

RESOLUTION 05-09-2016 (As Amended)

DIGEST

Public Utilities: Reciprocal Prevailing Party Attorney's Fees Availability in Power Theft Cases
Amends Civil Code section 1882.2 to delete treble the availability of treble damages to the utility and allow the award of reasonable attorney's fees to the prevailing party in power theft cases.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Civil Code section 1882.2 to read as follows:

§1882.2

- 1 In any civil action brought pursuant to Section 1882.1, the prevailing party ~~utility~~ may
- 2 recover ~~as damages three times the amount of~~ actual damages, if any, plus the costs of the suit
- 3 and reasonable attorney's fees.

(Proposed new language underlined; language to be deleted stricken)

PROPONENT: Sacramento County Bar Association

STATEMENT OF REASONS

The Problem: The unilateral recovery of attorney's fees in this statute, plus treble damages, encourages well-financed utility companies to engage in "scorched earth" litigation against customers for power theft, regardless of the customer's actual involvement. It also discourages innocent, and often low income, customers from defending against such claims.

Civil Code section 1882.1 authorizes utility companies to file lawsuits for power theft. Utility companies interpret that statute to mean that any customer who might unknowingly assist someone in committing power theft, e.g. by leaving the utility account in the customer's name after leasing out the property, is liable for power theft. Under current law, utility companies bear little risk in filing such lawsuits – if they win, they recover attorney's fees plus treble damages, and if they lose they only bear their own fees.

The Solution: With the unilateral fees and treble damages provisions, customers and attorneys are discouraged from defending against power theft claims – the utility can increase litigation expenses to make it financially unfeasible for a customer to defend the case. With no chance of recovering fees, defending against a utility is generally not cost-effective. The one-sided power of Civil Code section 1882.2, is further evidenced by the fact that there is no California case law on Civil Code section 1882.1 – customers cannot afford the risk of challenging the utilities. In Sacramento, in the last two years, one utility has filed nearly 100 power theft cases against customers (not necessarily perpetrators). Almost all of those cases ended with default judgments.

Unlike other unilateral fee shifting statutes, (e.g. civil rights, disabilities, and elder abuse) which were enacted to encourage vulnerable individuals with limited resources and/or limited damages,

to pursue public policy claims, Civil Code section 1882.2 does not protect vulnerable individuals and is not needed to encourage lawsuits.

Civil Code sections 1882.1 and 1882.2, were enacted because utilities wanted to file power theft lawsuits when criminal complaints were not being pursued. (Assem. Com. on Utilities and Energy, Rep. on Assem. Bill No. 1285 (1981-1982 Reg. Sess.) April 27, 1981, p. 2.) Utilities have both the motivation and the means to file such lawsuits; they do not need the aid of unilateral attorney's fees.

Further, Governor Brown originally rejected AB 1285 because the award of treble damages plus attorney's fees was too punitive.

Making fees reciprocal and eliminating treble damages will encourage utility companies to file lawsuits in good faith while still allowing them to recover fees on meritorious cases. Similarly, reciprocal fees will enable innocent customers to present meritorious defenses, rather than being forced to settle, while still discouraging perpetrators from committing power theft.

IMPACT STATEMENT

This resolution would affect the damages recoverable under Civil Code section 1882.1.

CURRENT OR PRIOR RELATED LEGISLATION

AB 1285 (1981-1982 Reg. Session)

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RESOLUTIONS COMMITTEE RECOMMENDATION

APPROVE IN PRINCIPLE

History:

No similar resolutions found.

Reasons:

This resolution amends Civil Code section 1882.2 to delete the availability of treble damages to the utility and allow the award of reasonable attorney's fees to the prevailing party in power theft cases. This resolution should be approved in principle because it somewhat levels the playing field between the parties in such cases, and provides some redress to persons who are unjustly accused.

Civil Code section 1882.1 provides that a utility may bring a civil action for damages against any person who steals, tampers with and/or diverts utility services. Section 1882.2 currently provides

that utility may recover treble damages plus the costs of suit and reasonably attorney's fees, however, the law does not contain a reciprocal provision if the accused person prevails. This resolution limits the damages the utility may recover, equal to the actual value of the theft and eliminates the punitive treble damages in those cases where a customer is liable. This resolution also eases the burden on parties who should not be defendants in such cases, by providing the potential for the recovery of defense costs and attorney's fees.