Recovery of Attorneys Fees, A Benefit for the Public Good?

By Hugh A. McCabe

Attorney fees are often a driving force behind filing a lawsuit. In California, the general rule for attorney fees are each party to a lawsuit must ordinarily pay his or her own attorney fees, unless a specific statute provides otherwise. This premise has even been codified by California Legislature at Code of Civil Procedure section 1021.

More common in our society is the notion of “spoils to the victor.” Therefore, many of us may be familiar with the idea a party who prevails at trial is often awarded their attorney fees. Logic by this is two-fold, one as a sense of justice to make the losing party pay the other’s costs and two as an incentive for parties to forgo the cost of litigation and make efforts to settle their dispute prior to trial.

For many business owners the issue of attorney fees and settling a lawsuit go hand in hand. More often than not, settling a legal dispute before trial can avoid or reduce the payment of attorney fees and paying just the damages incurred by an opposing party.

In the evolution of attorney fees, other theories have come into practice to entice lawyers to effectuate change for some social public benefit or the public interest and being awarded attorney fees before ever winning at trial.

Business Owners should be aware of these theories and how they actually work. The Private Attorney General Doctrine and the “Catalyst” theory are two such theories in practice today and the business community should have a basic understanding of their implications on litigation such as class actions, consumer protection lawsuits and employment discrimination cases.

Private Attorney General Doctrine

Now codified by law in California, the Private Attorney General Doctrine provides in essence a “successful” party may be awarded attorney fees against one or more opposing parties in a civil action which results in the enforcement of an important right affecting the public interest. (See Cal. Code of Civ. Proc. 1021.5) The doctrine is based on the theory privately initiated lawsuits are often necessary to enforce public policies.
California Code of Civil Procedure section 1021.5 does not require the “successful” party prevail at trial to be awarded attorney fees. There are three basic criteria required to support an award of attorney fees under the statute: (1) the action resulted in the enforcement of an important right affecting the public interest; (2) a significant benefit was conferred on the general public; and (3) the necessity and financial burden of private enforcement were as such to make the award appropriate.

**Catalyst Theory (Class Action Cases)**

California courts have taken a broad view of what it means to be “successful.” It is not limited to obtaining a judgment in your party’s favor or a court approved settlement. A party may also be found successful if the lawsuit was a “catalyst” motivating defendants to provide the relief sought. A party may be deemed successful even if his or her case has been dismissed.

California Courts recognize plaintiffs’ attorneys can recover their fees when it is shown plaintiffs’ lawsuit was a “catalyst” for the defendant to modify its behavior. *Tipton-Whittingham v. City of Los Angeles* (2003) 316 F 3d 1058.

In order to recover under the catalyst theory, the plaintiff must establish three things: (1) the lawsuit was a catalyst motivating the defendants to provide the primary relief sought; (2) the lawsuit had merit and achieved its catalytic effect by threat of victory, not by dint of nuisance and threat of expense; and (3) the plaintiffs reasonably attempted to settle the litigation prior to filing the lawsuit.

**Success Without Victory**

The California Supreme Court upheld the catalyst theory. In *Graham v. DaimlerChrysler Corp.* (2004) 34 Cal 4th 553, DaimlerChrysler marketed its ’98-'99 Dakota trucks as having a 6,400-pound towing capacity when in fact they could tow only 2,000 pounds. DaimlerChrysler became aware of the problem and notified customers of the error and initially offered cash and merchandise in compensation. Later that year, the Santa Cruz District Attorney and the California Attorney General threatened legal action for false advertising. Meanwhile, plaintiffs filed their complaint seeking return of their payments, compensatory damages and attorneys’ fees. Within three weeks Daimler Chrysler offered to replace or repurchase all buyers trucks. Plaintiffs’ case was later dismissed as moot.

Despite plaintiffs’ lawsuit being dismissed they sought attorneys’ fees under section 1021.5 and the catalyst theory. The District Court awarded attorneys fees of close to one million dollars. The California Supreme Court in *Graham* determined plaintiffs’ lawsuit “was a catalyst motivating defendants to provide the relief sought.” The California Supreme Court upheld the awarding of attorneys fees, only objecting to how they were calculated.

**Limitation to Success**

While the catalyst theory is the law in California there is a limitation. The Supreme Court in *Graham*, found the trial court did not abuse its discretion in finding the substantial benefit and public interest prongs of § 1021.5 were met. The lawsuit implicated an issue of public safety and the lawsuit benefited thousands of consumers by acting as a deterrent to discourage lax responses to known safety hazards. Yet, the Supreme Court also stated the plaintiffs seeking
attorneys’ fees under the catalyst theory must first reasonably attempt to settle the matter short of litigation. The California Supreme Court reasoned “awarding attorney fees for litigation when those rights could have been vindicated by reasonable efforts short of litigation does not advance the objective and encourages lawsuits that are more opportunistic than authentically for the public good.” *Grimsley v. Board of Supervisors* (1985) 169 Cal. App. 3d 960. In Grimsley, the Supreme Court emphatically held attorney fees under section 1021.5, will not be awarded unless the plaintiff seeking such fees had reasonably endeavored to enforce the public right affecting the public interest, without litigation and its attendant expense.” (*Grimsley, supra*, 169 Cal. App. 3d at p. 966.) But what is required by plaintiff to demonstrate it attempted to resolve the matter prior to litigation?

In *Grimsley*, the Court held the plaintiff must in a timely manner complain or notify defendants about their failure to comply with the law, or point out in what respects those statutes were not being followed. Had plaintiffs done so, it was a near certainty appropriate corrective action would have been forthcoming, thus avoiding litigation and substantial public expense. Ibid.

**Appropriate Responsibility**

Employers need to be aware of this limitation to the catalyst theory and private attorney general doctrine. In awarding attorneys fees in a lawsuit that involves a substantial benefit to the public interest plaintiffs have an obligation to notify defendants of their allegations before filing a lawsuit. Defendants deserve an opportunity to make an appropriate response or effectuate a cure before being forced to litigate.

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Hugh A. McCabe is a shareholder at Neil Dymott and concentrates his practice on the defense of employers. Mr. McCabe focuses on the areas of wrongful termination, discrimination, sexual harassment and the Family and Medical Leave Act. Mr. McCabe may be reached at (619) 238-1712 or hmccabe@neildymott.com [1]

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