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What Fees Can Public Entities Recover From Successful Litigation

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In federal civil rights litigation, a successful plaintiff suing a public entity may ordinarily recover his or her attorneys fees. But when the public entity defendant prevails, it may also recover its attorneys fees from the unsuccessful plaintiff. This article examines exactly which fees the public entity may recover in cases where the losing plaintiff has joined both frivolous and non-frivolous claims in the same lawsuit.

Interpretation of the Federal Fee Shifting Statute Against Defendants

The federal civil rights statute generally provides the court with discretion to allow the "prevailing party" a reasonable attorney's fee as part of its costs. However, there are two exceptions: the United States cannot recover its attorneys fees under this statute, and "judicial officers" cannot be held liable for the prevailing plaintiff's legal fees unless they take action that is "clearly in excess" of their jurisdiction.

Therefore, the federal statute is neutral on its face - both prevailing plaintiffs *and* prevailing defendants (other than the United States) may be awarded "a reasonable attorney's fee as part of the costs." However, for policy reasons designed to support citizens' assertion of their civil rights, the U.S. Supreme Court has limited the right of prevailing defendants to recover their legal fees, holding that they may only recover fees incurred in the defense of frivolous or unreasonable claims.

This rule reflects the competing public policy considerations regarding attorney fee awards in civil rights cases. On the one hand, the law encourages individual plaintiffs to seek relief for violations of their civil rights, and awarding attorneys fees to them when they succeed is one such encouragement. However, the public should not have to pay the cost of defending against frivolous claims. Therefore, when public entities prevail in civil rights litigation they may recover their legal fees incurred in the defense of plaintiff's claims that are found to be frivolous, unreasonable or without foundation.

The Problem

A significant problem arises when a prevailing defendant seeks to recover its attorneys' fees from the losing plaintiff, but its request includes time and charges for defending against both

frivolous and non-frivolous claims. This situation is quite common because in the real world, attorneys' work is seldom neatly divided between defending against the various claims alleged in a lawsuit. Rather, a significant portion of such legal work supports the defense against all alleged claims, such as participating in written discovery, depositions, and court hearings. The question therefore becomes to what extent can the prevailing defendant recover its legal expenses for such "general" legal work?

The federal appellate circuits are split on the issue of whether a prevailing defendant can recover **any** portion of its legal fees reflecting work relating to both frivolous and non-frivolous claims. This issue is currently before the U.S. Supreme Court, so it may be decided once and for all when that Court rules. But in the meantime, the Ninth Circuit has decided **against** allowing the recovery of **any** portion of such "general" fees by defendants in federal civil rights cases.

The Ninth Circuit's "But For" Rule

In January of this year, a divided Ninth Circuit panel held 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." In this case, a fired employee of the Arizona state courts filed suit in federal court, alleging claims for hostile work environment, racial discrimination, violation of due process, breach of contract, false light invasion of privacy, wrongful termination, and infliction of emotional distress. However, the defendant state court (and other related defendants) prevailed at trial.

When it came time to consider the defendants' request for prevailing party attorneys fees, the federal trial court concluded that some of plaintiff's civil rights claims were not frivolous, and that the defendants were not entitled to recover their legal fees incurred in defending against those claims. However, the court awarded fees incurred in the defense of other claims that it found to be frivolous.

Then, in order to determine the total amount of the fee award, the trial court decided to include a percentage of the defendants' "general fees" which they could not allocate to any particular claim. The court therefore divided those "general fees" by the ten claims alleged in the Amended Complaint, and then added one-tenth of the total "general" fees to the attorney fee award for each frivolous claim. The trial court applied the same methodology to award the defendants' litigation "costs." However, the court then cut its fee award in half because of the individual plaintiff's financial hardship.

On appeal, the majority of the Ninth Circuit panel disapproved of this method of calculation of defendants' recoverable fees, holding that any such fee recovery was limited to fees that were incurred **solely** in the defense against frivolous claims. In reaching this conclusion, the Court cited the public policy of "encouraging individuals injured by... discrimination to seek judicial relief." However, the Ninth Circuit did recognize that prevailing defendants may recover fees for claims that are "frivolous, unreasonable, or groundless." The majority of the Court of Appeals panel directed the trial court to reconsider its fee award to the defendants, this time only

awarding legal fees and costs that the defendants could prove would not have been incurred "**but for**" plaintiff's frivolous claims.

However, a vigorous dissent reviewed the split of authority among the federal appellate circuits regarding the extent to which successful defendants may recover their "intertwined" legal fees and costs from plaintiffs in civil rights litigation, and observed that this issue is currently being reviewed by the U.S. Supreme Court. The Supreme Court will therefore ultimately decide whether the Fifth Circuit was correct in holding that a prevailing "defendant is only entitled to attorneys' fees for work which can be distinctly traced to a plaintiff's frivolous claims," and whether "the court must consider the interrelated nature of the frivolous and non-frivolous claims to determine the appropriate fee."

Fox was argued before the Supreme Court on March 22, 2011, so an opinion may come down soon. But until that happens, prevailing defendants in civil rights cases in the Ninth Circuit may **only** successfully recover their attorneys fees to the extent that they can prove that such fees and costs would not have been incurred "**but for**" plaintiff's frivolous claims.

What Defendants Should Do To Maximize Their Fee Recoveries

Public entity defendants should insist that their staff attorneys and/or outside defense counsel provide very detailed billing descriptions regarding the work they are performing. In particular, such billing descriptions should clearly identify the work being performed in order to provide a defense against plaintiffs' frivolous claims. It is very important that public entity defendants **not** allow their counsel to "block bill" their time (i.e., combining more than one task in a single description), or submit "vague" descriptions of the work being performed. While adherence to these basic billing guidelines is important in all legal contexts, it is particularly important in defending against federal civil rights claims because combining tasks relating to both frivolous and non-frivolous claims will result in the entire time entry being disallowed, and the defendant will not be able to prove that vaguely described work relates solely to defending against frivolous claims.

About the Author

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