. The court also recognized that the class of beneficiaries "is both well defined and entitled to a preference in the distribution of defendant's funds."[427] The small and identifiable nature of the benefitted class (employees of the Knapp corporations), and the fact that the beneficiaries were threatened with a direct injury if the funds were transferred (they would be denied support), influenced the court's decision. In allowing the suit to go forward, the court decided that the remedy sought and the nature of the benefitted class outweighed the absence of fraud and the attorney general's participation. The court thus found that this particular group of people had a "special interest" in these charitable funds and could maintain suit.[428]

These examples demonstrate how the courts have evaluated, weighed, and used various factors in their decisions about whether or not a plaintiff has a "special interest" in a charity. All of these elements have been used individually by courts to show that a plaintiff does or does not have a "special interest" in a charity. However, a court can also evaluate these elements in combination, weighing them against one another in order to evaluate a plaintiff's "special interest."

E) The Development of the Special Interest Doctrine: A Case Study

In our study of the expansion of standing in the charitable sector, we have taken examples of the "special interest" doctrine from many different jurisdictions in an effort to show how a general pattern has emerged. Nevertheless, some jurisdictions have been more liberal than others, and a few have led the way in the creation of more liberal standing rules for private plaintiffs vis-a-vis charities. One such state is New Jersey. In order to better illustrate how the "special interest" doctrine has developed over time as the main tool for the expansion of the class of those persons able to sue, we will examine the development over the past century or so of the rules governing standing to sue charities in New Jersey.

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426 *Id.* at 756.

427 *Id.* at 755.

428 *Id.*

New Jersey apparently always has had liberal standing requirements, and it has never subscribed to the idea that no one, not even minority trustees, can sue a charity, except for the attorney general. At the turn of the century, the New Jersey rule seems to have been that trustees, executors, and those specially interested[429] could maintain a suit against a charitable trust, while ordinary taxpayers and citizens could not.[430] A private plaintiff had two options when challenging the actions of a charity: to proceed by bill and information in conjunction with the attorney general (i.e., as a relator), or to proceed by bill on behalf of herself and all others similarly situated, making the attorney general a defendant.[431] Ordinary citizens, residents, and taxpayers were consistently denied standing. Further, the attorney general was an indispensable party,[432] and only if he was before the court, as a plaintiff or as a defendant, could the case go forward.[433] Although New Jersey did not restrict standing as stringently as most other states, the attorney general was still a necessary party to any litigation, and plaintiffs needed a well-defined interest in the charity.

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429 This term is not defined in the relevant cases cited below. *See, e.g., Green v. Blackwell*, 35 A. 375 (N.J. Super. Ch. 1896); *In re St. Michael's Church*, 74 A. 491 (N.J. Ch. 1909).

430 One New Jersey court dismissed a bill brought by the next of kin of the founder of a charitable trust asking that the trust be ended or, in the alternate, that a new trustee be appointed. The court refused to end the trust since a charitable trust will not fail for want of a trustee. But the court also refused to appoint a trustee at the request of the plaintiffs because neither the attorney general nor any beneficiary was before the court. "[A] citizen of the state of New Jersey, not being a trustee or executor or otherwise especially interested, [cannot] file a bill in a case in which he seeks to do nothing more than vindicate a public right." *Green v. Blackwell*, 35 A. 375, 376 (N.J. Super. Ch. 1896). *See also Cuthbert v. McNeill*, 142 A. 667 (N.J. Ch. 1928), *aff'd*, 146 A. 881 (N.J. Err. & App. 1929). Residuary legatees challenging a trust made the attorney general a party defendant, although he refused to participate. The court dismissed the bill because only the attorney general, on behalf of the public, and the trustee or cestui qui trust, on behalf of the trust, can sue a charity. *Id.* at 670.

431 *In re St. Michael's Church*, 74 A. 491, 492 (N.J. Ch. 1909) (residuary legatee has only her right as a member of the public to question the administration of a charitable trust, which means that she cannot question it).

432 *Green*, 35 A. at 376.

433 *Bible Readers' Aid Soc. of Trenton v. Katzenbach*, 128 A. 628, 628 (N.J. Ch. 1925).

Gradually, the role of the attorney general diminished in New Jersey. In *In Re Estate of Pfizer*,[434] the court restated the general rule that the attorney general was a necessary party to all litigation involving charities, and it refused to enter a final judgment until the attorney general had been made a party.[435] The court did accept, however, that if the attorney general thought a correct result had been reached, judgment could be entered without further hearings or proceedings.[436] This implies that as long as the parties give the attorney general the opportunity to participate, the case can go forward. Following this rule, a New Jersey court in 1987 denied the attorney general's motion to reopen a case involving the distribution of charitable funds.[437] The court acknowledged that the attorney general was labelled an "indispensable party" and that he had statutory authority to intervene in cases involving charities.[438] But the court decided that the intent of the law was to afford *notice* to the attorney general and that he need not be a *party* to all charities proceedings.[439] If the interested parties have given notice to the attorney general and raised and litigated an issue, then the judgment is final and the attorney general, notwithstanding his role as protector of the public interest, cannot challenge it.[440] In New Jersey today, the attorney general has the option to intervene, but is no longer indispensable to litigation.

As the role of attorney general enforcement diminished in New Jersey, the role of private parties grew. Starting with *Leeds v. Harrison*[441] in 1950, New Jersey began to adopt a liberal construction of what constitutes a "special interest" in a charity. This action arose when several members and others interested in becoming members of a Y.W.C.A. challenged the composition of the board of directors and the requirement that members sign a "statement of

434 110 A.2d 40 (N.J. Super.), *aff'd*, 110 A.2d 54 (N.J. 1954).

435 *Id.*

436 *Id.*

437 *In re Estate of Yablick*, 526 A.2d 1134, 1138 (N.J. Super. A.D. 1987).

438 *Id.* at 1138.

439 *Id.*

440 *Id.*

441 72 A.2d 371 (N.J. Super. Ch. 1950).

faith" asserting their membership in a Protestant church. The *Leeds* court affirmed as the general rule that members of the public-at-large could not sue a charity, and it dismissed the suit against a Y.W.C.A., a charitable corporation, by non-members.[442] The court also ruled that mere contributors to a charitable fund did not have standing to question the disposition of that fund, and it dismissed the suit brought by contributors to the Y.W.C.A..[443]

But insofar as *members* of the charitable corporation were concerned, the court ruled that they did have "rights" in the corporation arising from the certificate of incorporation, constitution, and by-laws.[444] The corporate charter, which granted those admitted to membership certain rights, constituted a contract between the corporation and its members, and the directors bear a fiduciary relationship to these members.[445] The same "rights and liabilities" arose between the members and the nonprofit as between stockholders and a for-profit corporation.[446] The suit brought by the plaintiffs was "likened to a derivative or representative suit brought in connection with a stock corporation."[447] The court did not explicitly state why, in the absence of a pecuniary interest, the members had "rights and liabilities" in the corporation. It implied, however, that the mere fact of membership gives an interest analogous to contractual (or shareholder) rights. Although contributors and non-members did not have standing to challenge the actions of a charity, except as relators for an information filed by the attorney general,[448] members of a charitable corporation had an interest sufficient to allow them to sue.

Later New Jersey decisions further enlarged the circle of those eligible to maintain a suit against a charity. In the 1967 case of *City*

442 *Id.* at 380.

443 The court stated, without explaining its reasoning, that "there must be something peculiar in the transaction, beyond the mere fact of contribution, to give a contributor to a charitable fund a foothold in court." *Id.* at 380. This rule, of course, has a foundation in simple common sense: an organization like the Y.W.C.A. has millions of contributors: should they all have a right to sue ?

444 *Id.* at 378.

445 *Id.* at 377-78.

446 *Id.*

447 *Id.*

448 *Id.* at 380-81.

of Paterson v. The Paterson General Hospital,[449] the court rejected a challenge by individual residents and taxpayers to an attempt by the trustees to relocate a hospital.[450] But although the plaintiffs lost on the merits of the case, the court specifically affirmed the right of these plaintiffs to bring the suit.[451] The court ruled that the plaintiffs, as residents, had a sufficient "special interest" in the local hospital, a charitable corporation, to allow them to challenge its relocation.[452] The court never explained why these plaintiffs had a "special interest," but did imply that local residents are, by their very nature, specially interested in a local hospital. Logically, as the court implies, if these plaintiffs were not interested in the hospital's location (and the remedy sought was to keep the hospital in its present location), then who was?

The court also cited a policy argument for its recognition of these plaintiffs: the lack of supervision of charities by state attorneys general. The court reasoned that "[w]hile public supervision of the administration of charities remains inadequate, a liberal rule as to the standing of a plaintiff to complain about the administration of a charitable trust or charitable corporation seems decidedly in the public interest."[453] The New Jersey court extended standing to a previously unrecognized plaintiff via the "special interest" doctrine because of a desire to increase the supervision of charities and a lack of supervision by the state.

The willingness of New Jersey courts to grant standing to the public is further demonstrated by their decision of *Township of Cinnaminson v. First Camden National Bank and Trust Co.*.[454] An earlier decision had granted permission to apply the funds from a trust established to support a town library to the libraries of two adjacent townships.[455] After federal funds became available to build a library in Cinnaminson, local residents sued to enforce the

449 235 A.2d 487 (N.J. Super. Ch. 1967).

450 *Id.* at 494.

451 *Id.* at 495.

452 *Id.*

453 *Id.* at 495.

454 238 A.2d 701 (N.J. Super. Ch. 1968).

455 *Id.* at 705.

trust based on its original intent.[456] The court granted the plaintiffs standing based on their status as citizens of the township and beneficiaries of the trust.[457] The court reasoned that "since the township is in reality nothing more than the governmental representative of its citizens, any legacy bequeathed or devised to it for the direct benefits of its citizens is by implication a legacy to the individual citizens."[458] Seemingly, a resident of the township is, ipso facto, a beneficiary of the trust. And the rule in New Jersey, as the court presented it, is that members of generally benefitted classes are permitted to bring suit to compel enforcement of charitable trusts.[459] The court repeatedly emphasized the "special interest" of the plaintiffs, although it never defined this term. Presumably, any member of the generally benefitted class, anyone not a stranger to the trust, in short any resident of the township, had a "special interest."[460] The *Cinnaminson* case thus represents an extremely liberal use of the "special interest" doctrine to grant standing to a previously unrecognized plaintiff.

At the beginning of the century, New Jersey held the attorney general a necessary party to litigation involving charities, and granted private parties standing only in limited circumstances. The role of the attorney general has diminished over time, however, and there has been a rise in the willingness of courts to grant standing to private parties. The courts have identified certain private parties as having a "special interest" in a charity, based on the various factors discussed in this article. Although it must be recognized that New Jersey's standing rules are more liberal than those of most states, they nonetheless provide a notable example of how the courts have seized upon the "special interest" doctrine to justify an expansion of standing in the charitable sector.

F) Examples of How Standing Might be Granted Today

In order to demonstrate how courts might apply this concept of a "special interest" to a contemporary lawsuit, we present several

456 *Id.* at 706.

457 *Id.* at 707.

458 *Id.* at 706.

459 *Id.* at 707.

460 *Id.*

hypothetical situations. The first involves a national charity, whose director has been accused of self-dealing: granting himself an excessive salary and giving his friends and family lucrative jobs and service contracts. The second hypothetical involves a community hospital, a charitable corporation, which has not been serving indigent members of the local community. The final hypothetical involves an environmental foundation which has received funds for a certain project but has spent the money on something different (but equally worthwhile).[461]

For our first situation, let us assume that the charity in question is the mother organization for a large number of smaller local charities. It receives dues from each local charity and uses this money for national advertising and fund-raising campaigns, staff and volunteer training, government relations, research, etc. The national director of this organization receives a very generous salary and has been very liberal about putting her family on the payroll. Two lawsuits are launched: one by members of the public (as potential beneficiaries), and another by a local branch of the charity. Both want to replace the director and her relatives and to redirect savings toward the charity's purposes.

In this situation, members of the public, whether suing as individual potential beneficiaries or as part of a class action, would not be granted standing. Admittedly, their accusations of fraud and misconduct on the part of the national director would be important to the court. But the plaintiffs seek an extreme remedy, the removal of the director,[462] rather than mere access to records or even an injunction or specific performance. In addition, the acts of which the plaintiffs complained were not extraordinary ones, but maladministration in the ordinary course of business. Furthermore, the attorney general is not "disabled" by the controversy, and may even have a certain incentive, given the nation-wide character of the charity and the (undoubtedly) high profile of the dispute, to take aggressive action. Above all, the benefitted class represented by the plaintiffs in this action is very large and amorphous. It has not suffered a

461 Note that although these hypotheticals are based on actual situations, we have changed the facts so as to make the situations directly applicable to the discussion in this article. *See supra* notes 5-8 and accompanying text. We have no opinion as to the actual allegations made against the United Way, the Methodist Hospital of Houston, or the Sierra Club.

462 To justify removal, the alleged misconduct must demonstrate such a lack of managerial capacity or fidelity in the manager as to endanger loss of the charitable property. FISCH, CHARITIES, *supra* note 11, § 712.

particularized injury due to the alleged misadministration, but simply thinks that certain funds could be better spent. All of these factors weigh against granting standing to the "public" plaintiffs. Such a plaintiff does not have a "special interest" in the charity.

To examine a variation of the above scenario, what if the plaintiff were not a member of the public, but instead one of the local charities sending dues to the national branch? Except for the nature of the benefitted class, the various factors remain the same. Although the local charity is a donor to the national headquarters (and cannot claim standing on that ground), it is also a beneficiary, in the sense that it receives the benefits of the national advertising and fund-raising campaigns, etc. The local charity thus has a considerably more direct interest than the general public in how the national headquarters spends its money. Nevertheless, the true beneficiaries of the charity's activities are the poor and unfortunate of the country; the help given to the local charity is largely incidental to this greater goal. This factor, together with the extreme nature of the remedy sought, militates against granting standing to the local charity. If the charity, instead of suing to remove the director, were suing because the national headquarters had decided to cancel all advertising in their region (for example), the injury to the plaintiff charity would be more direct and the remedy less extreme, and a court would be more inclined to allow the suit. Even so, such a grant of standing would be at the fringe of the generally accepted concept of a "special interest."[463] The very nature of the national charity and of its undertakings weighs against any individual or organization having a direct interest in its activities. The "special interest" doctrine is thus inapplicable to this situation.

In the second example, a nonprofit community hospital was organized to provide medical services to indigent members of the local community. The hospital has received numerous donations for this worthy purpose, but is spending less than 1% of its revenue on charity care (i.e. most of its services go to those who can pay for them). The attorney general, although aware of the situation, has

463 In these situations, it is possible that a local charity or a group of locals will have representation on the national board. *Cf. Picking Up the United Way Pieces*, N.Y. TIMES, Apr. 19, 1992, § 4, at 10. In such a case, the local charity would have standing to sue based on its status as a minority trustee or director. The local charity would have a direct interest in the national's affairs because of the fiduciary relationship between the two.

refused to act.[464] Many important civic leaders are members of the hospital board and the attorney general does not want to alienate them. There are hundreds of donors to the hospital (ranging from a local philanthropist who gave $1 million to local citizens who contribute $10 a year) and none have any real interest in the institution. However, a group of local residents, helped by counsel provided by a public interest law firm, have filed suit asking for declaratory relief. They want to compel the hospital to spend a certain percentage of its revenue (perhaps equal to the percentage of its income it receives from charitable contributions) on care for indigent local residents.

Although such plaintiffs would be denied standing under the traditional approach, a flexible court, using the "special interest" doctrine, would likely grant standing. The plaintiffs seek an equitable remedy: the enforcement of the charitable purposes of the hospital and its contributors. On the other hand, the plantiffs are challenging the day-to-day administration of the hospital. The plaintiffs are not alleging actual fraud, but the hospital is clearly not spending money on the purposes for which it was chartered, so the hospital's formal purposes are being neglected. No ongoing harassment seems likely since this type of suit probably only would be brought once, because a favorable result for the plaintiffs would result in a permanent court order enjoining the hospital to make certain types and levels of expenditures. The class of beneficiaries is admittedly somewhat amorphous. But the citizens bringing the lawsuit are definitely members of the benefitted class and are being directly injured by the hospital's failure to fulfill its charitable responsibilities. These plaintiffs have a direct interest in challenging the hospital's actions or omissions and have a "special interest" in the proper administration of the hospital itself. The courts, particularly those of jurisdictions such as New Jersey and California that take an expansive view of standing rights, thus probably would grant standing to these plaintiffs. Without use of the special interest doctrine, this complaint about the maladministration of a charity might not be heard, unless the attorney general had sufficient resources to investigate and act.

464 In the model for this hypothetical, the Texas Attorney General did file suit against the hospital. *Maddox Sues Methodist Hospital for Alleged Lack of Charity Care*, UPI, Nov. 26, 1990, *available in* LEXIS, Nexis Library, UPI file. The suit was dismissed by summary judgement, however, on the grounds that providing medical care of any kind was inherently charitable. Tara Parker Pope, *Lawsuit Against Methodist Tossed Out*, HOUS. CHRON., Feb. 20, 1993, at A1.

To postulate a final scenario where the "special interest" doctrine would make a clear difference, let us consider an environmental conservation foundation. This foundation has solicited donations to allow it to buy a large plot of land in a rural area. This land, a scenic mountain valley, will not be developed. Instead, 50 families of impoverished, local, immigrant farmers will use it as grazing pasture, thus preserving its natural beauty. The charity received the donations, but instead of buying the land, used the money to fund a recycling project in another state. Assume further that the attorney general, although advised of the situation, has refused to act because she and several of her assistants are active supporters of the environmental foundation.[465] The donor has retained no interest in her gift and is in no sense a beneficiary of the charity, and so cannot maintain an action.[466] Do the impoverished immigrant farmers have standing to sue the charity to force it to spend the money on the intended purpose?

Under the "special interest" doctrine, as explained in this article, the answer would almost always be yes. The attorney general is unavailable. The remedy sought is equitable: the specific enforcement of a charitable pledge. Although the plaintiffs are not alleging actual fraud, elements of misconduct are certainly present in that the foundation has misdirected the funds. Above all, and this is the heart of the special interest doctrine, the plaintiffs are members of a small class whose interests are directly affected. The 50 families of immigrant farmers (certainly a small class) have been injured by the charity's failure to fulfill its obligations. They have an interest in the charity distinct from that of the general public, and their suit will not open the doors to endless litigation. This demonstrates sufficient "special interest" in the charity to entitle the farmers to sue to enforce the charitable obligation.

Members of large, shifting classes and the public in general do not have a "special interest" and cannot maintain a suit against a charity, as in the example of an individual suing a national charity to remove an overcompensated director. Nor does an incidental beneficiary have a special interest or standing to sue, as in the example of a local charity suing the national headquarters. But courts will grant standing, particularly if the remedy sought is

465 In the actual situation on which this hypothetical is modelled, the donor has asked the New Mexico Attorney General to take action against the charity, and the Attorney General has filed suit. *See supra* notes 5-8 and accompanying text.

466 *See supra* note 61 and accompanying text.

reasonable and desirable from a policy standpoint and state enforcement is unavailable, to individuals with a direct interest in the activities of the charity. Individuals such as these, including local residents not being served by a community hospital, or immigrant farmers suing to enforce a gift made for their benefit, form the *raison d'etre* of the "special interest" exception to the general limitations on standing to sue a charity. They probably should be granted standing to sue regarding misconduct. Without this exception, as courts have increasingly come to recognize, charitable beneficiaries would have no recourse to the courts and neither the interests of these beneficiaries, nor the interests of society in general, would be served.

IV) Conclusion

The numerous cases discussed in this article, further illuminated by the preceding hypothetical examples, indicate a slowly growing tendency in the law to allow private individuals to enforce what is commonly considered the "public good" that charities are expected to serve — largely by holding the management of charitable organizations more directly accountable to members and beneficiaries. Whereas at one time charities largely could operate without taking into account the possibility of legal challenge save by the attorney general (who often was restrained by practical considerations from acting, except in the most egregious situations), they must now contemplate defending themselves before a much wider audience. Statutory or common law in many states currently allows for the cause of action we have termed a "member derivative suit," similar to a shareholder derivative suit in corporate law, which allows members of charities to file suit, based on directorial malfeasance, for inspections of records or injunctions against *ultra vires* or other improper acts. Many charitable entities, however, do not have members, at least as recognized by courts. Accordingly, it is especially significant that a number of courts have employed a version of the "special interest" doctrine to extend standing to parties beyond the formally recognized "membership" of a given charity. The courts have used the "special interest" doctrine in a manner so flexible that it could fairly be called "loose." Courts usually consider one or more of the following factors:

1. the extraordinary nature of the acts complained of and of the remedy sought by the claimant;
2. the presence or absence of bad faith on the part of the charity being challenged;

3. the availability, willingness, or effectiveness of the attorney general as *parens patriae*;
4. the nature of the benefitted class and its relationship to the charity being challenged; and
5. the social or subjective desirability of granting standing to a given party.

As noted earlier, such an expansion of charitable enforcement has costs to both the charities themselves and to society at large, especially in opening charities to potentially vexatious litigation. Yet in the face of the tremendously important role charities now play and the wide influence they wield, courts have increasingly accepted those costs by expanding the "special interest" doctrine. In light of the influence and wealth possessed by charities, the vulnerability of such entities to abuse, and the lack of interested investors to police operations, a reasonable argument can be made to strengthen enforcement by allowing other categories of persons to sue. Although increased enforcement alone cannot eliminate abuse, the deterrent value of a general expansion of public scrutiny will have a beneficial effect against abuse that may well outweigh the costs and risks of more litigation.

The growth of charitable enforcement mechanisms clearly reflects a new weighing of important policy considerations by courts and legislatures attempting to hold charities effectively accountable without overburdening them. The ad hoc nature of state statutory and common law responses to the question, however, has resulted in a distinct lack of uniformity among the states in accepting or utilizing the "special interest" doctrine. This article provides some basis for analyzing the likelihood that a particular plaintiff may be granted standing to sue a charity and highlights some of the key factors that either party in a standing battle should be prepared to argue regarding the "special interest" doctrine. It cannot, however, provide a specific description of the doctrine and its application that holds true in every state, or even consistently in the courts of the same state. This doctrinal looseness not only interferes with enforcement efforts, but it also prevents parties from accurately ascertaining their rights and duties before entering litigation, a long-recognized goal of the legal system.

One possible solution to this problem would involve the creation of a national oversight committee or equivalent state committees that would evaluate claims against charities based on a

set of specific and uniform guidelines,[467] rather than on such subjective and variable factors as attorney general availability or local standing doctrine. The committee could be vested with authority to pursue charities that have allegedly violated rules or breached their duties in the federal courts, or it could simply make recommendations to state attorneys general as to whether complaints from private parties would justify filing a state court suit.[468] Although the authors of this article believe that the benefits of more effective scrutiny and of consistent doctrine make this approach attractive and probably the most desirable one, it would involve a radical departure from current practice and probably an increased commitment of financial resources. Therefore, this system is not likely to be put into practice in the near future. For the moment, we can only suggest that the nonprofit law sector consider the pros as well as the cons of a substantial restructuring.

Another, less dramatic approach would involve the promulgation of a Uniform or Model Act that would reflect the policy concerns of both charities and society at large. Such an act would provide guidance to courts grappling with the inherent problems of deciding when and how to expand standing in the charitable sector.[469] A uniform code would both make the courts less likely to rely on the poorly defined and subjective factors that often seem to be at work now and increase the level of predictability of potential litigation. The disappointing fact is that the relevant proposals and models have not addressed this issue.

One immediately practical suggestion is available: to make more consistent and predictable the judicial use of the special interest doctrine. It is clear that courts often use the "special interest" doctrine to ensure that charities are subject to some form of effective scrutiny, especially on important issues. This mechanism will increase in fairness and predictability, and consequently in value, if courts adhere to a specific formulation of the doctrine. The multi-factor test used so far by only a few courts seems to be an effective approach. It is flexible and can readily accommodate factual

467 Such a commission would have powers analagous to those of the British Charity Board. *See supra* text accompanying notes 58-66.

468 It is worth noting that a few commentators have recommended this system. *See, e.g.*, Karst, *The Efficiency of the Charitable Dollar, supra* note 3, at 476-83.

469 THE UNIFORM SUPERVISION OF TRUSTEES FOR CHARITABLE PURPOSES ACT, *see supra* note 144, represents a similar effort. The Act has not been adopted in many states, however.

variations such as the level of activity of the relevant attorney general or the crucial quality of the complained-of actions.

Certain factors should always play important roles. In particular, the presence of sincere allegations of managerial bad faith[470] and a request for a limited remedy should favor a grant of standing to private parties. A claim that the complained-of acts will have an extraordinary impact on the charity should be especially persuasive in the plaintiffs' favor. On the other hand, the authors hope that the influence of subjective social factors will wither away. The nature of the relationship between the charity and the plaintiffs probably will remain a less easily measured factor, but the existence of a well-defined and limited group of plaintiffs who have a clear interest in the operation of the charity should favor a grant of standing. If courts allow suits by larger groups of plaintiffs with more vague interests, they should understand that this could substantially expand the range of potential plaintiffs in charitable abuse cases.

In short, we recommend that courts explicitly adopt the multi-factor approach used in the *Escondido* (San Diego Boy Scouts) and *Alco Gravure* cases. We have just outlined the roles specific factors could play. This method would allow courts to grant standing to private plaintiffs needed to keep charities accountable on important matters while avoiding excessive and undesirable litigation burdens on those charities, all with greater consistency and predictive value than is currently the case.

While the expansion of standing for private parties has been a somewhat irregular trend in the law of charities, it nevertheless has an important role to play. Establishing guidelines for courts to refer to in considering whether or not to grant standing to a particular plaintiff is one possible means of strengthening enforcement and helping to curb or remedy some of the abuses that threaten to destroy the public trust that is vital to the very existence of charities. Whatever response is decided upon, the competing societal interests of leaving charities relatively unencumbered from harassing claims yet providing needed review of their practically unfettered discretion must be considered and balanced. State courts that have engaged in that balancing act seem to realize the nature and importance of their task, and some have been willing to develop new rules, as reflected in the various applications of the special

470 Perhaps such claims of bad faith should be forced to be pleaded "with particularity" as are fraud claims under Rule 9(b) of the Federal Rules of Civil Procedure.

interest doctrine. The next step, however, should be the regularization of this doctrine and the creation of a consistent rule of standing for private parties to sue in the charitable sector.