LOS ANGELES
Daily Journal
www.dailyjournal.com

VOL. 125 NO. 141 MONDAY, JULY 23, 2012

© 201:

GUEST COLUMN

Rethinking 'American rule' in California

Mark H. Wagner *is the founder of the Wagner Legal Group. He is licensed in California and Arizona. Prior to attending law school, Mr. Wagner worked on Wall Street and held various securities licenses.*

"There can be no equal justice where the kind of trial a man gets depends on the amount of money he has," proclaimed Supreme Court Justice Hugo Black in 1964. Many say the right to recover attorney fees by a prevailing party can deprive parties of equal justice. Conversely, others say that justice is better served when fees are recoverable. Both arguments certainly have their merits, but clearly it's necessary to re-examine the current system and discuss new alternatives.

California Code of Civil Procedure Section 1021 states generally that parties to a lawsuit have to pay their own fees, with the exception being a statute or contract saying otherwise. Known as the American rule, this is currently followed by almost every state, with a few slight variations. For example, Arizona provides for the recovery of fees in contract cases even if the contract does not provide for such as long as the lawsuit is "arising out of a contract." On the contrary, Alaska and much of the rest of the Western world follow the English rule. This rule states that the prevailing party is entitled to recover attorney fees.

Numerous rationales have been asserted for both rules. Proponents of the English rule argue that courts are backlogged due to frivolous lawsuits, and that that fear of having to pay the other party's attorney fees would reduce meritless filings. Similarly, they argue that a defendant may avoid expensive and abusive practices, as well as counter-claims, knowing they may be on the hook for the plaintiff's attorney fees. This would of course make for an increasingly fairer and more efficient system. Additionally, they argue that the threat of paying attorney fees to the opponent is a significant incentive to settle claims

See Page 3 — RETHINKING

Rethinking the 'American rule' in California

Continued from page 1

quicker, again helping reduce court congestion. They also argue that without allowing the winning party to recover fees, they are not being made whole. For example, if a party has been injured and sues and wins $100,000, but had to spend $50,000 in non-recoverable fees to win, it is not equitable. Similarly, without the recovery of fees, the offending party can immediately offer much less during settlement discussions, knowing the plaintiff would not get more even if they won. For example, they could offer $55,000, saving a lot of money and hurting the plaintiff; this is contrary to the notions of justice. Lastly, it is asserted that valid claims that otherwise would not have been brought may now be litigated because lawyers will more likely take the case being that the potential reward makes the risk worthwhile.

Proponents of the American rule suggest that the fear of some plaintiffs having to pay the defendants' attorney fees could deter them from asserting legitimate claims, especially considering the unpredictability of litigation. They argue the public policy favoring open access to courts is promoted by the American rule and that it gives the benefit of the doubt to plaintiffs of lesser means who can now risk going to court without the fear of financial ruin. They claim that middle-class individuals, and small and mid-size businesses, cannot afford to pay the attorney fees for themselves and the other party if they lose, and therefore they choose not to sue. Similarly, if they are sued, they pay off a plaintiff on an invalid claim because they cannot take the chance of financial ruin.

There are, of course, exceptions to the American rule. For example, many courts allow recovery to the prevailing party if provided for in a contract, if the action was for the "common benefit" of the people, if the other party filed a "frivolous" claim or defense, or if the plaintiff was acting as a private attorney general. Amongst the exceptions are situations where there is a one-way shifting statute, i.e., if the plaintiff wins, the plaintiff can recover fees, but if the defendant wins, the defendant cannot recover fees, or has a much higher burden. For example, California's Fair Employment and Housing Act provides that a prevailing plaintiff should recover fees unless special circumstances would make it unjust. A prevailing defendant, however, can only recover fees if the lawsuit was unreasonable, frivolous, meritless or vexatious. The rationale is that discrimination suits vindicate a vital public policy and the rule makes it easier for a plaintiff with limited means to bring a meritorious suit to vindicate a strong public policy — employment without discrimination.

Is it fair to hurt those with strong but smaller claims to protect those with questionable claims?

In the past few years, other states (e.g. Texas, Georgia and Missouri) have proposed legislation that would adopt the English rule, or at least a variation. Proponents have argued that budget cuts to their court systems require changes and that weeding out frivolous lawsuits would be a great benefit. For example, California, facing a $16 billion deficit, has slashed hundreds of millions of dollars from the courts' budget. It has also taken steps of its own to enact tort reform (e.g. medical malpractice limits). Therefore, it is very likely that this debate may soon begin to rage in California.

It is time for California to consider expanding the right to recovery of fees in certain situations. For example, California should allow the recovery of fees in any action arising out of a contract. This would encourage parties to follow their agreement and avoid lawsuits. Moreover, it would not let a party intentionally breach a contract, knowing the other party may not sue because they would have to spend more money on attorney fees than they could recover. Without such a change, a party that has a $35,000 contract claim will often not sue on a valid claim because the lack of attorney fees award makes it unattractive to most contingent lawyers, and impossible for clients who do not have $15,000+ to spend hourly on attorneys to recover $35,000. As Justice Black said, it is not equal justice when a plaintiff cannot get justice because they do not have sufficient money.

Similarly, it may be time to allow recovery in personal injury cases. Like the example above, a plaintiff who has $15,000 in losses may not have $20,000+ to hire a lawyer, and many contingency lawyers shy away from such small cases. Knowing this, the wrongdoer can ignore a valid pre-litigation demand because the plaintiff has no practical avenue to seek redress. This is not equal access to justice.

Of course, permitting the recovery of fees in various situations may scare off those with questionable claims. But is it fair to hurt those with strong but smaller claims to protect those with questionable claims? Will it increase the amount of lawsuits? Perhaps, but is it better to have fewer lawsuits while keeping out valid claims in favor of more questionable claims? These are all tough questions that deserve further examination. Perhaps in personal injury cases, a fee-shifting-type statute, one where an injured plaintiff can recover attorney fees, but a defendant can only recover if the lawsuit was frivolous. This would give access to the courts for the small but valid claims, yet allow people to take chances with litigation on more questionable claims without the total risk of financial ruin.

As it stands now, depriving plaintiffs access to courts because the case is too small, or not making a party whole and incentivizing wrongdoers is not the answer. Clearly, the current system has not helped avoid frivolous lawsuits and the system needs to adapt in the tumultuous economic climate.

SUBMIT A COLUMN
The Daily Journal accepts opinion pieces, practice pieces, book reviews and excerpts and personal essays. These articles typically should run about 1,000 words but can run longer if the content warrants it. For guidelines, e-mail legal editor Ben Armistead at ben_armistead@dailyjournal.com.

WRITE TO US
The Daily Journal welcomes your feedback on news articles, commentaries and other issues. Please submit letters to the editor by e-mail to ben_armistead@dailyjournal.com. Letters should be no more than 500 words and, if referencing a particular article, should include the date of the article and its headline. Letters may not reference a previous letter to the editor.