

## Absence of Prevailing Party Won't Preclude Lawyer Fees

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### Focus Column

### Litigation

By Daniel Lee Jacobson

Civil Code Section 1717 requires any contractual attorney fees clause that provides for attorney fees to be awarded to a specific party to be figuratively, but with full legal force, "rewritten" so that the prevailing party will be awarded attorney fees - whomever that prevailing party may be.

Civil Code Section 1717(a) says: "In any action on a contract, where the contract specifically provides that attorney's fees ... which are incurred to enforce that contract, shall be awarded either to one of the parties or to the prevailing party, then the party who is determined to be the party prevailing on the contract, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney's fees."

The "party prevailing on the contract" is generally "the party who recovered a greater relief in the action on the contract." Civil Code Section 1717(b)(2). But in order to "recover[] a greater relief in the action on the contract," the substance of the contract does not have to be litigated. *Hsu v. Abbata*, 9 Cal.4th 863 (1995); *Wong v. Thrifty*, 97 Cal.App.4th 261 (2002).

The California Supreme Court explained, "When a defendant obtains a simple, unqualified victory by defeating the ... contract claim in the action, [S]ection 1717 entitles the successful defendant to recover reasonable attorney fees incurred in defense of that claim if the contract contained a provision for attorney fees. The trial court has no discretion to deny attorney fees to the defendant in this situation by finding that there was no party prevailing on the contract." *Hsu*.

The "situation" in *Hsu* was that the court found that no contract had been formed. So, of course, the substance of the contract was not litigated; there was no contract. "[W]e hold that in deciding whether there is a 'party prevailing on the contract,' the trial court is to compare the relief awarded on the contract claim or claims with the parties' demands on those same claims and their litigation objectives as disclosed by the pleadings, trial briefs, opening statements and similar sources. The prevailing party determination is to be made only upon final resolution of the contract claims and only by 'a comparison of the extent to which each party ha[s] succeeded and failed to succeed in its contentions.' [citation.]" *Hsu*.

Because there was no contract in *Hsu*, a "final resolution of the contract claims" cannot require litigation of the substance of the contract. The "prevailing party" analysis is focused on what the parties sought in the contract action, as compared with what the parties got in the contract action.

In *Wong*, there was no litigation of the substance of a contract, or even of whether there was a contract; in fact, there was no litigation of anything regarding the contractual claim. In *Wong* a monetary judgment was entered pursuant to the acceptance of Code of Civil Procedure Section 998 offer to compromise. That offer proposed a monetary compromise to settle the case. It was silent as to fees and costs.

Under Code of Civil Procedure Section 998, a party may make a written offer to compromise. If within a certain period of time the party to whom the offer is made accepts the offer, then that party may file a written acceptance with the court. Upon the receipt of such an acceptance, the court enters judgment as a

simple ministerial act.

The *Wong* court explained: "Wong is entitled to reasonable attorney fees because the conditions of [S]ection 1717 have been met: There was an action on the contract; the contract provided that fees incurred to enforce the contract be awarded to one of the parties ... and Wong - who recovered greater relief in the action - clearly was the party who prevailed on the contract."

A voluntary dismissal of the contract action greatly affects the applicability of Civil Code Section 1717. "Where an action has been voluntarily dismissed, or dismissed pursuant to a settlement of the case, there shall be no prevailing party for purposes of this section." Civil Code Section 1717(2).

Certainly a voluntary dismissal before trial precludes the award of attorney fees under Civil Code Section 1717; *International Industries v. Olen*, 21 Cal.3d 218 (1978); but at least one Court of Appeal has found that even a voluntary dismissal during trial precludes such recovery. *D&J Inc. v. Ferro*, 176 Cal.App.3d 1191 (1986).

A recent case addressed where an attorney fees provision subject to Civil Code Section 1717 might be found. In *Baldwin Builders v. Coast Plastering*, 125 Cal.App.4th 1339 (2005), the court found an attorney fees provision within an indemnity agreement. Previous cases such as *Meininger v. Larwin-Northern California Inc.*, 63 Cal.App.3d 82 (1976), had analyzed indemnity clauses that included attorney fees as one of various items that the indemnitor owed to the indemnitee, and had concluded that those indemnity clauses did not invoke Civil Code Section 1717.

In *Meininger*, the indemnification clause in question required indemnity for "all actions or causes of action, claims, demands, liabilities, loss, damage or expense of whatsoever kind and nature, *including counsel or attorney's fees.*" [Emphasis originally in the *Meininger* court's decision.]

*Baldwin*, on the other hand, dealt with an indemnity agreement that stated the indemnity owed, and then: "Subcontractor [the indemnitor] shall pay all costs, including attorney's fees, incurred in enforcing this indemnity agreement."

The *Baldwin* court ruled that this sentence, found inside the indemnity agreement, was an attorney fees clause subject to Civil Code Section 1717.

"Reasonable attorney's fees [to the prevailing party] shall be fixed by the court, and shall be an element of costs of suit." Civil Code Section 1717(a). "The determination of what is a reasonable fee is a question of fact that rests within the discretion of the trial court [citation] after it has considered a number of factors including [the] nature of the litigation, its difficulty, the amount involved, the skill required in its handling, the skill employed, the attention given, the success or failure of the attorney's efforts, the attorney's skill and learning, including his age and experience in the particular type of work demanded." *La Mesa-Spring Valley School District v. Otsuka*, 57 Cal.2d 309 (1962).

In cases where there are contract claims mixed with other types of claims, fees are awardable under Civil Code Section 1717, but only for those fees that were incurred as a result of the contractual claims. *Reynolds Metal Company v. Alperson*, 25 Cal.3d 124 (1979).

In 1981, Civil Code Section 1717 was amended so that it applies not only to contract actions involving unilateral attorney fees clauses, but it applies to contract actions involving attorney fees clauses that award fees, "either to one of the parties or to the prevailing party." Thus, procedural mandates in Civil Code Section 1717 apply not only in cases involving purportedly unilateral attorney fees clauses, but also in cases involving reciprocal attorney fees clauses. *Stantis v. Goodin*, 17 Cal.4th 599 (1998), (overruling *HoneyBaked Hams Inc. v. Dickens*, 37 Cal.App.4th 421 [1995], on this point).

"The court may also determine that there is no party prevailing on the contract for purposes of this section." Civil Code Section 1717(b)(1). But, the discretion afforded a court by this sentence is very limited. In *Hsu*, the California

Supreme Court gave examples of instances in which a court could find that there was no "party prevailing on the contract," and concluded such a finding was available only in cases where there really is no winner; the news is bad for both sides, the results are mixed.

The examples given by the *Hsu* court were:

- Where no relief is awarded to either side on cross-actions based on a contract (*Bankes v. Lucas*, 9 Cal.App.4th 365 [1992]).
- Where a lessee sought to validate an option to renew and to establish the rent at a certain amount, with the court validating the option to renew but setting the rent at a rate far greater than that requested by the lessee (*Nasser v. Superior Court*, 156 Cal.App.3d 52 [1984]).
- Where a claimed easement was found to be valid, but its scope was found to be far narrower than claimed by its owner (*Kytasty v. Godwin*, 102 Cal.App.3d 762 [1980]).

The strength of Civil Code Section 1717 is underscored by its non-waiveability. "Any provisions in any ... contract [subject to Civil Code Section 1717] which provides for a waiver of attorney's fees is void." Civil Code Section 1717(a).

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