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## Government Code 800: Reimbursement of Counsel Fees

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# Legislative Comments

## Government Code 800 Reimbursement of Counsel Fees

A decade ago the commission on poverty reported: "A system of justice that attempts, in mid-twentieth century America, to meet the needs of the financially incapacitated . . . through primary or exclusive reliance on the uncompensated services of counsel will prove unsuccessful and inadequate"<sup>1</sup>—and it has. The more systematic charity approach of the legal aid organizations is also inadequate. There, ability to have "one's day in court" really depends on one's ability to qualify for welfare. This makes our concept of legal rights meaningless to the majority of the financially incapacitated: a matter of grace, not justice, to those who qualify.

This country is now very nearly alone in failing to allow counsel fees to the victorious litigant.<sup>2</sup> Almost everywhere else in the world the chance of recovering counsel fees, however modest, from the losing opponent is a strong inducement for the lawyer to take on a meritorious case without regard to his client's affluence.

In California, the general rule is that, absent specific statutory authorization, the Court award of attorneys' fees is barred.<sup>3</sup> How-

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1. REPORT OF THE ATT'Y GEN.'S COMM'N ON POVERTY AND THE ADMINISTRATION OF CRIMINAL JUSTICE, at 41-42 (1963).

2. A. Ehrenzweig, *Reimbursement of Counsel Fees and the Great Society*, 54 CALIF. L. REV. 792 (1966).

3. CAL. CIV. PROC. CODE § 1021 (West 1955).

ever, there are exceptions to the general rule. In proper cases and where justice requires it, Courts of equity will allow attorneys' fees as part of the relief granted.<sup>4</sup> However, without statutory authorization, the awarding of attorneys' fees is speculative and not a matter of right. In the absence of a complete reform of our law of counsel fees, a partial solution is to increase the areas in which actions will be fee generating through act of the legislature.

The most recent California statute authorizing attorneys' fees is Government Code Section 800. This section provides:

In any civil action to appeal or review the award, finding, or other determination of any administrative proceeding under this code or under any other provision of state law, except actions resulting from actions of the State Board of Control, where it is shown that the award, finding, or other determination of such proceeding was the result of *arbitrary* or *capricious action* or conduct by a public entity or an officer thereof in his official capacity, the complainant if he prevails in the civil action may collect reasonable attorney's fees, but not to exceed one thousand five hundred dollars (\$1,500), where he is personally obligated to pay such fees, from such public entity, in addition to any other relief granted or other costs awarded.

This section is ancillary only, and shall not be construed to create a new cause of action.

Refusal by a public entity or officer thereof to admit liability pursuant to a contract of insurance shall not be considered *arbitrary* or *capricious action* or conduct within the meaning of this action.<sup>5</sup> (Emphasis added).

## I. BACKGROUND AND LEGISLATIVE INTENT

This statute was introduced as Assembly Bill 1074 of the 1971 Legislative Session by Assemblyman John Stull, who stated:

I am personally aware of several instances in which individual citizens have been forced to appeal an administrative decision through the courts [and] then having won their appeal, they had no way to recover the costs which they incurred in retaining an attorney. This bill provides for such recovery, so that an agency will have to pay for its mistake and assume this bill is to . . . provide a measure of equity to the wronged citizen.<sup>6</sup>

When introduced, the bill was supported by the California Trial Lawyers Association and opposed by the following agencies: The Department of Finance, The Department of Public Works, The Department of Alcoholic Beverage Control, The Department of Gen-

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4. Estate of Olmstead, 120 Cal. 447, 453, 52 P. 804, 806 (1898). See also Sanger v. Ryan, 122 Cal. 52, 54 P. 522 (1898); Estate of Phelps, 132 Cal. App. 2d 850, 283 P.2d 293 (1955).

5. CAL. GOV'T CODE § 800 (West 1972).

6. Assemblyman John Stull's (now State Senator) Press Release, November 18, 1971.

eral Services, The State Board of Equalization, The Franchise Tax Board, and The Irrigation Districts Association of California.

## II. SCOPE OF GOVERNMENT CODE SECTION 800

WHAT IS AN "ADMINISTRATIVE PROCEEDING"? The concern implicit in this question is whether every determination by an officer or employee acting in an administrative capacity is an administrative proceeding. Clearly, the answer to that question is no. The California Legislative Counsel has defined an administrative proceeding.<sup>7</sup> They state, by way of example, that the arbitrary refusal of a public officer to grant a license is not an administrative proceeding, while the appeal of that refusal to an administrative body is. Therefore, in that example, a complainant could collect reasonable attorney's fees for bringing a civil action to review the appeal proceeding upholding the refusal to grant the license.

This would then appear to apply to civil actions to review appeals of denial of unemployment benefits and state aid of all kinds (Medi-Cal, ATD, etc.) as well as wrongful dismissal from state employment.

## III. CASE LAW ON GOVERNMENT CODE SECTION 800

Only one California case has appeared at the appellate level since March 4, 1972, the effective date of the statute. In *Olsen v. Hickman*<sup>8</sup> the Court found that the scope of Government Code Section 800 extended to actions of a county assessor in discharging an employee from a Civil Service position. This decision was reached over objections by defendant's counsel that Government Code Section 800 did not apply to local agency decisions.<sup>9</sup> Furthermore, the defense argued that, even if the statute did apply, acting in a discriminatory manner was not arbitrary and capricious as described by Government Code Section 800.<sup>10</sup>

In prior cases the Courts have held that an administrative act ". . . is arbitrary when it is based on no more than the will or de-

7. Opinion and Analysis of George Murphy, Legislative Counsel of California, *Costs in Administrative Proceedings*—#15138, July 18, 1972, regarding CAL. GOV'T CODE § 800.

8. *Olsen v. Hickman*, 25 Cal. App. 3d 920, 120 Cal. Rptr. 248 (1972).

9. Defendant's Memorandum of Points and Authorities, *Olsen v. Hickman*, 25 Cal. App. 3d 920, 120 Cal. Rptr. 248 (1972).

10. *Id.*

sire of the decision-maker and not supported by a fair or substantial reason.”<sup>11</sup> “Arbitrary” generally means, therefore, acting without adequate determining principle. Actions can, thus, be discriminatory and not necessarily capricious or arbitrary.

Relying on a previously unpublished opinion<sup>12</sup> the *Olsen* Court ruled that “discriminatory” actions would fulfill the necessary criteria for “arbitrary” encompassed by Government Code Section 800. The essence of this decision, therefore, is an extension of the meaning of the word arbitrary to include discriminatory.

#### IV. EFFECT OF GOVERNMENT CODE SECTION 800

Until this provision became law, it was clear that persons successfully appealing from adverse administrative decisions were not entitled to collect attorneys’ fees from the administrative agency. Counsel for appellants were compensated, if at all, pursuant to their private agreements with their client. Private attorneys were reluctant, therefore, to take cases for the financially incapacitated. “It is virtually unheard of for a private firm to handle a mandamus challenge to an adverse welfare ‘fair hearing’ decision—except that very occasionally a firm which does charity work may take such a case on a charitable basis.”<sup>13</sup>

Government Code Section 800 makes services of private counsel more available to needy citizens in this one area of law. In addition, it makes available to the private counsel a financially and morally rewarding area of practice until now virtually untapped.

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11. *Clack v. State ex rel. Department of Public Works*, 275 Cal. App. 2d 743, 747, 80 Cal. Rptr. 274, 276 (1969).

12. *Olson v. Hickman*, Civil No. 12982 (3d Appellate District, Sacramento, filed February 28, 1972).

13. Plaintiff’s Memorandum of Points and Authorities, at 2, Declaration of Thomas J. Mack, *Russell v. State Department of Social Welfare*, No. 219590 (Superior Court, Sacramento, State of California, filed April 18, 1972).