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Focus

FEE FOR FEW

By Timothy D. Reuben
and Natella Royzman

Although meeting the criteria established by case law to obtain attorney fees under Section 1021.5 is pretty tough, the state Supreme Court has just made it a little bit tougher. Case law has established that the fundamental objective of the private attorney general statute is to encourage suits enforcing public policy by awarding attorney fees to those who successfully bring such suits and thereby bring about benefits to a broad class of citizens. The statute has been characterized as an incentive to pursue litigation effectuating public policy, implying that the statute may be broadly used to obtain attorney fees in any suit that sets precedent benefiting the public. However, the Supreme Court, in *Adoption of Joshua S.*, 2008 DJDAR 1227 (Cal. Jan. 24, 2008), has articulated “an implicit” requirement that the winning party to a lawsuit benefiting a large class of people may not obtain fees from the losing party unless the losing party’s conduct also adversely affected the rights of the public. In other words, it is not enough for a party to make new law for the public good; the losing party must actually have hurt (or at least would have hurt if not prevented by the lawsuit) the public by its wrongful conduct.

In *Joshua S.*, the Supreme Court reviewed the 4th District Court of Appeal’s decision to reverse an award of attorney fees under Section 1021.5 following a decision that validated a “second parent” adoption, when the same-sex partner of a birth mother adopted the birth mother’s child while the birth mother remained a co-parent. The case began when Sharon, Joshua’s birth parent, moved the court for approval to withdraw her consent to adopt and to dismiss the petition of her former partner, Annette, for adoption. Following the San Diego Superior Court’s denial of Sharon’s motion to dismiss the adoption, Sharon filed and the Court of Appeal granted a petition for writ of mandate, holding that the form of

second-parent adoption sought by Annette was without statutory basis. The Supreme Court granted Annette’s petition for review and reversed, finding that second-parent adoptions like the one sought by Annette were lawful, and remanded the matter for resolution of factual issues.

At that point, Annette moved for an award of attorney fees under Section 1021.5. She argued that she was entitled to fees because she had prevailed in the Supreme Court on the second-parent adoption issue — an issue of benefit to a large class of people. The trial court was persuaded by Annette’s position and awarded her attorney fees. However, the Court of Appeal later reversed the decision

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on the ground that Annette’s cost or burden in bringing suit did not “transcend” her personal stake in the matter, which although nonmonetary, was obviously significant. The test used by the Court of Appeal was not novel, because case law has long held that fees are appropriate under the statute only when the burden of litigation is disproportionate to the individual’s stake in the matter. But the Supreme Court accepted the case anyway for further review, obviously intent on making new law.

Although the Supreme Court considered the question of whether the costs of litigation transcended Annette’s personal interests in its decision, it decided that an award of fees was inappropriate and affirmed on other, independent grounds: Sharon had done nothing to compromise the rights of the public other than to adjudicate her own private rights from which important appellate precedent happened to emerge. The Supreme Court acknowledged that the litigation unquestionably yielded a substantial and widespread public benefit:

Adoptive parents’ rights were confirmed. Nonetheless, it determined that, although not explicit in either the statute or case law, an unspoken justification for awarding attorney fees under Section 1021.5 is to impose a kind of equitable penalty on parties that have done something to harm the public. To support its finding, the Supreme Court stated that, in virtually all published cases in which attorney fees had been awarded, the litigation obtained a substantial benefit by causing a change in the defendant’s behavior - behavior that somehow directly impaired the rights of the public or a significant class of people.

For the vast majority of cases in which fees were awarded under the statute, the Supreme Court’s observation is correct. For example, in *Beasley v. Wells Fargo Bank*, 235 Cal.App.3d 1407 (1991), attorney fees were allowed under Section 1021.5 in a consumer class action challenging a bank’s assessment of fees against credit card customers who failed to make timely payments or exceeded their credit limits. The suit had stopped the bank’s unfair business practices, which were harming the bank’s many customers. Similarly, in *Colgan v. Leatherman Tool Group Inc.*, 135 Cal.App.4th 663 (2006), attorney fees were assessed against a corporation that labeled products in violation of the false-advertising law. Yet another example is *Planned Parenthood of Santa Barbara v. Aakus*, 14 Cal.App.4th 162 (1993), in which a medical clinic providing abortion services was awarded fees after successfully preventing anti-abortion demonstrators from entering onto its property and confronting its patrons by verbal and physical acts of persuasion in violation of their constitutional right to privacy.

However, there are cases that run contrary to the Supreme Court’s formula, including a Court of Appeal decision that came down in October, *Mejia v. City of Los Angeles*, 156 Cal. App.4th 151 (2007), a case the Supreme Court did not mention, involved a petition for writ of mandate brought by a homeowner challenging a city’s approval of a residential development project under the California Environmental Quality Act and other grounds. The developer opposed the petition as the real party in interest. The court granted the homeowner’s

petition, finding that substantial evidence supported an argument that the project would have significant, unmitigated environmental impacts on animal wildlife and traffic, and issued a peremptory writ of mandate ordering the city to vacate its approval of the project. It also awarded her attorney fees, to be paid equally by the city and the developer. The developer appealed the fee award, contending that it was improper because it was without fault and compliance with the the act was the city's sole responsibility. The Court of Appeal disagreed with the developer's position, finding that Section 1021.5 did not require fault or misconduct by the opposing party. According to the *Mejia* court, fees granted under the private attorney general theory are not intended to punish those who violate the law. Thus, the developer was subject to attorney fees simply by actively participating in the litigation. The same conclusion was reached in an older case — *San Bernardino Valley Audubon Soc'y v. County of San Bernardino*, 155 Cal.App.3d 738 (1984) — in which the court held that, when a private party is a real party in interest and actively participates in litigation along with a government agency, that party can fairly bear half the fees, regardless of fault. That court supported its conclusion by stating that fees under the private attorney general

theory are not intended to punish those who violate the law.

One way to reconcile the cases is to read the Supreme Court's decision narrowly to prohibit an award of attorney fees only when a party has done nothing more than raise an issue through private litigation that could establish a legal precedent adverse to a portion of the public. Under this reading, the decision does not really require harm by the losing party's actions but rather creates one extremely limited exception to the statute. Thus, one can appreciate why the Supreme Court would not want to impose fees on a mother who sought no public impact but simply wanted to vindicate her parental rights. On the other hand, the court does state that involvement in certain types of litigation can by itself be sufficient to meet the new implied requirement for fees under Section 1021.5. Moreover, the decision appears to be written broadly to hold that widespread fault or wrongdoing on the part of the party against whom fees are assessed is required, and most courts likely will expect a showing of adverse public impact from the losing party's conduct before granting fees under Section 1021.5. This latter interpretation does call into question a number of prior decisions and clearly creates a much broader limitation on fees under the statute.

Notably, many of the statute's terms are open to interpretation, evidenced by the large number of cases defining and clarifying them. The meaning of each of the terms "important right," "significant benefit," "necessity" and "financial burden" has been the subject of a great deal of judicial interpretation, including several cases in just the past few years. Even the meaning of "successful party" and "opposing party" has been considered in many cases. In fact, the "catalyst theory," a concept broadening the term "successful party" to include parties that have not obtained a final judgment, has itself been the topic of numerous judicial decisions. Now there is yet another new hurdle to fees never before articulated. The moral of the story: If you want to make law for the public good, either sue a nasty, public-hurting defendant or be ready and able to pay for it.

Timothy D. Reuben is the managing principal and **Natella Royzman** is an associate at Reuben, Raucher & Blum, a litigation boutique in Westwood. Their practice focuses on complex business litigation, including real estate, intellectual property, entertainment and unfair competition. They can be reached through the firm's Web site at www.rrbattorneys.com.