

Intervenor The Foundation for Taxpayer and Consumer Rights ("FTCR") seeks an award of attorneys' fees pursuant to Ins. Code section 1861.10 ("section 1861.10") and CCP section 1021.5 ("section 1021.5") for having helped defeat the Petition. The court has read and considered the moving papers, opposition, and reply, and renders the following tentative decision.

**A. Statement of the Case**

Petitioners<sup>1</sup> commenced this proceeding on May 25, 2007. The Petition seeks a writ of mandate preventing the Insurance Commissioner and the California Department of Insurance (the "Department") from enforcing Title 10 of California Code of Regulations sections 2651.1, 2661.1, 2661.3, 2662.1, 2662.3, and 2662.5, as recently amended, on the ground that they violate Government Code section 11342.2. The regulations relate to the process of awarding consumer groups compensation for participating in certain administrative proceedings relating to insurance. The Petition alleges that the challenged regulations (1) are inconsistent and in conflict with Insurance Code sections 1861.10 and 1861.05 and (2) are not reasonably necessary to effectuate the purpose of the underlying statutes.

The court denied the Petition on March 7, 2008. The decision noted that the regulations at issue were intended to "clarify that consumers, who participate in the approval process after having filed a petition for a hearing, may seek an award of reasonable advocacy fees." The Department endeavors to encourage interested consumer representatives and insurers who have filed rate applications to resolve rate challenges informally, which obviates the need for a lengthy formal hearing. After a settlement is reached, insurers often seek to withdraw their rate applications, after substantial time and effort had been devoted to challenging the rate application. There was no provision in the prior regulations to award costs to consumer representatives in those circumstances, even though their efforts resulted in reduced rate increases. The amendments to the regulations were necessary in order to properly implement the requirements, purposes and intent of Prop. 103.

Petitioners contended that there is a conflict between the regulations and section 1861.10, which contemplates consumer participation in "any proceeding." The court concluded that section 1861.10(a) broadly allows consumer participation in "any proceeding" within the rate review process. As FTCR argued, the regulations merely define when a "rate proceeding" begins, and that is when a petition for hearing is submitted. The regulations allow consumer representatives to participate in those negotiations and seek an award after the Commissioner's decision. Section 1861.10's use of the term "any proceeding" and not "hearing" plainly supports the regulations as authorized. Although the statute does not define the term "proceeding," that term is commonly quite broad in scope. As commonly used, the term "proceeding" necessarily

---

<sup>1</sup>Petitioners are insurance trade groups The Association of California Insurance Companies, The Personal Insurance Federation of California, The American Insurance Association, and The Pacific Association of Domestic Insurance Companies.

encompasses any act, step, or remedy, including in the rate review process. Section 1861.05 permits consumer participation in “any” proceeding.

The court concluded that Petitioners had failed to demonstrate that the regulations are inconsistent and in conflict with section 1861.10, and not reasonably necessary to effectuate the purpose thereof.

### **B. Applicable Law**

Although the purpose of much civil litigation is to make the injured party “whole,” the traditional common law rule is that the parties must bear their own costs. Davis v. KGO-TV, Inc., (1998) 17 Cal.4th 436, 446. It is, therefore, axiomatic that the right to recover costs is purely statutory, and, in the absence of an authorizing statute, no costs can be recovered by either party. Crib Retaining Walls, Inc. v. NBS/Lowry, Inc., (1996) 47 Cal.App.4th 886, 889; Garcia v. Hyster Co., (1994) 28 Cal.App.4th 724, 732; Perko's Enterprises, Inc. v. RRNS Enterprises, (1992) 4 Cal.App.4th 238, 241.

CCP section 1032(b) states that, “Except as otherwise expressly provided by statute, a prevailing party is entitled as a matter of right to recover costs in any action or proceeding.” With respect to the concept of “prevailing party,” section 1032 defines the term as the party with a net monetary recovery, a defendant in whose favor a dismissal is entered, or a defendant who avoids all liability. Great Western Bank v. Converse Consultants, Inc., (1997) 58 Cal.App.4th 609, 612; Childers v. Edwards, (1996) 48 Cal.App.4th 1544, 1548; Coltrain v. Shewalter, (1998) 66 Cal.App.4th 94, 101-102.

The common law doctrine of the “private attorney general” is codified in section 1021.5 and represents an exception to the American rule that each party pays his or her own attorney’s fees. See Woodland Hills Residents Ass’n. Inc. v. City Council, (1979) 23 Cal. 3d 917, 933; Crawford v. Board of Education, (1988) 200 Cal. App. 3d 1397, 1405. As noted by the Court of Appeal in Flannery v. California Highway Patrol, (1998) 61 Cal. App. 4th 629, 634, “[u]nderlying the private attorney general doctrine is the recognition that privately initiated lawsuits often are essential to effectuate fundamental public policies embodied in constitutional or statutory provisions, and without some mechanism authorizing a fee award, such private actions often will as a practical matter be infeasible.”

Section 1021.5 permits a trial court to award fees to a successful party in any action that “has resulted in the enforcement of an important right affecting the public interest if: (a) a significant benefit has been conferred on the general public or a large class of persons, (b) the necessity and financial burden of private enforcement are such as to make the award appropriate, and (c) such fees should not in the interest of justice be paid out of the recovery. The issue is committed to the trial court’s discretion. Flannery v. California Highway Patrol, 61 Cal.App.4th 629, 634. The Legislature did not intend to authorize an award of fees under section 1021.5 in every lawsuit enforcing a constitutional or statutory right. *Id.*

Courts have read “the necessity and financial burden of private enforcement” requirement as comprising two distinct elements, each of which must be met if attorneys’ fees are to be awarded. Thus, the FTCR must prove both that the financial burden of private enforcement justifies the award of attorney fees, and that the necessity of private enforcement, as opposed to public enforcement, justifies such award. Arnold v. California Exposition and State Fair, (2004) 125 Cal. App.4th 498, 511; Committee To Defend Reproductive Rights v. A Free Pregnancy

Center, (1991) 229 Cal. App. 3d 633, 639.

Section 1861.10(b) provides that consumer groups are entitled to an award of fees if they (1) represent the interests of consumers; and (2) make a substantial contribution to the adoption of an order or decision by this court in a proceeding permitted or established under Chapter 9 of the Code.

### **C. Analysis**

Intervenor FTCT seeks an award of attorneys' fees, pursuant to sections 1861.10 and 1021.5, for having helped defeat the Petition.

#### **1. Section 1021.5**

FTCT seeks an award of attorneys' fees under section 1021.5. Petitioners oppose on the ground that FTCT cannot show both necessity and financial burden.

With respect to financial burden, Petitioners argue that FTCT had a financial stake in the outcome of the litigation. FTCT has intervened in over two dozen rate proceedings and will seek attorneys' fees in all rate proceedings in which it participates. FTCT opposed the Petition out of self-interest because the regulations open the way for FTCT to seek attorneys' fees where rate issues settle without formal hearing. FTCT admitted that it has a direct pecuniary interest in the subject matter of the Petition. It stood to receive no compensation from rate proceedings settled informally should the Petitioners prevail. Conversely, according to Petitioners, FTCT has been given an "unrestricted license to prospect for gold" now that the Petition has been denied and the regulations upheld. Opp. at 4-5.

A plaintiff does not establish a significant public benefit when it is simply incidental to her own personal stake in the matter. See Bagget v. Gates, (1982) 32 Cal.3d 128, 131, 134. This is true where the relief merely gives the plaintiff an opportunity to compete for a potentially lucrative future recovery. See Arnold v. California Exposition and State Fair, (2004) 125 Cal.App.4th 498, 510; United Systems of Arkansas v. Stamison, (1998) 63 Cal.App.4th 1001, 1013.

Petitioners' argument essentially is that success in this litigation is a precondition to FTCT's recovery of attorneys' fees for rate proceedings that settle without formal hearing, and FTCT had a strong pecuniary interest to protect itself by intervening. As a result, its principle motivation was its own individual stake, and only secondarily the public interest in ensuring that insurance rates remain low for consumers.

There is no doubt that FTCT had a financial stake in the outcome of this litigation. The regulations were designed to permit consumers, including consumer groups like FTCT, to participate in rate proceedings, provide expert support and analysis to the Department, and ultimately achieve lower insurance rates for consumers. The regulations provide the incentive of recovery of attorneys' fees and costs for doing so. FTCT had a strong self-interest in pursuing the litigation.

The issue is whether FTCT's primary purpose was the vindication of consumer rights or the recovery of fees for doing so. It crops the photograph too closely to say that it was. FTCT's purpose as a non-profit tax-exempt consumer advocacy to enforce public rights to lower insurance rates. To achieve this goal, FTCT and other consumer groups are entitled to attorney's fees incurred in rate-making proceedings. FTCT was protecting its right for such fees by

intervening in the Petition. But a concomitant purpose of FTCCR's action was to protect the ability of consumers generally to participate in rate proceedings and obtain the lowest possible rates. Under these circumstances, FTCCR's public purpose exceeded its financial interest.

Turning to the issue of necessity, Petitioners contend that the Commissioner did not need FTCCR's aid and FTCCR's involvement had little bearing on the outcome of this matter. Simply stated, Petitioners argue that private enforcement was unnecessary.

Again, the court cannot reach this conclusion. It is true that the Commissioner was ably represented to by the Attorney General. However, necessity is not evaluated after-the-fact, but rather by whether FTCCR contributed to the success of the litigation. City of Santa Monica v. Stewart, (2005) 126 Cal.App.4th 43, 86-88. FTCCR actively participated in the case, met with the Attorney General to discuss issues, the history of Prop. 103, and strategies, prepared an opposition and objections to evidence, and participated in oral argument. The court's decision cited an argument made by FTCCR that the regulations merely define when a "rate proceeding" begins, and that is when a petition for hearing is submitted. FTCCR actively participated in the success of defeating the Petition.

Therefore, FTCCR is entitled to attorney fees under section 1021.5.

## **2. Section 1861.10(b)**

FTCCR also claims that it is entitled to fees under section 1861.10(b), which provides that consumer groups are entitled to an award of fees if they (1) represent the interests of consumers; and (2) make a substantial contribution to the adoption of an order or decision by this court in a proceeding permitted or established under Chapter 9 of the Code.

Petitioners contend that the FTCCR is not entitled to fees under section 1861.10(b) because the present matter is not a matter within the scope of Chapter 9. Instead, the Petition concerned a violation of the Administrative Procedures Act ("APA"), specifically Govt. Code section 11342.2 concerning the consistency of regulations and their statutory authority.

Chapter 9 of the Insurance Code concerns making and use of insurance rates. The FTCCR intervened in a proceeding determining the procedure for consumer representatives to receive costs in rate proceedings where their efforts resulted in reduced rate increases. This is clearly a proceeding permitted by Chapter 9, and the fact that the substantive law concerning regulation consistency with statutes is contained in the APA does not control.

FTCCR is entitled to its reasonable attorneys' fees under section 1861.10(b).

## **3. Reasonable Fees**

Petitioners contend that FTCCR's fees are unreasonable because it expended 270 hours on a case involving no discovery, no trial, no witness preparation, and no travel. Little more was involved than the drafting of a single 15 page opposition and attending a hearing.

FTCCR argues that Petitioners have not met their burden to show unreasonableness. An attorney's declaration identifying the work performed, hour rates, and total fees incurred is *prima facie* evidence that the expenses were necessarily incurred. Hadley v. Krepel, (1985) 167 Cal.App.3d 677, 682. Petitioners had the burden to rebut this with specific objections to particular hours. *Id.* Petitioners have failed to make any specific objection.

This is true, but as Hadley also states, a trial judge is entitled to take all the circumstances of the case into account and is not limited by the attorney's declaration. The billing records

submitted by FTCR reveal numerous instances of double and even triple-billing by FTCR's attorneys. The records suffer from the fact that they are "block billing," meaning that the entries identify only generally the work performed. The entries contain numerous instances where two or three of the FTCR attorneys (Pressley, Rosenfield and Foreman) charged time for talking or corresponding with one another. Of the 270 hours sought, at least 40 hours have been charged for this purpose. The proper lodestar, therefore, is \$137,848.16 minus \$16,000 (40 hours at \$400 per hour), or \$121,848.16.

Coupled with the excessive billing is the fact that FTCR had a significant financial stake in the case. This stake means that no multiplier should be added to the lodestar. The purpose of a lodestar is to account for the risks in public interest litigation and for the skill of counsel and the result achieved. There is no need for a fee enhancement where the litigant has a separate and significant stake in the outcome in addition to its consumer interest.

The motion is granted in the amount of \$121,848.16.