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Remembrance of Things Past: Can a Newly Enacted Statute Provide for a Retroactive Award of Attorney Fees?

WRITTEN BY

Elizabeth Holt Andrews

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Authors:
Elizabeth Holt Andrews
Taylor Boyle*

**Taylor Boyle is a 2021 summer associate with Troutman Pepper and not licensed to practice law in any jurisdiction.*

When a bill becomes law in California, it generally operates prospectively, unless the Legislature specifically provides otherwise. A generally—but not universally—recognized exception exists, however, for new statutes authorizing an award of attorney fees. Some California appellate courts have approved the application of fee-shifting statutes to litigation pending at the time of enactment, even if the lawsuit itself was filed long before the statute went into effect.[1]

An Example

To take a concrete example, imagine that unlawful conduct occurred in 2010 in violation of Statute X. The aggrieved plaintiff files her lawsuit in 2011, wins a jury verdict in 2013, and the defendant appeals. On January 1, 2014, while the appeal is still pending—or even if no appeal is pending but the deadline has not yet passed for a notice of appeal to be filed—a new statute goes into effect that allows a court to award attorney fees to prevailing plaintiffs in a Statute X lawsuit. In that situation, the trial court may, in some circumstances, award to our theoretical plaintiff all of the attorney fees she incurred during her entire case—all the way back to when she filed it in 2011, when the new fee-shifting statute was barely even a gleam in the eye of an Assembly Member. After years of litigation, hundreds of thousands of dollars could easily be at stake for her.

And what about her unlucky defendant? When the defendant engaged in the challenged conduct in 2010, she had no way of knowing what was at stake. Nor could she have known she was risking a fee-shift when she evaluated the case for settlement, as she likely did multiple times throughout the course of the lawsuit. She wouldn't have known this when she decided to take it to trial, nor even when she decided to file an appeal.

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Fortunately for unsuccessful parties in the late stages of lawsuits, who suddenly find their opponents trying to put them on the hook for all the fees in the case following an unforeseen statutory enactment, there are several broad exceptions to the fee-shifting retroactivity rule. Some of the most prominent are the legislative history exception, the manifest injustice exception, and the due process exception.

Legislative Intent Exception

First, a party may challenge the application of a fee-shifting statute retroactively if they can show that the **Legislature intended** the statute to be applied prospectively only.[2] Litigants can generally trigger the legislative intent exception by identifying either the expressed or implied intent of the legislature.

Manifest Injustice Exception

Second, litigants may avoid retroactive fee-shifting statutes if the application would result in **manifest injustice**.[3] Some courts have declined to enforce a newly amended fee-shifting statute against an unsuccessful party when it will significantly affect the rights and obligations of the party.[4] This is especially true if the prevailing party does not necessarily need to shift costs based on the financial burden of litigation.[5] Litigants looking to challenge a fee-shifting award via the manifest injustice exception should emphasize their own financial burdens whenever applicable.

Due Process Exception

Third, if application of a fee-shifting statute would violate **due process**, the court may not apply it retroactively.[6] A party may take advantage of this due process exception if retroactive application of the fee-shifting statute in question will deprive them of their “vested property rights.” These “rights” can refer to real or personal property.[7] To determine if retroactive application of the statute would impair these rights, courts weigh multiple factors, including “the significance of the state interest served by the law, the importance of the retroactive application of the law to the effectuation of that interest, the extent of reliance upon the former law, the legitimacy of that reliance, the extent of the actions taken on the based on that reliance, and the extent to which retroactive application of the new law would disrupt those actions.”[8] While one may take the above factors into consideration, there is no reliable way that the courts have applied the law in this area, and the case law is relatively sparse.

One can debate the wisdom of the retroactive application of new fee-shifting statutes to existing litigation, and one can even debate how settled of a rule it is.[9] But California lawyers will want to bear in mind this potential for retroactivity and the exceptions to it, whenever they survey a new crop of legislation for applicability to their practice.

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[1] *USS-Posco Industries v. Case* (2016) 244 Cal.App.4th 197, 220–221 (*USS-Posco*) (collecting cases).

[2] *Woodland Hills Residents Ass’n Inc. v. City Council* (1979) 23 Cal.3d 917, 931.

[3] *Ibid.*

[4] *Di Genova v. State Bd. of Ed.* (1962) 57 Cal.2d 167, 180.

[5] *Schwartz v. City of Rosemead* (1984) 155 Cal.App.3d 547, 558.

[6] *In re Marriage of Bouquet* (1976) 16 Cal.3d 583, 592.

[7] *In re Marriage of Buol* (1985) 39 Cal.3d 751, 755.

[8] *Bouley v. Long Beach Memorial Medical Center* (2005) 127 Cal.App.4th 601, 610.

[9] *USS-Posco*, *supra*, 244 Cal.App.4th at pp. 220–221(pointing out a lack of unanimity among California appellate courts on the subject).

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