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ARTICLE

High Court Injunction Case Could Shake Up Fee-Shifting Rules

MAY 24, 2024

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"Who pays the attorney fees?" is a common question across jurisdictions and dispute resolution processes.

The English rule, which is applicable in much of the world and in many alternative dispute resolution processes, requires the losing party to pay the winner's reasonable attorney fees. The rationale is sometimes articulated as a potential to decrease frivolous and unreasonable litigation, with a counter being that the English rule may instead deter defending or prosecuting otherwise meritorious claims.

In 1796, in Arcambel v. Wiseman, the U.S. Supreme Court adopted a countervailing view and set the standard for the American rule, holding that each party is responsible for paying their own attorney fees, regardless of the outcome of the case.[1] Under the American rule, attorney fees are only awarded under certain circumstances, such as when there are fee-shifting statutes or attorney fees available under a contractual agreement.

It is the circumstance of fee-shifting statutes that the U.S. Supreme Court in April agreed to take up in Lackey v. Stinnie. This case may have broader implications, given the number of federal statutes and varying subjects that invoke some type of fee-shifting process.[2]

THE CASE AT ISSUE

Lackey v. Stinnie involves the Virginia Department of Motor Vehicles and examines the entitlement of a prevailing party to attorney fees in instances involving preliminary injunctions.

The central question pertains to whether a party must secure a definitive ruling in its favor on the merits, or if obtaining a preliminary injunction alone qualifies one as a prevailing party.[3] The court is anticipated to render its decision by June 2025.

In Lackey, the class action plaintiffs challenged the constitutionality of Virginia's procedure for suspending driver's licenses due to nonpayment of court fines and costs.[4] The lawsuit raised issues regarding equal protection under the law and due process.

The plaintiffs contended that the suspension of their driver's licenses without first determining their ability to pay fines and costs violated their constitutional rights. They sought a preliminary injunction to halt the enforcement of Virginia's driver's license suspension program.[5]

The U.S. District Court for the Western District of Virginia granted a preliminary injunction favoring the reinstatement of suspended licenses under the challenged law. However, during the case's progression, the Virginia General Assembly halted and eventually repealed the law, making the plaintiffs' claims moot.[6]

Subsequently, the trial court denied the plaintiffs' request for attorney fees under Title 42 of the U.S. Code, Section 1988, citing the absence of a final judgment.[7] In response, the plaintiffs sought an en banc rehearing from the U.S. Court of Appeals for the Fourth Circuit.

Upon rehearing, the Fourth Circuit determined in August 2023 that if a preliminary injunction provides concrete and irreversible relief on the merits of the claim and becomes moot before final judgment due to the absence of further court-ordered assistance, attorney fees may still be awarded under Section 1988.[8] In other words, the plaintiffs were in fact the prevailing party under the statutory fee-shifting scheme, even without a final judgment.

In its certiorari petition, the Virginia DMV questioned whether, as a threshold matter, a preliminary injunction finding of "likely" success could confer prevailing party status for purposes of a fee award. And, it argued, there are conflicting rulings across federal circuit courts on this issue.[9]

IMPLICATIONS

Notably, in the 2007 case, Sole v. Wyner, the Supreme Court expressed "no view on whether, in the absence of a final decision on the merits of a claim for permanent injunctive relief, success in gaining a preliminary injunction may sometimes warrant an award of counsel fees."[10] In hearing Lackey v. Stinnie, the Supreme Court appears to want to answer this question — and address the "sometimes."

And it is the "sometimes" that creates the potential for wide-reaching implications.

As the Fourth Circuit observed, "'Prevailing party,' in turn, is a 'legal term of art that we interpret consistently across all federal fee-shifting statutes.'"[11] This term of art is not statutorily defined but is embedded in numerous federal statutes, including:

- The Copyright Act;
- The Freedom of Information Act;
- The Patent Act, with exceptional circumstances;
- The Lanham Act, with exceptional circumstances;
- The Fair Labor Standards Act;
- The Family Medical Leave Act; and
- The Equal Pay Act.

Additionally, federal regulations use similar language and fee-shifting schemes, including government contracting regulations such as the Federal Acquisition Regulation. Further, Medicare rules allow for someone involved in a legal dispute or administrative action to be deemed a prevailing party.

Lastly, states often use language mirroring federal law and rely on federal case law interpreting the term "prevailing party."[12]

In short, how the term "prevailing party" is interpreted, and the "sometimes" when that interpretation may be available for preliminary injunctions, affects statutes and regulations that run across industries, including construction contractors, insurance and health care, among others.

Given this, there is a real question of how well a fact-specific test could work with a term that crosses a myriad of circumstances. And, yet, a bright-line test that never allows attorney fees when only prevailing on a preliminary injunction — which was the rule in the Fourth Circuit prior to its decision en banc — would seem to read out the "sometimes" and the equitable considerations inherent with injunctive relief.

Against this backdrop, a ruling affirming the Fourth Circuit decision would almost certainly bring more arguments over fee awards and more creative arguments to obtain attorney fees earlier in a matter based on the matter's specific facts.

Conversely, if the court reverses and does impose a bright-line rule of no prevailing party status for preliminary injunctions, this may, while arguably rooted in the American rule tradition, erode some purposes of having statutory fee-shifting exceptions in the first place, including deterring challenges to governmental regulations if the regulations can be altered before the final award, such as in the Lackey case.

At bottom, we are set to receive additional guidance on the more-than-200-year-old question of who pays and under what circumstances in the Supreme Court's next term. No matter the result, the court's decision should have much wider implications that will require close scrutiny across statutory and regulatory fee-shifting schemes to determine how, and when, attorney fees may be available as a prevailing party.

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[1] Arcambel v. Wiseman , 3 U.S. (3 Dall.) 306 (1796).

[2] See Lackey v. Stinnie , No. 23-621, 2024 WL 1706013 (U.S. Apr. 22, 2024).

[3] Lackey v. Stinnie, Pet. for Writ of Certiorari, No. 23-621 (U.S. Nov. 20, 2023).

[4] Id. at 7.

[5] Id. at 8.

[6] Id. at 9.

[7] Id. at 10.

[8] Id. at 10-11.

[9] Referencing Singer Management Consultants Inc. v. Milgram , 650 F.3d 223, 230 at 223 (3d Cir. 2011) ("[A] court's finding of 'reasonable probability of success on the merits' is not a resolution of 'any merit-based issue.'") and Haley v. Pataki , 106 F.3d 478, 483 (2d Cir. 1997) (affirming fee award where order granting preliminary relief was based on a likelihood of success).

[10] Sole v. Wyner , 551 U.S. 74, 86, 127 S.Ct. 2188, 167 L.Ed.2d 1069 (2007).

[11] Stinnie v. Holcomb , 77 F.4th 200, 206 (4th Cir. 2023), cert. granted sub nom. Lackey v. Stinnie , No. 23-621, 2024 WL 1706013 (U.S. Apr. 22, 2024) (citations omitted).

[12] See, e.g., Lake Breeze Condominium Homeowners' Association v. Eastlake Ohio Developers LLC , 2022 -Ohio- 3002, ¶ 48, 2022 WL 3713647, at *6 (Ohio App. 11 Dist., 2022) (state court looking to U.S. Supreme Court's interpretation of prevailing party from Buckhannon Board and Care Home Inc. v. West Virginia Dept. of Health and Human Resources , 532 U.S. 598, 603, 121 S.Ct. 1835, 149 L.Ed.2d 855 (2001)).

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