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GREEN FEES: ATTORNEY FEES IN ENVIRONMENTAL LITIGATION

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Attorney fees are a pressing issue for businesses facing the prospect of litigation, and are particularly problematic for legal departments tasked with keeping those fees in check. Because an award of attorney fees can significantly shift the anticipated costs of a lawsuit, the likelihood that either side to a suit will recover fees is a question that regularly arises at the outset of a case. Environmental law is no stranger to this dynamic, and an understanding of the factors that enable or bar a party from recovering fees in environmental litigation can be an important asset to effectively manage litigation expenses.

The typical backdrop for any discussion of attorney fees is the "American Rule." The American Rule is a default rule followed by many states, which provides that each party to a litigation is responsible for paying its own attorney's fees regardless of whether they prevail in the matter. There are a number of equitable exceptions to the rule that courts have used to permit recovery of attorneys' fees in instances including bad faith actions by a litigant, and cases where a plaintiff's suit confers a benefit on an ascertainable class such that the award of fees would spread the costs of litigation among the beneficiaries.

The equitable exceptions to the American Rule are, however, generally applied narrowly by the courts, so the threshold issue becomes whether a specific statutory framework implicated in a lawsuit provides for a direct exception to the bar against award of counsel fees. For instance, The Civil Rights Attorney's Fees Awards Act enables successful litigants to recover their attorneys' fees in civil rights cases.

The primary federal environmental statutes typically at issue in environmental litigation also contain provisions that can affect the award of attorney fees. Most notably, the Clean Water Act, Clean Air Act, and the Resource Conservation and Recovery Act all authorize citizens to act as "private attorneys general" to enforce compliance with the statutes' standards. These citizen suit provisions were enacted to supplement state and federal regulatory agency enforcement of the statutes by allowing any person who might be adversely affected by alleged violations of the statutes to bring suit against the alleged violator. Prevailing plaintiffs can obtain injunctive relief in the form of a court order stopping the violation in question, civil penalties and attorneys' fees and legal costs such as expert expenses.

Environmental citizen suits can impose significant liability and expenses on corporate defendants, and deserve consideration by corporation counsel tasked with addressing a company's environmental liabilities. In light of the specter of penalties combined with counsel fee awards, it can frequently be more

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cost effective for companies to deal directly with regulatory agencies rather than private litigants. Because the citizen suit provisions typically require the plaintiffs to give advance notice of the alleged violation to the violator as well as state and federal agencies, a window of opportunity exists wherein companies may be able to address the alleged violation and resolve the matter with the regulating agencies without engaging in litigation. Although many companies find themselves defending against citizen suits brought by environmental organizations, it is also worth keeping in mind that those same provisions can also be used by companies to pursue claims - for example against a prior property owner – to their advantage and potentially without the expense of counsel fees .

While the environmental citizen suit provisions allow for injunctive relief, penalties and the award of legal costs, they do not provide for money damages reflecting a plaintiff's past cleanup costs where a contaminated property is at issue. Such remediation expenses can instead be recouped through the Comprehensive Environmental Response, Compensation, and Liability Act, otherwise known as CERCLA or Superfund. CERCLA specifically allows parties that have incurred costs to clean up a property to assert claims against other potentially responsible parties.

To be covered under CERCLA, costs must be closely tied to the actual cleanup so that they are "necessary costs of response," and standard litigation expenses will not be awarded by a court. In certain limited circumstances, however, some attorney fees incurred in activities such as "tracking down other responsible solvent polluters" have been found to be sufficiently associated with a cleanup to be considered part of the costs of the remediation. Many courts have resisted even these limited counsel fee awards under CERCLA, and in the Circuits that have found certain fees recoverable, it is important to be able to distinguish a company's legal efforts that directly contribute to the remediation – such as searching for other responsible parties - from their more typical litigation expenses, placing an emphasis on specific and detailed billing descriptions by all counsel involved.

Beyond the federal statutory framework, it is also important to remain mindful of other potential exceptions to the American Rule. State environmental statutes have their own provisions that may provide for the award of counsel fees, and contractual provisions between litigants can also serve to shift the potential fee burden. This can be particularly true in the context of real property purchases, where an agreement of sale may allocate the liability for the environmental condition of a property, and also in contracts that require a defaulting party to pay for the "costs of collection." Finally, the terms of a settlement agreement entered into by your company may dictate whether you are later allowed to recover fees expended to enforce the terms of the settlement. In all of these instances, precise drafting of the relevant document is vital to make it clear that the recovery of attorney fees was meant to be included in the addressed costs.

While all of the above considerations present a complex puzzle, it remains a puzzle very much worth solving in light of the significant fees at stake, and should remain a primary question for any business facing potential environmental litigation.