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Feature

***6** LEGISLATIVE ATTORNEY'S FEES UNDER THE FLSA--THE TRUMP CARD

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Who is entitled to attorney's fees when statutes conflict with contracts? The answer may surprise some. Under a typical employment contract, the employee must agree to a fee-shifting provision in favor of the "prevailing party" in any dispute with the employer. The Ninth Circuit Court of Appeals, overturning one of its own precedents, recently held that employers may force workers to submit to mandatory arbitration as a condition of employment. EEOC v. Luce, Forward, Hamilton & Scripps, 2002 D.J.D.A.R. 1089 (9th Cir. Sept. 3, 2002). So the thought that an employer would also include a reciprocal attorney's fee clause in the employment contract is a pretty good bet. But what happens when the employee sues for unpaid wages under the Fair Labor Standards Act, which specifically provides for an one way fee-shifting "to be paid by the defendant" to the prevailing plaintiff? 29 U.S.C.A. §216(b). Does the statute trump the contract or vice-versa? The answer may lie in the appellate court's analysis in Carver v. Chevron U.S.A., Inc., 97 Cal.App.4th 132, 118 Cal.Rptr.2d 569 (March 27, 2002).

In Carver, a group of gasoline dealers sued an oil company and several of its management employees for breach of contract, fraud and violation of antitrust laws. The dealers won a jury verdict on some of their theories, but the judgment was reversed on appeal, in an unpublished opinion, with directions to enter judgment in favor of Chevron. Carver v. Chevron, 1999 WL 1704957 (May 28, 1999). Chevron quickly submitted a memorandum of costs and attorney declarations requesting fees for over $5 million on the basis that the dealer leases contained an attorney's fees clause for the prevailing party in the litigation! The plaintiffs opposed this request, in part, because the attorney fee clauses required the dealers to waive critical rights under the Cartwright Act (Business & Professions Code §16750), which provides for a one-sided recovery of attorney's fees. The trial court was not persuaded and awarded Chevron attorney's fees it incurred in defense of Cartwright Act claims. This time, the plaintiffs appealed.

The appellate court was forced to evaluate the attorney fee clause in light of statutory standards for prevailing party attorney fees and costs entitlements, with a specific reference to the general policies promoted by state and federal legislatures. The dealers' chief argument was that the fees incurred in defense of the Cartwright Act claims cannot fall within the scope of the attorney fees clause of the lease, and are not authorized by contract or by statute. Basic litigation costs rules are outlined in Santisas v. Goodin, 17 Cal.4th 599, 606; 71 Cal.Rptr.2d 830; 951 P.2d 399 (1998), which holds that "except as otherwise expressly provided by statute, a prevailing party is entitled as a matter of right to recover costs in any action or proceeding." Most state courts, however, allow attorney fees to be classified as costs only when authorized by contract or statute. See, ***7** e.g., Code of Civil Procedure §1032 (recognizing that attorney fees incurred in defending or prosecuting an action may be recovered as costs when authorized by statute or by the parties' agreement). A problem arises when one tries to harmonize these rules with the attorney fees clause of many consumer and employee protection statutes.

A perfect example is litigation under the FLSA. Unlike other fee-shifting statutes where an award of attorneys' fees to the prevailing party is discretionary, an award of attorneys' fees incurred at the trial court level by a prevailing plaintiff is mandatory under the FLSA. Shelton v. Ervin, 830 F.2d 182, 184; 28 WH Cases 695 (11th Cir. 1987),

aff'd, 853 F.2d 931 (11th Cir. 1988) (attorneys' fees mandatory and integral part of judgment). The rational is simple: An express purpose of the FLSA is to eliminate and rectify "labor conditions detrimental to the maintenance of the minimum standard of living" for workers. Roofers Local 307 v. G & M Roofing & Sheet Metal Co., 732 F.2d 495, 501; 26 WH Cases 1151 (6th Cir. 1984). Congress' mandate to award attorneys' fees and costs to all successful FLSA plaintiffs was intended as a necessary incentive for private litigants to act as "private attorneys general," to vindicate and enforce the FLSA. Laffey v. Northwest Airlines, 746 F.2d 4, 11; 35 FEP Cases 1609 (D.C.Cir. 1984); cert. denied, 472 U.S. 1021; 37 FEP Cases 1816 (1985).

Additionally, by shifting the responsibility for a successful plaintiff's fee to the employer, "Congress intended that the wronged employee should receive his full wages ... without incurring any expense for legal fees or costs." Maddrix v. Dize, 153 F.2d 274, 274 (4th Cir. 1946). In fact, the FLSA has absolutely no provision to award fees to prevailing defendants in "certain unique circumstances" like some other fee-shifting statutes. Hughes v. Rowe, 449 U.S. 5, 14 (1980) (defendant entitled to attorneys' fees under §1988 as result of defending frivolous claims); Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 421 (1978) (same for Title VII claims). The underlying purpose and history is so dynamic in an FLSA action that as a prevailing party, a plaintiff is entitled to an award of attorneys' fees that may substantially exceed the amount of damages awarded. Bonnette v. California Health & Welfare, 704 F.2d 1465, 1473; 26 WH Cases 152 (9th Cir. 1983) (court awarded $100,000 in attorneys' fees although damage award was only $18,455).

Turning back to Carver, the question was whether §16750(a) of the Cartwright Act otherwise indicates that attorney fees incurred to defend against such claims are subject to a reciprocal contractual attorney fees clause, or other reciprocal effect as created by law. The answer necessitates a public policy discussion. The fact that lawmakers offer a bounty, of sorts, for plaintiffs who sue to enforce a right the legislature has elected to favor in no sense implies it intends to offer this same bounty to defendants who show they have not violated the right. Rather, the more logical rationale is that the legislature desires to encourage injured parties to seek redress--and thereby simultaneously enforce public policy--in situations where they otherwise would not find it economical to sue.

Imagine an employee who has been wrongfully denied overtime compensation where the potential recovery is only a few thousand dollars. His or her own legal fees might otherwise consume a good portion of, or even exceed, his or her judgment. He or she is unlikely to sue, even if success is almost certain. If the chances of winning are pretty good, but not quite certain, the disincentive is even more chilling. If one has to deduct one's own attorney's fees from a less than certain judgment, one may likely not sue at all, even though the loss was substantial. In the end, the employer has effectively skirted the overtime laws because enforcement is cost prohibitive. It is precisely in this type of case--where the legislature wants to encourage litigation--that it intervened to alter the decision-making process by instituting unilateral fee-shifting under the FLSA. The injured person now understands he or she will not have to absorb the lawyer's legal fees if he or she wins. This makes it economical to seek redress not just where the recovery is large, but also in more modest cases.

Likewise, it means the probability of success can be much lower without effectively discouraging the exercise of legal redress. As a result of the legal intervention, more injured parties will file more lawsuits and the public policy behind the substantive statute will be more effectively and more broadly enforced. Into this bargain must be factored the consideration that "awarding fees as part of a prevailing plaintiff's relief should also provide increased and efficient deterrence of wrongful primary conduct because the prospect of having to pay the full cost that an injured party incurs in securing compensation of its loss ...." Rowe, Attorney Fee Arrangements and Dispute Resolution, paper prepared for the National Conference on the Lawyer's Changing Role in Resolving Disputes, Harvard Law School, October 14-16, 1984, at p. 41, citing Posner, Economic Analysis of Law 143 (1977).

Superimposing some type of contractual principle of "reciprocity" on statutes which call for one-sided fee shifting

would frustrate the legislative intent to allow more injured people to seek redress and to encourage improved enforcement of public policy. In fact, private parties' contractual dealings would effectively thwart the legislative intent if injured people contemplating a lawsuit were forced to confront the prospect of having to pay the defendant's legal fees as well as their own as a risk of enforcing their rights.

In recognition of this public policy effect, the Carver court ruled that the Cartwright Act fees provision is the kind of statutory provision that will override a general litigation contractual costs entitlement application for purposes of assessing attorney fees. Carver v. Chevron, supra, 97 Cal.App.4th at 147. The court, citing Covenant Mutual Insurance Company v. Young, 179 Cal.App.3d 318 (1986), stated that there is "a salient difference between 'one-sided' attorney fee provisions which individuals or institutions insert in private contracts and those which lawmakers enact in public legislation." The former are created for private advantage and almost always favor the party with the greater bargaining power. The latter are created by the publicly elected legislative branch "as a deliberate stratagem for advancing some public purpose, usually by encouraging more effective enforcement of some important public policy." Id.

It is hard to offer a more compelling statutory construct for "one-sided" attorney fee provisions than that of the FLSA. After all, it was President Franklin D. Roosevelt who sent a blistering message to Congress urging enactment when he said, "[O]ur nation so richly endowed with natural resources and with a capable and industrious population should be able to devise ways and means of insuring to all our able-bodied working men and women a fair day's pay for a fair day's work." H.R.Rep.No. 101-260 (Sept. 26, 1989), 1989 U.S.C.C.A.N. 696-97.

Consequently, the legislative "trump card" under FLSA should override a contractual provision in an employment agreement providing for recovery of employers attorneys' fees in the event of an unsuccessful prosecution of a statutory overtime claim.

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