



2023 Media Law Conference, Lansdowne, Virginia: Anti-SLAPP Boutique Session

SLAPPING Back: A Discussion on Recovering Fees and New Legislation

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Overview

This Anti-SLAPP Boutique discusses media lawyers' offensive efforts with SLAPP cases: (1) strategies for recovery of attorneys' fees pursuant to Anti-SLAPP statutes; and (2) domestic and international efforts to enact Anti-SLAPP laws.

I. Focus on Fee Recovery

A. State Law Distinctions

1. Permissive vs. Mandatory Fee Awards

- a. Mandatory: California, Colorado, Florida, Illinois, Indiana, Kansas, Kentucky, Louisiana, Missouri, New York, New Mexico, Nevada, Oregon, Rhode Island, Tennessee, Texas, Vermont
 - a. Under the [Uniform Public Expression Protection Act](#) (UPEPA), fee recovery is mandatory: "On a motion under Section 3, the court shall award court costs, reasonable attorney's fees, and reasonable litigation expenses related to the motion." Section 10.
 - b. As discussed *infra*, Utah, Washington, Kentucky, Hawaii, and most recent, New Jersey, have passed versions of the UPEPA model statute.
- b. Permissive: Virginia, Arizona, Nebraska.
 - a. *See, e.g., Fairfax v. CBS Corp.*, 2 F.4th 286, 297 (4th Cir. 2021) ("Seeing no reason to embellish the plain language of Virginia's statute, we conclude that Section 8.01-223.2(B) permits, but does not require, a court to award attorney's fees to a prevailing defendant and does not create a presumption in favor of a fee award.").

2. Winner-Take-All Provisions

- a. Plaintiffs' recovery of fees upon defeat of an Anti-SLAPP motion
 - i. *See, e.g.* Florida §§ 768.295(4); 720.304(c).
- b. Plaintiffs' recovery of fees only upon a court finding that an Anti-SLAPP motion lacked merit or was filed frivolously
 - i. *See, e.g.*, California, §425.16(c)(1); Indiana, § 34-7-7-8.

B. Fee Petition Strategy

1. Fee Petition Timing

- a. Seeking Fees and Dismissal Simultaneously
- b. Motion for Fees After an Anti-SLAPP Win
- c. Bill of Costs Submission

2. Considering Voluntary Reductions in Fees

- a. *Peterson v. Sutter Med. Found.*, 2023 U.S. Dist. LEXIS 139882, *10 (N.D. Cal. 2023) (court awarded reduced fees “that sufficiently accounts for the overlap between the motions while reflecting the difficulty of the issues—especially given the separate time dedicated to the motion to strike—and also considers the defendants’ voluntary 50 percent reduction of hours spent.”).
- b. *Parekh v. CBS Corp.*, 2019 U.S. Dist. LEXIS 89126, *7-9 (M.D. Fla. 2019) (finding counsel “exercised her billing judgment to write off \$13,050.76 before billing her clients. In preparing this fee application, [counsel] wrote off an additional \$1,097.50. After due consideration I find the reduced hours for which reimbursement is sought to have been reasonable and necessarily expended on Defendants’ behalf.”).
- c. *Tobinick v. Novella*, 2018 U.S. Dist. LEXIS 198671, *9-10 (S.D. Fla. 2018) (“If fee applicants do not exercise billing judgment by excluding excessive, redundant, or otherwise unnecessary” hours, which are hours that would be unreasonable to bill to a client and therefore to one’s adversary, the court must exercise billing judgment for them.”).
- d. *Community Strategies, Inc. v. Sharp*, 2020 WL 5923219, *7 (Okla. Dist. Aug. 17, 2020) (awarding counsel \$36,000 in attorneys’ fees and \$500,000 in sanctions under the Oklahoma Citizens Participation Act, with the Court explaining that “while the briefs and testimony support the reasonableness of Defendant’s entire fee amount, Defense counsel voluntarily discounted the requested fees by more than 50% in Defendant’s fee application.”).

3. Seeking Additional Sanctions

- a. *Ketchum v. Moses*, 17 P.3d 735, 746 (Cal. 2001) (“Of course, the trial court is not required to include a fee enhancement to the basic lodestar figure for contingent risk, exceptional skill, or other factors, although it retains discretion to do so in the appropriate case; moreover, the party seeking a fee enhancement bears the burden of proof.”).
- b. *Landry's, Inc. & Houston Aquarium, Inc. v. Animal Legal Def. Fund*, 566 S.W.3d 41, 70 (Tex. Ct. App. 2018) (“An award of reasonable attorneys’ fees and of just and equitable expenses is necessary not as a sanction, but simply to make that party whole. The award of fees and expenses therefore serves the same purpose

as compensatory damages so that the party's future exercise of rights protected by the TCPA is not chilled. Sanctions awarded for a successful motion to dismiss serve a different purpose. They are awarded to deter the party who brought the legal action from bringing similar actions in the future.”).

- c. *Zaid v. Boyd*, 2022 U.S. Dist. LEXIS 176520, *29-30 (D. Kan. 2022) (“To deter meritless claimants, the KPSPA mandates an award of costs and reasonable attorneys’ fees to the defendant should the defendant prevail on her motion to strike under the act. The KPSPA also authorizes courts to grant ‘additional relief, including sanctions upon the responding party as the court determines necessary to deter repetition of the conduct by others similarly situated.’ [T]he phrase ‘as the court determines necessary’ does not apply to the initial award of costs of litigation and reasonable attorney fees. Rather, it grants courts discretion solely as to whether to impose additional sanctions on top of the mandatory costs and fees.”).

C. Key Fee Award Decisions

1. Wins

- a. *Planet Aid, Inc. v. Reveal, Ctr. for Investigative Reporting* (N.D. Cal.): October 2022 settlement of \$1.925 million in attorneys’ fees after six-year court battle. *See also Planet Aid, Inc. v. Reveal, Ctr. for Investigative Reporting*, 2021 U.S. Dist. LEXIS 163169 (N.D. Cal. 2021) (deferring ruling on request for \$4,149,897.91 in attorneys’ fees and costs until after conclusion of appeal).
- b. *Clifford v. Trump*, 2018 U.S. Dist. LEXIS 211297, *17 (C.D. Ca. 2018) (in “litigation unique in its nature and scope,” awarding sitting president “attorneys’ fees and costs of \$292,052.33, a 25% reduction of the total fees and costs claimed of \$389,403.11.”).

2. Losses

- a. *Christian Research Institute v. Alnor*, 165 Cal. App. 4th 1315, 1326 (Cal. Ct. App. 2008) (affirming reduction in hours for fees from 600 to 71 and opining that “with a motion that involved little or no time spent on discovery, the trial court was justifiably puzzled at the size of the fee request. . . Indeed, the five attorneys Alnor deployed on the motion appear to have expended more time telephoning, conferencing, and e-mailing each other than on identifiable legal research for the motion, supporting the trial court's conclusion the matter was overstaffed. In sum, based on the trial court's own observations in managing the proceedings up to the hearing and on the billing record eventually submitted, the

court could reasonably determine counsel’s fee request was unreasonably padded, vague, and worthy of little credence.”)

D. Calculation of Fees

1. Most States Use Lodestar Method

- a. *Pasternack v. McCullough*, 65 Ca. App. 5th 1050 (Cal. App. 2021) (“The ‘lodestar’ method of determining the reasonableness of fees applies even where the attorney had discounted rates, such that there may be a higher fee award than the reduced rate actually charged.”)
- b. *Sullivan v. Abraham*, 488 S.W. 3d 294 (Tex. 2016) (court found the use of the “lodestar” method was appropriate, as “a reasonable attorney’s fee is one that is not excessive or extreme, but rather moderate or fair,” reversing the trial court’s fee calculation based on an “equitable and just amount” rather than the lodestar).
- c. *Murphy v. Rosen*, 2022 Conn. Super. LEXIS 2401, *7-8 (Conn. Sup. Ct. 2022) (“There is a dearth of Connecticut case law regarding the reasonableness of attorneys’ fees in the context of Connecticut’s anti-SLAPP statute. The court notes, however . . . that [a court] considered the lodestar amount, the factors enumerated in Rule 1.5 of the Rules of Professional Conduct, and the *Johnson* factors to conclude that that the defendant’s rates were reasonable given the novel and complex issues presented by a special motion to dismiss.”).

2. Payment for Out-of-Town Counsel

- a. *Marshall v. Webster*, 54 Cal. App. 5th 275, 286 (Cal. 3d Ct. App. 2020) (“However, in the unusual circumstance that local counsel is unavailable, or that hiring local counsel was impracticable, the trial court is not limited to the use of local rates and may instead use the hourly rate of out-of-town counsel from a higher fee market in calculating the lodestar amount.”)

3. Fee Awards in Cases of Pro Bono Counsel or Insurance Funding

- a. *Doe v. Burke*, 133 A.3d 569, 578 (D.C. Ct. App. 2016) (finding that the trial court erred in denying attorneys’ fees to an anonymous defendant who prevailed on a special motion to quash a subpoena and that it was “not material that Zujua’s attorneys (the Center) represented him pro bono before requesting fees on his behalf.”).
- b. *Poulard v. Lauth*, 793 N.E.2d 1120, 1125 (Ind. Ct. App. 2003) (“We believe the legislative purpose of the attorney’s fees provision of the anti-SLAPP statute is not advanced by allowing the award of attorney’s fees to only those parties

who have directly incurred that expense and are obliged to pay it, and by denying the award of fees to those litigants whose fees are paid by insurers or other non-parties. We therefore find the trial court abused its discretion in denying Lauth’s motion for the attorney’s fees a ‘prevailing defendant . . . is entitled to recover’’).

4. The Effect of an Indigent Plaintiff

- a. *Du Bois v. Boskovich*, 2023 U.S. Dist. LEXIS 91122, 2023 WL 3637030, at *1 (N.D. Cal. May 24, 2023) (“Plaintiff does not cite—and the Court is unaware of—any authority giving the Court discretion to consider her ability to pay in awarding fees under the anti-SLAPP statute.”).
- b. *Gregory v. Harris*, 2022 U.S. Dist. LEXIS 70748, 2022 WL 1136798, at *6 (N.D. Cal. Apr. 18, 2022) (“The Court [] is sympathetic to [the *pro se* plaintiffs] statement that she cannot afford to pay a fee award in the amount of \$17,505. However, the Court does not have discretion to adjust the amount of the mandatory fee award to accommodate [her] ability to pay.”).

5. Fee Recovery for Seeking Fees

- a. *Khan v. Orbis Bus. Intelligence Ltd.*, 292 A.3d 244, 262-263 (D.C. Ct. App. 2023) (“The law is well established that, when fees are available to the prevailing party, that party may also be awarded fees on fees, i.e., the reasonable expenses incurred in the recovery of its original costs and fees.”).
- b. *Ketchum v. Moses*, 17 P.3d 735, 748 (Cal. 2001) (“[F]ollow[ing] the rule of the overwhelming majority of courts that have considered the question . . . [w]e hold . . . that, absent circumstances rendering the award unjust, fees recoverable . . . ordinarily include compensation for all hours reasonably spent, including those necessary to establish and defend the fee claim.”).

E. Fee Petition Discovery

1. Available Fee Evidence

- a. Plaintiff’s counsel’s billing records as evidence of the reasonableness of defendant’s counsel’s fees
 - a. *Wentz v. Project Veritas*, 2019 U.S. Dist. LEXIS 235700, *8 (M.D. Fla. 2019) (granting motion to compel discovery even though “summary judgment has been entered in favor of Defendants [because] the requested information remains relevant and proportional to Defendants’ request for attorneys’ fees under Florida’s Anti-SLAPP statute.”).

- b. *Maughan v. Google Technology, Inc.*, 143 Cal. App. 4th 1242, 1253 (Cal. 2d Dist. App. 2006) (affirming trial court’s award of only a quarter of the fees that Google’s counsel requested and relying on evidence of the time expended by plaintiff’s counsel to draft an “equal caliber” Anti-SLAPP brief”).

2. Use of Fee Experts

- a. *Iola Barker v. Hurst*, 632 S.W.3d 175, 193 (Tex. Ct. App. 2021) (“Attorney’s fees may be proven as a matter of law in some cases by uncontroverted expert testimony if it is (1) readily controvertible if untrue; (2) clear, direct, and positive; and (3) uncontradicted by the ‘attendant circumstances.’”).
- b. *But see Parekh v. CBS Corp.*, 2019 U.S. Dist. LEXIS 89126, *6 (M.D. Fla. 2019) (“The Court is an expert on the question [of attorneys’ fees] and may consider its own knowledge and experience concerning reasonable and proper fees and may form an independent judgment either with or without the aid of witnesses as to value.”).

F. Stays of Fee Awards Pending Appeal

1. Fees Awarded Notwithstanding Appeal

- a. *Histogen Inc. v. Imaged*, 2023 Cal. Super. LEXIS 14104, *7 (Cal. Super. Ct. 2023) (“It is well settled that the filing of an appeal does not stay a motion for attorneys’ fees.”).

2. Fees Deferred Pending Appeal

- a. *Forras v. Rauf*, 74 F. Supp. 3d 1, 3 (D.D.C. 2014) (holding fee petition in abeyance pending appeal because “even if the decision is upheld on appeal, the Court will likely face another motion for attorney fees related to the cost of the appeal process. Such a motion would raise issues similar to those in the present motion for attorney fees, i.e., the propriety of awarding fees to a defendant’s law firm, the appropriate hourly rate for work performed by attorneys not licensed in the forum, and the billing practices of Defendants’ attorneys.”).

II. The European Union and the United Kingdom

A. Two new publications underscore the need for the [European Union’s Anti-SLAPP Directive](#) given the increase in SLAPP lawsuits in both Europe and the United Kingdom.

- 1. The Foreign Policy Centre, “London Calling”: The issue of legal intimidation and SLAPPs against media emanating from the United Kingdom, originally published February 2022 (updated February 2023) (attached).

2. Coalition Against SLAPPs in Europe (CASE), A Threat to Democracy Continues to Grow, August 2023 (2d ed.) (attached).

III. New and Proposed State Anti-SLAPP Laws

A. States Adopting the UPEPA

1. The Uniform Law Commission’s decision to pass the [Uniform Public Expression Protection Act](#) (UPEPA) has spurred a number of states to enact Anti-SLAPP laws, including Utah, Washington, Oregon, Kentucky, Hawaii, and just in September, New Jersey.

B. Proposed Legislation

1. UPEPA model legislation

- a. Legislators in Iowa, Minnesota, Missouri, North Carolina, South Carolina, and Wisconsin have introduced versions of the UPEPA.

2. Pennsylvania legislation

- a. A coalition of legislators and interest groups, including the Pennsylvania NewsMedia Association, ACLU, and Americans for Prosperity have introduced a modified version of the UPEPA that would expand the Commonwealth’s narrow law limited to environmental issues. The [legislation](#) differs from the UPEPA because it is structured to comply with unique aspects of Pennsylvania’s Constitution, which provides that the power to enact court procedures is vested solely in the Supreme Court. To address that issue, the bill is split into two sections – one substantive and one procedural. Significantly, the legislation’s fee-shifting provision and its new cause of action apply in federal court.