For Publication

IN THE SUPERIOR COURT
FOR THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

PACIFIC AMUSEMENT, et al, Plaintiffs, v. **FRANK C. VILLANEUVA, et al**, Defendants.	**CIVIL ACTION NO. 02-0378** **ORDER CONCERNING PLAINTIFF'S MOTION FOR ATTORNEY FEES**

THIS MATTER came on for hearing August 6, 2003, on Pacific Amusement's motion for award of attorney fees and costs. Present were Assistant Attorneys General Joseph L.G. Taijeron, Jr. and Deborah L. Covington, counsel for defendants Frank C. Villaneuva, in his official capacity as the Secretary of Finance, and the CNMI Department of Finance, and David G. Banes and Joseph E. Horey, counsel for plaintiff Pacific Amusement. After carefully considering the pleadings and the arguments made during the hearing, the Court is prepared to rule.

This case is about the poker machine industry. Pacific Amusement and co-plaintiffs are all operators of poker machines in the Commonwealth. The defendants are a number of other operators of poker machines ("Operator Defendants") and the government entity charged with regulating them ("Government"). Plaintiffs alleged that the Operator Defendants were not complying with the rules that govern poker machines, and that the Government was impermissibly lax in enforcing those rules. Since that time, all of the plaintiffs except Pacific Amusement and all the defendants except the Government have

settled.[1] In addition, Pacific Amusement's complaint was recently dismissed by order of this Court because Pacific Amusement had, by its own admission, received all the relief it sought in its complaint through the settlements entered into by the Government and the other plaintiffs. Its complaint was therefore moot. This dismissal notwithstanding, this Court must still determine whether Pacific Amusement is entitled to an award of attorney fees and costs under the "taxpayer suit" provisions of Article X, Section 9 of the Commonwealth Constitution.

Article X, Section 9 allows taxpayers to "bring an action against the government or one of its instrumentalities in order to enjoin the expenditure of public funds for other than public purposes or for a breach of fiduciary duty." N.M.I. Const. art. X, § 9. To encourage such actions, the Commonwealth Constitution requires the Court to "award costs and attorney fees to any person who prevails in [a taxpayer suit] in a reasonable amount relative to the public benefit of the suit." *Id*. Pacific Amusement argues that it has prevailed because the Government made substantial changes in its policies and procedures as a result of the suit. By contrast, the Government disputes that the policy changes were a result of the lawsuit and challenges the legal basis for Pacific Amusement's claim that it is a "person who prevails."

I. The Provisions of the Commonwealth Constitution Should Be Liberally Construed to Encourage Actions Brought in the Public Interest

The instant matter requires this Court to decide how a particular provision of the Commonwealth Constitution should be construed. The taxpayer suit provision of the Commonwealth Constitution (Art. X, § 9), "is remedial in nature and should be liberally construed." *Mafnas v. Commonwealth*, 2 N.M.I. 248, 261 (1991). Therefore, the Court must consider what reading of the constitutional language will "accomplish most effectively its remedial purposes." *Limon v. Camacho*, 1996 MP 18 ¶ 50, 5 N.M.I. 21, 30. In the case of the taxpayer suit provision, the remedial purpose is to "call [the] government to account in matters pertaining to expenditures of public funds." *Mafnas*, 2 N.M.I at 261. Therefore, in construing the attorney fees and costs provision of Article X, Section 9, the Court must consider the role of the fee award in calling the Government to account.

The attorney fees provision is intended as an incentive to promote suits that serve the public interest.

[1] The settlements in place between the other plaintiffs and the Government provide that the settling plaintiffs shall receive attorney fees and costs only if Pacific Amusement is successful in obtaining fees in the instant matter.

Torres v. Tenorio, Civ. No. 95-0390 (N.M.I. Super. Ct. Jan. 25, 1996) (Memorandum Decision Disqualifying Plaintiffs' Counsel at 7-8). It prevents "the inequity of having individuals bear the costs of litigation which benefits all taxpayers." *Id*. at 8. Therefore, in interpreting Article X, Section 9, the Court must construe the language in a way that will encourage taxpayers to file suits in the public interest and to insure that the costs of litigation are not a bar to bringing such suits.

II. Applying the "Catalyst Theory" Would Best Effectuate the Remedial Purpose

Pacific Amusement argues that the Court should adopt the "catalyst theory" in deciding whether or not a plaintiff is a "person who prevails" under Article X, Section 9. Under the catalyst theory, a party prevails if it "achieves the desired result because the lawsuit brought about a voluntary change in the defendant's conduct." *Buckhannon Bd. and Care Home, Inc., v. W. Va. Dep't of Health and Human Resources*, 532 U.S. 598, 601, 121 S. Ct. 1835, 1838, 148 L. Ed. 2d 855, 861 (2001). The catalyst theory would allow recovery of fees even where the plaintiff did not secure either a judgment in its favor or a court ordered consent decree. *Id*. Hence, where a suit brought by the plaintiff is mooted by subsequent voluntary action of the government, the plaintiff could still recover fees on the grounds that their lawsuit was the catalyst for the resulting change.

Applying the catalyst theory would effectuate the remedial purpose of the Article X, Section 9. It would reward those whose lawsuits prevent some illegal expenditure or breach of fiduciary duty, even where the quick response of the Government moots the lawsuit before any final, binding resolution can be reached. At the same time, allowing fees even in cases where the plaintiff is a mere catalyst for change will not discourage the Government from acting quickly on taxpayer lawsuits, because under Article X, Section 9, a court may award only "reasonable" fees and costs. Certainly the amount of fees and costs that would be reasonable will be less if the litigation is resolved early on.

Allowing awards of fees and costs based on the catalyst theory would have another beneficial effect. It would prevent the Government from favoring some plaintiffs over others, based on the relative willingness of each plaintiff to forego their right to fees and costs. Taxpayer lawsuits serve the valuable purpose of insuring government accountability. Therefore, the framers of our Commonwealth Constitution deliberately decided to mandate the award of reasonable fees and costs as an incentive to bring such suits. Allowing the Government to cherry pick plaintiffs, settling only with those who will waive their

Constitutional right to fees and costs, improperly and unacceptably reduces the incentive to bring the suits. These benefits notwithstanding, the Government argues that this Court may not apply the catalyst theory because the U.S. Supreme Court has explicitly rejected it as a basis for recovering attorney fees and costs.

III. *Buckhannon* Is Not Binding

The Government's argument is based on the decision in *Buckhannon Bd. and Care Home, Inc.*, and is not without merit. The *Buckhannon* Court held that a plaintiff was not entitled to reimbursement of attorney fees, under the catalyst theory, in a case brought under provisions of the Fair Housing Amendments Act of 1988 (FHAA), 42 U.S.C. §§ 3601, *et seq.*, and the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. §§ 12101, *et seq.*, which mandate the award of such fees to a "prevailing party." *Buckhannon*, 532 U.S. at 600-601, 121 S. Ct. at 1838, 149 L. Ed. 2d at 860-861. The plaintiff, Buckhannon, was challenging an administrative action by the defendant, arguing that it violated federal law, specifically FHAA and ADA. *Id.* Subsequent to filing the lawsuit, the West Virginia Legislature amended the law, removing the offensive provisions. *Id*. The trial court then dismissed the lawsuit as moot. *Id*.

Because Buckhannon had neither prevailed at trial nor reached a settlement agreement secured by a consent decree, the Supreme Court concluded that it was not a "prevailing party" as that term was used in the legislation. *Id.*, 532 U.S. at 605, 121 S. Ct. at 1840, 149 L. Ed. 2d at 863. Instead the Court found that Congress was using "prevailing party" as a legal term of art and that this legal term did not include a party that was the mere catalyst for some change, but never received any judicial relief. *See id.*, 532 U.S. at 601-607, 121 S. Ct. at 1838 -1841, 149 L. Ed. 2d at 861-864. The U.S. Supreme Court noted that the catalyst theory would allow "an award where there is no judicially sanctioned change in the legal relationship of the parties" and this was simply not what Congress intended when it allowed reimbursement of fees and costs only to the "prevailing party." *Id.*, 532 U.S. at 605, 121 S. Ct. at 1840, 149 L. Ed. 2d at 863. Therefore, it held that a "defendant's voluntary change in conduct, although perhaps accomplishing what the plaintiff sought to achieve by the lawsuit, lacks the necessary judicial *imprimatur* on the change" to allow for reimbursement of fees. *Id.* If this Court were to accept both the validity of the *Buckhannon* precedent and the accuracy of the Government's contention that Pacific Amusement must rely solely on the catalyst theory, then the Court would have no choice but to deny Pacific Amusement's motion for fees and costs.

However, it is important to note that *Buckhannon* concerned violations of two federal laws. It did not address or even purport to address the CNMI Constitution. Furthermore, the Court did not conclude that imposition of attorney fees under a catalyst theory was somehow impermissible under the U.S. Constitution. Instead, the Court simply concluded that Congress had intended to require at least "judicial imprimatur." *See id.* There is no precedent in *Buckhannon* that would prevent this Court from adopting the catalyst theory for determining who is the "person who prevails" under Article X, Section 9 of the Commonwealth Constitution and, for the reasons stated above, the Court will do so.[2] This leaves the Court to consider whether Pacific Amusement's suit was in fact a catalyst for the subsequent improvements in the Department of Finance's policies and procedures, which both sides concede have occurred.

IV. Pacific Amusement Appears to Have Been the Catalyst For at Least Some of the Changes Made at the Department of Finance

The first and most obvious question to ask is whether the recent policy and procedure changes at the Department of Finance post-dated the filing of the lawsuit. It appears that at least some of them did. For example, pursuant to the Court's October 29, 2002 "Order Pursuant to Stipulation of Plaintiffs L&W Amusement Corp., Northern Mariana's Investment Group, Ltd., and Leonard G. Wolf, Jr. and Defendants Frank B. Villaneuva and the CNMI Department of Finance," the Government promulgated regulations providing for, among other things: payment of license fees together with submission of license application as a prerequisite to the issuance of a license; proof of registration with the U.S. Attorney's office; the mandatory affixing of tags to poker machines from which it can clearly be determined whether the machine is properly licensed with attendant fees paid and registration made; and the seizure of unlicenced machines. These rules have recently been finalized. *Rules and Regulations for the Operation of Poker Machines*, 25 Com. Reg. 20,107 (April 30, 2003).

In addition, the settlement agreements required that the Government: verify compliance of all poker machines; seize machines not in compliance; revoke licenses of those failing to register with the U.S. Attorney General; compile a database of poker machine owners, with serial numbers, license fees paid,

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[2] The Court notes that Pacific Amusement also argued that it would be entitled to an award of fees and costs even if *Buckhannon* controlled. It argues that the settlement agreements between the Government and the other defendants are the "judicial imprimatur" that would be required. Finding that the allegation of being a mere catalyst is sufficient, even without judicial imprimatur, the Court will not reach this issue.

and location; affix stickers with the expiration date to each poker machine; review the database for compliance; and revoke the licenses of delinquent owners/operators. While it is not entirely clear from the evidence thus far presented that the Government was failing to do any of these things before the instant suit was filed, there is no question that the new operating methods and new regulations required under the settlement agreements have substantially improved regulation of the poker machine industry in the Commonwealth.

Based on the evidence above, it seems clear that the lawsuit in which Pacific Amusement was an original plaintiff was the catalyst for major changes at the Department of Finance, and that these changes yielded substantial public benefit. However, the Government argues that it was already planning to make all of the changes and perform all of the acts required under the settlement agreements and would have done so even without the lawsuit. If this were proven, the Government might be able to refute plaintiff's argument that the lawsuit was a catalyst for those changes. Therefore, the Court can not yet conclusively say that Pacific Amusement's lawsuit was a catalyst for change such that it would be entitled to any substantial recovery of fees and costs. However, for reasons that will be discussed in more detail below, it seems very likely that Pacific Amusement will be entitled to at least partial reimbursement of its reasonable fees and costs.

V. Considerations in Determining Whether Pacific Amusement Is a Catalyst and in Determining the Amount of Reasonable Fees and Costs

The Court hopes that the remaining parties, with their legal issues largely decided, can now reach some accommodation and save both themselves and the Court time and resources. To help the parties accomplish this and to prepare for a potential future evidentiary hearing, should no accommodation be reached, the Court notes the following guidelines, which it will use in determining whether Pacific Amusement is entitled to fees and, if so, in what amount.

First, in determining whether the lawsuit was a catalyst, evidence of mere subjective intent to make particular changes is insufficient to prove that those changes would have been made even without the suit.[3] The undisputed fact in the instant case is that the relevant regulatory changes did not actually occur, indeed were not even formally proposed, until after the lawsuit began. To prove that Pacific Amusement was not

[3] As the old saying goes, "the road to hell is paved with good intentions."

the catalyst for these changes, the Government would have to prove more than a mere intent to make them. It would have to show, clear, precise, and date-certain plans to promulgate those rules and regulations. Indeed, even if the Government could produce such evidence, it would not necessarily prevent partial recovery of fees. If Pacific Amusement could show that the lawsuit caused the rules to be promulgated and finalized sooner than they otherwise would have been, then they will have demonstrated a clear public benefit that arose as a result of the suit.

A similar standard would apply for the enforcement actions mandated by the settlement agreement, the requirement that the Department of Finance compile a database of poker machine owners, with serial numbers, license fees paid, and location, for example. To refute the obvious assumption that the lawsuit and subsequent settlement agreement were the catalyst for these actions, the Government would again have to show clear, precise, and date-certain plans to take the relevant enforcement actions, or show that such efforts were already ongoing. Again, evidence of mere subjective intent to take such actions in the future is not enough. Producing sufficient evidence will be particularly difficult in this case because the Government has already admitted, through a Com. R. Civ. P. 30(b)(6) deposition with Estrellita S. Ada, Director of Revenue and Taxation, that the lawsuit was the catalyst for at least some of the positive changes in the policing of the poker machine industry that have already occurred. While the Court is not yet prepared to rule on whether this admission should be considered absolutely binding on the Government, it is competent, indeed powerful evidence in favor of Pacific Amusement's arguments.

Second, the Government could not fairly argue that the actions of the other plaintiffs, but not the actions of Pacific Amusement, were the catalyst for the relevant changes in policy and procedure simply because a settlement was reached with the former, but not with the latter. Both sides agree that the only sticking point in their negotiations was attorney fees and costs. Had either side been willing to compromise on this issue, Pacific Amusement almost certainly would have been party to the settlement agreements. It would be both profoundly unfair and against the public policy favoring taxpayer suits to punish Pacific Amusement for refusing to compromise its right under the Constitution to reimbursement of reasonable attorney fees and costs and the Court will impose no such punishment on Pacific Amusement.

Third, the Court notes that in deciding the amount of fees and costs to be awarded, if any, it must be guided by the "public benefit of the suit." N.M.I Const. art. X, § 9. In weighing the public benefit, the

Court will naturally consider how the system of regulating and policing the poker machine industry in the Commonwealth has been improved (or damaged) as a result of the suit. However, the Court will likely not consider the length of the litigation, because it takes two to litigate. In this case, both Pacific Amusement and the Government were unwilling to compromise on the issue of attorney fees and costs. There is no evidence that Pacific Amusement or its attorneys brought the case in bad faith and it is entirely proper for them to maintain the litigation primarily, or even solely, to seek reimbursement of fees and costs because they had a good faith belief that they were entitled to such reimbursement under the Constitution. In addition, allowing length of litigation to subtract from the public benefit would discourage taxpayers from tackling the most difficult and thorny government abuses for fear that the more they spend, the less they will be able to recover. Such a disincentive to pursuing complex and difficult litigation is directly contrary to the public policy behind the taxpayer suit provision of our Constitution. Therefore, absent a showing of bad faith, there is no cause for the Court to consider length of litigation in weighing the public benefit of a taxpayer suit.

For similar reasons, the Court will likely not consider the burden the lawsuit placed on the agency being sued. The amount of resources that must be devoted to a taxpayer lawsuit is usually proportional to the seriousness of the impropriety alleged. In addition, the Government, as a litigant, has nearly as much control over the burdensomeness of a lawsuit as does the plaintiff. Of course, there is always the danger that some troublemaker might pursue substantial and lengthy litigation over some minor matter, but this would be both potentially indicative of bad faith on the part of the plaintiff and evidence that relatively little public benefit was ultimately obtained. Both would reduce or eliminate such a troublesome plaintiff's entitlement to fees and costs. Therefore, absent a showing of bad faith on the part of the plaintiff, the Court will not consider the burden of defending the lawsuit in weighing the resulting public benefit.

CONCLUSION

For the reasons stated above, the Court FINDS that Pacific Amusement is a "person who prevails" under N.M.I. Const. art. X, § 9 and is therefore likely entitled to at least nominal reimbursement of fees and costs. However, because the ultimate decision of whether, and how much, reimbursement shall be due cannot be answered based on the facts currently in evidence, the Court must continue to keep Pacific Amusement's motion for attorney fees and costs UNDER ADVISEMENT.

Pacific Amusement SHALL, within 30 days of the date of this order, provide the Government and the Court with the specific amount of fees and costs requested and an itemized accounting of how this amount was calculated.

Within 30 days of receipt of the above request, the Government SHALL either pay that amount to Pacific Amusement or request a hearing. Such a hearing will be in the nature of a pre-trial conference and will be held to set deadlines for discovery and motions-in-limine and to set a date for an evidentiary hearing to determine the amount of fees and costs, if any, to be awarded.

SO ORDERED this 3rd day of September 2003.

/s/
JUAN T. LIZAMA, Associate Judge