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U.S. Supreme Court Sets New Guidelines for Recovery of Legal Fees for Frivolous Civil Rights Claims

By Matthew Hank and Sarah McCarthy

In *Fox v. Vice*, No. 10-114 (June 6, 2011), the U.S. Supreme Court held that, in civil rights cases where a plaintiff asserts both frivolous and non-frivolous claims, a defendant is entitled to recover, under 42 U.S.C. section 1988, the portion of its attorney's fees that would not have been incurred but for the frivolous claims.

Background

Ricky Fox, a candidate for chief of police of Vinton, Louisiana, sued his former electoral opponent, Billy Ray Vice, asserting that Vice resorted to underhanded tactics to force Fox out of the race, including sending Fox an anonymous letter threatening to publish damaging charges against Fox if he remained a candidate. After Fox won the election, Vice was convicted of criminal extortion for his election-related conduct. Additionally, Fox filed against Vice a civil suit in state court, alleging a variety of state law claims (including defamation) and federal civil rights claims under 42 U.S.C. section 1983 (including interference with Fox's right to seek public office).

Vice removed the case to federal court on the basis of the section 1983 claims, the parties engaged in discovery, and Vice then moved for summary judgment as to the federal claims. After Fox conceded that the federal claims were "no[t] valid," the district court granted summary judgment as to the section 1983 claims, declined to exercise supplemental jurisdiction over the remaining state law claims, and remanded the case to state court for adjudication of the claims arising under state law. In the process, the district court observed that "[a]ny trial preparation, legal research, and discovery may be used by the parties in the state court proceedings."

Subsequently, the district court granted Vice's motion for attorney's fees under 42 U.S.C. section 1988, which (in actions to enforce certain civil rights statutes) authorizes a district court to award attorney's fees to a defendant "upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation." Concluding that Fox's federal claims were frivolous, the district court held that Vice should receive all of the fees he reasonably incurred in defending the suit, even though his billing records did not differentiate between time spent defending against the frivolous and non-frivolous claims. After the Fifth Circuit affirmed, the Supreme Court decided to review the case.

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Supreme Court Holds A Court May Award Attorney's Fees Under Section 1988 When Plaintiff Asserts Both Frivolous And Non-Frivolous Claims, But Only Those Fees that Would Not Have Been Paid "But For" the Frivolous Claims

The issues before the Supreme Court were whether, and to what extent, a trial court may award attorney's fees to a defendant under section 1988 when a civil rights plaintiff asserts both frivolous and non-frivolous claims. In a unanimous opinion, the Court answered these questions and resolved a split among Circuit Courts of Appeals, one of which had forbidden compensation unless all of the plaintiff's claims were frivolous, and others of which allowed fees but with varying rules of allocation.

The Court readily answered the first question in the affirmative, reasoning that a plaintiff acts wrongly in bringing frivolous allegations, that a court may shift to that plaintiff the "reasonable costs that those claims imposed on his adversary," and that the presence of reasonable allegations in a lawsuit should not "immunize the plaintiff against paying for the fees that his frivolous claims imposed."

The second, more difficult, question that the Court faced was one of allocation: "In a lawsuit involving a mix of frivolous and non-frivolous claims, what work may the defendant receive fees for?" The Court answered that question by adopting a "but for" test: the defendant may recover fees that "would [not] have been incurred in the absence of the frivolous allegation," but *only* those fees. In so ruling, the Court struck a balance between two competing policies: that defendants should be protected from burdensome claims that have no legal or factual basis, and that plaintiffs should be encouraged to prosecute meritorious civil rights claims.

Application of *Fox's* "but for" standard will sometimes be as simple as asking whether, in the absence of the frivolous claim, a particular billing entry would have been incurred. In other instances, however, trial courts may have to make difficult judgment calls, taking into account their "overall sense of a lawsuit" and using estimates in calculating and allocating a lawyer's time. For example, where a defendant chooses to hire more expensive counsel based on the presence of the frivolous claim, the trial court might conclude that the defendant is entitled to an award for the increased costs incurred to defend the entire lawsuit. Similarly, a trial court that concludes that the defendant removed the case to federal court based on the presence of a frivolous federal claim (as Vice did here) has the discretion to permit an award of any additional expenses and costs to defend the claim in federal court.

The operative word is "discretion." Application of *Fox's* "but for" standard requires trial courts to make discretionary choices that will, in many cases, be debatable. Perhaps to embolden trial judges to perform that role, the Supreme Court emphasized that the purpose of fee-shifting is to do "rough justice," and not to "achieve auditing perfection." For that reason, and because of the district court's superior understanding of the litigation, a trial court's judgments about which fees would have been incurred absent the frivolous claim will usually be the last word. The Court of Appeals must review the fee allocation with "substantial deference" and afford the trial judge "wide discretion."

In *Fox*, however, because the trial court made no attempt to allocate Vice's fees between the legal work that would not have been done absent the frivolous section 1983 claims and all other work, the Court remanded the action for application of the "but for" standard.

Practical Implications for In-House Counsel

Although *Fox* may seem, at first blush, to balance the interests of civil rights plaintiffs and defendants, the practical effects of the decision will be largely pro-employer.

Before *Fox*, fee-shifting was, in some jurisdictions, basically an all-or-nothing proposition. In jurisdictions where no fees were available unless the defendant could prove that *every* one of the plaintiff's claims was frivolous, employers had only two principled choices: (1) request fees incurred in defending the entire lawsuit, or (2) request no fees at all. In such jurisdictions, because of the difficulty in proving that every one of a plaintiff's claims was baseless, and because of courts' reluctance to impose all of an employer's legal fees on a civil rights plaintiff, employers rarely found it attractive to seek fees. Even in jurisdictions where an employer was permitted to seek fees incurred because of the frivolous claims only, the standard for allocating fees caused by the frivolous claims was often difficult to apply or to satisfy.

Now, however, the Supreme Court has provided a clear roadmap for employers to obtain fees in civil rights cases, and a principled basis

to seek a fee award that is low enough that courts may be willing to impose it on civil rights plaintiffs, yet high enough to deter frivolous lawsuits. To benefit from *Fox*, however, employers should begin the defense of an action with a view to obtaining fees, taking these steps:

- Discuss *Fox's* "but for" rule with the employer's legal team at the outset of litigation. Because the pre-*Fox* rule for obtaining fees rendered section 1988 almost useless for employers (at least in some jurisdictions), counsel in some locales may not be instinctively disposed to exploit *Fox* to its full potential.
- As early as possible in the litigation, separate the claims that are colorable from those that are arguably frivolous.
- Be sure that billing records clearly differentiate between work done on the former and latter claims. If, for example, a claimant has a facially reasonable claim under the American With Disabilities Act (ADA), but asserts a frivolous claim under 42 U.S.C. section 1981, be sure that the billing records differentiate between the work done to defend against the two claims. For instance, there should be separate billing entries for the research needed to move for summary judgment on the ADA claim and the section 1981 claim.
- Although an employer should rarely expect to prevail on a motion for attorney's fees, nevertheless consider an aggressive approach to seeking fees incurred solely by the defense of frivolous claims. The Supreme Court has made clear that trial judges enjoy broad discretion to award fees to employers who are forced to defend frivolous civil rights claims. Provided that the employer has already laid the foundation for a fee petition by keeping clear billing records and by explaining in a motion to dismiss or for summary judgment motion why a particular civil rights claim is frivolous, there is little to be lost, and much to be gained, by asking the district court to award fees after the employer prevails on that claim.
- But do not get greedy. The Supreme Court has made clear that the award of fees hinges on equitable considerations. Thus, for example, if an employer implausibly claims to have spent an inordinate amount of time researching defenses to a frivolous claim, the Court may conclude that the employer's overreaching tips the equitable balance against the employer. Bear in mind that even the award of fairly modest attorney's fees may deter future plaintiffs from pursuing meritless claims. Thus, even after *Fox*, less is more when it comes to filing a fee petition.

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