RECOVERY OF ATTORNEYS' FEES BY PREVAILING PARTIES IN ENVIRONMENTAL LITIGATION

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1. "AMERICAN RULE"

- EACH SIDE PAYS ITS OWN LEGAL FEES, REGARDLESS OF WHO WINS CASE

2. "ENGLISH RULE"

- LOSING SIDE PAYS ATTORNEYS FEES OF WINNING SIDE

POLICY ISSUES:

AMERICAN RULE

- MORE OPEN APPROACH TO THE COURTHOUSE DOOR

- MORE SKEWED TOWARD ALLOWING LITIGANTS TO ATTEMPT TO VINIDCATE RIGHTS

- MORE FORGIVING OF MEDIOCRE OR MARGINAL CASES

POLICY ISSUES (CONTINUED)

ENGLISH RULE

- TIGHTER APPROACH TO THE COURTHOUSE DOOR

- MORE SKEWED TOWARD HOLDING LITIGATNS ACCOUNTABLE FOR THE LACK OF SUCCESS OF THEIR CLAIMS

- IN THEORY, WEEDS OUT MORE MEDIOCRE OR MARGINAL CASES

EXCEPTIONS TO AMERICAN RULE: FEE SHIFTING STATUTES

- "PRIVATE ATTORNEY GENERAL STATUTES"

California Code of Civil Procedure Sec. 1021.5

"Upon motion, a court may award attorneys' fees to a *successful party* against one or more opposing parties in any action which has resulted in the *enforcement of an important right affecting the public interest* if: (a) a *significant benefit*, whether pecuniary or nonpecuniary, has been conferred on *the general public or a large class of persons*, (b) *the necessity and financial burden of private enforcement*, or of enforcement by one public entity against another public entity, *are such as to make the award appropriate*, and (c) such fees should not in the interest of justice be paid out of the recovery, if any. *With respect to actions involving public entities, this section applies to allowances against, but not in favor of, public entities . . . .*"

1. "IMPORTANT RIGHT" . . . "SIGNIFICANT BENEFIT"

- NOT DE MINIMUS RELIEF

- NOT TRIVIAL

2. "GENERAL PUBLIC OR LARGE CLASS OF PERSONS"

- NOT PRIMARILY PRIVATE BENFIT

- CAN BE "NIMBY" SUIT, BUT NOT TOO NARROW

3.	"NECESSITY & FINANCIAL BURDEN OF PRIVATE	ENFORCEMENT"

- USUALLY FOUND WHERE PRIVATE CITIZEN VS. GOVT.
- USUALLY FOUND WHERE GOVT DID NOT STEP UP AND CITIZEN SUIT WAS NECESSARY

4. "APPLIES AGAINST, BUT NOT IN FAVOR OF, PUBLIC ENTITIES"

- PRIVATE CITIZENS CAN RECOVER FEES AGAINST GOVT, BUT GOVT CANNOT RECOVER FEES AGAINST PRIVATE CITIZENS

- GOOD NEWS FOR CITIZENS' GROUPS

METHODOLOGY FOR CALCULATING REASONABLE LEGAL FEES

- *"LODESTAR" METHOD (SERRANO V. PRIEST (1977) 20 Cal.3d 25)*

NUMBER OF HOURS REASONABLY
EXPENDED ON THE CASE
X
REASONABLE HOURLY RATE
= REASONABLE ATTORNEYS FEE

1. REASONABLENESS OF HOURS SPENT

- NOT EXCESSIVE HOURS
- NOT FOR IRRELEVANT OR TANGENTIAL ISSUES
- NOT EXCESSIVE DUPLICATION BY MULTIPLE ATTYS
- CHALLENGING ISSUES OR HEAVILY CONTESTED MATTERS MAY JUSTIFY UNUSUALLY HIGH HOURS
- JUDGES MAY ELIMINATE TIME THAT THEY DO NOT BELIEVE IS PROPERLY COMPENSABLE
- NO MATHEMATICAL FORMULA FOR "REASONABLNESS"
- JUDGES USE THEIR OWN EXPERIENCE AS LAWYERS

2. REASONABLENSS OF HOURLY RATES

- EXPERIENCE AND EXPERTISE IN SIMILAR CASES
- LAWYER'S NORMAL RATE FOR HOURLY PAYING CLIENTS
- THE PREVAILING HOURLY RATE IN THE LEGAL MARKET IN WHICH THE CASE WAS LITIGATED (TUOLOMNE CASE)
- THE COMPLEXITY OF THE CASE

CONTINGENCY MULTIPLIERS

- WHAT: ADDITIONAL DISCRETIONARY PAYMENT TO COUNSEL IN CONTINGENCY CASES, CONSISTING OF SOME MULTIPLE OF THE LODESTAR AMOUNT

- EXAMPLE: $50,000 LODESTAR x MULTIPLIER OF 2 = $100,000 FEE

- WHY: COMPENSATE COUNSEL FULLY BECAUSE HOURLY RATES DO NOT TRULY COMPENSATE

FACTORS FOR MULTIPLIERS:

A. RISK OF HANDLING CASE ON CONTINGENCY BASIS

B. SKILL IN HANDLING CASE

C. DIFFICULTY/NOVELTY OF LEGAL ISSUES

D. DIFFICULTY OF CLIENT IN OBTAINING COUNSEL

E. DELAY IN PAYMENT

F. OPPORTUNITY COSTS

OTHER POINTS RE "MULTIPLIERS"

- AUTHORITY: COMMON LAW (CASE LAW BY JUDGES) NOT STATUTES
- THEORY: MAKE COUNSEL WHOLE (LIKE HOURLY)
- DISCRETIONARY
- USUALLY 1-2X RANGE
- NOT AVAILABLE IN FEDERAL COURT – JUST CA COURTS (& OTHER STATE COURTS)

PROCESS OF OBTAINING AWARD OF ATTORNEYS FEES

- MOTION FOR AWARD OF ATTORNEYS FEES AND COSTS

- MADE AT END OF CASE, AFTER FAVORABLE RULING ON THE MERITS

BASIC CONTENTS OF FEE MOTION

- A.   LEGAL BRIEF EXPLAINING THE FACTS OF CASE, THE APPLICABLE LAW ON ATTORNEYS FEES, AND SUMMARIZING THE HOURS SPENT AND HOURLY RATES

- B.   DETAILED DECLARATIONS BY THE LAWYERS AS TO WHAT THEY DID, WHY IT WAS NECESSARY, HOW MUCH TIME THEY SPENT

OPPOSITION BRIEF TO FEE MOTION

- USUALLY CONCEDES PLAINTIFF "PREVAILED"

- BUT OFTEN ARGUES:

  - TOO MUCH TIME SPENT ON CERTAIN ISSUES/PROJECTS
  - CERTAIN ISSUES NOT SUCCESSFUL

    IRONY: SAME PEOPLE WHO FOUGHT YOU FOR YEARS EVERY STEP OF WAY, NOW CLAIM THAT YOU DIDN'T NEED TO SPEND ALL THAT TIME DOING WHAT WAS NECESSARY TO PREVAIL!

FINAL STEP IN FEE MOTION PROCESS

- HEARING – ORAL ARGUMENT

☺ PREVAILING COUNSEL CAN RECOVER ATTORNEYS FEES FOR WORK ON THE FEE MOTION ☺

EXAMPLES OF OTHER STATUTES BESIDES C.C.P. SEC. 1021.5

CALIFORNIA:
- PUBLIC RECORDS ACT, GOVERNMENT CODE SEC. 6259

FEDERAL:
- **CLEAN WATER ACT:**
  - STRAIGHT PREVAILING PARTY FEES SIMILAR TO C.C.P SEC. 1021.5
- **EQUAL ACCESS TO JUSTICE ACT:**
  - -- SUITS AGAINST UNITED STATES
  - -- ONLY GET FEES IF YOU PREVAIL AND THE GOVERNMENT'S POSITION WAS NOT "SUBSTANTIALLY JUSTIFIED"

"SLAPP" = STRATEGIC LAWSUIT AGAINST PUBLIC ARTICIPATION

SLAPP SUIT = WHAT IS IT?

- LAWSUIT CHALLENGING SPEECH/1ST AMDMT ACTIVITY

- USUALLY INTENDED TO (OR DOES) CHILL, PUNISH OR INTIMIDATE SPEECH

- USUALLY ALLEGES TORT CLAIMS SUCH AS LIBEL, MALICIOUS PROSECUTION, INTERFERENCE WITH CONTRACT

ANTI-SLAPP STATUTE: CAL. CODE OF CIVIL PROCEDURE SEC. 425.16

- A.   ALLOWS SPECIAL EARLY MOTION TO DISMISS CASE (FILED WITHIN 60 DAYS OF SERVICE OF COMPLAINT)

- B.   TWO-STEP ANALYSIS:

  STEP 1: DEFENDANT MUST SHOW THAT THE LAWSUIT CHALLENGES SOME ACTION THAT FALLS UNDER THE STATUTE – THAT IS IT IS SPEECH OR PROTECTED FIRST AMENDMENT ACTIVITY

  STEP 2: BURDEN SHIFTS TO PLAINTIFF TO DEMONSTRATE A PROBABILITY OF SUCCESS ON THE MERITS OF THE CASE
  →   IF IT IS PROTECTED ACTIVITY, AND IF PLAINTIFF THEN CANNOT SHOW PROBABILITY OF SUCCESS, THE CASE IS DISMISSED

ANTI-SLAPP MOTION IS
EXTRAORDINARY MOTION BECAUSE:

- A. THE FILING OF THAT MOTION STAYS ALL OTHER EVENTS IN THE CASE UNTIL THE MOTION WAS RULED UPON

- B. CALLS UPON THE JUDGE TO DECIDE THE MERITS OF THE CASE AT THE VERY BEGINNING OF THE CASE

PREVAILING SLAPP DEFENDANT GETS ATTYS FEES:

- IF DEFENDANT PREVAILS ON SLAPP MOTION, THE COURT "SHALL" AWARD HIS OR HER LEGAL FEES AND COSTS INCURRED ON THE SLAPP MOTION:

   "IN ANY ACTION SUBJECT TO SUBDIVISION (B), A PREVAILING DEFENDANT ON A SPECIAL MOTION TO STRIKE **SHALL** BE ENTITLED TO RECOVER HIS OF HER ATTORNEY'S FEES AND COSTS."

   (CODE CIV. PROC. § 425.16(C) (EMPHASIS ADDED).)

POINTS RE SLAPP FEES

- "LODESTAR" APPROACH USED TO MEASURE FEES → *KETCHUM V. MOSES* (2001) 24 Cal.4th 1122, 1131
- FEES ARE MANDATORY, NOT DISCRETIONARY
- INCREASES THE STAKES OF SLAPP SUITS
- SOME LEEWAY AS TO WHAT FEES ARE RELATED TO THE SLAPP MOTION AS TO OTHER ACTIVITIES IN THE CASE

  (EXAMPLES – *ALLEN* CASE - DEMURRERS TO ANSWER & MOTION TO COMPEL DISCOVERY, THAT OCCURRED PRIOR TO SLAPP RULING, HELD TO BE NONCOMPENSABLE)

PITHY QUOTE RE LAWYERS:

"A countryman between two lawyers is like a fish between two cats." -- Benjamin Franklin

BROADER POINTS ON RECOVERY OF PREVAILING PARTY ATTORNEYS' FEES

1. PREVAILING PARTY FEES CAN BE RECOVERED WHETHER OR NOT THE LAWYER HAS BEEN PAID BY THE CLIENT

- LAWYER CAN STILL RECOVER ATTORNEYS FEES
- LAWYER MAY HAVE TO REIMBURSE CLIENT SOME OR ALL OF RECOVERED FEES (MATTER OF CONTRACT)
- IF LAWYER IS BEING PAID BY CLIENT, THIS MAY AFFECT HIS ABILITY TO OBTAIN A CONTINGENCY MULTIPLIER

Broader Points (continued)

- 2. FEE RECOVERY PROSPECTS AFFECT ABILITY TO ATTRACT COUNSEL TO DO THESE CASES

Broader Points (continued)

- 3. FEE RECOVERY PROSPECTS AFFECT ABILITY OF CITIZENS' GROUPS AND ENVIRONMENTAL GROUPS TO DO THESE CASES

Broader Points (continued)

4. RECOVERY OF PREVAILING PARTY ATTORNEYS FEES DEPENDS ON *PREVAILING*

- THIS IS ANOTHER REASON TO CHOOSE YOUR CASES WISELY

- IN ADDITION TO THE SUBSTANTIVE REASONS FOR CHOOSING IMPORTANT CASES AND ALSO "PICKING THE RIGHT BATTLES"