Backdoor Attorney Fees: Costs-of-Proof Awards

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Where a party prevails at trial or on summary judgment but has no contractual or statutory basis to recover all attorney fees – or even where a party loses at trial or on summary judgment – the possibility of a fee recovery remains. Increasingly, plaintiffs are using the pre-trial denial of requests for admissions ("RFAs") to seek substantial attorney fees for having to prove an issue, notwithstanding the general rule that each party bears its own fees. Such fees are also a potential tool in the defense arsenal.

RFAs are useful tools for narrowing the scope of discovery, eliminating undisputed issues, and expediting trial. They can help reduce your litigation costs if the other side admits discrete facts. And they also can serve as a basis for *recovering* substantial attorney fees and costs, if they are reasonably propounded and unreasonably denied. Reasonably propounded requests include, for example, the defense asking the plaintiff to admit that the plaintiff was driving in excess of the speed limit at the time of the accident, or that certain other factors caused at least some of the damages claimed. Code of Civil Procedure, section 2033.420 ("section 2033.420") allows the requesting party to recover its costs of proof when the other side unreasonably denies one or more RFAs and the requesting party proves the truth of those matters at trial.

This article sets forth section 2033.420's parameters and requirements, as well as practical tips for parties moving for or defending against costs-of-proof awards.

Overview

"Section 2033.420 is a procedural mechanism designed to expedite trial by reducing the number of triable issues that must be adjudicated." (*Doe v. Los Angeles County Dept. of Children & Family Services* (2019) 37 Cal.App.5th 675, 690 (Doe).) Under the statute, if a requesting party proves the truth of an RFA that the other party previously denied, the requesting party "may move the court for an order requiring the party to whom the request was directed to pay the reasonable expenses incurred in making that proof, including reasonable attorney fees." (Code Civ. Proc., § 2033.420, subd. (a).) Legislators intended this fee-shifting statute to reimburse the requesting party for costs of proof, i.e., expenses incurred in proving the requested matter. (*City of Glendale v. Marcus Cable Associates, LLC* (2015) 235 Cal.App.4th 344, 353-354, 359 (*City of Glendale*).)

Parties may seek costs of proof regardless of which side filed the initial complaint or even ultimately prevailed at trial. (E.g., *City of Glendale, supra*, 235 Cal.App.4th at pp. 349-350 [defendant and cross-complainant filed a motion to recover its costs of proof under section 2033.420].) Even if the moving party ultimately loses at trial, the moving party still may recover the costs and expenses of proving an RFA that the other side unreasonably denied, so long as the losing party prevailed on the particular question that was at issue in the RFA. (*Smith v. Circle P Ranch Co.* (1978) 87 Cal.App.3d 267, 274-275 (*Smith*) [fee shifting for denial of plaintiff's RFAs permitted even where jury returned a general verdict for the defense: such a verdict does not "establish that defendants were justified in their pretrial denials of specific facts later proved true. Nor does it constitute a determination that plaintiff failed to prove all facts to which defendants' denials were relevant"]; *id.* at pp. 277-278 [trial court awarded fees "on the basis that the genuineness of certain photographs and truth of matters of fact were 'wrongfully denied'" by the defendant whose agents had taken the photos].)

Parties may only seek costs of proof against other parties. They may not seek such costs against parties' attorneys. (*City of Glendale, supra*, 235 Cal.App.4th at p. 354.)

While parties most commonly file section 2033.420 motions after trial, they also may do so after the court grants summary judgment in their favor. (*Barnett v. Penske Truck Leasing* (2001) 90 Cal.App.4th 494, 497-499.)

Key Parameters and Requirements For Recovery

Relevant timeframe. A court may award only costs of proof incurred *after* the RFA denial. (*Yoon v. Cam IX Trust* (2021) 60 Cal. App.5th 388, 395.) And the moving party must wait until after it was forced to prove the matter requested in the RFA, either at trial or by another dispositive process such as summary judgment. (See *Wagy v. Brown* (1994) 24 Cal.App.4th 1, 6 (*Wagy*) [costs of

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proof are recoverable only where the party requesting the admission proves the truth of that matter, not where the party merely prepares to do so].) In essence, the clock for accruing costs of proof "starts" when the responding party denies the RFA, and "ends" when the moving party *proves* the requested matter.

The RFA response must be complete. Section 2033.420 applies only where the responding party "fails to admit" an RFA. (Code Civ. Proc., § 2033.420, subd. (a).) If the responding party simply objects to the RFA, the requesting party first must move to compel further answers. (*Wimberly v. Derby Cycle Corp.* (1997) 56 Cal.App.4th 618, 636.) Failure to file a motion to compel waives the right to further responses and the right to costs of proof under section 2033.420. (See *Association for Los Angeles Deputy Sheriffs v. Macias* (2021) 63 Cal. App.5th 1007, 1028 (*Macias*) [if a party provided complete responses to the RFAs, there is no need to compel further responses and the requesting party does not waive its right to costs-of-proof fees].)

A response that a party has insufficient information to admit or deny the matter requested is a complete response and a motion to compel further responses is unnecessary. (*Macias, supra*, 63 Cal. App.5th at pp. 1028-1029.)

The moving party must *prove* the fact denied in the RFA. The moving party may recover only where it actually proved the matter requested in the RFAs. (*Grace v. Mansourian* (2015) 240 Cal.App.4th 523, 529-530 (*Grace*).) This means the moving party must have introduced evidence. (*Ibid*. [citing Evid. Code, § 190, which defines "proof" as "the establishment by evidence of a requisite degree of belief concerning a fact" in the mind of the jury or court].) "Until a trier of fact is exposed to evidence and concludes that the evidence supports a position, it cannot be said that anything has been proved." (*Stull v. Sparrow* (2001) 92 Cal.App.4th 860, 865-866 (*Stull*).)

The court may not award costs of proof if the parties stipulated to facts, even if the responding party had previously denied

them. (*Grace, supra*, 240 Cal.App.4th at p. 530.) The matters denied in the RFAs actually have to be litigated at trial, rather than simply conceded or ignored. If a responding party refuses to admit an RFA during discovery but later concedes its truth before trial begins, section 2033.420 does not apply because there is no need to offer proof. (See *Stull, supra*, 92 Cal. App.4th at pp. 865-866.) Thus, for example, if a party admits liability on the eve of trial, there are no costs-of-proof fees available for the prior denial.

Similarly, the requesting party may not recover costs of proof incurred in preparing for trial if the case settles or is dismissed before trial. (See Wagy, supra, 24 Cal.App.4th at p. 6 [expenses not recoverable where the moving party merely prepares to prove the matters requested].) However, the requesting party still may recover costs of proof where the trial starts and the requesting party proves the requested matters, but the case ultimately ends in a nonsuit. (See Doe, supra, 37 Cal. App.5th at p. 692.)

The Moving Party's Burden of Proof: Identifying and Segregating the Applicable Fees and Costs

The moving party has the burden to show that it incurred the requested costs of proof specifically to prove the issues the other side should have admitted. (*Grace, supra*, 240 Cal.App.4th at p. 529.) "The requested amounts must be segregated from costs and fees expended to prove other issues." (*Ibid*.; see also *Smith, supra*, 87 Cal.App.3d at pp. 279-280 [remanding for calculation of fees where record did not demonstrate fees were reasonably related to proofs necessitated by denial: "no assessment may be made for expenses unrelated to the specific grounds of the motion before the court"].)

The moving party must make a specific accounting of the costs and fees incurred as a result of the denied RFAs. (*In re Tobacco Cases II* (2015) 240 Cal.App.4th 779, 807-808.) Conclusionary declarations failing to set out an hourly fee or any accounting of time are insufficient. (*Garcia, supra*, 28 Cal.App.4th at p. 737; see also Edmon & Karnow, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2022) ¶ 8:1413.1 [As with any other motion, "the moving party must set forth *specific facts supporting the amount* of costs and expenses sought"].)

It is not necessary to allocate fees and costs to each specific RFA, particularly where the pertinent RFAs all relate to a single issue, such as liability. (*Macias, supra*, 63 Cal. App.5th at pp. 1030-1031.) Nevertheless, the moving party must allocate the amount of fees and costs incurred in proving the specific *issues* addressed by the denied RFAs – i.e., segregate the requested fees and costs from those incurred in proving issues outside the RFAs' scope. (*Id*. at p. 1031.) "The rule is that a party cannot recover costs of proof for *other* issues." (*Ibid*.)

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(*Orange County, supra*, 31 Cal.App.5th. at p. 117.) A party cannot simply rely on a plainly unqualified expert to avoid having to pay costs of proof. (*Ibid*.)

Lay evidence is equally important in defending against a costs-of-proof motion. Whether the responding party reasonably believes it will prevail "necessarily requires consideration of *all* the evidence, both for and against the party's position, known or reasonably available to the party at the time the RFA responses are served." (*Orange County, supra*, 31 Cal.App.5th at p. 118, italics added.) Accordingly, a party arguing that it had good reason to deny the RFA also must show that it met its duty to reasonably investigate the facts before the denial. (See *Macias, supra*, 63 Cal.App.5th at p. 1029; see also *Smith, supra*, 87 Cal. App.3d at p. 275 ["where it becomes clear from evidence introduced by either party at trial that the party who denied for lack of information or belief had access to the information at the time requests for admissions were propounded, sanctions are justified because that party has a duty to investigate"].) Even if the party ultimately loses at trial, it still may be able to show it had a reasonable basis to deny the RFAs at issue, based on the evidence it offered. (See *Universal Home Improvement, Inc. v. Robertson* (2020) 51 Cal.App.5th 116, 132 [losing party's robust evidence contesting the RFAs constituted reasonable ground for denying the RFAs and proceeding to trial on the issue].)

Practice Tips

When propounding RFAs:

- Defense counsel should consider framing RFAs in terms specific enough that the opposing party might reasonably be expected to investigate and respond affirmatively. Courts generally should deny costs-of-proof attorney fee requests based on a single RFA where plaintiff declined to "admit that defendant is not negligent."

- Counsel should track their time and costs carefully such that they can later correlate time spent and costs incurred with proving matters on an issue-by-issue basis.

- Counsel must move to compel further responses upon receiving incomplete responses (e.g., objections to the RFAs without any response) to preserve the right to recover costs of proof.

When answering RFAs:

- Counsel should keep in mind that they may later be required to articulate a basis for any denials. Parties should carefully consider the evidence for and against their position, including potential expert opinion evidence.

- When parties deny requests or fail to admit requests for lack of information or belief, counsel should be prepared to show they reasonably investigated the facts before denying the RFAs.

- When appropriate, RFA denials should be qualified, e.g., "Defendant admits that the accident may have caused plaintiff some damage but denies that the accident caused plaintiff all of the claimed damages," or "Defendant admits that he was driving one of the vehicles involved in the accident but denies that he was at fault or was solely at fault." Again, counsel should think about how they might later articulate and document the basis for such responses.

When moving for costs of proof:

- Counsel moving for costs of proof must directly tie all requested expenses to proving the specific matters denied and establish the reasonableness of the fees. They should submit declarations in support of the motion, setting forth a detailed accounting and attaching evidence of time spent proving the specific issues denied in the RFAs. The absence of such evidence is fertile ground for opposing a costs-of-proof motion.

When defending against a costs-of-proof motion:

- A party opposing a motion for costs of proof should review the exceptions listed in section 2033.420, subdivision (b) to see if any apply to the RFA denials at issue. In particular, the party should be prepared to demonstrate the reasonable basis for denying the RFA grounded in the evidence presented at trial. It is *crucial* in opposing a costs-of-proof motion that the party put on an *evidentiary* showing as to the basis for its denial. Fees and costs must be granted if the opposing party cannot establish one of the statutory exceptions.

- Counsel should scrutinize the moving party's attempt to tie requested fees to matters that were denied to ensure that the opponent in fact demonstrably proved as true the precise question the defendant denied, as framed in the RFA. If the plaintiff asked the defendant entity to admit it was negligent in three different ways, and the verdict shows only that the defendant was negligent, the jury may have found for the plaintiff on only one theory of negligence. In that case, the plaintiff will arguably be unable to establish which denied fact was decided in the plaintiff's favor, and thus may not have preserved the ability to allocate time to a winning issue as necessary for the motion.

- Counsel should also examine whether there are grounds to challenge the *reasonableness* of the claimed rates or hours spent. A failure to properly allocate time or show reasonableness warrants denying the motion. V

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