

LOS ANGELES

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Viewpoint

## Net Fees

**Although tort and contract law allow the victor to recover monies spent on a lawsuit, carefully worded agreements are always a good bet.**

BY GARY L. BARR

When advising clients of the potential benefits and risks of litigation, one of the least discussed issues is the potential recovery of attorney's fees and the potential payment of the opposing party's attorney's fees. Even for the plaintiffs who believe they are seeking to redress a wrong, a loss could result in the plaintiff paying substantial attorney's fees to the defendant. The possibility of recovering or paying attorney's fees at the end of a case should play a substantial role in litigation strategy.

The basic American rule is that regardless of which party prevails in litigation, each party must bear his or her own attorney's fees. This rule is codified in California in Code of Civil Procedure §1021, which provides: "Except as attorney's fees are specifically provided for by statute, the measure and mode of compensation of attorneys and counselors at law is left to the agreement, express or implied, of the parties..." The key, however, is to know the exceptions that allow for the recovery of attorney's fees.

Probably the most widely used exception is in contract disputes. Contracts often provide that the prevailing party in litigation involving the contract is entitled to recover his or her attorney's fees. It is obvious that when this contract provision emerges, the prevailing party on a breach of contract cause of action based on that contract will be entitled to recover reasonable attorney's fees. What is less obvious, and subject to analysis and interpretation, is when a prevailing litigant may recover attorney's fees for tort claims such as fraud.

Civil Code §1717 provides for the recovery of attorney's fees in cases where they are included in a contractual provisions. However, as the California Court of Appeal stated in *Xuereb v. Marcus & Millichap, Inc.*, 3 Cal. App.4th 1338,1342 (1992), Civil Code §1717 has its limitations: "By its terms, therefore, Civil Code section 1717 has a limited application. It covers only contract actions where the theory of the case is breach of contract, and where the contract sued upon itself specifically provides for an award of attorney fees incurred to enforce the contract."

Thus, §1717 does not expand the rights of the parties to recover attorney's fees. It is specifically limited in scope to the recovery of attorney's fees for breach of contract-type causes of action. On the other hand, §1717 does not limit the rights of parties to make attorney's fees agreements pursuant to Code of Civil Procedure §1021. *Xuereb* at 1342.

Relying on §1021, numerous cases have established that where the contractual fee provision agreed to by the parties is extensive enough to cover fraud or other tort causes of action, attorney's fees are recoverable. The key is the interpretation of the contractual language agreed to by the parties. If the parties agreed to an attorney's fees provision that is broad enough to include tort actions, the prevailing party may recover attorney's fees under §1021 but not under §1717. *Adam v. DeCharon*, 21 Cal. App. 4th 708 (1995); see also *Childers v. Edwards*, 48 CA4th 1544 (1996); *Xuereb* at 1342.

In *Xuereb*, the plaintiff filed a lawsuit arising out of the purchase of real property, alleging that the property had been sold in a defective condition. The plaintiff further alleged that the defendants had withheld this information. The case was submitted to the jury on misrepresentation, concealment and breach of fiduciary duty causes of action but not on a breach of contract theory. The jury returned a verdict for the defendants. The defendants then moved for attorney's fees under the terms of the contract. However, the motion was denied by the trial court on the grounds that the case had been tried on tort theories rather than on contract theories.

The parties in *Xuereb* had agreed to an attorney's fees provision in their contract which provided, in pertinent part, as follows: "If this Agreement gives rise to a lawsuit or other legal proceeding between any of the parties hereto, ... the prevailing party shall be entitled to recover actual court costs and attorneys' fees ...." The Court of Appeal held that the language was broad enough to cover tort actions, as well as contract actions, since its provision covered any lawsuit arising from the agreement. The court stated: "The language of this provision does not limit an award of attorney fees to actions brought on a breach of contract theory, or to actions brought to interpret or enforce the contract." *Xuereb*, supra at 1342-43. The Court reasoned that the phrases "arises from" and "arises out of" should be interpreted as used in "ordinary popular speech." The allegations arose from the underlying transactional relationship and, therefore, tort causes of action were subject to the attorney's fees provision.

The key to the analysis of whether a contractual attorney's fees provision will apply to tort actions is the language of the provision itself. Where the language of the contractual provision, by its terms, covers only actions "on the contract" or "to enforce the terms of the contract," then only attorney's fees incurred on the contract cause of action may be recovered. *Reynolds Metal Co. v. Alperson*, 25 Cal3d 124,129 (1979). Where, on the other hand, a fee provision contains broader language such as "arising out of" or "gives rise to," the provision authorizes fees to be awarded on tort as well as contract claims. See *Santisas v. Goodin*, 17 Cal4th 599 (1998).

In preparing for any litigation where the underlying contract contains an attorney's fees provision, it is incumbent upon an attorney to take a hard look at the wording of the provision. Based on the verbiage, the attorney should then properly advise the client on the possibility of recovering attorney's fees and the risk of paying the opposing party's attorney's fees, regardless of whether the lawsuit is founded in tort or contract.



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