

Ga. Voters' Counsel Can't Get \$6.3M Fees Award

Law360 (May 26, 2020, 11:02 PM EDT) — A Georgia federal judge ruled Tuesday that now wasn't the right time to award plaintiffs' counsel \$6.3 million in fees for helping Georgia voters secure a ruling that barred the state from using an allegedly insecure electronic voting system, citing their revamped challenge to the state's new voting process and the economic strain of the coronavirus pandemic on the state.

Counsel for two groups of plaintiffs challenging Georgia's long-standing direct record electronic, or DRE, voting system asked U.S. District Judge Amy Totenberg last August to award them just over \$6.3 million in fees and expenses for their work on the litigation up to that point. The request came on the heels of Judge Totenberg issuing a ruling earlier that month that found the voters had overwhelmingly demonstrated "serious problems and failures" with the system and banning officials from continuing to use the DRE units after 2019.

The attorneys argued that they were entitled to the interim fee award under Section 1988, which enables prevailing parties in civil rights actions to recover reasonable attorneys' fees, in light of the favorable ruling on their preliminary injunction bid. But Judge Totenberg ruled in denying counsel's fee request without prejudice Tuesday that the award wasn't warranted at this point in the litigation.

"This is not to diminish plaintiffs and their counsel's contribution and commitment to protecting the constitutional rights of Georgia voters through their efforts in litigating this and other cases in this district. Nor is it an indication that the court does not believe that plaintiffs are entitled as prevailing parties on some portion of their claims here to an eventual award of reasonable attorney's fees and expenses under § 1988," the judge ruled. "However, the court in its discretion finds that it is more prudent to wait until a final resolution of this case to award fees at this juncture."

Judge Totenberg pointed to several factors that influenced her decision, including "the court's recognition of the immediate pressing needs and deficits the State must address due to the current public health crisis and the reverberating economic fallout from the COVID-19 pandemic."

"This is especially so given the monetary size of interim fees and expenses sought in this case," the judge continued. "It would not be in the public interest to add significant strain to the State's available financial resources necessary to address the welfare and safety of Georgians in these unprecedented times."

"But time and circumstances may also change the court's determination," Judge Totenberg added.

The judge also found amended complaints filed in the action last year by the two plaintiffs' groups challenging the state's newly enacted ballot marking device voting system to be a significant motivating factor in her decision to deny the fee request.

While the plaintiffs haven't directly addressed whether the grounds for their interim fee bid are "sufficiently discrete" from what's left to be litigated in the dispute, Judge Totenberg pointed out that the voters have argued that their original claims challenging the now-invalidated DRE touch screen voting units are "fundamentally the same in their objective" as their newly asserted claims challenging Georgia's BMD voting system.

"Indeed, the ultimate relief requested — an order requiring Georgia to move to hand-marked paper ballots for all elections — is identical for both sets of claims," the judge noted. "While the court's view as to the similarity of the claims, as opposed to relief requested, may turn out to be different than that advocated by plaintiffs, the court recognizes that all parties here are capable of arguing both sides of this coin at different points."

Additionally, neither group of plaintiffs has asserted that their counsel will be unable to continue litigating this case, or unable to take on other election cases, due to a lack of resources if the interim fee request isn't granted, Judge Totenberg noted.

Counsel for the plaintiffs group led by voting integrity group Coalition for Good Governance, which is seeking nearly \$1.9 million in fees and expenses, and attorneys for the second plaintiffs' collective that is made up of Georgia voters, which have asked for \$4.4 million in fees, have both filed several other cases challenging Georgia's election process since last August's preliminary injunction ruling, according to Judge Totenberg. And neither group has shown they'd be unable to continuing litigating the current dispute absent the fee award, the judge added.

"While there are certainly cases where requiring counsel to wait years between entry of final judgment and a fee award would undermine one purpose of § 1988 by making representation in civil rights cases financially untenable and by discouraging members of the bar from undertaking similar cases in the future, this does not appear to be the case here," the judge ruled.

Morrison & Foerster LLP partner David Cross, who represents pro bono the group of Georgia voters who make up one of the two plaintiffs' groups pressing the suit, told Law360 on Tuesday that his side viewed the decision as a "good ruling," given that Judge Totenberg recognized the work that plaintiffs' counsel had already put into the case and her acknowledgment that she plans to award fees at some point.

"While we would have liked recovery now, we certainly understand the judge's reasoning to wait until the end of the case and do it all at once, and we also appreciate the points she made about the financial strain on the state because of the pandemic," Cross said.

He added that the voters he represents are looking forward to the judge's ruling on their latest bid to enjoin the use of Georgia's new voting system and that they planned to again move for fees and costs later in the litigation.

Counsel for the other plaintiffs group, led by the Coalition for Good Governance, as well as Georgia's secretary of state did not immediately respond to a request for comment.

The voters are represented by David D. Cross, Jane P. Bentrott, John P. Carlin and Robert W. Manoso of Morrison & Foerster LLP, and Halsey G. Knapp Jr. and Adam M. Sparks of Krevolin & Horst LLC.

The Coalition for Good Governance plaintiffs are represented by Bruce P. Brown of Bruce P. Brown Law LLC, Robert A. McGuire III of Robert McGuire Law Firm, Cary Ichter of Ichter Davis LLC and Ezra D. Rosenberg, David Brody and John Powers of the Lawyers' Committee for Civil Rights Under Law.

The state election officials are represented by ***Vincent R. Russo, Josh Belinfante, Carey A. Miller, Kimberly Anderson, Alexander Denton and Brian E. Lake of Robbins Alloy Belinfante Littlefield LLC***, and Bryan P. Tyson and Bryan F. Jacoutot of Taylor English Duma LLP.

The case is Curling et al. v. Raffensperger et al., case number 1:17-cv-02989, in the U.S. District Court for the Northern District of Georgia.