

# SUPREME COURT COPY

S183372

SUPREME COURT  
**FILED**

JAN 26 2011

IN THE SUPREME COURT  
OF THE STATE OF CALIFORNIA

Frederick K. Ohlrich Clerk

Deputy

PORFIRIO SERRANO AND )  
LOURDES SERRANO )

No. S183372

Plaintiffs - Appellants, )

STEFAN MERLI PLASTERING )  
COMPANY, INC. DBA INLAND )  
CONCRETE PUMPING )

Defendant, )

COAST COURT REPORTERS, )

Respondent. )

## APPELLANTS' REQUEST FOR JUDICIAL NOTICE

Review After Decision of the Court of Appeal, Second Appellate District,  
Division Three, Case No. B215837

From an Order of the Superior Court, Los Angeles County  
Case No. BC 324031, the Honorable Aurelio Munoz, Judge

STEPHEN MONROE (SBN 56345) (smonroe@davidbloomlaw.com)

EDWARD IDELL, (SBN 141291) (eidell@davidbloomlaw.com)

JAMES ADLER (SBN 75653) (jadler@davidbloomlaw.com)

Law Offices of David B. Bloom, APC

3699 Wilshire Boulevard, Tenth Floor, Los Angeles, California 90010

Telephone: 213-384-4088

Attorneys for Plaintiffs and Appellants, PORFIRIO

SERRANO AND LOURDES SERRANO

S183372

IN THE SUPREME COURT  
OF THE STATE OF CALIFORNIA

PORFIRIO SERRANO AND	)	No. S183372
LOURDES SERRANO	)	
	)	
Plaintiffs - Appellants,	)	
	)	
	)	
STEFAN MERLI PLASTERING	)	
COMPANY, INC. DBA INLAND	)	
CONCRETE PUMPING	)	
	)	
Defendant,	)	
	)	
COAST COURT REPORTERS,	)	
	)	
	)	
Respondent.	)	
_____	)	

APPELLANTS' REQUEST FOR JUDICIAL NOTICE

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Telephone: 213-384-4088

Attorneys for Plaintiffs and Appellants, PORFIRIO  
SERRANO AND LOURDES SERRANO

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF CONTENTS .....	i
TABLE OF AUTHORITIES .....	ii
JUDICIAL NOTICE OF LEGISLATIVE HISTORY DOCUMENTS IS PROPER .....	1
DECLARATION OF EDWARD IDELL .....	4
PROOF OF SERVICE .....	5

TABLE OF AUTHORITIES

<u>California Supreme Court Cases:</u>	<u>Pages</u>
<i>Commodore Home Systems, Inc., v. Superior Court</i> (1982) 32 Cal.3d 211 .....	1
<i>Hutnick v. United States Fidelity &amp; Guaranty Co.</i> (1988) 47 Cal.3d 456 .....	2
<i>Lantzy v. Centex Homes</i> (2003) 31 Cal.4th 363. ....	2
<i>Mejia v. Reed</i> (2003) 31 Cal.4th 657 .....	2
<i>People v. Snyder</i> (2000) 22 Cal.4th 304 .....	2
<i>Post v. Pratt</i> (1979) 90 Cal.App.3d 626 .....	1
<i>White v. Ultramar, Inc.</i> (1999) 21 Cal.4th 563 .....	2
<i>White v. Maldonado</i> (2010) 50 Cal.4th 1206 .....	1
 <u>California Appellate Cases</u>	
<i>Kern v. County of Imperial</i> (1990) 226 Cal.App.3d 391 .....	2
<i>People v. Goodlow</i> (1995) 37 Cal.App.4th 485 .....	2
<i>Quartermain v. Kefauver</i> (1997) 55 Cal.App.4th 1366 .....	2

**Judicial Notice of the Legislative History Documents Is Proper.**

Appellants hereby request this Court take judicial notice of the attached Legislative History documents which are properly the subject of judicial notice. The Legislative History is relevant to assist in determining if the action at issue is the type of proceeding which the Legislature intended as appropriate for "private attorney general" fees.

Respondent Coast Court Reporters, in connection with Respondent's Answer Brief on the Merits, has requested Judicial Notice of certain documents from the Legislative History of the statute which is the subject of this appeal, however, Respondent's submission is incomplete and largely concerns documents from the 1975 Assembly session, Assembly Bill 3257, which failed passage. The documents submitted herewith relate to the revised legislation, AB 1310, which bill was signed by Governor Brown in 1977.

This Court recently reaffirmed these documents are properly the subject of judicial notice. (*Whitley v. Maldonado* (2010) 50 Cal. 4<sup>th</sup> 1206, 1218, fn. 3; see also *Post v. Pratt* (1979) 90 Cal.App.3d 626, 634; *Commodore Home Systems, Inc. v. Superior Court* (1982) 32 Cal.3d

211, 218-219.) “[R]eports of legislative committees and commissions are part of a statute’s legislative history ...” (*Hutnick v. United States Fidelity & Guaranty Co.* (1988) 47 Cal.3d 456, 465 fn. 7.)

In ascertaining legislative intent, “[s]tatements from the sponsor of legislation may be instructive [citation], as are legislative committee reports on the proposed legislation [citation.]” (*Quartermain v. Kefauver* (1997) 55 Cal.App.4<sup>th</sup> 1366; see also *White v. Ultramar, Inc* (1999) 21 Cal.4<sup>th</sup> 563, 572, fn. 3; *People v. Snyder* (2000) 22 Cal.4<sup>th</sup> 304, 309.) “The statements of the sponsor of legislation are entitled to be considered in determining the import of the legislation.” (*Kern v. County of Imperial* (1990) 226 Cal.App.3d 391, 401. Specifically, communications from the State Bar are relevant as well. (*Mejia v. Reed* (2003) 31 Cal.4<sup>th</sup> 657, 667.)

The evolution of a statute is relevant to understanding Legislative Intent (*People v. Goodlow* (1995) 37 Cal.App.4<sup>th</sup> 485, 491), as is testimony in Legislative hearings. (*Lantzy v. Centex Homes* (2003) 31 Cal.4<sup>th</sup> 363, 376.)

Based on all of the foregoing, all the material supplied as exhibits to this request are properly the subject of judicial notice, and it is

respectfully requested that Appellants' Application be granted in its entirety.

Dated: January 25, 2011

Law Offices of David B. Bloom  
A Professional Corporation

By   
STEPHEN MONROE

EDWARD IDELL  
Attorney for Appellants  
Porfirio Serrano and Lourdes  
Serrano

**DECLARATION OF EDWARD IDELL, ESQ.**

I, Edward Idell, Esq., declare the following to be true of my own personal knowledge, and, if called to testify thereto, would and could competently do so.

1. Attached hereto are true copies of the Legislative History Documents I excerpted from those supplied by the Legislative Intent Service.

I declare the following to be true and correct under penalty of perjury under the laws of the State of California, and that this Declaration was executed on January 25, 2011 in Los Angeles, California.



EDWARD IDELL



**EXHIBIT "1"**

Introduced by Assemblyman Berman

March 31, 1977

REFERRED TO COMMITTEE ON JUDICIARY

An act to add Section 1021.5 to the Code of Civil Procedure, relating to attorneys' fees.

LEGISLATIVE COUNSEL'S DIGEST

AB 1310, as introduced, Berman (Jud). Attorneys' fees.

Under existing law, the measure and mode of compensation of attorneys is determined by agreement of the parties, except attorneys' fees may also be awarded by a court pursuant to express authority in the law.

This bill would authorize a court, upon motion, in any action not involving a public entity, to award attorneys' fees to a successful party against one or more opposing parties in any action which has resulted in the enforcement of an important right affecting the public interest if 3 specified conditions are satisfied.

The bill would require a court to make such award of attorneys' fees in an action involving a public entity, but would prohibit such award of attorneys' fees in favor of a public entity.

The bill also would provide that neither appropriation is made nor obligation created for the reimbursement of any local agency for any costs incurred by it pursuant thereto.

Vote: majority. Appropriation: no. Fiscal committee: no. State-mandated local program: yes.



*The people of the State of California do enact as follows:*

1 SECTION 1. Section 1021.5 is added to the Code of  
 2 Civil Procedure, to read:  
 3 1021.5. Upon motion, a court may award attorneys' fees  
 4 to a successful party against one or more opposing parties  
 5 in any action which has resulted in the enforcement of an  
 6 important right affecting the public interest if: (a) a  
 7 significant benefit, whether pecuniary or nonpecuniary,  
 8 has been conferred on the general public or a large class  
 9 of persons, (b) the necessity and financial burden of  
 10 private enforcement are such as to make the award  
 11 appropriate, and (c) such fees should not in the interest  
 12 of justice be paid out of the recovery, if any. With respect  
 13 to actions involving public entities, this section applies to  
 14 allowances against, but not in favor of, public entities, and  
 15 no claim shall be required to be filed therefor.  
 16 SEC. 2. No appropriation is made by this act, nor is any  
 17 obligation created thereby under Section 2231 of the  
 18 Revenue and Taxation Code, for the reimbursement of  
 19 any local agency for any costs that may be incurred by it  
 20 under this act.

O



**EXHIBIT "2"**

AMENDED IN ASSEMBLY MAY 18, 1977

CALIFORNIA LEGISLATURE—1977-78 REGULAR SESSION

ASSEMBLY BILL

No. 1310

Introduced by Assemblyman Berman

March 31, 1977

REFERRED TO COMMITTEE ON JUDICIARY

An act to add Section 1021.5 to the Code of Civil Procedure, relating to attorneys' fees.

LEGISLATIVE COUNSEL'S DIGEST

AB 1310, as amended, Berman (Jud). Attorneys' fees.

Under existing law, the measure and mode of compensation of attorneys is determined by agreement of the parties, except attorneys' fees may also be awarded by a court pursuant to express authority in the law.

This bill would authorize a court, upon motion, in any action not involving a public entity, to award reasonable attorneys' fees to a successful party against one or more opposing parties in any action which has resulted in the enforcement of an important right affecting the public interest if 3 specified conditions are satisfied.

The bill would require a court to make such award of attorneys' fees in an action involving a public entity, but would prohibit such award of attorneys' fees in favor of a public entity.

The bill also would provide that neither appropriation is made nor obligation created for the reimbursement of any local agency for any costs incurred by it pursuant thereto.

Vote: majority. Appropriation: no. Fiscal committee: no.

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LEGISLATIVE INTENT SERVICE



0 1035 60 10

State-mandated local program: yes. *no.*

*The people of the State of California do enact as follows:*

1 SECTION 1. Section 1021.5 is added to the Code of  
2 Civil Procedure, to read:

3 1021.5. Upon motion, a court may award *reasonable*  
4 attorneys' fees to a successful party against one or more  
5 opposing parties in any action which has resulted in the  
6 enforcement of an important right affecting the public  
7 interest if: (a) a significant benefit, whether pecuniary or  
8 nonpecuniary, has been conferred on the general public  
9 or a large class of persons, (b) the necessity and financial  
10 burden of ~~private~~ enforcement are such as to make the  
11 award appropriate, and (c) such fees should not in the  
12 interest of justice be paid out of the recovery, if any. ~~With~~  
13 ~~respect to actions involving public entities, this section~~  
14 ~~applies to allowances against, but not in favor of, public~~  
15 ~~entities, and no claim shall be required to be filed~~  
16 ~~therefor.~~

17 ~~SEC. 2. No appropriation is made by this act, nor is any~~  
18 ~~obligation created thereby under Section 2231 of the~~  
19 ~~Revenue and Taxation Code, for the reimbursement of~~  
20 ~~any local agency for any costs that may be incurred by it~~  
21 ~~under this act.~~



**EXHIBIT "3"**

AMENDED IN SENATE AUGUST 23, 1977

AMENDED IN ASSEMBLY MAY 18, 1977

CALIFORNIA LEGISLATURE—1977-78 REGULAR SESSION

ASSEMBLY BILL

No. 1310

Introduced by Assemblyman Berman

March 31, 1977

REFERRED TO COMMITTEE ON JUDICIARY

An act to add Section 1021.5 to the Code of Civil Procedure, relating to attorneys' fees.

LEGISLATIVE COUNSEL'S DIGEST

AB 1310, as amended, Berman (Jud). Attorney's fees.

Under existing law, the measure and mode of compensation of attorneys is determined by agreement of the parties, except attorneys' fees may also be awarded by a court pursuant to express authority in the law.

This bill would authorize a court, upon motion, *in any action not involving a public entity*, to award ~~reasonable~~ attorneys' fees to a successful party against one or more opposing parties in any action which has resulted in the enforcement of an important right affecting the public interest if 3 specified conditions are satisfied.

*The bill would require a court to make such award of attorneys' fees in an action involving a public entity, but would prohibit such award of attorneys' fees in favor of a public entity.*

*The bill also would provide that neither appropriation is made nor obligation created for the reimbursement of any local agency for any costs incurred by it pursuant thereto.*

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Vote: majority. Appropriation: no. Fiscal committee: no.  
State-mandated local program: yes. ~~no~~.

*The people of the State of California do enact as follows:*

1 SECTION 1. Section 1021.5 is added to the Code of  
2 Civil Procedure, to read:

3 1021.5. Upon motion, a court may award ~~reasonable~~  
4 attorneys' fees to a successful party against one or more  
5 opposing parties in any action which has resulted in the  
6 enforcement of an important right affecting the public  
7 interest if: (a) a significant benefit, whether pecuniary or  
8 nonpecuniary, has been conferred on the general public  
9 or a large class of persons, (b) the necessity and financial  
10 burden of *private* enforcement are such as to make the  
11 award appropriate, and (c) such fees should not in the  
12 interest of justice be paid out of the recovery, if any. *With*  
13 *respect to actions involving public entities, this section*  
14 *applies to allowances against, but not in favor of, public*  
15 *entities, and no claim shall be required to be filed*  
16 *therefor.*

17 SEC. 2. *No appropriation is made by this act, nor is*  
18 *any obligation created thereby under Section 2231 of the*  
19 *Revenue and Taxation Code, for the reimbursement of*  
20 *any local agency for any costs that may be incurred by it*  
21 *under this act.*



**EXHIBIT "4"**

AMENDED IN SENATE SEPTEMBER 2, 1977

AMENDED IN SENATE AUGUST 23, 1977

AMENDED IN ASSEMBLY MAY 18, 1977

CALIFORNIA LEGISLATURE—1977-78 REGULAR SESSION

**ASSEMBLY BILL**

**No. 1310**

**Introduced by Assemblyman Berman**

March 31, 1977

REFERRED TO COMMITTEE ON JUDICIARY

An act to add Section 1021.5 to the Code of Civil Procedure, relating to attorneys' fees.

LEGISLATIVE COUNSEL'S DIGEST

AB 1310, as amended, Berman (Jud). Attorney's fees.

Under existing law, the measure and mode of compensation of attorneys is determined by agreement of the parties, except attorneys' fees may also be awarded by a court pursuant to express authority in the law.

This bill would authorize a court, upon motion, in any action not involving a public entity, to award attorneys' fees to a successful party against one or more opposing parties in any action which has resulted in the enforcement of an important right affecting the public interest if 3 specified conditions are satisfied.

The bill would require a court to make such award of attorneys' fees in an action involving a public entity, but would prohibit such award of attorneys' fees in favor of a public entity.

The bill also would provide that neither appropriation is

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made nor obligation created for the reimbursement of any local agency for any costs incurred by it pursuant thereto.

Vote: majority. Appropriation: no. Fiscal committee: no. State-mandated local program: yes.

*The people of the State of California do enact as follows:*

1 SECTION 1. Section 1021.5 is added to the Code of  
2 Civil Procedure, to read:

3 1021.5. Upon motion, a court may award attorneys' fees  
4 to a successful party against one or more opposing parties  
5 in any action which has resulted in the enforcement of an  
6 important right affecting the public interest if: (a) a  
7 significant benefit, whether pecuniary or nonpecuniary,  
8 has been conferred on the general public or a large class  
9 of persons, (b) the necessity and financial burden of  
10 private enforcement are such as to make the award  
11 appropriate, and (c) such fees should not in the interest  
12 of justice be paid out of the recovery, if any. With respect  
13 to actions involving public entities, this section applies to  
14 allowances against, but not in favor of, public entities, and  
15 no claim shall be required to be filed therefor.

16 ~~SEC. 2. No appropriation is made by this act, nor is~~  
17 ~~any obligation created thereby under Section 2231 of the~~  
18 ~~Revenue and Taxation Code, for the reimbursement of~~  
19 ~~any local agency for any costs that may be incurred by it~~  
20 ~~under this act.~~

21 *SEC. 2. Notwithstanding Section 2231 of the*  
22 *Revenue and Taxation Code, there shall be no*  
23 *reimbursement pursuant to this section nor shall there be*  
24 *any appropriation made by this act because duties,*  
25 *obligations, or responsibilities imposed on local*  
26 *governmental entities by this act are such that related*  
27 *costs are incurred as a part of their normal operating*  
28 *procedures.*

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**EXHIBIT "5"**

Assembly Bill No. 1310

CHAPTER 1197

An act to add Section 1021.5 to the Code of Civil Procedure, relating to attorneys' fees.

[Approved by Governor September 30, 1977. Filed with Secretary of State October 1, 1977.]

LEGISLATIVE COUNSEL'S DIGEST

AB 1310, Berman. Attorney's fees.

Under existing law, the measure and mode of compensation of attorneys is determined by agreement of the parties, except attorneys' fees may also be awarded by a court pursuant to express authority in the law.

This bill would authorize a court, upon motion, in any action not involving a public entity, to award attorneys' fees to a successful party against one or more opposing parties in any action which has resulted in the enforcement of an important right affecting the public interest if 3 specified conditions are satisfied.

The bill would authorize a court to make such award of attorneys' fees in an action involving a public entity, but would prohibit such award of attorneys' fees in favor of a public entity.

The bill also would provide that neither appropriation is made nor obligation created for the reimbursement of any local agency for any costs incurred by it pursuant thereto.

*The people of the State of California do enact as follows:*

SECTION 1. Section 1021.5 is added to the Code of Civil Procedure, to read:

1021.5. Upon motion, a court may award attorneys' fees to a successful party against one or more opposing parties in any action which has resulted in the enforcement of an important right affecting the public interest if: (a) a significant benefit, whether pecuniary or nonpecuniary, 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, if any. With respect to actions involving public entities, this section applies to allowances against, but not in favor of, public entities, and no claim shall be required to be filed therefor.

SEC. 2. Notwithstanding Section 2231 of the Revenue and Taxation Code, there shall be no reimbursement pursuant to this section nor shall there be any appropriation made by this act because duties, obligations, or responsibilities imposed on local governmental



Ch. 1197

— 2 —

entities by this act are such that related costs are incurred as a part of their normal operating procedures.



**EXHIBIT "6"**



BILL DIGEST

\* BILL: AB 1310

HEARING DATE: 5/12/77

AUTHOR: Berman

SUBJECT: Attorney's fees: Private Attorney General

BACKGROUND:

Section 1021 of the Code of Civil Procedure provides "that except as attorney's fees are specifically provided for by statute, the measure and mode of compensation... is left to the agreement, expressed or implied, of the parties..." This statute reflects the traditional philosophy that the court should not impose liability for attorney's fees as "one should not be penalized for merely defending or prosecuting a lawsuit, and that the poor might be unjustly discouraged from instituting actions to vindicate their rights if the penalty for losing included the fees of their opponents' counsel." (Fleischman Corp. v. Maier Brewing, (1967) 386 U.S. 714, 718.) This position is commonly referred to as the American Rule.

Appellate decisions have created two non-statutory exceptions to the general rule of Section 1021. Derived from its inherent equitable powers, the court has awarded attorney's fees if the plaintiff recovers or preserves a common fund, or if a class action or stockholder's derivative action confers substantial benefits, whether pecuniary or not, upon the defendant in such action.

Litigants have argued that a third exception should be recognized to provide for an award of attorney's fees where the plaintiff acting as a private attorney general seeks to enforce a public right. The California Supreme

(CONTINUED)

\*AMENDED IN COMMITTEE: Amendments (1) Strike out the restrictions on the recovery of attorney's fees by a public entity to thereby allow a public entity to be awarded fees and (2) specifies "reasonable" attorney's fees.



Court has expressly refused to pass on the question whether the "private attorney general rule" exists in California, whereas it has been rejected by the United States Supreme Court for the federal court.

BILL DESCRIPTION:

This measure would authorize a court to award attorney's fees to a successful party whose efforts result in the enforcement of an important right affecting the public interest if:

- A. A significant benefit, whether pecuniary or non-pecuniary, has been conferred on the general public or 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, in the interest of justice, should not be paid out of the recovery, if any.

Attorney's fees are only permitted to be assessed against a public entity, and not in favor of the public entity.

SOURCE:

California State Bar

SUPPORT:

California Rural Legal  
David McClain, Attorney at Law  
Marshall Grossman, Attorney at Law

(CONTINUED)



OPPOSITION:

None received.

COMMENT:

What is the justification for prohibiting the assessment of attorney's fees against the losing party and in favor of a public entity? For instance, under the provisions of this bill, the Pacific Legal Foundation could possibly be granted legal fees if it is successful in its lawsuit against the California Legislature, whereas, in the alternative the Legislature could not. In addition, a number of small communities may have far more limited legal resources for bringing suits to enforce public right than a number of legal foundations.



**EXHIBIT "7"**

ASSEMBLY COMMITTEE ON JUDICIARY

Bill Analysis

Work Sheet

RE: Bill No. AB 1310 - Attorneys Fees

Please complete this form and return it to the Assembly Committee on Judiciary as soon as possible.

1. Origin of the bill:

- (a) What is the source of the bill? (What person, organization or governmental entity, if any, requested introduction?)

California State Bar

- (b) Has a similar bill been before either this or a previous session of the Legislature? If so, please identify the session, bill number and disposition of the bill.

1975-76 Session. AB 3257-failed Assembly passage on 5/21/76, was granted reconsideration on 5/28/76, placed on inactive file 6/7/76.

- (c) Has there been an interim committee report on the bill? If so, please identify the report.

Yes - Senate Judiciary Committee Paper:  
Private Attorneys General

2. Problem or deficiency in the present law which the bill seeks to remedy: The U.S. Supreme Court, in the Ayleska case, 95 S.C.Rptr. 1612, ruled in 1975 that the legislature, not the courts, must make the policy decision regarding expanding those classes of cases in which attorneys fees may be assessed against the losing party.

3. Please attach copies of any background material in explanation of the bill, or state where such material is available for reference by the committee staff.

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LEGISLATIVE INTENT SERVICE



**EXHIBIT "8"**

MAY 1 1977  
Req. #9612  
Substantive

AMENDMENTS TO ASSEMBLY BILL NO. 1310

AMENDMENT 1

On page 2, line 3, of the printed bill,  
after "award" insert:

reasonable

AMENDMENT 2

On page 2, line 10, strike out "private"

AMENDMENT 3

On page 2, line 12, strike out "With respect",  
and strike out lines 13 to 20, inclusive.

LEGISLATIVE INTENT SERVICE (800) 666-1917



**EXHIBIT "9"**



1310  
MA

SENATE COMMITTEE ( JUDICIARY

1977-78 REGULAR SESSION

AB 1310 (Berman)  
As amended May 18  
Code of Civil Procedure

A  
B  
  
1  
3  
1  
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ATTORNEYS' FEES

HISTORY

Source: State Bar

Prior Legislation: AB 3257 (1975) - refused passage in  
Assembly  
SB 644 (1975) - held in this  
Committee

Support: Unknown

Opposition: California Assn. of Realtors, Calif. Assn.  
of Water Agencies

PURPOSE

Under existing law (C.C.P. Sec. 1021), the measure and manner of compensation of attorneys is determined by agreement of the parties, except attorneys' fees may also be awarded by a court pursuant to express authority in the law.

This bill would authorize a court, upon motion, to award reasonable attorneys' fees to a successful party in any public interest action if the following conditions are met: (1) a significant benefit has been conferred on the general public or a large class of persons; (2) the necessity and financial burden of private enforcement make the award appropriate; and (3) such fees should not in the interest of justice be paid out of the recovery, if any.

The purpose of this bill is to provide statutory authority for an award of attorneys' fees in public interest litigation.

(More)



A  
B  
  
1  
3  
1  
0

COMMENT

1. Public interest litigation and attorneys' fees

The U.S. Supreme Court in Alyeska Pipeline Serv. v. Wilderness Soc. (1975), 95 S.C. Rptr. 1614, held that without express statutory authority, a court may not award attorneys' fees to a successful party even though the action resulted in a significant benefit to the general public, and that attorneys' fees were a matter properly to be determined by Congress.

Existing California law reflects the traditional philosophy espoused by the U.S. Supreme Court in Fleischman Corp. v. Maier Brewing, (1967), 386 U.S. 714, and again in Alyeska Pipeline, supra, that it would be unfair to penalize an individual for availing himself of the judicial process to defend or prosecute a case.

Although appellate decisions have created two exceptions to Sec. 1021 (i.e., if the plaintiff recovers or preserves a common fund, and if a class action or stockholder derivative action confers substantial benefits, whether pecuniary or not, upon the defendant in such action), the California Supreme Court has refused to pass on the question of whether a third exception should be recognized where the plaintiff acting as a "private attorney general" seeks to enforce a public right (D'Amico v. Board of Medical Examiners, (1974) 116 3d 1).

In partial response to the Alyeska ruling the Congress in 1976 enacted 42 USC Sec. 1988 to authorize the award of attorneys' fees in civil rights class actions.

(More)



No similar authority is currently in the California statutes.

2. AB 1310

This bill would authorize a court, upon motion, to award reasonable attorneys' fees to the successful party in an action which results in the enforcement of an important right affecting the public interest if all of the following conditions are met:

- (a) a significant benefit, whether pecuniary or nonpecuniary, has been conferred on the general public or a large class of persons, and
- (b) the necessity and financial burden of 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, if any.

Proponents contend that passage of AB 1310 would encourage the pursuit of public interest litigation as these types of suits are usually prolonged, expensive to undertake, and, if successful, usually confer significant benefits on a large class of people. It would also allow the defendant, if he or she is the successful party in preserving a matter of public interest or benefit, to recover attorneys' fees.

DIGEST

See Purpose section.

\*\*\*\*\*



**EXHIBIT "10"**

SENATE COMMITTEE ON JUDICIARY

BACKGROUND INFORMATION

AB 1310

1. Source

- (a) What group, organization, governmental agency, or other person, if any, requested the introduction of the bill? Please list the requestor's telephone number or, if unavailable, his address.

California State Bar 444-2762

- (b) Which groups, organizations, or governmental agencies have contacted you in support of, or in opposition to, your bill? Santa Clara County Bar Assoc., L.A. County Bar Assc. and C.R.L.A. are in support.

California Association of Realtors and Calif. Assoc. of Water Agencies opposes.

- (c) If a similar bill has been introduced at a previous session of the Legislature, what was its number and the year of its introduction? AB 3257, 1975.

2. Purpose

What problem or deficiency under existing law does the bill seek to remedy? The U.S. Supreme Court, in the Alyeska Case, 95 S.C. Rptr. 1612, ruled in 1975 that the Legislature, not the courts, must make the policy decision regarding expanding those classes of cases in which attorneys fees may be assessed against the losing party.

If you have any further background information or material relating to the bill, please enclose a copy of it or state where the information or material is available.

Senate Judiciary Committee Paper:

Private Attorneys General

PLEASE COMPLETE THIS FORM AND RETURN IT TO THE SENATE COMMITTEE ON JUDICIARY, ROOM 2046 AS SOON AS POSSIBLE. THE COMMITTEE STAFF CANNOT SET THE BILL FOR A HEARING UNTIL THIS FORM HAS BEEN RETURNED.

SP-1



**EXHIBIT "11"**

THE STATE BAR OF CALIFORNIA

1210 K Street, Sacramento, CA 95814 (916) 444-2762

Harold F. Bradford

Legislative Representative

A  
B  
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A.B. 1310 (Berman)

ATTORNEYS' FEES: PUBLIC INTEREST LITIGATION

Summary

Authorizes an award of attorneys' fees to the successful party in an action that has resulted in the enforcement of an important right which affects the public interest.

Sections Affected

Adds Section 1021.5 to the Code of Civil Procedure.

Purpose

Permit courts to reimburse litigants their attorney's fees in those cases where the litigant has obtained a result that is beneficial to the public or a major segment thereof.

Discussion

Under existing law, except as attorney's fees are specifically provided for by statute, the measure and mode of compensation of attorneys is left to the agreement of the parties (Section 1021, Code of Civil Procedure).

This bill would permit the court to award attorney's fees to a successful party in litigation (either the plaintiff or the defendant) if that litigant's success has resulted in the enforcement of an important right affecting the public interest. To be entitled to attorney's fees, three conditions must be met:

- 1) A significant benefit has been conferred on the general public or a large class of persons;
- 2) The necessity and financial burden of private enforcement make the award appropriate; and
- 3) Such fees cannot reasonably be paid out of the recovery.

The general rule in civil litigation is that each party pays for the services of his or her attorney. Thus, important claims that

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affect a large number of persons may go unlitigated simply because no individual litigant can afford the necessary attorney's services, or the benefit to be gained by an individual litigant is so minimal as not to justify the expense of legal services to prosecute the matter.

In order to encourage the assertion of rights that affect large numbers of citizens, the courts and legislatures have developed procedures whereby representative actions can be brought to litigate common matters for the benefit of all. For example, in class actions, the individual litigator can sue on behalf of the entire class, and his expenses can be reimbursed out of the recovery he obtains on behalf of all.

Existing law leaves gaps in these procedures, however: the defendant, not the plaintiff, may be the party who succeeded in preserving a matter of public interest and benefit; there may be no monetary recovery from which to reimburse the litigator, even though his action has conferred great benefit on the public. This bill is designed to fill those gaps and permit the award of attorney's fees to be paid by the losing party when the successful litigant has in fact conferred a benefit on the public or a large class of persons.

This bill is a response to the invitation of the United States Supreme Court in Alyeska Pipeline Serv. v. Wilderness Soc. (1975) to state legislatures to enact statutory schemes providing for the payment of attorneys' fees in public interest litigation. The Court in Alyeska recognized that the award of such fees is socially appropriate but that the provision therefor should be legislative and not judicial.

### References

Board of Governors ad hoc Committee on Fee Shifting, Report, January, 1976.

### History

#### 1976

Introduced as A.B. 3257 - refused by Assembly.  
December, 1976 - placed on 1977-78 Legislative Program.  
March 31, 1977 - introduced.  
May 12 - passed by Assembly Judiciary Committee.  
June 22 - passed by Assembly.





**EXHIBIT "12"**

THE LEGAL SERVICES SECTION  
OF THE STATE BAR OF CALIFORNIA

BEVERLY RUBIN, Chairman  
LOLA MALJUN GRANT, Vice-Chairman  
MORTIMER HERSHBERG, Secretary  
LUTHER A. LEVY, Treasurer



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JOHN H. VAN DE BANG, LOS ANGELES

SUITE 502  
633 BATTERY STREET  
SAN FRANCISCO 94111  
TELEPHONE 922-1440  
AREA CODE 415

Testimony of John R. Phillips  
Presented To The

Senate Judiciary Committee on August 16, 1977  
In Support of AB 1310 (Attorneys' Fees)

INTRODUCTION

My name is John R. Phillips. I am one of the founding attorneys and directors of the Los Angeles based Center for Law in the Public Interest, a charitable, non-profit corporation governed by a thirty member Board of Trustees that employs a staff of twenty including ten attorneys. I appear here today in support of AB 1310 (attached hereto as Exhibit B) in my capacity as an Executive Committee member of the Legal Services Section of the State Bar of California. As you may know, the Bar Board of Governors last year officially endorsed AB 3257 which is virtually identical to the bill before you today. It is my understanding that the State Bar endorsement attaches to AB 1310.

John R. Phillips  
Testimony  
Page Two

AB 1310 deserves your support for the following

reasons:

1. It will encourage more effective implementation and enforcement of important laws that you as legislators enact to benefit the public.
2. It will make government agencies and corporate entities more accountable and responsive to important legislative measures.
3. It will act as an additional incentive for the private bar to fulfill its professional responsibility by engaging in meritorious pro bono litigation where your legislative will is being thwarted.
4. It is consistent with the American system of jurisprudence which spreads the cost of enforcement to the public at large where a significant benefit has been conferred on the general public.

I would like to stress that this bill would have a rather narrow application. It would not apply to more than 99% of the civil cases filed in California where the disputes revolve around property or personal rights between two private litigants. This bill would give judges discretion to award attorneys' fees in only those very few number of cases where the judge finds that the issues involved are currently regarded as being of extreme importance (such as environmental and consumer protection) and where a favorable



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John R. Phillips  
Testimony  
Page Three

final judgment will affect not only the plaintiffs who initiate the action but a substantial number of individuals.

AB 1310 will encourage effective implementation and enforcement of important laws enacted by the California legislature.

There should be no interest group more supportive of this bill than the California Legislature itself because it will result in more effective implementation and enforcement of important legislation that you enacted after careful research and full debate.

It is sadly true that many of the laws you pass for benefit of the public are not adequately implemented because they lack an effective enforcement mechanism. A prime example is the California Environmental Quality Act of 1970. This hallmark legislation was virtually ignored by all state and local agencies for the first two years of its existence and only after several law suits were successfully brought by private parties did agencies begin to comply with that Act.

There are, of course, existing enforcement agencies like the Attorney General, County Counsel and City Attorney. While their offices have achieved some court victories in vindication of citizen rights, inherent limitations have impaired their overall effectiveness. These limitations

John R. Phillips  
Testimony  
Page Four

include political restraints, lack of adequate funding and large case loads. Attorney General Younger himself testified at a hearing in 1975 on a similar attorneys fees bill that because of funding limitations, his office couldn't possibly bring all the meritorious cases that are brought to the attention of his office. But there is another even more serious impediment -- conflict of interest. If, for example, the state air pollution laws go unenforced, the Attorney General must defend rather than sue the State Air Resources Board. The same is true for the County Counsel's office and City Attorneys when counties and cities fail to implement and enforce legislation.

By encouraging meritorious private challenges to government agencies which fail to comply with the legislature's will, this legislation will also have the added benefit of making these agencies more accountable and therefore more vigilant in fulfilling their legislature's mandate. Attorneys fees awarded against government agencies could serve as one useful index of performance; those agencies that are repeatedly found in systematic violation of law by courts would or should be singled out as problem agencies in need of a shake-up.



John R. Phillips  
Testimony  
Page Five

Existing private enforcement of public rights legislation is inadequate.

There are very few attorneys in this state who have ever been engaged in what can be described as "public rights" or "public interest" litigation. Lawyers funded by the federal government are concerned almost exclusively with claims of individuals below the federally established poverty level, for example, a welfare mother who may want a divorce or a person who may be eligible for but is not receiving food stamps. They are typically private property claims of impoverished individuals who cannot afford a lawyer. These lawyers do not represent issues of interest to the average citizen or to the general public like the following two examples.

Consider the case of Caltrans proposing to build a freeway without complying with various state and federal laws. While many thousands of California residents will be affected by the state's actions, which would cut a swath through communities and parks, no one will have a sufficient financial interest or resources to go to court to challenge the unlawful activity. If the affected individual does go to a lawyer for advice, he will quickly learn that a lawyer's fee would be at least \$25,000 to \$50,000 for the extensive commitment of time necessary to file a class action against the state and federal authorities. That individual (or the

John R. Phillips  
Testimony  
Page Six

lawyer) no matter how public spirited he or she is will ask, "Why should I be out of pocket \$25,000 to vindicate the rights of 10,000 or more other people who are also going to be affected?" Thus, rarely will an individual, even a wealthy individual, be likely to seek out and pay counsel to commence costly litigation to vindicate not his own rights, but widely shared public rights.

Consider also a similar case where a county refuses to comply with a state law requiring rezoning counties in accordance with a comprehensive general plan on the theory that most cities and counties are way over-zoned for development. Who will challenge this illegal conduct?

The above examples are not hypothetical. They are two representative cases brought by the Center for Law in the Public Interest on behalf of citizen groups. In both cases the state and county were found to be in flagrant violation of the laws that you enacted.

These cases were brought only because there was an independent organization like the Center with the financial support of a very few charitable foundations. And, there are only a handful of attorneys in the state who have had the good fortune to secure limited foundation grants for this type of public rights litigation. A federal district judge in a freeway case similar to the one described above commented on the problems posed by private enforcement of



John R. Phillips  
Testimony  
Page Seven

this type of legislation.

"(E)hortations towards citizen participation can sound somewhat hollow against the background of the economic realities of vigorous litigation. In many public interest cases only injunctive relief is sought, and the average attorney or litigant must hesitate, if not shudder at the thought of taking on an entity such as the California Department of Highways, with no prospect of financial compensation for the efforts and expenses rendered. The expense of litigation in such a case poses a formidable, if not insurmountable obstacle. The only public entities that might have brought in this case were named as defendants in this action and vigorously opposed plaintiffs' contentions. Only a private party could have been expected to bring this litigation, and yet a private party is least able to bear the tremendous economic burdens. To force the private litigants to bear their own costs here would be tantamount to a penalty, and it seems somewhat inequitable to public litigants who have policed those charged with implementing and following Congressional mandates." [57 F.R.D. at 101.]

The very few organizations like the Center that exist today will not survive without the possibility of attorneys' fees being awarded in meritorious and successful litigation. Foundation funds were initially provided as seed money and will not be renewed. And, it is extremely difficult to entice private lawyers and law firms, even the most public spirited, to devote substantial time and money to vindicate public rights when it means that they will have no chance whatsoever to recoup their fees and costs. If these attorneys and law firms felt that there was a possibility of getting fees on those successfully litigated cases which confer a substantial benefit on a broad segment of the public, we would be far more successful in getting attorneys

John R. Phillips  
Testimony  
Page Eight

to engage in public interest litigation. As it is, many highly meritorious suits are not brought because of a lack of resources. It also means that many state and local agencies will continue to violate various laws without real likelihood of being challenged.

Substantial benefits to the general public should not depend upon the financial status of the plaintiff or upon the charity of foundations or upon the charity of public-minded lawyers alone. Where the benefit is conferred upon a large number of persons, it is inequitable that a person who steps forward to enforce the rights should bear the entire cost. AB 1310 will rectify this situation by authorizing a court, in its discretion, to grant attorneys' fees to the successful party under these particular circumstances. The legal system will become a more egalitarian instrument by encouraging attorneys to act as citizen attorneys general and to use the courtroom to broaden the concept of democracy.

AB 1310 creates an extremely narrow exception to the American rule on attorneys' fees which is entirely consistent with our system of jurisprudence.

The proposed legislation carves out a limited exception to the American rule that each side must bear the costs of their own attorneys' fees. The American rule is a



John R. Phillips  
Testimony  
Page Nine

departure from the common law practice and while the origins of the rule remain somewhat obscure, the main purpose was apparently to provide citizens with wider access to the courts. It was thought that this purpose was achieved under the American rule because plaintiffs would no longer refrain from instituting actions due to the "chilling effect" of being taxed with the opponents' attorneys' fees should the plaintiffs fail in their suit.

Both the legislature and the judiciary, however, have carved out exceptions to the application of the rule since its origin in order to alleviate inequitable results. These exceptions have been created in those situations where economic interests or other important rights are broadly shared and where it would be grossly unfair to saddle an individual plaintiff with the full costs of his litigation. While federal and California statutes have been enacted which provide for an award of attorneys' fees to a successful party in various situations,\* with few exceptions these situations involved commercial matters not likely to be the subject of any public rights litigation.

The judiciary, utilizing traditional equitable powers, has taken an active role in formulating four exceptions

\* See Appendix A for listing of California statutes.

John R. Phillips  
Testimony  
Page Ten

to the American rule. Under the obdurate behavior theory, a party which abuses the judicial process by initiating a vexatious or oppressive lawsuit in bad faith should be penalized. Courts have therefore awarded attorneys' fees to the prevailing party where an opponent is engaged in groundless, fraudulent or vexatious litigation. F. D. Rich Co., 417 U.S. 219. A second exception, the "common fund" doctrine, utilized by courts as early as 1881, was applied when a litigant had created a monetary fund in behalf of others as well as himself by the prosecution of his lawsuit. Applying the theory of "unjust enrichment", courts reasoned that persons who benefitted from the litigation should bear the expenses of creating such a fund. Trustees v. Greenough, 105 U.S. 527, 536 (1881). The common fund doctrine evolved into the "substantial benefit" theory between 1960-1970. Hall v. Cole, 412 U.S. 1 (1973). Under the new doctrine, a non-pecuniary substantial benefit conferred upon an identifiable class could be the basis for courts to use their equitable discretion to shift fees.

The final exception created by American courts originated with the idea of reimbursing an individual who initiates a suit for the purpose of vindicating Congressional policies of high priority where he is successful in the litigation. In order to elicit the essential aid of these "private attorneys general", the prohibitive expense of



John R. Phillips  
Testimony  
Page Eleven

bringing litigation was eliminated by granting fees against the opponenet if the private litigant succeeded in effectuating a strong public policy which benefitted a large class of people. La Raza Unida v. Volpe, 57 F.R.D. 94 (N.D. Calif. 1972).

Entirely consistent with the American system of jurisprudence, AB 1310 in essence codifies this fourth exception to the American rule, the "private attorney general" doctrine. The doctrine was left in a state of flux by the U.S. Supreme Court decision in Alyeska Pipeline Serv. v. Wilderness Society 421 U.S. 240 (1975). In that case, the Supreme Court held that courts do not have the inherent power to award fees under this particular theory, indicating that this exception should be created by the Congress rather than by the courts.

The California courts have affirmed all of the judicially-created exceptions (Quinn v. State of California, 15 Cal. 3d.162 (1975); Mandel v. Hodges, 54 Cal. App. 3d 596 (1976)). The California Supreme Court prior to Alyeska indicated that it would wait to see what the U.S. Supreme Court's decision would be regarding the "private attorney general" doctrine, leaving the present situation within the state unresolved and in need of legislative guidance. D'Amico v. Board Of Medical Examiners, 11 Cal. 3d.1 (1974).

John R. Phillips  
Testimony  
Page Twelve

Thus, it is the proper time for the California Legislature to speak out on this important issue and make their will known to California judges regarding their authority to award attorneys fees in appropriate cases.

Frivolous litigation will not be encouraged due to the strict standards in the bill which must be applied and weighed by the judge.

A fear that AB 1310 may encourage unmeritorious and court-wasting litigation is completely unfounded and unwarranted. The careful wording of the bill ensures that only meritorious lawsuits would be encouraged. A strict three-pronged standard must be met by all litigants requesting an award of attorneys' fees by the court. A litigant would be eligible for attorneys' fees first of all, only if the judgment is in favor of his client. Secondly, and more importantly, the attorney must persuade the judge that the litigation resulted in the "enforcement of an important right affecting the public interest." In determining this question, the judge must determine whether: a) "there was a significant benefit conferred upon 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 not in the interest of justice be paid out of the recovery, if any". In order for



John R. Phillips  
Testimony  
Page Thirteen

the judge in his discretion to grant attorneys' fees to a successful party, that party must meet this three step test. A judge's ability to balance the factors and define the terms such as an "important right" are clearly within his province of interpreting the law and the will of the legislature.

Those actions which do enforce public interest policies are extremely time-consuming and costly. As an example, the Serrano v. Priest (5 Cal 3d. 584 (1973)) action attacking school district funding methods lasted seven months at trial with a significant cost. The fact that only a successful plaintiff who confers substantial benefits on the public may receive an award of attorneys' fees remains as a disincentive to private attorneys. As in contingency fee cases, an attorney must make a careful analysis of the action and possibilities of meeting the strict criteria before undertaking any litigation.

I would also like to point out that this legislation takes a step toward evening out the imbalance that exists in favor of those with substantial resources. Large businesses, cities, counties and the state all have enormous resources to litigate. Businesses can deduct the costs as an ordinary and necessary expense. If a company wants to protect a business interest, it can often bring an action under the Unfair Trade Practices Act (Bus. & Professions

John R. Phillips  
Testimony  
Page Fourteen

Code 17082) and can obtain a statutory attorneys' fee award. AB 1310 simply makes the situation a little more equitable. Certainly the public deserves the same protection of their interests as businesses receive.

This legislation may also encourage a more efficient litigation process in those cases where attorneys fees could be awarded. AB 1310 will have the added benefit of reducing the number of frivolous motions which are currently made in order to delay an action and/or harass an opponent. In an action to enforce legislation enacted in the public interest, a party with a weak position will ultimately pay for such behavior by bearing the cost of his opponent's attorneys' fees if he loses the lawsuit. Settlements and compromises should be encouraged by the bill because a party with a losing position will hesitate to undertake and continue a lawsuit if costs could be assessed against him.

#### CONCLUSION

The legislators of this state are the natural body to help ensure that the laws enacted by them in the public interest will reach and benefit the citizens. Until a supplementary enforcement mechanism to the present public system is adopted, the laws will not be effectively implemented.

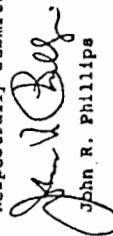




John R. Phillips  
Testimony  
Page Fifteen

AB 1310 offers this enforcement aid by creating an incentive to private attorneys to bring meritorious litigation which will enforce public rights. AB 1310 offers this enforcement mechanism by creating a necessary incentive to private attorneys to bring litigation which will enforce public rights. The incentive consists of a discretionary award of attorneys' fees to a prevailing party who both enforces a legislatively affirmed public policy and meets a strict standard which must be applied by a judge. AB 1310 will establish the "private attorney general" doctrine as a legislative mandate in California and will effectuate the enforcement of laws enacted by the legislature of the state in the public interest.

Respectfully submitted,

  
John R. Phillips

APPENDIX A

State Statutes Authorizing Attorney Fees.

Administrative hearings, Gov 11507.7  
Allen insurer, payment, Ins 1619  
Annulment of marriage, CC 87  
Attachment, amount of undertaking, CCP 539  
Banks:  
Liquidation, Fin 3106, 3107  
Organization, Fin 406  
Bond filed by bidder with complaint in action for relief from bid, Gov 14350  
Brands, Container brand suit, Bus & P 14438  
Colleges and universities, false advertising, damages Educ 19008  
Container brand suit, but & P 14438  
Contractor's bond on public works, action, Gov 4207  
Corporations, action by shareholder, Corp 834  
Correspondence schools, actions for damages, judgment, Educ 29007.3  
Cosmetology school, action on bond, Bus & P 7398  
County treasurer's action against district attorney on official bond, Gov 16505  
Dance studio contracts, violations, CC 1812.94  
Dead bodies, compelling interment, Health & S 7109  
Deeds and conveyances, quitclaim deed, oil, gas and mineral leases, abandonment or expiration, CC 794  
Documents of title, lost, stolen or destroyed, bailee, Com 7601  
Eminent domain:  
Abandonment of proceeding, CCP 1255a  
Railroad bond, action on, CCP 1251



Expunging lis pendens, order, CCP 4093  
Fixtures erroneously affixed to land, removal, CL 1013.5  
Health services, contracts, violations, CC 1812.94  
Improvement Act of 1911, this index  
Improvement Bond Act of 1915, refunding bonds, foreclosure of  
    reassessment liens Str & H 9354  
Industrial loan companies, collection, defaulting debtor, Fin 18662  
Libel and slander action, CCP 836  
Liens and encumbrances, treble damage action, Bus & P 10246  
Motor vehicles, conditional sales, CC 2983.4  
Real estate securities dealers,  
    Action for damages, Bus & P 10238.7  
    Conservatorship and liquidation proceedings, Bus & P 10239.23  
Restraint of trade, action to recover damages, Bus & P 16750  
Revenue Bond Law of 1941, action to enforce, Gov 54356  
San Francisco Bay area transit districts, bond action, Pub U 29292  
Security owners protection, civil liability, Corp 27200  
Separate maintenance, CC 137.3  
Sewers and sewer systems,  
    Delinquent payments, collection, Health & S 5053  
Small claims court, appeals, CCP 117j  
Subdivision maps, installation of improvements, rescission  
    proceedings, Bus & P 11612.5  
Transfer of causes, motions for allowance, CCP 396b  
Unfair trade practices, action for damages, Bus & P 17082



**EXHIBIT "13"**

# ENROLLED BILL REPORT

AGENCY GOVERNOR'S OFFICE	BILL NUMBER AB 1310
DEPARTMENT, BOARD OR COMMISSION LEGAL AFFAIRS	AUTHOR Berman

The language of this bill, which specifically authorizes (but does not require) the payment of attorney fees in a limited type of public interest cases, was suggested by the opinion of Federal Judge Robert Peckham in La Raza Unida v. Volpe, 57 F.R.D. 94 (N.D. Cal. 1972):

"whenever there is nothing in a statutory scheme which might be interpreted as precluding it, a 'private attorney-general' should be awarded attorneys' fees when he has effectuated a strong Congressional policy which has benefited a large class of people, and where further the necessity and financial burden of private enforcement are such as to make the award essential."

The need for such fee awards was explained by Judge Peckham as follows:

"...exhortations towards citizen participation can sound somewhat hollow against the background of the economic realities of vigorous litigation. In many 'public interest' cases only injunctive relief is sought, and the average attorney or litigant must hesitate, if not shudder, at the thought of 'taking on' an entity such as the California Department of Highways, with no prospect of financial compensation for the efforts and expense rendered. The expense of litigation in such a case poses a formidable, if not insurmountable, obstacle."

"The only public entities that might have brought suit in this case were named as defendants in this action and vigorously opposed plaintiffs' contentions. Only a private party could have been expected to bring this litigation, and yet a private party is least able to bear the tremendous economic burdens. To force the private litigants to bear their own costs here would be tantamount to a penalty, and it seems somewhat inequitable to punish litigants who have policed those charged with implementing and following Congressional mandates ...".

It has been argued by large corporations and some others that this bill would result in an increased number of lawsuits, many of which would be frivolous. I strongly disagree and, in fact, believe the signing of this bill might have the opposite result.

Preliminarily, very few cases meet all three pre-conditions set forth in the bill. More importantly, however, with respect to the relatively small number of cases in which plaintiffs might be eligible for fees, the bill would give defendants a salutary incentive to settle meritorious suits without requiring time-consuming and expensive litigation. It is not an uncommon practice for many large institutions, both public and private, to force a plaintiff to the expense and delay of the judicial process even where it is conceded that the

RECOMMENDATION:

Analyst	DATE	Legal Affairs Secretary	DATE
			PE - 8

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# ENROLLED BILL REPORT

AGENCY GOVERNOR'S OFFICE	BILL NUMBER AB 1310
DEPARTMENT, BOARD OR COMMISSION LEGAL AFFAIRS	AUTHOR Berman

Continued .....

plaintiff will eventually prevail. See, e.g., Vaugh v. Atkinson, 369 U.S. 527 (1962). This was a common practice of southern school boards during the 1950's. See, e.g., Bell v. School Board, 321 F.2d 494 (4th Cir. 1963), and remains the practice of individuals and institutions who, usually for economic reasons, seek to delay with a clear legal mandate. The signing of this bill would discourage such resistance.

It should be emphasized that even if this bill becomes law, plaintiffs would still have to expend the considerable amount of money required up front in order to commence major litigation of the sort contemplated by this bill. Very few individuals or organizations are willing to make such an investment without strong reason to believe they will eventually prevail. For this reason, frivolous litigation is not likely to be generated by the bill. And if frivolous litigation is commenced, the courts are equitably empowered to punitively assess fees against plaintiffs.

Another reason to sign this bill is that, in the absence of legislation such as this, the courts might develop a more liberal common law rule that would justify fees in cases beyond the scope of the bill now before you. In the minds of some people, the California courts are currently engaged in such a process (see, e.g., Mandel v. Hodges, 54 Cal. App. 3d 596 (1974)), and they are being encouraged by virtually every recent treatise on the subject. See, e.g., Nussbaum, Attorneys' Fees and Public Interest Litigation, 43 N.Y.U.L. Rev. 301 (1973) and Note, Awarding Attorneys Fees to the "Private Attorney General": Judicial Green Light to Private Litigation in the Public Interest, 24 Hastings L.J. 733 (1973).

In 1974, the Congress enacted legislation similar to AB 1310 which was introduced by Senator Tunney. This federal law, which has been in effect for almost three years, has not opened a floodgate of litigation or increased government costs.

I have promised Assemblyman Berman, who is greatly concerned about this bill, that I would convey to you his desire to discuss it with you in the event you are inclined to veto.

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RECOMMENDATION:

SIGN

Analyst J. Anthony Kline	DATE 9/22/77	Legal Affairs Secretary <i>[Signature]</i>	DATE PE - 9
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**EXHIBIT "14"**



1020 N STREET, SACRAMENTO, CALIFORNIA 95814



## ENROLLED BILL REPORT

AGENCY Agriculture and Services	BILL NUMBER AB 1310
DEPARTMENT, BOARD OR COMMISSION Department of Consumer Affairs	AUTHOR Berman

SUBJECT: Permitting the Award of Attorneys Fees to the Successful Party in Public Interest Lawsuits.

HISTORY, SPONSORSHIP, and RELATED LEGISLATION

Assembly Bill 1310, sponsored by the State Bar of California, would authorize a court, upon motion, when certain conditions have been met, to award attorneys fees to a successful party against one or more opposing parties in any action which has resulted in the enforcement of an important right affecting the public interest.

SB 664 (Song) and AB 3257 (Miller) of the 1975-76 Session were similar bills which dealt with the same subject. SB 664 died in Committee last year and AB 3257 went to the Assembly Inactive file after reconsideration was granted on Assembly Third Reading.

ANALYSIS

A. SPECIFIC FINDINGS

Under existing law, the measure and mode of compensation of attorneys is determined by agreement of the parties, except that attorneys fees may also be awarded by a court pursuant to express authority in law. (Code of Civil Procedure Section 1021.) In addition, appellate decisions have created two non-statutory exceptions to the general rule of Section 1021. Derived from its inherent equitable powers, the court may award attorneys fees if 1) the plaintiff recovers or preserves a common fund or 2) if a class action or stockholder's derivative action confers substantial benefits, whether pecuniary or not, upon the defendant in such action.

AB 1310 would authorize a court, upon motion, to award attorneys fees a successful party against one or more opposing parties in any action which has resulted in the enforcement of an important right affecting the public interest if:

- a) a significant benefit, whether pecuniary or nonpecuniary, has been conferred on the general public or a large class of persons; and
- 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 ~~at~~ the recovery, if any.

*Lawyer fee is that recover it fees*

RECOMMENDATION: **SIGN**

DEPARTMENT DIRECTOR <i>[Signature]</i>	DATE 7/27/77	AGENCY SECRETARY <i>[Signature]</i>	DATE 8/28/77
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AB 1310 contains an SB 90 waiver stating that notwithstanding Section 2231 of the Revenue and Taxation Code, there shall be no reimbursement nor any appropriation by the bill because duties, obligations, or responsibilities imposed on local governmental entities by the bill are such that related costs are incurred as a part of their normal operating procedures.

B. FISCAL IMPACT

No Fiscal Impact on this Department.

C. VOTE

Assembly 52-19  
Senate 21-12

D. RECOMMENDATION: Sign

This Department supports AB 1310 because we feel that it is vitally important that citizens have access to the legal system when necessary in order to enforce important rights affecting the public interest. Such access is not presently available to most citizens because of the prohibitive expense involved in bringing such cases. AB 1310 would provide for such access by allowing the courts the discretion to award attorneys fees to the successful party in cases where the public interest has been protected.

Traditionally, parties to a civil action must pay for their own attorneys fees, either directly from their own personal resources, or by contingency fee out of any recovery that may be awarded in the case. However, the cases covered by AB 1310 often result in nonpecuniary or intangible recoveries, thus precluding the possibility of a contingency fee arrangement. In addition, such cases require extensive amounts of attorney time and skill since the issues being decided are often of first impression in the courts and are without established legal precedents. Thus, these cases are prohibitively expensive for almost all citizens. Yet, such cases can have important consequences for large numbers of the public.

There are some statutory or judicial exceptions to the general rule that a party must pay for his/her own attorney's fees. However, because of their limited applicability, such exceptions are often unavailable in many of the factual situations that involve the public interest. Class actions have been severely limited recently by the imposition of increased notice requirements. And even where such actions are available, there is still no provision made for court awards of attorney fees.

Therefore, if many important rights are to be adequately enforced, it is necessary that the courts be granted the authority to make awards of attorneys fees to the successful party in certain specified circumstances. AB 1310 provides that authority.

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AB 1310 should not encourage "frivolous" lawsuits. The bill is written so as to narrowly define the situations in which a court award of attorneys fees is possible. Three specific conditions must be met before the court is allowed to make an award. And even then, the court is not obligated to do so. In addition, "frivolous" lawsuits are subject to countervailing legal recourse, including a legal cause of action by the injured party.

This Department has recommended a Support position on AB 1310 in the past, but has received approval for a Neutral position instead, primarily because the bill would allow for awards of attorneys fees against public entities. We believe the preceding arguments apply as well to situations where public entities are the defending parties.

When a private party seeks judicial review of what is believed to be an illegal action by a public entity, such private party must confront the large and expert legal resources available to such public entities, be it the Attorney General, the County or City Counsel. Often the action is sought to prohibit or compel a certain act by the public entity rather than to recover any monetary award. Consequently, such a private party's right to judicial review is eliminated by, what is for them, the prohibitive cost of prosecuting such an action.

Finally, it should be reiterated that AB 1310 only permits and does not require a court to award attorneys fees. Before a court may do so, all three preconditions must be met. Preeminent among them is that "a significant benefit... has been conferred on the general public or a large class of persons." This is very similar to the existing "substantial benefit" exception referred to earlier, since the defendant public entity often represents those upon whom the significant benefit will be conferred.

AB 1310 provides the opportunity for those people who are not financial privileged to gain access to their own legal system as a means of enforcing their own rights and the public interest at the same time. Such access ultimately benefits all of us and stimulates progress in our system of laws.

Therefore, this Department recommends that the Governor sign AB 1310 into law.

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**EXHIBIT "15"**



# THE STATE BAR OF CALIFORNIA

*Office of the Legislative Representative*

1210 K STREET

SACRAMENTO, CALIFORNIA 95814

TELEPHONE (916) 444-2762

September 20, 1977

Honorable Edmund G. Brown, Jr.  
Governor of California  
State Capitol  
Sacramento, Ca. 95814

Attention: Legislative Section

Re: Assembly Bill 1310

Dear Governor Brown:

The State Bar of California respectfully requests your approval of Assembly Bill 1310, relating to award of attorneys' fees in cases where the litigant has obtained a result that is beneficial to the public or a major segment thereof.

Under existing law, except as attorneys' fees are specifically provided for by statute, the measure and mode of compensation of attorneys is left to the agreement of the parties (Section 1021, Code of Civil Procedure).

Assembly Bill 1310 will permit the court to award attorneys' fees to a successful party in litigation (either the plaintiff or the defendant) if that litigant's success has resulted in the enforcement of an important right affecting the public interest. To be entitled to attorneys' fees, three conditions must be met:

- 1) A significant benefit has been conferred on the general public or a large class of persons;
- 2) The necessity and financial burden of private enforcement make the award appropriate; and
- 3) Such fees cannot reasonably be paid out of the recovery.

The general rule in civil litigation is that each party pays for the services of his or her attorney. Thus, important claims that affect a large number of persons may go unlitigated simply because no individual litigant can afford the necessary attorney's services, or the benefit to be gained by an individual litigant is so minimal as not to justify the expense of legal services to prosecute the matter.

In order to encourage the assertion of rights that affect large

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Honorable Edmund G. Brown, Jr.

September 20, 1977

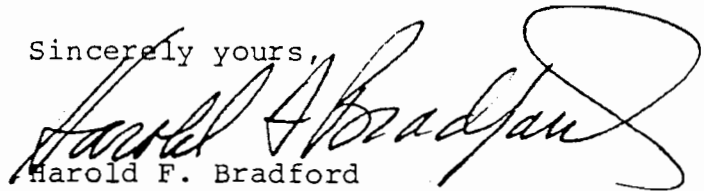
numbers of citizens, the courts and legislatures have developed procedures whereby representative actions can be brought to litigate common matters for the benefit of all. For example, in class actions, the individual litigator can sue on behalf of the entire class, and his expenses can be reimbursed out of the recovery he obtained on behalf of all.

Existing law leaves gaps in these procedures, however: The defendant, not the plaintiff, may be the party who succeeded in preserving a matter of public interest and benefit; there may be no monetary recovery from which to reimburse the litigator, even though his action has conferred great benefit on the public. This bill is designed to fill those gaps and permit the award of attorneys' fees to be paid by the losing party when the successful litigant has in fact conferred a benefit on the public or a large class of persons.

This bill is a response to the invitation of the United States Supreme Court in Alyeska Pipeline Serv. v. Wilderness Soc. (1975) to state legislatures to enact statutory schemes providing for the payment of attorneys' fees in public interest litigation. The Court in Alyeska recognized that the award of such fees is socially appropriate, but that the provision therefor should be legislative and not judicial.

Please do not hesitate to call upon us if we can be of further assistance in this matter.

Sincerely yours,



Harold F. Bradford  
Legislative Representative

b  
cc: Honorable Howard L. Berman

(800) 666-1917

LEGISLATIVE INTENT SERVICE



**EXHIBIT "16"**

THE LEGAL SERVICES SECTION  
OF THE STATE BAR OF CALIFORNIA

RENEE RUBIN, *Chairperson*  
LOLA McALPIN-GRANT, *Vice-Chairperson*  
MORTIMER HERZSTEIN, *Secretary*  
LUTHER AVERY, *Treasurer*



SUITE 502  
633 BATTERY STREET  
SAN FRANCISCO 94111  
TELEPHONE 922-1440  
AREA CODE 415

EXECUTIVE COMMITTEE  
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HALL SEELY, NEWPORT BEACH  
JOHN K. VAN DE KAMP, LOS ANGELES

August 29, 1977

J. Anthony Kline, Esq.  
Legal Affairs Secretary  
Office of the Governor  
State Capitol  
Sacramento, California 95814

*John R. Phillips*

Dear Tony:

This is a short follow-up on our meeting of August 25 regarding AB 1310.

I believe it would be unwise to attempt at this last stage to rewrite the Senate version of the bill in an attempt to mollify some of Brown's possible concerns regarding potential increased costs to government.

We now have united public interest support behind the bill (which we could lose) with very little opposition. Any change now runs the serious risk of dividing the public interest support and arousing the active opposition of various special interest groups. One of the reasons that the bill has come so far is its low profile. The more tinkering with the bill's language that occurs now, the greater the risk of picking up the same opposition that surfaced during the last two attempts to pass similar legislation.

I realize that, given your past experience in the area, you are fully conversant with arguments in support of the private attorney general doctrine that this bill attempts to codify. But I would like to suggest a few arguments aimed at Brown's possible concern about increased cost to government.

1) The bill will have very limited application. It would doubtlessly apply to a tiny fraction of 1% of civil litigation filed in state courts. The standards that must be met in order to give the court discretion to award fees

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J. Anthony Klir Esq.  
August 29, 1977  
Page Two

("may" rather than "shall" is used) will be extremely difficult to meet. It must involve the enforcement of an important right affecting the public interest and must have resulted in significant benefits being conferred on the general public or a large class of persons. Any attorney fee award would typically be inconsequential when measured against the importance (or cost) of the conduct or activity in question.

2) This is a more efficient way to make state and local government agencies more responsive and accountable. Other states have added whole new layers of bureaucracy designed to deal with the problem of government agencies not fulfilling their legislative mandates. New Jersey, for example, has created a state Office of the Public Advocate to assure that state and local agencies properly represent the public and comply with the law. Other states have built ombudsmen into each major state agency. Both of these approaches involve much greater costs to government than the occasional attorney fee award that may result when a state or local agency has been found to be in violation of the law.

3) This bill should act as an incentive to negotiated settlements which would result in net savings to government. The government agencies as defendants tend to litigate excessively in part because the costs are not internalized to the department involved. If each department becomes accountable for fees awarded against it, decision as to whether to continue litigating will be based more on the likelihood of ultimately prevailing in the litigation.

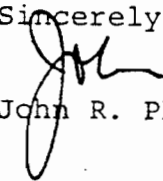
Also, an incentive to government compromise and settlement in litigation would result in shortened time spans for resolution of conflicts in which government conduct delays private sector action.

4) The bill may help to identify problem agencies. Successive attorney fee awards against one agency or department would be a strong indicator that it is in serious disregard of its statutory responsibilities and thus in need of an internal shake-up.

5) AB 1310 will also advance Brown's newly found interest in encouraging "volunteerism."

I am sure you can think of additional arguments that will convince our reluctant Governor of the merits of this important legislation.

Sincerely,

  
John R. Phillips

JRP/pk  
cc/Howard Berman

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**PROOF OF SERVICE**  
**STATE OF CALIFORNIA, COUNTY OF LOS ANGELES**

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is: 3699 Wilshire Boulevard, Tenth Floor, Los Angeles, California 90010.

On January 25, 2011 I served the foregoing document described as **APPELLANTS' REQUEST FOR JUDICIAL NOTICE** on the interested parties to this action by placing **A TRUE COPY** thereof enclosed in a sealed envelope addressed as follows:

See attached Service List

X **BY MAIL :**

I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. postal service on that same day with postage thereon fully prepaid at Los Angeles, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after the date of deposit for mailing in the Affidavit.

Executed on January 25, 2011 at Los Angeles, California.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

ESTELA MENJIVAR





**SERVICE LIST**

**Attorneys for Respondent Coast Court Reporters**

John L. Dodd, Esq. SBN 126729  
John L. Dodd & Associates  
17621 Irvine Blvd  
# 200  
Tustin, CA 92780

Peter Alan Noronha, Esq. SBN 107088  
Chambers & Noronha  
2070 N. Tustin Ave  
Santa Ana, CA 92705-7827

**Superior Court Clerk, Stanley Mosk Courthouse**

For Delivery to: Hon. Aurelio Munoz  
Department 47  
111 N. Hill Street  
Los Angeles, CA 90012

