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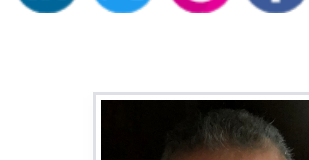
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Fee-Shifting in Overtime Wage Statute Trumps Contract's Attorney-Fee Clause

Who is entitled to attorney fees when statutes conflict with contracts? The answer may surprise some. Under a typical employment arrangement, the employee must sign an employment contract, which often contains an attorney fee-shifting provision.



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The 9th U.S. Circuit Court of Appeals recently held that employers may force workers to submit to mandatory arbitration as a condition of employment. *EEOC v. Luce, Forward, Hamilton & Scripps*, 2002 DJDAR 1089 (9th Cir. Sept. 3, 2002). So the chance that an employer also may include a reciprocal attorney-fee clause in an 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 one-way fee shifting "to be paid by the defendant" to the prevailing plaintiff? 29 U.S.C. Section 216(b). Does the statute trump the contract? The answer may lie in the analysis in *Carver v. Chevron U.S.A. Inc.*, 97 Cal.App.4th 132 (2002).

In *Carver*, a group of gasoline dealers sued the oil company and several of its management employees for breach of contract, fraud and violation of the antitrust laws. The dealers won a jury verdict, but the judgment was reversed on appeal, in an unpublished opinion, with directions to enter judgment in favor of Chevron.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 (9th Cir. May 28, 1999).

Chevron quickly submitted a memorandum of costs and attorney declarations requesting fees of more than \$5 million on the basis that the dealer leases contained an attorney-fee clause for the prevailing party to the litigation. The plaintiffs opposed this request because the attorney-fee clauses required the dealers to waive critical rights under the Cartwright Act (Business & Professions Code Section 16750), which provides for a one-sided recovery of attorney fees.

The trial court was not persuaded and awarded Chevron attorney fees that it incurred in defense of Cartwright Act claims. 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 could not fall within the scope of the attorney-fee clause of the lease and were not authorized by contract or by statute.

Santisas v. Goodin, 17 Cal.4th 599 (1998), outlines basic litigation costs rules. *Santisas* 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, for example, Code of Civil Procedure Section 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-fee clause of many consumer and employee-protection statutes. A perfect example is the Fair Labor Standards Act. Unlike other fee-shifting statutes where an award of attorney fees to the prevailing party is discretionary, an award of attorney fees incurred at the trial-court level by a prevailing plaintiff is mandatory under the act. *Shelton v. Ervin*, 830 F.2d 182 (11th Cir. 1987), *aff'd*, 853 F.2d 931 (11th Cir. 1988).

The rationale is simple. An express purpose of the act 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 (6th Cir. 1984).

Congress' mandate to award attorney fees and costs to all successful plaintiffs under the act was intended as a necessary incentive for private litigants to act as "private attorneys general" to vindicate and enforce the act. *Laffey v. Northwest Airlines*, 746 F.2d 4 (D.C. Cir.), *cert. denied*, 472 U.S. 1021 (1984).

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 (4th Cir. 1946).

In fact, the act 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 (1980) (defendant entitled to attorney fees under Section 1988 as result of defending frivolous claims); *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978) (same for Title VII claims).

The underlying purpose and history is so dynamic in an Fair Labor Standards Act action that, as a prevailing party, a plaintiff is entitled to an award of attorney fees that may substantially exceed the amount of damages awarded. *Bonnette v. California Health & Welfare*, 704 F.2d 1465 (9th Cir. 1983) (awarding \$100,000 in attorney fees, although damage award was only \$18,455).

In *Carver*, the question was whether Section 16750(a) of the Cartwright Act otherwise indicates that attorney fees incurred to defend against such claims are not subject to a reciprocal contractual attorney-fee clause or other reciprocal effect as created by law. The answer, however, necessitates a public-policy discussion.

The fact that lawmakers offer a bounty, of sorts, for plaintiffs who sue to enforce a right that the Legislature has elected to favor in no sense implies that 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 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 own legal fees might otherwise consume a good portion of his judgment. So he is unlikely to sue, even if success is almost certain.

If he has to deduct his own attorney fees from a less-than-certain judgment, the disincentive is even more chilling. He likewise may not sue, even though his injury was quite severe and his gross recovery large. In the end, the employer effectively skirts 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 can intervene to alter the decision-making process by instituting unilateral fee shifting. Now the injured person understands that he will not have to absorb his own lawyer's legal fees if he wins. This makes it economical to seek redress not just where the recovery is large but also in modest cases.

This, likewise, means that the probability of success can be much lower before a suit is instituted. Thus, as a result of the intervention, more injured parties will file more lawsuits and the public policy behind the substantive statute will be enforced more effectively and more broadly.

Into the bargain, "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." Thomas D. 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, Oct. 14-16, 1984, at 41.

Superimposing some type of contractual principle of "reciprocity" on statutes that 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 would effectively thwart the legislative intent if injured people contemplating a lawsuit have to confront the prospect of having to pay the defendant's legal fees as well as their own in the event that they lost.

As such, the *Carver* court ruled that the Cartwright Act fees provision is the kind of statutory provision that will override a general litigation costs entitlement application for purposes of assessing attorney fees by contract.

The court, citing *Covenant Mutual Insurance Co. 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 greater bargaining power. The latter are created by legislators "as a deliberate stratagem for advancing some public purpose, usually by encouraging more effective enforcement of some important public policy."

It is hard to offer a more compelling statutory construct for "one-sided" attorney-fee provisions than that of the Fair Labor Standards Act. After all, it was President Franklin D. Roosevelt who sent a blistering message to Congress urging enactment when he said that "our 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." Joint Hearings on HR7200 & S2475, H.R. Rep. No. 75-2182 (1937).

Consequently, the legislative "trump card" under the act should override an employment agreement providing for employers' attorney fees in the event of an unsuccessful prosecution of statutory overtime claims.

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