

**UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF ALASKA**

In re: Case No. A03-00720-DMD

Chapter 7

LAWRENCE C. THOMPSON and
KIMBERLEY A. SMITH-THOMPSON,

Debtors.

LAWRENCE C. THOMPSON and
KIMBERLEY A. SMITH-THOMPSON,

Adversary No. A03-90089-DMD

Plaintiffs,

v.

WE THE PEOPLE ALASKA, L.L.C. and
WE THE PEOPLE FORMS AND
SERVICE CENTERS USA, INC.,

Defendants.

**CERTIFICATION TO THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA
[Re: Attorney's Fees]**

This action was remanded by the district court for determination of attorney's fees. Additional pleadings have been filed and a hearing was conducted on January 26, 2005. I recommend that the plaintiffs be awarded attorney's fees in the sum of \$4,333.33 in accordance with 11 U.S.C. § 110(i)(1)(C) and (j)(3) and that the defendants be awarded nothing. My findings regarding attorney's fees are certified to the United States District Court for the District of Alaska pursuant to 28 U.S.C. § 157(c)(2), 11 U.S.C. § 110(i)(1) and AK LBR 9033-2(d).

Analysis

It is the general rule in the United States that in the absence of legislation providing otherwise, litigants must pay their own attorney's fees. Congress has provided only limited exceptions to this rule "under selected statutes granting or protecting various federal rights." Some of these statutes make fee awards mandatory for prevailing plaintiffs . . . ¹

Some of the federal statutes that provide for mandatory fee awards to prevailing plaintiffs are the Clayton Act, the Fair Labor Standards Act of 1983, the Packers and Stockyards Act, and the Truth in Lending Act.² These statutes do not otherwise abrogate the American Rule and permit a prevailing *defendant* to recover attorney's fees.³

11 U.S.C. § 110(i)(1)(C) and (j)(3) contain mandatory fee provisions, which require an award of attorney's fees to prevailing plaintiffs.⁴ These provisions are not discretionary; they are mandatory and must be followed. They override any inconsistent state law on the same subject.⁵

Nonetheless, the defendants seek to avert the plain language of the federal statute with a wag-the-dog argument based on state law. They maintain they are entitled to

¹*Christiansburg Garment Co. v. E.E.O.C.*, 434 U.S. 410, 415 (1978) [citations omitted].

²*Id.* at p. 415 n.5.

³*See, e.g., Postow v. OBA Fed. S & L Ass'n*, 627 F.2d 1370, 1387-88 (D. C. Cir. 1980) [court rejected defendant's due process and equal protection challenges to the mandatory fee provisions of the Truth in Lending Act]; *Boksa v. Keystone Chevrolet Co.*, 553 F.Supp. 958, 962 (N.D. Ill. 1982).

⁴Subsection 110(i)(1)(C) mandates that if the fact of a bankruptcy petition preparer's violations of that section are certified to the district court, the district court "shall order the bankruptcy petition preparer to pay to the debtor . . . reasonable attorney's fees and costs in moving for damages under this subsection." Similarly, subsection 110(j)(3) specifies that a court "shall award" reasonable attorney's fees and costs to a debtor, trustee or creditor that brings a successful action for injunction against a bankruptcy petition preparer.

⁵U.S. CONST., art. I, § 8.

recover their complete attorney's fees and costs, which total \$11,728.42, because they prevailed on the plaintiffs' state law claims for deceptive business practices. I disagree for several reasons.

This is a federal court and § 110 is a federal statute. The primary issues in this case – whether the defendants had committed “fraudulent, unfair or deceptive business acts,” and whether they had violated any provisions of § 110 – were federal issues.⁶ The plaintiffs' state law claim for deceptive business practices was simply an alternative theory of relief based on the same operative facts as the underlying the federal claims. And, although the plaintiffs did not prevail on their claim for deceptive business practices, under either the federal or state law, they did prevail on six of the other ten counts in their complaint, based on provisions of § 110. An award of attorneys fees to the plaintiffs is mandated by § 110(i)(1)(C) and (j)(3). If Congress had intended for prevailing defendants to recover defense costs, it would have so provided. It chose not to, instead making statutory damages and attorney's fees available to a successful plaintiff in order to encourage both consumers and attorneys to act as “private attorneys general” for the enforcement of § 110's provisions.⁷

The defendants also argue they are entitled to recover their attorneys fees because the plaintiffs' state law claim was frivolous and brought in bad faith. I disagree. The plaintiff's action was not frivolous under AS 45.50.537(b), upon which the defendants

⁶11 U.S.C. § 110(i)(1).

⁷2 COLLIER ON BANKRUPTCY ¶ 110.10[1] at 110-17 (15th ed. revised 2004). Plaintiffs who prosecute violations of § 110 are akin to “public interest litigants” under state law. Accordingly, a fee award to the defendants would be inappropriate under Ak. R. Civ. P. 82, as well. *See, e.g., Alaska Wildlife Alliance v. State of Alaska*, 74 P.3d 201, 208 (Alaska 2003) [It is abuse of discretion to award attorney's fees against a losing public interest plaintiff, unless the claim is frivolous or brought in bad faith.].

rely in seeking a fee award. AS 45.50.537(e) defines “frivolous” as “(1) not reasonably based on evidence or on existing law or a reasonable extension, modification, or reversal of existing law; or (2) brought to harass the defendant or to cause unnecessary delay or needless expense.” The plaintiff’s action satisfies neither prong. They have prevailed on six of the ten counts asserted. They did not bring the action for the purposes of harassment or delay.

The plaintiffs seek an award of all attorney’s fees they have incurred in this action, roughly \$7,645.99 as of November 10, 2004, plus an additional \$500.00 since that time. Their attorney’s rate is \$150.00 an hour. It is impossible to break down his fees and allocate them to each of the various counts in the plaintiffs’ complaint.

Rather than attempt to quantify a reasonable fee award based on an hourly rate, I believe the fee should be based on the total monetary fines that could be imposed against the defendants under § 110. The plaintiffs have established 26 violations of § 110 by the defendants. The total possible fines for those violations are \$13,000.00. A standard contingency fee arrangement would allow attorney’s fees of one-third following trial. I feel a one-third allocation is appropriate here, as well. I would allow \$4,333.00 in attorney’s fees to the plaintiffs. This sum is sufficient to encompass the plaintiffs’ fees for the injunctive relief and monetary fines and damages they have obtained. The plaintiffs’ request for fees in excess of \$4,333.00 should be denied.

Conclusion

Federal claims for relief under 11 U.S.C. § 110 predominate in this action, and the plaintiffs have prevailed on six of the ten counts they asserted. The plaintiffs asserted

two counts for unfair or deceptive business practices – one under § 110(i) and the other under state law. While they did not prevail on either of these counts, they did establish that the defendants had committed several violations of § 110 and obtained the issuance of an injunction against the defendants to preclude further violations. Under § 110(i)(1)(C) and (j)(3), the plaintiffs must be awarded their reasonable attorney’s fees, which I recommend be set at the sum of \$4,333.00. Finally, since the plaintiffs are considered “private attorneys general” in prosecuting violations of § 110, it is inappropriate to award the defendants attorney’s fees on any basis under state law.

DATED: February 7, 2005

BY THE COURT

DONALD MacDONALD IV
United States Bankruptcy Judge