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ATTORNEY FEES AWARD MAY BE REEVALUATED WHEN CLAIMS ARE PARTIALLY REVERSED ON APPEAL

Environmental Protection Information Center, et al. v. California Department of Forestry and Fire Protection, et al., A108410 (1st Dist. Div. 5, November 19, 2010)

By Daniel Bane

In *Environmental Protection Information Center, et al. v. California Department of Forestry and Fire Protection, et al.*, the Court of Appeal considered whether an attorneys' fees award issued by the trial court must be reevaluated in light of the final outcome of the underlying litigation in the California Supreme Court. The Court of Appeal concluded that the attorney fee awards may be warranted even if some of the environmental protections attained at trial are reversed on appeal if the plaintiff still prevailed on some key issues. The court also concluded that attorney fee awards may also depend on whether a reasonable settlement offer might have prevented a lawsuit. Finally, the appellate court held that the amount of fees may be reduced where plaintiffs are only partially successful, depending in part on whether the claims are related.

Background

After prevailing in the underlying litigation at the trial court level, Plaintiffs and Respondents Environmental Protection Information Center ("EPIC") and United Steel Workers of America ("Steelworkers") (collectively "Respondents") moved for awards of attorney fees pursuant to Code of Civil Procedure section 1021.5 ("Section 1021.5"). Defendants and Appellants California Department of Forestry and Fire Protection ("CDF") and the Department of Fish and Game ("DFG") (collectively, the "Agencies") opposed both motions but the trial court ultimately awarded attorney fees to EPIC ($4,279,915.74) and the Steelworkers ($1,787,806.21). In its orders, the trial court found that EPIC and the Steelworkers had satisfied all of Section 121.5's conditions for entitlement to an award of attorney fees. Specifically, it found Respondents were successful parties and determined their actions had vindicated important rights affecting the public interest. The trial court further found Respondents' actions had conferred a significant benefit on the general public and that private enforcement of the rights vindicated in the actions was necessary.

On appeal from the attorney fees awards, the Agencies argued that Respondents cannot demonstrate that their litigation conferred a "significant benefit . . . on the general public or a large class of persons" or that the "necessity . . . of private enforcement . . . [is] such as to make the award appropriate . . . ." Alternatively, the Agencies claimed that even if Respondents were entitled to an award, the amount of fees granted was excessive because: (1) the Respondents achieved only limited success on the merits after the Supreme Court's ruling; (2) the Respondents duplicated efforts; and (3) the trial court had abused its discretion in awarding certain categories of fees.

Significant Benefit

On appeal, the Agencies' primary contention against the attorney fees award was that the litigation did not result in any significant benefit to the environment because nearly all of the claimed environmental protection and sustainable timber harvest aspects of Respondents' lawsuit had been erased by the reviewing courts' opinions. The Court of Appeal disagreed.

Relying on the Supreme Court's decision regarding the merits, the Court of Appeal held Respondents had prevailed on a number of important issues. First, the Respondents successfully argued that the Safe Yield Plan ("SYP") was invalid and the Court of Appeal reasoned that CDF would respond to the Supreme Court's decision by "resubmitting an adequate, identifiable SYP for approval" which will enhance effective public review of future logging at the site and increase participation in environmental decision-making, as well as improve CDF's procedures.

The Court of Appeal further reasoned that, due to Respondents' action, the Supreme Court held, for the first time, that no surprise clauses were inconsistent with the language of Fish and Game Code section 2081, subdivision (b)(2), which requires that the impacts of an authorized take of an endangered or threatened species be "minimized and fully mitigated." The Court of Appeal acknowledged "[t]he Supreme Court's decision thus sets a precedent that will apply to future state incidental take permits issued under CESA."

Lastly, the Court of Appeal affirmed that aspects of its own ruling were not challenged in the Supreme Court. As a result, DFG could not issue permits in advance for certain unlisted species. Thus, new permits would have to be sought in the future should these species become listed. The Court of Appeal held that this additional protection added further weight to its conclusion that the Respondents' action resulted in a significant benefit.

The Necessity of Private Enforcement

Next, the Court of Appeal considered the Agencies' argument that Respondents could not show the necessity of private enforcement because the Respondents failed to make reasonable settlement efforts or that they were willing to settle the action on "terms approaching the narrow result achieved" by the litigation. EPIC asserted it had satisfied any pre-litigation settlement requirements by exhausting its administrative remedies. The Court of Appeal disagreed and held that the question a trial court must address in making a necessity determination is "whether a reasonable settlement offer might have prevented a lawsuit." The Court of Appeal then directed the trial court, on remand, to *consider* the question of settlement efforts in determining whether private enforcement was sufficiently necessary to justify an award of fees. However, the Court of Appeal was clear that settlement efforts, while relevant, are not determinative of the necessity decision in every case.

The Amount of the Fee Award

In addressing the Agencies' claim that the Respondents' fee awards must be reduced due to Respondents' limited success, the Court of Appeal applied the two-part approach set forth in *Hensley v. Eckerhart* (1983) 461 U.S. 424, 434 ("Hensley"). The first step asks whether "the plaintiff fail[ed] to prevail on claims that were unrelated to the claims on which he succeeded[.]" If successful and unsuccessful claims are related, the court then must proceed to the second step of *Hensley* inquiry, which asks whether "the plaintiff achieve[d] a level of success that makes the hours reasonably expended a satisfactory basis for making the fee award." The Court of Appeal found the Agencies' arguments invoked both steps of the *Hensley* approach.

Hensley Step One: Related and Unrelated Claims

The Agencies argued that the Court of Appeal's analysis of the issue of limited success must take account of the fact that the actions below were for administrative mandamus under Code of Civil Procedure section 1094.5 ("Section 1094.5") and that under such circumstances, the amount of work required "is directly related to the breadth and aggressiveness of the legal challenge." In contrast, EPIC contended that because the same record was involved for all claims, all facts and legal theories were based on one course of conduct and thus, all of its challenges to the various approvals at issue in the litigation constitute related claims under *Hensley*. The Court of Appeal declined the Agencies' invitation to treat administrative mandamus actions differently when deciding to award attorney fees under Section 1021.5.

Regarding EPIC's contention, the Court of Appeal found that California courts had not directly addressed the relatedness of claims in actions for administrative mandamus and therefore, looked to federal decisional law for persuasive guidance. Relying on the United States Court of Appeals for the District of Columbia's decision in *Sierra Club v. E.P.A.* (D.C. Cir. 1985) 769 F.2d 796, the Court of Appeal concluded that a common administrative record and a common procedural history are not sufficient on their own to establish that claims are related. Nor are multiple legal challenges to different agency decisions necessarily related because they are grounded in the standards of review prescribed by Section 1094.5.

However, the Court of Appeal found that both the Steelworkers and EPIC's individual claims were sufficiently related to warrant an attorney fees award. For Steelworkers, the Court of Appeal found that "[t]here were no 'important goals' of the litigation the Steelworkers failed to achieve." The Court of Appeal reasoned that the Steelworkers sought an order rescinding approval of the SYP and obtained precisely that and consequently, their action could not be said to involve unrelated claims.
Concerning EPIC, the Court of Appeal found that it had achieved only two of its four litigation objectives. However, under the unique circumstances present in the case, the Court of Appeal held that EPIC's unsuccessful claims were related to its successful ones because the "myriad of regulatory approvals" at issue in the case were each supported by a document or documents that "are to some degree interrelated with the others." Therefore, the Court of Appeal reasoned that the relief EPIC sought on the unsuccessful claims did not seek to remedy a course of conduct *entirely distinct and separate* from the court of conduct underlying its successful claims.

Hensley Step Two: Significance of the Overall Relief

For step two of the *Hensley* approach, the Agencies contended that Respondents should not be compensated for the hours spent on litigating unsuccessful theories and further that the Supreme Court's rejection of almost all of the Respondents' attacks on the validity of the SYP requires a reduction of the fee awards. The Court of Appeal declined to decide these contentions and left it to the trial court to resolve them on remand. However, the Court of Appeal clarified that a partially prevailing party is not necessarily entitled to all incurred fees even where the work on the successful and unsuccessful claims was overlapping or related.

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