<u>Recovery, and Defense of Attorneys' Fees Claims</u>
<u>FDCC – Toronto 2024</u>

Russell Buhite:

General Avenues for Recovery of Fees and Prevailing Party Issue (20 Minutes total)

I. **"American Rule"** – Provides that in the absence of legislation otherwise, or contractual duty, litigants must pay their own attorneys' fees. *Alyeska Pipeline Svcs. Co. v. Wilderness Society*, 421 U.S. 240 (1975)

II. **Common Statutory Provisions –** e.g. community association law; cooperatives; proposals for settlement; ERISA; Civil Rights laws; California PAGA.

III. **State Common Law** – e.g. WA "*Olympic Steamship*" fees (insured party has the right to recover its attorney fees when an insurer "refuses to defend or pay the justified action or claim of the insured.")

IV. **Sanctions and other provisions** – such as the court's equitable power, sanctions under court rules. (Rule 11, Court's inherent powers, state law rules)

V. **Contractual Provisions** – Prevailing party fee provisions are designed to put the prevailing party in the position it would have been in had the matter been resolved without litigation. Describe several common contractual provisions.

VI. **What is a "Prevailing Party"?**

A. In general: a prevailing party is one that prevails on all or a substantial part of the litigation. Courts often employ a balancing test to determine. *Barber v. T.D. Williamson, Inc.*, 254 F.3d 1223 ((10th Cir. 2001).

B. What if both parties are deemed to have prevailed? *Estate of Hevia v. Portrio Corp.*, 602 F.3d 34 (1st Cir. 2010); *Howell Petr. Corp. v. Samson Res. Co.*, 903 F.2d 778 (10th Cir. 1990).

C. What happens when there are counterclaims? *Scutti v. Daniel E. Adache & Assoc. Arch.*, 515 So.2d 1023 (Fla. 4th DCA 1987); *Tax Track Sys. Corp. v. New Investor World, Inc.*, 478 F.3d 783 (7th Cir. 2007).

D. Relief cannot be merely procedural or technical. *Johnson v. Lafayette Fire Fighters Ass'n*, 51 F.3d 726 (7th Cir. 1995). It must reach the underlying merits.

E. Courts often look at difference between judgment recovered and relief sought, the significance of the legal issue, and the purpose of the litigation. *Farrar v. Hobby*, 506 U.S. 103 (1992).

F. Relief must affect the behavior of the defendant towards the plaintiff (or vice versa) or legal relationship between the parties. *Hewitt v. Helms*, 482 U.S. 755 (1987); *Shum v. Intel Corp.*, 629 F.3d 1360 (Fed. Cir. 2010).

G. The awarding of nominal damages can qualify. *Farrar v. Hobby*, 506 U.S. 103 (1992).

H. What happens if the judgment is vacated or reversed on appeal? *Dexter v. Kirschner*, 984 F.2d 979 (9th Cir. 1992).

I. Mootness of prior injunction after final judgment? *Dahlem v. Bd. of Educ.*, 901 F.2d 1508 (10th Cir. 1990)

J. Public interest cases where fees are disproportionate to damages awarded. *City of Riverside v. Rivera*, 477 U.S. 561 (1986).

Brooks Magratten:

VII. **What is a reasonable hourly rate?** (20 minutes)

A. Factors that determine a reasonable hourly rate
- Location
- Specialization
- Firm size
- Experience
- Scholarship
- Rates of opposing counsel
- Nature of work done
- The Judge

B. Class Actions

C. Multipliers

D. Inflation rate

Bailey King

I. Litigating Petitions for Reasonable Attorneys' Fees (20 minutes)

A. No longer an afterthought; deserves a strategy.

a. Legislatures increasingly permitting fee-shifting.

i. Ex.: Reciprocal Attorneys' Fees in Business Contract statute in North Carolina. N.C. Gen. Stat. § 6-21.6.

b. Increasing costs of litigation means potential for larger recovery/exposure.

c. Merits of a claim for fees can be used as leverage in settlement.

B. Pleading a claim for reasonable attorneys' fees

a. Should be pled specifically (or by motion once potential entitlement becomes known) or can be waived.

i. Ex.: AAA R-45 provides for "an award of attorneys' fees if all parties have requested such an award or it is authorized by law or their arbitration agreement."

ii. Identify specific grounds (statutory provision) and applicable standard in pleading.

1. Ex.: N.C. Unfair and Deceptive Trade Practices mandates an award of fees if (i) defendant "willfully engaged in the act . . . and there was an unwar4ranted refusal by such party to fully resolve" the case; or (ii) plaintiff "knew or should have known, the action was frivolous and malicious."

b. Motion to dismiss/motion to strike/affirmative defense.

C. Proving/Opposing a claim for reasonable attorneys' fees

a. Traditional methods

i. Billing records – do not prove reasonableness but oftentimes submitted.

1. Use of summary chart instead of actual records?

2. Block-billing makes determination more difficult for court.

a. May need to segregate fees for particular claims/tasks/etc.

ii. Expert testimony by attorney affidavit within relevant community.

            1. Reasonableness opinion from attorney who handled case?
        iii. Billing Rate Surveys
    b. Relevance/Admissibility of Settlement Negotiations. *See* Fed. R. Evid. (Ordinarily irrelevant, but "the court may admit [evidence of compromise offers] for another purpose").

D. Discovery on reasonableness of attorneys' fees.
    a. Scope of discovery is unclear.
        i. "A request for attorneys' fees should not result in a second major litigation." *In re Nat'l Lloyds Ins. Co.*, No. 15-0591, 2017 WL 2501107, at *7 (Tex. 2017) *quoting Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983).
            1. But Rules of Civil Procedure apply to claim for attorneys' fees.
        ii. Party seeking fees open themselves up to discovery (likely will provide voluntarily).
            1. Waiver of work product protection if use billing records for offensive use. *Id.*
        iii. Party opposing fees may open also themselves up to discovery on your fees as "comparator."
            1. Discovery on opposing party's fees should be irrelevant.
                a. Post-judgment discovery prolongs litigation, resulting in the "second major litigation."
                b. Opposing party's fees are not relevant to whether fee-seeking party's fees are "relevant."
                c. Threatens attorney-client privilege and work product protection (because not voluntarily making offensive use)
            2. But some courts have permitted.
                a. *Pollard v. E.I. DuPont De Nemours & Co.*, 2004 WL 784489, at *3 (W.D. Tenn. Feb. 24, 2004) ("the time spent by defense counsel . . . may well be the best

measure of what amount of time is reasonable" and a "logical yardstick."}

3. Practice Pointer – Don't put your fees at issue by making a comparison.

b. Depositions?

Conclusion and Questions

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