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OPINION	:	No. 81-208
	:	
of	:	<u>JULY 3, 1981</u>
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The State Board of Control has requested an opinion on the following question:

Under the equitable “common fund doctrine” is the state responsible for a proportionate share of attorney fees and costs for legal proceedings in which the state recovers money through a lien under Government Code section 13966(b) when the crime victim/claimant is the active litigant responsible for the recovery?

CONCLUSION

The state is not responsible for a proportionate share of attorney fees and costs for legal proceedings in which the state recovers money through a lien under Government Code section 13966(b) when the crime victim/claimant is the active litigant responsible for the recovery.

ANALYSIS

Government Code section 13959 *et seq.* contains provisions under which a victim of crime who meets certain qualifications can receive financial assistance of up to \$10,000 from the state.

Government Code section 13966 provides a means by which the state can recover the amount of the assistance granted from any recovery obtained by the victim from the perpetrator of the crime. This section reads in full:

“§ 13966. (a) The State of California shall be subrogated to the rights of the victim to whom cash payments are granted to the extent of the cash payments granted, less the amount of any fine imposed by the court on the perpetrator of the crime. Such subrogation rights shall be against the perpetrator of the crime or any person liable for the pecuniary loss.

“(b) The state also shall be entitled to a lien on the judgment, award, or settlement, in the amount of such cash payments on any recovery made by or on behalf of the victim. The state may recover this amount in a separate action, or may intervene in an action brought by or on behalf of the victim. If a claim is filed within one year of the date of recovery, the state shall pay 25 percent of the amount of the recovery which is subject to a lien on the judgment, award, or settlement, to the county probation department or the victim responsible for recovery thereof from the perpetrator of the crime, provided the total amount of the lien is recovered. The remaining 75 percent of the amount and any amount not claimed within one year pursuant to this section, shall be deposited in the Indemnity Fund.

“(c) The board may compromise or settle and release any lien pursuant to this article if it is found that such action is in the best interest of the state or the collection would cause undue hardship upon the victim.

“(d) In the event that the victim, his guardian, personal representative, estate, or survivors, or any of them, bring an action for damages against the person or persons liable for the injury or death giving rise to an award by the board under this article, notice of institution of legal proceedings, notice of settlement and all other notices required to be given to the judgment debtor pursuant to

Chapters 1 (commencing with Section 681) and 2 (commencing with Section 714) of Title 9 of Part 2 of the Code of Civil Procedure, shall be given to the board in Sacramento except in cases where the board specifies that notice shall be given to the Attorney General. All such notices shall be given by the attorney employed to bring the action for damages or by the victim, his guardian, personal representative, estate, or survivors, if no attorney is employed.”

The victim/claimant is required by Board of Control regulations to bring legal action against the perpetrator of the crime if recovery is likely.

“As a condition of the receipt of cash payments or assistance under this article, the victim shall assure the Board, under penalty of perjury, that a civil action for the losses sustained has been instituted, or will be instituted, against the perpetrator of the crime, if he is known to the victim. In the alternative, the victim must prove, to the satisfaction of the Board, that there is no likelihood of recovery from the perpetrator of the crime.” (2 CAC 649.10.)

Section 13966 does not specifically provide for the deduction of any of the victim/litigant’s attorney fees or legal costs from the amount of the state’s lien. The question we have been asked to address is whether the state is responsible for reasonable pro rata share of the plaintiff’s attorney fees under the equitable “common fund doctrine.” In responding to this question we will examine the “common fund doctrine” and its applicability to a section 13966 lien.

The “common fund doctrine” is an equitable rule under which the California courts have traditionally allowed attorney’s fees to be a surcharge on a common fund when the fees were reasonably expended to recover or protect the fund. (*Quinn v. State of Calif.* (1975) 15 Cal. 3d 162, representative cases cited therein.)

“The bases of the equitable rule which permits surcharging a common fund with the expenses of its protection or recovery, including counsel fees, appear to be these: fairness to the successful litigant, who might otherwise receive no benefits because his recovery might be consumed by the expenses; correlative prevention of an unfair advantage to the others who are entitled to share in the fund and who should bear their share of the burden of its recovery; encouragement of the attorney for the successful litigant, who will be more willing to undertake and diligently prosecute proper litigation

for the protection or recovery of the fund if he is assured that he will be promptly and directly compensated should his efforts be successful.” (*Estate of Stauffer* (1959) 53 Cal. 2d 124, 132.)

There are three common elements in cases to which the common fund doctrine has been applied:

“(1) without the litigation there would be no recovery;

“(2) the recovery was an available fund out of which the beneficiaries of the litigation would be paid; and

“(3) the applicant seeking contribution in respect to costs and attorney fees was the sole ‘active litigant’ and as such obtained the recovery that provided the fund.” (*Lindsey v. County of Los Angeles* (1980) 109 Cal. App. 3d at p. 936.)

These three elements are all present when a victim of crime who has received state aid under the victim’s assistance program litigates successfully against the person liable for causing the injury. Without litigation against the perpetrator of the crime the state could not recover the amounts paid the victim/claimant. The cash grants paid under the victim’s assistance program are not characterized as loans. There is no requirement that the claimant repay the amount granted regardless of his future economic status nor are there any provisions for the state to claim a lien on any of the victim’s future assets, with the exception of a recovery from the perpetrator of the crime.

Second, if the victim is successful in his litigation, his recovery is an available fund out of which the state can be reimbursed under section 13966.

Third, the question we are dealing with assumes the victim is the sole active litigant. (If the state takes an active part in the litigation through its own attorney the question of apportionment of attorney fees would not arise, even if the victim’s attorney did most of the work. The common fund theory requires apportionment only where a passive beneficiary takes no active part in the litigation; the court is not permitted to weigh the respective contributions. (*In re Estate of Ott* (1980) 99 Cal. App. 3d 613.))

The equitable theories which allow the award of attorney fees have been held to be applicable against the state. (*Serrano v. Priest* (1977) 20 Cal. 3d 25.)

Although this equitable doctrine may be applied without specific statutory authority (*Kaiser Foundation Hospitals v. Workers Comp. Appeals Bd. (Calif. School for the Deaf)* (1978) 83 Cal. App. 3d 413) it may not be applied where statutory language indicates a contrary legislative intent. The history of litigation surrounding Labor Code section 3850 *et seq.* illustrates this point.

Labor Code section 3850 *et seq.* concerns the subrogation rights of an employer who has paid worker's compensation benefits to an injured employee who has a cause of action against a third party tortfeasor.

In *Dobbs v. Stellar* (1947) 30 Cal. 2d 496 the California Supreme Court held that the version of Labor Code section 3856 in existence in 1947,¹ when examined with the surrounding statutory framework did not allow the equitable apportionment of attorney's fees between employer and employee when the employee was solely responsible for the recovery. Not only was there no statutory provision for the apportionment but the statutory scheme as a whole contemplated full recovery by the employer without deduction. For example, section 3854 specifically allowed the employer who had prosecuted an action alone to deduct his attorney's fee as well as his damages before paying the excess to the injured employee. The lack of a reciprocal provision in section 3856 was found to be significant.

In 1949 the Legislature amended Labor Code sections 3854 and 3856 in a manner which clearly required equitable apportionment of attorney's fees regardless of whether the employer or the employee brought the action.² (Stats.

¹ § 3856. The court shall first apply, out of the entire amount of any judgment for any damage recovered by the employee, a sufficient amount to reimburse the employer for the amount of his expenditures for compensation. If the employer has not joined in the action or has not brought action, or if his action has not been consolidated, the court, on his application shall allow, as a first lien against the entire amount of any judgment for any damages recovered by the employee, the amount of the employers expenditures for compensation."

² § 3854. If the action is prosecuted by the employer alone, evidence of any amount which the employer has paid or become obligated to pay by reason of the injury or death of the employee is admissible, and such expenditures or liability shall be considered as proximately resulting from such injury or death in addition to any other items of damage proximately resulting therefrom. After recouping himself for such special damages, together with a reasonable attorneys fee fixed by the court, which shall be based solely upon the services rendered by the employers attorney in effecting recovery for the benefit of the employee, the employee shall pay any excess to the injured employee or other person entitled thereto.

The present version of Labor Code section 3856, added in 1959,³ left

§ 3856. The court shall first apply, out of the entire amount of any judgment for any damage recovered by the employee a sufficient amount to reimburse the employer for the amount of his expenditures for compensation. If the employer has not joined in the action or has not brought action, or if his action has not been consolidated, the court, on his application shall allow, as a first lien against the entire amount of any judgment for any damages recovered by the employee, the amount of the employer's expenditures for compensation, provided, however, that where the employer has failed to join in said action and to be represented therein by his own attorney, or where the employer has not made arrangements with the employee's attorney to represent him in said action, the court shall fix a reasonable attorney's fee, which shall be fixed as a share of the amount actually received by the employer, to be paid to the employee's attorney on account of the service rendered by him in effecting recovery for the benefit of the employer, which said fee shall be deducted from any amounts due to the employer."

³ § 3856. Allocation of payments from judgment for damages

"In the event of suit against such third party:

"(a) If the action is prosecuted by the employer alone, the court shall first order paid from any judgment for damages recovered the reasonable litigation expenses incurred in preparation and prosecution of such action, together with a reasonable attorney's fee which shall be based solely upon the services rendered by the employer's attorney in effecting recovery both for the benefit of the employer and the employee. After the payment of such expenses and attorney's fees, the court shall apply out of the amount of such judgment an amount sufficient to reimburse the employer for the amount of his expenditure for compensation together with any amounts to which he may be entitled as special damages under Section 3852 and shall order any excess paid to the injured employee or other person entitled thereto.

"(b) If the action is prosecuted by the employee alone, the court shall first order paid from any judgment for damages recovered the reasonable litigation expenses incurred in preparation and prosecution of such action, together with a reasonable attorney's fee which shall be based solely upon the services rendered by the employee's attorney in effecting recovery both for the benefit of the employee and the employer. After the payment of such expenses and attorney's fee the court shall, on application of the employer, allow as a first lien against the amount of such judgment for damages, the amount of the employer's expenditure for compensation together with any amounts to which he may be entitled as special damages under Section 3852.

"(c) If the action is prosecuted both by the employee and the employer, in a

the right of the employee litigant to equitable apportionment somewhat less clear. However, the California Supreme Court held in *Quinn v. State of Calif.*, *supra*, 15 Cal. 3d 162 that the statute did still provide for apportionment. Thus, in a case in which the worker might well stand entitled to contribution toward his attorney's fee *absent* any statutory provision, this court cannot interpret a statute which on its face calls for weighing of benefits and burdens, as *barring* apportionment of fees." (*Id.*, at p. 170, emphasis in original.)

The *Quinn* court's statement that contribution might well have been required in the absence of statutory provision has been relied on in subsequent cases to justify equitable apportionment in common fund cases where no statutory or contractual mandate exists. (E.g., *Kaiser Foundation Hospitals v. Workers' Comp. Appeals Bd. (Calif. School for the Deaf)*, *supra*, 83 Cal. App. 3d 413; *Kaiser Foundation Hospital v. Workers' Comp. Appeals Bd. (Brennan)* (1979) 91 Cal. App. 3d 493; *Lee v. State Farm Mut. Auto. Ins. Co.* (1976) 57 Cal. App. 3d 458.)

In 1976, the year after the Supreme Court's decision in *Quinn*, the Legislature added to the lien provision of section 13966 the requirement that 25 percent of the amount of the recovery subject to the state's lien be paid to the probation department or victim responsible for the recovery. (Stats. 1976, ch. 661, § 1.) This amendment accomplished two things. Without specifically so stating, the Legislature provided a contribution that could be applied to the victim/litigant legal costs. In addition the amended statute specifically provided for the allocation of 100

single action or in consolidated actions, and they are represented by the same agreed attorney or by separate attorneys, the court shall first order paid from any judgment for damages recovered, the reasonable litigation expenses incurred in preparation and prosecution of such action or actions, together with reasonable attorneys' fees based solely on the services rendered for the benefit of both parties where they are represented by the same attorney, and where they are represented by separate attorneys, based solely upon the service rendered in each instance by the attorney in effecting recovery for the benefit of the party represented. After the payment of such expenses and attorneys' fees the court shall apply out of the amount of such judgment for damages an amount sufficient to reimburse the employer for the amount of his expenditures for compensation together with any other amounts to which he may be entitled as special damages under Section 3852.

"(d) The amount of reasonable litigation expenses and the amount of attorneys' fees under subdivisions (a), (b) and (c) of this section shall be fixed by the court. Where the employer and employee are represented by separate attorneys they may propose to the court, for its consideration and determination, the amount and division of such expenses and fees."

percent of the amount subject to the state's lien by providing for the remaining 75 percent of the amount to be deposited in the Indemnity Fund. Therefore, even if the 25 percent paid to the victim/litigant was not intended as the state's share of litigation costs, the Legislature has clearly precluded an equitable remedy by specifically directing the disposal of the entire amount leaving nothing for payment of attorney's fees from the amount subject to the lien except the 25 percent allocated to the victim/litigant.

The current version of section 13966, *supra*, as amended in 1980 (Stats. 1980, ch. 1370, § 5) requires that the victim/litigant's 25 percent of the state's recovery be returned only if claimed and then will be paid only if the state has recovered the entire amount of its lien. Any amount not claimed will go into the Indemnity Fund.

In summary, the equitable apportionment of attorneys' fees is a doctrine that will be applied in appropriate circumstances in the absence of a contrary legislative intent. Government Code section 13966 contains such contrary legislative intent in that it provides for the disposition of 100 percent of the state's lien without allowing for any deductions specifically for attorneys' fees. The statute does provide, however, for 25 percent of the state's lien recovery to be paid to a victim/litigant (when the full lien is recovered). The addition of that provision to the lien provisions immediately after the Supreme Court's decision in *Quinn v. State of Calif.*, *supra*, 15 Cal. 3d 162 suggests that the 25 percent was intended as the state's contribution for attorneys' fees.
