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U.S. SUPREME COURT CLARIFIES RECOVERABLE ATTORNEY FEES FOR PUBLIC ENTITIES IN SUCCESSFUL LITIGATION



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In an April 21, 2011 article published by PublicCEO.com, we explained the state of the law at that time regarding a public entity's right to recover its attorneys' fees when it prevails in federal civil rights litigation. Under the federal statute, a public entity is entitled to recover its fees incurred in defending against a plaintiff's "frivolous" claims, but it may not recover its fees relating to defending against non-frivolous claims. The problem we addressed arises in situations where the prevailing public entity defendant seeks to recover its attorneys' fees incurred in defending against both frivolous and non-frivolous claims. Such fees have been labeled "general" fees by the courts, and they are very common because legal work is seldom neatly divided between defending against the various claims alleged in a single lawsuit.

Decisions handed down by the federal appellate circuits are split on the issue of whether a prevailing defendant can recover any portion of "general" fees. In early 2011, the Ninth Circuit decided against allowing the recovery of any portion of such "general" fees by defendants in federal civil rights cases, holding that "a defendant must demonstrate that the work for which it asserts that it is entitled to fees would not have been performed **but for** the inclusion of the frivolous claims in the complaint." (*Harris v. Maricopa County Superior Court*, 631 F.3d 963, 972, 2011 U.S. App. LEXIS 1068 (9th Cir. Jan. 2011) (emphasis added).)

The U.S. Supreme Court Applies the "But For" Standard

The U.S. Supreme Court has now weighed in on this issue, holding that public entity defendants cannot recover for any defense expenses that they would not have incurred in the absence of the frivolous claims. Therefore, recoverable defense fees only include those that would not have been incurred **but for** the frivolous claims. (*Fox v. Vice*, 180 L. Ed. 2d 45, 2011 U.S. LEXIS 4182 (U.S. June 2011).)

The *Fox v. Vice* opinion is the sequel to the *Hensley v. Eckerhardt* and *Perdue v. Kenny* opinions, and it is a unanimous opinion that announces that even under this "but for" standard, the defendant may recover some portions of its "general" fees. For example, where the plaintiff alleges both frivolous and non-frivolous claims but only the frivolous claims can possibly result in an award of damages, work performed defending against this monetary exposure may be recoverable even if it advances the defense against both claims. In addition, in cases where removal to federal court is only possible because of the presence of the frivolous claim, any increase in the total defense expenses caused by the removal may be recoverable because that increase would not have been incurred "but for" the frivolous claim.

The Supreme Court further stated that "frivolous claims may increase the cost of defending a suit in ways that are not reflected in the number of hours billed." For example, where a frivolous claim involves a specialized (and expensive) legal practice area, the defendant may be forced to hire more expensive lawyers to defend the entire case. Under such facts, the defendant may recover its "general" fees to the extent that they represent the increased defense cost that would not have been incurred "but for" the frivolous claim.

In addition to the examples provided by the Court which are summarized above, we provide the following example that illustrates the application of the new rules:

Suppose the plaintiff in a federal civil rights lawsuit alleges that: 1) a U.S. city defendant cheated and violated the "civil rights" statute by not applying British accounting practices; and 2) a claim for an accounting (which is a standard sort of common law remedy that is often sought). Claim 1 is clearly frivolous under these facts, while Claim 2 is valid (but defensible). Therefore, the entire added cost of retaining federal court practitioners would be shifted. The defendant would argue that if the frivolous claim is eliminated via a motion for summary judgment, the cost of defending the case would continue to be higher because the defense counsel selected to defend both claims included lawyers with a specialized practice area and thus a higher hourly rate. The accounting claim would not be of great concern because it could not result in any monetary damages being awarded and, therefore, all of the defendant's legal fees and costs should be shifted.

It is also noteworthy that Justice Kagan's unanimous opinion in *Fox v. Vice* repeats the admonition to trial judges that they must apply the correct legal standard and demand appropriate documentation in order to find that the defendant has met its burden of proof on the fee shifting issue. This opinion also sets forth the following guiding light for the trial courts: "The essential goal in shifting fees (to either party) is to do rough justice, not to achieve auditing perfection. So trial courts may take into account their overall sense of a suit and may use estimates in calculating and allocating an attorney's time." (*Id.* at 57.)

In sum, the Supreme Court has held in *Fox v. Vice* that "the dispositive question is not whether attorney costs at all relate to a non-frivolous claim, but whether the costs would have been incurred in the absence of the frivolous allegation. The answers to those inquiries will usually track each other, but when they diverge, it is the second that matters." (*Id.* at 56-57.)

What Defendants Should Do to Maximize Their Fee Recoveries

This new Supreme Court decision does not change our previous recommendation that public entity defendants should insist that their defense attorneys provide very detailed billing descriptions of the work they are performing. Defendants must not allow defense counsel to "block bill" or vaguely describe the work they are performing in their bills. Again, such billing practices may well result in the public entity defendant being unable to prove exactly what work

would not have been performed "but for" the frivolous claim.

Further, defendants (and defense counsel) must now keep a sharp lookout for the additional issues that may justify an award for fees incurred defending against both frivolous and non-frivolous claims in situations where such "general" fees would not have been encountered "but for" the frivolous claim. Such recovery may be had in situations where only the frivolous claim can support a damages award, or where the presence of the frivolous claim necessarily drives up the cost of the entire defense. In particular, the defense should be careful to document the added cost of defending cases that require the retention of more expensive defense counsel due to the specialized nature of the frivolous claim.

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