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NINTH CIRCUIT APPELLATE NEWS: RULE 39 “COSTS” DO NOT INCLUDE ATTORNEY’S FEES

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A CASE OF FIRST IMPRESSION

In a recent decision from the Ninth Circuit Court of Appeals, *Family PAC v. Ferguson* (click [HERE](#) for the full opinion), the Court held, as a matter of first impression, that ***“the term ‘costs’ under Rule 39 of the Federal Rules of Appellate Procedure does not include attorney’s fees recoverable as part of costs under 42 U.S.C. § 1988 and similar statutes.”***ⁱⁱ The decision leaves unanswered an important question: what was the Ninth Circuit referring to in the phrase “similar statutes?” This uncertainty begs further clarification which will undoubtedly be revealed through future litigation. The decision continues a circuit split on the issue which may require intervention by the United States Supreme Court.

BACKGROUND AND RATIONALE

Plaintiff Family PAC, a continuing political committee organized under Washington law, alleged that three provisions of Washington election law violated the First Amendment as applied to ballot measure committees.ⁱⁱ The defendants, the Washington State Attorney General and the members of the Washington State Public Disclosure Commission, administer and enforce the challenged provisions. Plaintiff moved for summary judgment, which was granted in part and denied in part.ⁱⁱⁱ

After both parties appealed, the Ninth Circuit affirmed on all issues, holding that since each side had been partially successful on appeal, each side was to “bear its own costs of appeal” under Rule 39(a) of the Federal Rules of Appellate Procedure.^{iv} Plaintiff moved the Ninth Circuit for an order transferring consideration of attorney’s fees on appeal to the district court.^v The defendants opposed the motion, asserting that the Ninth Circuit had precluded an award of attorney’s fees by its earlier ruling that each party would bear its own costs under Rule 39.^{vi} The Ninth Circuit remanded to the district court for consideration of attorney’s fees, noting that its earlier instruction that each party shall bear its own costs on appeal “did not address whether any party is entitled to attorney’s fees under 42 U.S.C. § 1988.”^{vii}

On remand, Plaintiff moved for an award of \$148,987.62 in attorney’s fees and expenses, including fees and costs on appeal under §1988. The defendants opposed the motion, arguing once again that appellate attorney’s fees were precluded by the Ninth Circuit’s prior ruling that



the parties were to bear their own costs. Despite the defendant's opposition, the district court granted Plaintiff's motion for fees. The defendants timely appealed.

As a case of first impression, the Ninth Circuit held that the term "costs" in Rule 39(a) does not include attorney's fees recoverable as part of costs under §1988 and similar statutes. The rationale for the Ninth Circuit's opinion was five-fold:

The Court considered an "essential difference" between Rules 7 and 68, which are *silent* as to the types of costs contemplated, while Rule 39 is not.^{viii} The Court noted that "[u]nlike Rules 7 and 68, the language and context of Rule 39 offer insight into the meaning of the term 'costs' under the rule."^{ix} Rule 39(e) specifically enumerates the costs on appeal that may be awarded in the district court.^x Those costs are "all administrative costs, not attorney's fees."^{xi} In this case, the advisory committee's note accompanying the adoption of Rule 39 "makes plain that the rule is premised upon [28 U.S.C.] §1920," which "enumerates a set of uniformly administrative costs, not including attorney's fees."^{xii}

The above interpretation of Rule 39 is supported by other circuits, including the First, Third, Fifth, Seventh and Eleventh.^{xiii} Only one circuit (District of Columbia) has held that "costs" under Rule 39 include attorney's fees recoverable as part of costs.^{xiv}

In a prior Ninth Circuit case, *Azizian*, the Court found a similar interpretation of Rule 39. In that case, the Court held that while attorney's fees may be considered part of costs under Rule 7, the Court "assumed that attorney's fees were not costs under Rule 39, noting that there was 'no indication' that Rule 7 and Rule 39 shared a common definition of costs."^{xv}

The importance of procedural timing was an important consideration in the Ninth Circuit's ruling in *Family Pac*. The Court's General Orders "typically address[es] the taxation of costs when [it] file[s] a disposition resolving an appeal on the merits."^{xvi} Attorney's fees, by contrast, are addressed "by motions that are filed and decided later."^{xvii} When ruling on costs at the time of a disposition, the court does "not preclude or deny a motion for attorney's fees that has not yet been presented to [it]."^{xviii}

Lastly, the Court held that a contrary interpretation would "undermine the purposes" of §1988 as the standard of when an award of "costs" may be appropriate under Rule 39 ("mixed judgment") is different from the standard utilized under §1988.^{xix} As a result, a "partially prevailing plaintiff may well be entitled to an award of attorney's fees under §1988, because 'plaintiffs may be considered 'prevailing parties' for attorney's fees purposes if they succeed on *any significant issue* in litigation which achieves some of the benefit the parties sought in bringing suit."^{xx}

Family PAC interpreted 42 U.S.C. § 1988, which contains a fee-shifting provision:



“In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, [*inter alia*] the court, in its discretion, may allow the prevailing party a reasonable attorney’s fee as part of the costs.”^{xxi}

When the Ninth Circuit used the term “similar statutes” in its original holding, it was presumably referring to any statute that contains a similar fee-shifting provision. Is that a valid presumption?

The Court could have shed more light on the issue had it simply ruled that the term “costs” in Rule 39 does not include attorney’s fees. However, due to the lack of certainty on this issue, counsel must proceed with caution upon the disposition of an appeal. Counsel should be wary of required actions and relevant deadlines in order to preserve its ability to pursue a claim for both costs under Rule 39 and any attorney’s fees that may be available via an underlying statutory fee-shifting provision. Notwithstanding an appellate court’s determination as to allocation of costs under Rule 39, such a determination does not preclude a subsequent motion for attorney’s fees.

ⁱ *Family PAC v. Ferguson*, 2014 U.S. App. LEXIS 5172, *3 (9th Cir. Mar. 19, 2014).

ⁱⁱ *Id.* at *3-4 (The contested provisions were these: a provision requiring a political committee to report the name and address of each person contributing more than \$25 to the committee; a provision requiring a political committee to report the occupation and employer of each person contributing more than \$100 to the committee; and a provision barring a political committee from accepting from any one person contributions exceeding \$5,000 within 21 days of a general election.).

ⁱⁱⁱ *Id.* at *4.

^{iv} *Id.*

^v *Id.*

^{vi} *Id.* at 4-5.

^{vii} *Id.* at *5.

^{viii} *Id.* at *13.

^{ix} *Id.*

^x (i) the preparation and transmission of the record; (ii) the reporter's transcript, if needed to determine the appeal; (iii) premiums paid for a supersedeas bond or other bond to preserve rights pending appeal; and (iv) The fee for filing the notice of appeal. Fed. R. App. P. 39(e).

^{xi} *Family PAC, supra*, at *13.

^{xii} *Id.* at *14.



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^{xiii} *Farmington Dowel Prods. Co. v. Forster Mfg. Co.*, 421 F.2d 61, 91 (1st Cir. 1969); *McDonald v. McCarthy*, 966 F.2d 112, 118 (3d Cir. 1992); *Chem. Mfrs. Ass'n v. EPA*, 885 F.2d 1276, 1278 (5th Cir. 1989); *Terket v. Lund*, 623 F.2d 29, 33 (7th Cir. 1980); *Pedraza v. United Guarantee Corp.*, 313 F.3d 1323, 1330 n.12 (11th Cir. 2002).

^{xiv} *See Montgomery & Assocs., Inc. v. Commodity Futures Trading Comm'n*, 816 F.2d 783, 784-85 (D.C. Cir. 1987).

^{xv} *Family PAC*, at 18-19; *Azizian v. Federated Dep't Stores, Inc.*, 499 F.3d 950, 958-959 (9th Cir. 2007).

^{xvi} *Family PAC*, at *22.

^{xvii} *Id.* at *22; *see* 9th Cir. R. 39-1.6(a) (providing that “a request for attorneys’ fees shall be filed no later than 14 days after the expiration of the period within which a petition for rehearing may be filed.”).

^{xviii} *Family PAC*, at *22-23.

^{xix} *Id.* at 19-20.

^{xx} *Id.* (citing *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983)).

^{xxi} 42 U.S.C. §1988(b).