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If Settlement Doesn't Specify, Plaintiff Wins Costs by Default

California law declares that prevailing parties in a lawsuit may collect their basic litigation costs from their opponents. But what happens in a settlement, where the plaintiff agrees to drop the suit and the defendant agrees to pay some money? Who is the prevailing party? Who may collect costs?

According to a new decision from the California Supreme Court, the plaintiff. Absent any agreement about costs in the settlement, the "default rule" now is that a plaintiff receiving money from the defendant to settle a lawsuit is the prevailing party and may seek costs.

Most mediators and lawyers would say that in a settlement both the plaintiff and the defendant win, at least a little. The issue in the new decision grew from the fact that the statute on recovering costs also seems to say the settling plaintiff and settling defendant prevail.

Code of Civil Procedure Section 1032 "defines the 'prevailing party' in litigation to include 'the party with a net monetary recovery' and 'a defendant in whose favor a dismissal is entered,'" the court pointed out in *DeSaulles v. Community Hospital of the Monterey Peninsula*.

Obviously, both sides can't collect their costs. That would be "an absurd result," the court said, quoting an earlier decision.

To determine the reasonable result, the Supreme Court dug into the legislative history and judicial interpretations of the code section. It concluded that the reason the statute grants costs to someone obtaining a dismissal was to prevent plaintiffs from evading paying costs simply by dismissing their lawsuits. But, the court held, "[t]hat rule does not apply to plaintiffs that have achieved some litigation success through settlement of the case."

On the other hand, plaintiffs who do achieve some monetary success through settlement are prevailing parties. The settlement is a "monetary recovery" obtained through legal process, the court said.

"Just as a plaintiff cannot avoid a cost award by dismissing an action on the eve of trial, so a defendant cannot avoid a cost award merely by settling on the eve of trial."

Nor should it matter that the case ended in a dismissal rather than a stipulated judgment, as the defense in the case argued. Holding otherwise would be “inequitable and inconsistent with the purpose of section 1032,” the court said.

In a dissent, two justices argued that a defendant who obtains a dismissal is a prevailing party under the code section, and so is the plaintiff. But because both can’t be entitled to costs, the next sentence in the statute applies. The sentence says that “in situations other than as specified,” the judge determines which party prevailed and may allocate costs as seems appropriate. Two prevailing parties is “other than as specified” by the code section, according to the dissent.

Leaving it to courts to decide would protect defendants who pay nuisance settlements to end frivolous lawsuits from also having to pay costs. Such a rule “would permit trial courts to refrain from awarding costs to settling plaintiffs in circumstances in which a costs award would be inequitable or unjust,” the dissent said.

The majority opinion recognized the potential problem. It recommended that trial courts could consider “the realities” exercising their “gatekeeper function” under a different code section. “Although not required by law, it is advisable that trial courts inquire into whether the parties in a given case have resolved the allocation of costs in their settlement agreement, or whether they wish to have the court resolve the issue, before placing a judicial imprimatur on the agreement.”

Still, both majority and dissent agreed that the best answer to the question of who pays litigation costs following a settlement is for litigants to figure it out beforehand within their settlement agreement. “When parties settle a case, they are free to allocate costs in any manner they see fit, although they must do so in language specifically addressing such allocation,” the majority stated.

Since the court’s new “default rule” favors plaintiffs, the majority’s suggestion is especially important for the defense. Following this new decision, defense counsel preparing releases and settlement agreements should always be sure to include language specifying that each party bear its own costs.

Cutting One Check to Many Claimants May Not Cut It

Paying a judgment or settlement in a simple personal injury case isn’t necessarily simple. That’s especially true when the injured plaintiff has been treated by several doctors and hospitals, each demanding a share of the proceeds. If the plaintiff disputes their demands, the problem is even more complicated.

One approach defendants and their insurers sometimes use is to write one check made out to everybody plus the plaintiff’s attorney, and leave it to them to sort out.

According to a recent California Court of Appeal decision, that may not be a smart move — at least when one of the medical providers is a county hospital. In *County of Santa Clara v. Escobar*, the court ruled that the county could sue the defendant directly even after the defendant had paid the plaintiff.

“What [the defendant] cannot do is simply shirk its statutory obligations by turning disputed funds over to the injured person in a check payable to both contestants.”

The plaintiff in this case had been seriously injured in an auto accident caused by an employee of the packaged salad company Fresh Express. He was treated by the Santa Clara Valley Medical Center at a cost, according to the hospital, of $1.2 million. He eventually obtained a judgment for $5.7 million.

When the county asserted a lien against the judgment, the plaintiff’s attorney — who earlier had agreed the hospital charges were reasonable — disputed the amount. At that point, Fresh Express sent the attorney a $1.2 million check made out to the attorney and the county, but the attorney refused to endorse it over to the county. In response, the county sued both the plaintiff and the defendants.

The trial judge granted a demurrer to Fresh Express, ruling the county could only try to enforce its lien against the judgment but not bring a separate lawsuit.

The Court of Appeal reversed. It held that that Government Code Section 23004.1 — the special statute that allows counties to collect from tort defendants their hospitals’ reasonable costs for treating tort plaintiffs — does allow a direct suit.

The difficulty arises from a subsection of the statute that "authorizes the county to file suit on its own behalf, but goes on to state that if the injured person brings an action, 'the county's right of action shall abate during the pendency of such action, and continue as a first lien against any judgment recovered by the injured or diseased person,'" the appellate court noted.

The trial court judge apparently read "continue as" to mean "becomes" or "transforms into," according to the opinion. Digging exhaustively into the words and background of the code section, the appellate court disagreed.

"It is something of an oxymoron to say that a thing continues as a different thing. … Many would consider it imprecise, if not wrong, to say that a caterpillar continues as a butterfly, or an acorn as an oak."

The court agreed with Fresh Express that the law doesn't require defendants to pay twice. "But it does not follow that the Legislature meant to permit judgment debtors like Fresh Express to wash their hands of the matter by simply turning the funds over to the injured plaintiff. … Without the threat of such continuing liability, there would be no incentive for a judgment debtor to comply with a county's lien, and … no plaintiff would ever cooperate in such compliance when it could instead … cast the county into procedural limbo in hopes of driving down the size of its claim."

What Fresh Express should have done — and probably should do on remand — is deposit the money with the trial court and file an interpleader action. "To the extent that Fresh Express now finds itself in an uncomfortable strait, it is because it failed to avail itself of the escape routes provided by the code."

While the law in this case only applies to county hospitals, the court pointed out that another law applying to private hospitals, the Hospital Lien Act, also "expressly entitles the hospital to proceed directly against a tortfeasor who pays the injured person without honoring the lien."

Haunted House Survivor, Delivery Driver Assumed Risks

The legal doctrine called primary assumption of risk generally declares that someone involved in an activity with an inherent risk of harm has no duty to protect other participants from those risks. A baseball team doesn't have a to protect players from "beanball" pitches; someone injured while riding in a bumper car can't sue the other driver.

The current version of the doctrine comes from a 1992 case about touch football, and in the years since, it has been applied to many sports and expanded to cover other recreational activities as well. A different version, usually known as the firefighter's rule, prevents firefighters, police officers or veterinarians from suing whoever is responsible for the fire, crime or biting dog that injured them.

A pair of recent California Court of Appeal cases push each of those varieties of assumption of risk a little further.

One issued, fittingly, right before Halloween, expands the protection given recreational activities to include haunted houses. A patron who fell running away from an apparent chainsaw-wielding maniac can't sue the attraction, according to the decision in *Griffin v. The Haunted Hotel Inc.*

The reasoning isn't hard to guess. "At bottom, [the plaintiff's] complaint here is Haunted Hotel delivered on its promise to scare the wits out of him," the appellate court explained.

The attraction in this case was a haunted trail through part of San Diego's Balboa Park. Well along the way, patrons exited through a sort of gate that appeared to mark the end. As they relaxed, an actor waving a real, running chainsaw — but with the chain removed — would jump out to give them one more scare. The actor chased anyone who ran, including the plaintiff.

Under California's primary assumption of risk doctrine, courts won't impose liability if the risk that caused the plaintiff's injury is inherent in the sport and removing the risk would fundamentally alter how it's played. With a haunted attraction, "the risk that someone will become scared and react by running away cannot be eliminated without changing the basic character of the activity," the court held. "As the trial court aptly noted, '[W]ho would want to go to a haunted house that is not scary?'"

The second case in effect asks, who would want a deliveryman who can't pick up packages? *Moore v. William Jessup University* involves a UPS driver lifting an overweight box mislabeled by its sender as being much lighter.

"Receiving an injury in the course of moving or lifting heavy objects is a risk inherent in [the plaintiff's] occupation," the court held. Further, the university bookstore that shipped and apparently mislabeled the package did not "increase the risk of harm" to the driver beyond what he normally faced. Evidence showed he handled mislabeled packages weekly.

The court compared the UPS driver to the first responders covered by the firefighter's rule and the vets and assistants covered by the similar veterinarian's rule. Courts relying on those rules have held that "as a matter of public policy, it is unfair to impose a duty on a defendant to prevent an injury to a plaintiff arising from the very condition or hazard the defendant retained the plaintiff to confront."

Little-Noticed New Laws Bring Changes to Civil Procedure

News outlets around the country earlier this year reported on California' new "Fair Pay Act," which has been described as the strictest equal pay law in the nation. Other new California laws that drew national attention dealt with assisted suicide, mandatory childhood vaccinations and automatic voter registration via the Department of Motor Vehicles.

In addition, media within the state announced 2016 laws dealing with hover boards, artificial turf, cheerleaders, the minimum wage, medical marijuana, driving while wearing headphones, warrants for email searches and many more topics.

Far less noticed were new laws affecting civil litigation, courts and judges. Here are short descriptions of several of those laws:

Demurrers — The new law making perhaps the biggest change to California civil procedure has been described as demurrer reform. Primarily, SB 383 requires parties to a civil suit to meet and confer, in person or by phone, at least five days before a responsive pleading to the complaint or cross-complaint is due — with the goal of heading off the demurrer. The side planning to demurrer must identify the causes of action being targeted and give legal support for why. The other side must respond with proposals to amend the complaint or legal support for not making changes.

The new law also shortens the deadline for a plaintiff or cross-complainant to amend without court permission. Rather than at the time of a court's ruling on a demurrer, any by-right amendments must be filed by the time the opposition to a demurrer is due. Once a complaint is amended, the other side is not allowed to demur on grounds previously rejected or ones that could have been raised in a previous demurrer.

Failing to meet and confer, by the way, is not ground to sustain or overrule the demurrer. The law is set to sunset in 2021.

Expedited Jury Trials — For several years, civil litigants have been able to agree to try their cases in a stripped-down mode, with just three hours of trial time per side, an eight-person jury, limited discovery and no appeals. New law AB 555 makes a slightly looser form of expedited jury trials mandatory for most limited-jurisdiction civil matters, which are cases worth less than $25,000.

In the mandatory expedited trials, each side will be allowed five hours to put on their cases, including jury selection. Parties will be allowed four peremptory challenges, up from three. Most significantly, verdicts can be appealed to the superior court appellate department.

The law gives parties nine reasons to opt out of the expedited procedure, such as a demand for punitive damages or attorneys' fees, an insurer's reservation of rights, damages sought in excess of coverage and a claim of moral turpitude.

The law takes effect July 1, 2016 and sunsets three years later.

Summary Adjudication —In 2012, a new statute broadened courts' ability to dispose of issues through a motion for summary adjudication even though the motion sought a ruling that would not dispose of the entire case. However, the Legislature inadvertently allowed that law to sunset at the end of 2014. This year, AB 1141 brings it back.

Separately, the bill also fixes another legislative mistake, this one about costs that can be recovered under Code of Civil Procedure Section 998 when one side does less well at trial that the other side's pretrial offer. Until this year, the law allowed defendants to collect post-offer costs, such as expert fees, from plaintiffs, while plaintiffs could collect pre- offer costs as well. The new law cuts out pre-offer costs to equalize treatment of plaintiffs and defendants.

Summary Judgment Rulings — A related statute declares that judges no longer have to rule on every single evidence objection raised in connection with a motion for summary judgment. According to SB 470, the judges only have to rule on evidence questions they "deem material" to deciding the motion. The statute was sparked by an appellate decision that said summary judgment motions sometimes provoke hundreds of inconsequential evidence objections.

Judicial Signatures — In another bid to make life easier for judges, AB 432 says they now can put their electronic, rather than handwritten, signatures on any "any notice, order, judgment, decree, decision, ruling, opinion" or so forth.

Interpreter Costs — The fees interpreters charge for depositions can be recovered as costs, under AB 1002.

Unavailable Witness — AB 593 removes a sunset provision that would have ended the "forfeiture-by-wrongdoing" hearsay exception. The exception allows a statement by an unavailable witness to come into evidence if the party opposed to the statement intentionally caused the unavailability.

Harassing Lawsuits — A court can issue a civil penalty up to $5,000 against anyone who files or records a lawsuit, lien or other encumbrance knowing it is false in order to harass the other side, according to AB 1267.

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The founder and president of The Rodolff Law Firm, APC, Barry L. Rodolff, is a highly experienced lawyer who has been assisting clients faced with civil litigation for more than two decades. Mr. Rodolff developed his skills with two well-respected defense firms, Schell & Delamer, and Haight, Brown & Bonesteel. He also worked in-house at Travelers Insurance Company, representing a variety of insured companies in many types of litigation. His clients have ranged from small businesses to multinational corporations. Mr. Rodolff brings extensive experience and knowledge in the defense of litigation involving premises liability, business, product liability, personal injury, employment, construction defect, and intentional torts.