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Recovering Post-Judgment Attorney Fees After 'McQueen'

Audra Ibarra, The Recorder

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The California Supreme Court recently issued an opinion with the potential to affect every future attorney fee shifting case. Although the general rule is each party in civil litigation pays for his own fees regardless of the outcome, a statute or contract between the parties may authorize otherwise.

When fee shifting is authorized, whether an award should be made and in what amount may become one of the most important issues in a case because attorney fees frequently exceed damages. A prevailing party wants to maximize recovery of fees just as a losing party wants to avoid or minimize it. Knowing the deadline to file for fees is important for both sides. The court clarified the filing deadlines for appellate and enforcement attorney fees in *Conservatorship of McQueen*. ((2014) 59 Cal.4th 602, 605.)

In that case, a jury found the defendant liable for financial elder abuse. Because the financial elder abuse statute contains a fee shifting provision, the trial court ordered the defendant to pay the plaintiff's prejudgment attorney fees. After the plaintiff successfully defended the judgment on appeal and enforced the judgment in a separate action, the defendant finally satisfied the judgment.

The plaintiff then moved for appellate and enforcement attorney fees.

Although the trial court granted the motion for fees, the court of appeal reversed. According to the court of appeal, under the Enforcement of Judgments Law, satisfaction barred any further fees. The California Supreme Court reversed and upheld the appellate fees, but affirmed the denial of enforcement fees.

To recover appellate attorney fees for successfully defending a judgment on appeal in an unlimited civil case, a prevailing party must ask for the fees within 40 days after the clerk sends notice of issuance of remittitur.

Writing for a unanimous court, Justice Kathryn M. Werdegar explained "[w]here a statute provides for attorney fees, they are generally available both at trial and on appeal . . . and the procedure for their recovery is set out by court rule . . ." (59 Cal.4th at 605.) More specifically,

the deadline for recovery of appellate fees is governed by the California Rules of Court. A request for fees for a non-interlocutory appeal in an unlimited civil case must be made "[w]ithin 40 days after the clerk sends notice of issuance of remittitur" under rules 3.1702(c) and 8.278(c)(1). Although this case concerned a statutory provision, it appears the court's analysis would be equally applicable to a broad fee shifting provision in a contract.

Winning and Losing party Requirements

Before filing an appeal, a losing party in the trial court should evaluate whether the chance of reversal is worth the risk of an adverse appellate attorney fee award.

A party who loses at trial and on appeal cannot avoid an appellate attorney fee award by simply paying the judgment before fees are requested. The court held a prevailing party, who successfully defends the judgment, may ask for appellate fees regardless of whether the judgment has already been satisfied.

The court explained satisfaction and the Enforcement of Judgments Law do not limit the time within which a party may move for fees for a direct appeal. The Enforcement of Judgments Law generally provides a prevailing party may recover attorney fees for enforcing a judgment if the underlying judgment includes an award of fees to that party, and a request for enforcement fees is "made before the judgment is satisfied in full, but not later than two years after the costs have been incurred." (Code Civ. Proc., § 685.080, subd. (a)) However, the court found defending a judgment on appeal is distinguishable from enforcing a judgment: "plaintiff's efforts in opposing defendant's appeal of the judgment were not undertaken to *enforce* the judgment but to defend it against reversal or modification." (59 Cal.4th at 605.)

Covering the Check

To recover enforcement attorney fees, a prevailing party should file his motion for fees as soon as a substantial amount of attorney time is expended on enforcement, and then file supplemental motions for additional fees as necessary. If he receives an uncertified check for the full judgment, he should not cash or deposit it until after filing his final motion for fees. Similarly, if he receives a certified check, he should reject it before his final motion.

The court held satisfaction of judgment immediately cuts off the time to ask for enforcement fees under the "explicit, unambiguous language" of the Enforcement of Judgments Law (59 Cal.4th at 615.). The court explained a party "cannot accept a payment as full satisfaction of the judgment, and then file a memorandum or motion for additional enforcement costs and fees." (59 Cal.4th at 616.)

However, the court found a party who seeks recovery of enforcement fees can usually, but not always, postpone satisfaction until after he requests his fees: "[a] judgment creditor who has yet to file a memorandum of costs . . . or cost motion . . . is not generally at the mercy of the judgment debtor as to the timing of satisfaction." (59 Cal.4th at 615.) According to the court, a party can delay satisfaction by not presenting an uncertified check to a bank or "rejecting" a certified check, but the court did not define what constitutes "rejecting" a certified check.

To avoid an adverse enforcement attorney fee award, a losing party in the trial court

should pay his judgment in full as soon as possible. If he thinks he may face such fees, he should pay his judgment in cash or possibly by wire transfer to cut off the time to request fees.

According to the court, satisfaction of judgment occurs when among other things the judgment is paid in full by: (1) an uncertified check that is presented to and honored by a bank; (2) a certified check that is accepted by the prevailing party; or (3) cash.

A losing party cannot control whether the prevailing party will present its uncertified check to the bank or accept its certified check. But a losing party can pay its judgment in full in cash, or potentially by wire transfer, to immediately satisfy the judgment and cut off the prevailing party's time to request enforcement attorney fees.

In Practice articles inform readers on developments in substantive law. Contact James Cronin with submissions or questions at jcronin@alm.com.

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