Vasquez v. State of California clarifies uncertainties regarding attorneys' fees

Why public-interest attorneys should still make pre-litigation settlement demands even if not always required.

By Steven P. Shaw

It has long been the case that California plaintiffs who bring actions against corporations, government agencies and other entities, resulting in the enforcement of important rights affecting the public interest, may be entitled to attorney fees under the so-called private attorney general statute (Code Civ. Proc., § 1021.5). However, until recently, there has been some uncertainty regarding when, and under what circumstances, a public-interest plaintiff was required to make settlement demands prior to initiating suit to ensure eligibility under the statute. On November 21, 2008, the California Supreme Court, in *Vasquez v. State of California* (2008) 45 Cal.4th 243, provided some much-needed clarification.

Vasquez v. State of California

Vasquez v. State of California arose in the context of a class action suit filed by inmates in a San Diego prison facility against certain clothing manufacturers that participated in joint venture programs with the State of California to employ inmates under the Prison Inmate Labor Initiative of 1990 (Pen. Code, § 2717.1, *et seq.*).

Among other things, the class action charged employers with failing to pay inmates wages comparable to the wages that non-inmates performing substantially similar work would receive. The suit charged that this failure was in violation of Penal Code section 2717.1.

Because the state may collect up to 80 percent of inmates' wages to recoup various prison expenses, Cristina Vasquez, a labor union representative, asserted taxpayer standing to sue the state for taxpayer waste. While a demurrer to Vasquez's claims was being decided on appeal, the inmates' claims against the corporations settled.

Following an appeals court ruling that Vasquez had standing to sue the state, the parties entered into a stipulated injunction, resulting in the implementation of a number of procedures aimed at ensuring ongoing compliance with Penal Code section 2717.1. These procedures included identifying comparable wages, obtaining wage plans and duty statements from employers, complying with applicable record-keeping requirements and providing progress reports to the court. After the stipulated injunction, Vasquez moved for attorney fees under Code of Civil Procedure section 1021.5 (hereafter section 1021.5), which were awarded in the amount of $1,257,258.60.

Graham v. DaimlerChrysler Corp.

Four months later, in *Graham v. DaimlerChrysler Corp.* (2004) 34 Cal.4th 553, the California Supreme Court ruled that a public-interest plaintiff in a catalyst case (i.e., a case not resulting in a court-ordered resolution, but nevertheless successfully causing the defendant to substantially alter its behavior through settlement or voluntary action) "must . . . engage[] in a reasonable attempt to settle its dispute with defendant prior to the litigation." (*Graham*, *supra,* 34 Cal.4th at 561.)

The high court in *Graham* was not asked to consider whether pre-litigation settlement demands were required by section 1021.5. Nevertheless, the California Supreme Court adopted the rule as a compromise in response to defendants' urging that the state should abolish the catalyst theory. The defendants argued that court-ordered attorney fees in catalyst cases posed a greater risk of creating opportunistic litigation than awarding fees in cases ending in judgments or court-directed settlements.

According to Justice Moreno, who was writing for the majority, this was because a defendant's "voluntary" behavior changes raised the question of whether the plaintiff's legal work actually caused the defendant's change in behavior. If the plaintiff's legal work did *not* cause the behavior change, the plaintiff should not be "rewarded" by receiving attorney fees. The court determined that abolishing the catalyst theory altogether would deter attorneys from taking meritorious public-interest litigation because it would allow defendants to avoid paying attorney fees by voluntarily enacting changes at the last minute prior to judgment.

The pre-litigation demand rule

The *Graham* case created the pre-litigation demand rule, while also requiring plaintiffs to demonstrate that the lawsuit was "a catalyst motivating the defendants to provide the primary relief sought," and that it "had merit and achieved its catalytic effect by the threat of victory," not through mere nuisance value. (*Graham*, *supra*, 34 Cal.4th at 168; *see also Tipton-Whittingham v. City of Los Angeles* (2004) 34 Cal.4th 604, 608.)

Accordingly, after *Graham*, a plaintiff could not obtain attorney fees under section 1021.5 without either obtaining a judicially ordered resolution, or else demonstrating that the plaintiff made "reasonable attempts" to settle before filing suit. However, this left open the question of whether a plaintiff who did obtain a judicial resolution of a public-interest case, *i.e.,* a non-catalyst case, could get attorney fees under section 1021.5 without first attempting to settle the case.

When a pre-settlement demand is *not* necessary

Although probably the exception rather than the rule, the California Supreme Court pointed out in *Vasquez* that there are occasions in which "exigent circumstances" may require immediate resort to the judicial process, attempts at settling may be futile or prior efforts – perhaps by other parties – to call problems to defendants' attention may be rebuffed. (*Vasquez*, *supra,* 45 Cal.4th at 252.)

Accordingly, whether a plaintiff must first make reasonable efforts to settle a public-interest case is an important issue and one that could significantly influence a public-interest attorney's decision to accept a particular case, knowing that fees may not be recoverable. In particular, actions involving an imminent statute of limitations, an elderly or ill plaintiff or where the defendant corporation's conduct demands urgent and immediate attention, such as a Ponzi scheme, may require the immediate initiation of suit without the ability to devote significant time to settlement efforts.

In *Vasquez*, which was taken to the California Court of Appeals three weeks after *Graham* was decided; the state argued that the plaintiff could not recover attorney fees because she had not made reasonable attempts to settle before resorting to litigation.

The Court of Appeals affirmed the trial court, deciding that: (1) the action was not a catalyst case because the parties had entered into a stipulated injunction; and (2) the pre-litigation demand requirement in *Graham* was a judicially adopted rule applying only to catalyst cases. While the agreeing at the outset that this was not a catalyst case (because the stipulated injunction was akin to a consent decree), the California Supreme Court accepted review on the narrow issue of whether section 1021.5 requires public-interest plaintiffs to make reasonable attempts to settle short of litigation.

In finding that it does not, the California Supreme Court cited a number of legislative schemes expressly requiring advance notice and/or attempts to settle, such as the Consumer Legal Remedies Act, health-care provider professional negligence statutes, the Safe Drinking Water and Toxic Enforcement Act of 1986 and the Tort Claims Act.

The *Vasquez* court, finding no similar language in the private attorney general statute, declined to infer such a requirement. Instead, the Supreme court reiterated that the rules imposed in *Graham* were specific to catalyst cases, and were judicially imposed limitations to avoid the risk of unnecessary or "extortionate" litigation that could arise when the court is not involved in helping determine the necessity (and scope) of relief.

What *Vasquez* means for public interest attorneys

While *Vasquez* declined to *require* pre-litigation settlement demands, its holding does not mean that public-interest attorneys no longer need to engage in settlement efforts before filing suit.

If anything, the language used by the California Supreme Court should be taken as a warning that an attempt to settle is the norm, and attorney fees may not be awarded if such efforts are not made. Noting that a court may only award attorney fees under section 1021.5 if, among other things, "the *necessity* and financial burden of private enforcement . . . are such as to make the award appropriate," *Vasquez* cited the courts' considerable equitable discretion regarding attorney fees. (*Vasquez*, *supra,* 45 Cal.4th at 251.)

The high court explained that a party's pre-litigation settlement efforts "properly inform a court's exercise of discretion," and cautioned, "settlement efforts (or their absence) are relevant in *every case*" to show that private enforcement was necessary. (*Id.* at 258.)

The Supreme Court also provided several examples where pre-litigation settlement demands likely would have avoided the need for litigation. These included a case where trivial changes to consumer contracts were made promptly after the defendant company received the complaint and a case where a citizen failed to provide pre-litigation notice to the state attorney general of the need for an environmental review of a local power plant before initiating a costly and protracted lawsuit. (*See Baxter v. Salutary Sportsclubs, Inc.* (2004) 122 Cal.App.4th 91; *Schwarz v. City of Rosemead* (1984) 155 Cal.App.3d 547.)

Prudent lawyers should make pre-settlement demands

After *Vasquez*, the state of the law concerning section 1021.5 is a little more clear: public-interest attorneys are not necessarily *required* to have made pre-litigation demands to recover attorney fees in non-catalyst cases.

However, the real effect of this case is that the prudent attorney will be even more inclined to make pre-litigation settlement demands whenever feasible. There are at least two reasons to do this: (1) it is impossible to know whether your

case will settle without judicial resolution and be treated as a catalyst case, which still requires such a demand; and (2) even if you do obtain a judicial resolution, courts following *Vasquez* may be more likely to methodically examine your pre-litigation efforts to make sure the litigation was necessary.


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For now, we are left only to wait and see how stringently our California courts decide to apply *Vasquez's* warnings.

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