

[Dividing Attorneys' Fees Pro Rata by Number of Claims May Not be Sufficient](#)

Posted on January 21, 2011 by [Gary A. Bresee](#)

In *Harris v. Maricopa Count Superior Court*, the Ninth Circuit remanded an attorneys' fee award back to the District Court when defendants and the lower court allocated fees to the prevailing defendant by determining which claims carried the right to fees to the prevailing defendant, and then using a pro rata approach to divide some of the fees by the number of claims. The majority opinion held that this was improper.

Judge Bybee's dissent strikes to the heart of the matter. Does the "new rule" from the majority render a defendant's ability to recovery attorneys' fees almost impossible?

Vernon Harris brought a civil rights action against the Superior Court of Maricopa County alleging gender and race discrimination as well as state law claims of breach of contract and defamation. Harris' claims were ultimately dismissed when defendant's pre-trial summary adjudication motions were granted.

The court held it improper to allocate the general fees across the ten claims and then determining one-tenth of the fees were incurred for each claim. This strikes at the heart of the civil rights policy, which is to encourage victims of discrimination to seek judicial relief and avoid self-help actions. First, if defendant is seeking fees in a civil rights case, exceptional circumstances must be demonstrated. Then, only the amount of attorneys' fees attributable *exclusively* to a plaintiffs' frivolous claims will be awarded. When, as here, both non-frivolous and frivolous claims were brought, the burden rests with the fee claimant -- the defendant -- to show certain work performed which would not have been necessary but for the inclusion of the frivolous claims. The Ninth Circuit then acknowledged that when, again as here, the complaint lists various legal theories all based on essentially the same facts, the burden on the defendant to establish which specific fees were attributable solely to the frivolous claims is, from a practical viewpoint, *extremely difficult* to prove. At any rate, the Ninth Circuit held the burden is not carried by allocating fees in the pro rata fashion which was employed here.

I do not believe the burden is impossible, as Judge Bybee has intimated in his dissent. But the amount of specificity is certainly important to a prevailing party, fee claimant defendant.