



December 8, 2004

CALIFORNIA SUPREME COURT ALLOWS ATTORNEY FEES AWARD TO ACTIVISTS

(Graham v. DaimlerChrysler Corp.)

In a sharply divided 4-3 decision, the California Supreme Court recently affirmed a lower court's rationale for awarding a consumer group attorney fees under the so-called "catalyst theory." However, the Court remanded the case to the lower court to determine the actual amount that should be paid to the activist group for filing a short-lived consumer lawsuit against a company by taking into account certain clarifications of the catalyst theory.

Last year, the Washington Legal Foundation (WLF) filed a brief in the Court urging it to reverse the lower court decision because it could subject all companies to costly activist litigation. The lower court had upheld a huge attorneys' fee award to a consumer group for filing a lawsuit against an automobile company because of an inadvertent misprint in the owner's manual about the towing capacity of the vehicle. Because the company began to change the misprint in the manual well before the suit was filed, and even offered to repurchase any vehicle, the activists' suit became moot, no relief was awarded, and the case was dismissed less than three weeks after it was filed. Nevertheless, the group was awarded almost \$800,000 simply for filing the lawsuit.

Although the underlying suit was quickly dismissed, the litigation over the award of fees took over three and half years. Approximately 90 percent of the fees awarded by the court to the group represented "fees on fees" -- the fees the activists expended to seek the award of the attorneys' fees they claim they were entitled to for filing the original suit under the "catalyst theory." Under that theory, courts have awarded attorneys' fees if the lawsuit helped to bring about corrective changes that otherwise would not have been made, even if no favorable court order was obtained.

WLF argued in its brief that this judge-made catalyst theory has been rejected by the U.S. Supreme Court, and should also be rejected by California courts. Principles of fundamental fairness and sound public policy dictate that fees should not be awarded to a plaintiff who has received no relief from the court whatsoever. At a minimum, WLF argued that the Court should not award "fees on fees," otherwise, activists would engage in protracted litigation not to obtain relief for consumers, but to get large fee awards.

In its decision, the California Supreme Court declined to follow the U.S. Supreme Court ruling, indicating that California court's use of the catalyst theory encourages consumer lawsuits

that force companies to change their practices, even though no court judgment enforcing the change in practice is issued.

However, the Court cautioned that to be eligible for a fee award, the lawsuit must be found not only to be a catalyst for change in the defendant's behavior and conduct, but also that the lawsuit must have some merit (rather than being a nuisance suit), and that the plaintiff "must have engaged in a reasonable attempt to settle its dispute with the defendant prior to litigation."

As for the actual amount of attorney fees to be awarded, the Court rejected the argument that the fees should be limited only to the so-called "lodestar" amount, that is, the number of hours reasonably expended on the case times a reasonable hourly rate, rather than being enhanced by some multiple. The Court reasoned that enhanced lodestars encourage consumer litigation. The Court did rule, however, that the fees awarded for the time spent applying for the fees expended in the litigation, "should be enhanced at a significantly lower rate than fees for the underlying litigation, if they are enhanced at all."

In his 28-page dissenting opinion, Justice Ming W. Chin warned that the majority's ruling would spur needless lawsuits. "I can perceive of few things less useful to society than generating great amounts of attorney fees litigating the catalyst theory," wrote Judge Chin. He believed that a judicial order ruling in favor of the plaintiffs should be a prerequisite for the award of fees; otherwise, according to Justice Chin, the mere "threat of a huge award of attorney fees generated while litigating the catalyst theory permits the plaintiffs to extort attorney fees from businesses no matter how weak their entitlement to them may be. With this case as a warning, future defendants may surrender to attorney fees demands, no matter how unmeritorious, rather than risk a substantial award of attorney fees down the road."

WLF will continue to monitor the case on remand for possible further participation by WLF in the case. WLF's brief was filed with the pro bono assistance of Mark S. Pulliam, Jennifer F. Ziehaus, Daniel P. Brunton, attorneys with the San Diego office of Latham & Watkins.

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