

FALL 2008 EDITION

ATTORNEY FEE STATUTES

Many people who are involved in or are contemplating litigation are surprised to learn that the party responsible for their damages or loss is not ordinarily also responsible for their attorney's fees incurred in the litigation.

In fact, the jurisprudence system in the United States is largely based on the English common law system, whereby each party is only responsible for their own attorney's fees.

In the United States, this can only be changed by contract, case law or by statute, otherwise the "English Rule" applies to litigation arising out of the incident or transaction.

Many commercial contracts contain an attorney's fees clause as a matter of course, usually buried somewhere in the "small print". Typical examples of commercial contracts that almost always contain an attorney's fees clause are automobile dealer purchase/lease contracts, contracts for the purchase of real estate, credit card contracts, residential and commercial rental or lease contracts, contracts for consumer goods that are being paid for in installments, and loan contracts with lending institutions.

Although many of these attorney's clauses as worded would appear to only be in favor of the party who is providing the pre-printed contract containing the attorney's fees clause, under California law a one-sided attorney's fees clause is construed by the courts to apply to whichever party prevails in the litigation, as a matter of public policy, the one-sided wording of the clause notwithstanding. See Civil Code sec. 1717.

Other than by contract, it is only by statute (and in a few instances, by case law) that a prevailing party in litigation can claim attorney's fees in litigation arising out of a particular transaction or incident. These statutes cover a myriad of different types of matters, with the wisdom of the Legislature in enacting same being motivated by public policy, consumer protection, and/or the lobbying efforts of various business groups and associations who have managed to secure any given legislator's attention.

Some of the statutes make an award of attorney's fees only to the plaintiff bringing the action, and not to the party defending the action, even if the plaintiff loses the case. Some of the statutes provide for a *mandatory* award of attorney's fees (indicated by the use of the word "shall"), with only the amount thereof to be an issue to be decided by the court, while other statutes provide for a *discretionary* award of attorney's

fees (indicated by the use of the word “may”), with the discretion to award same invested in the trial court.

Whether the statute provides for a mandatory or discretionary award of attorney’s fees, the amount of the fee is determined by the court, and must be found to be “reasonable”. This is usually determined on a motion filed by the prevailing party after the entry of a judgment. Reasonableness may be indicated by a number of factors, including the time spent on the matter, the attorney’s particular expertise or experience in the legal field in general and in the subject legal matter of the case in particular, what other practitioners in the legal community would charge, the complexity of the matter, and the risk involved in taking on the case to the final outcome.

The wide-range of subject matters embraced by statutory authority for an award of attorney’s fees to a prevailing party are illustrated by some of the following statutes:

Swimming Pool Contracts: In an action arising out of the construction of a swimming pool as between a consumer and a swimming pool contractor, the prevailing party *shall* be awarded attorney’s fees. Business & Professions Code sec. 7168.

Lawsuits Arising From A Person’s Exercise of The Constitutional Right of Petition or Free Speech: If a person or entity engages in a First Amendment right of *petition of grievances* (this could encompass a multitude of different actions, from filing a lawsuit to making a report or complaint to a public agency) or of *free speech on a matter of public interest*, then they may sometimes find themselves as a defendant in a subsequent lawsuit that has as its real purpose an intent or motivation by the party bringing the action to force them to withdraw from or to cease from exercising such conduct or speech.

In recognition of the importance of the First Amendment, and the right of people to exercise it without being intimidated by retaliatory lawsuits, the Legislature enacted what is called the anti-SLAPP (Strategic Lawsuits Against Public Participation) statute, whereby a defendant may bring a motion to strike and dismiss such a lawsuit, upon an evidentiary showing that the conduct that they are accused of falls under legitimate First Amendment protection.

Once the defendant bringing the motion makes a preliminary showing that the lawsuit arises out of their exercise of a legitimate First Amendment right, then the burden of proof shifts to the plaintiff that notwithstanding that fact, that there is a probability that the plaintiff will still prevail in the action.

If the motion is granted in favor of the defendant, an award of attorney's fees to the prevailing defendant is *mandatory*. If the plaintiff prevails in the motion, either by showing that First Amendment activity is not involved or that if it is involved that they are still likely to prevail in the litigation, then attorney's fees to the prevailing plaintiff are *mandatory* but only if the plaintiff can prove that the motion as brought by the defendant is *frivolous or is solely intended to cause unnecessary delay*. Code of Civil Procedure sec. 425.16.

Open Book Accounts: An open book account is a commercial transaction wherein a certain amount of credit is extended by a business to a customer, with the customer being billed on a periodic basis and paying the amount due after receiving a bill. It usually contemplates or involves a continuing course of transactions between the business and the customer. In an action on an open book account, the prevailing party *shall* be awarded attorney's fees, and which are capped at certain dollar amounts, never to exceed the sum of \$1,000.00. Civil Code sec. 1717.5.

Action For Damages Against A Felon: In a civil action for damages against a felon that is based upon the felony offense for which that defendant has been convicted, a prevailing plaintiff (only) *may* be awarded attorney's fees against the defendant.

Action Involving Public Interest Issue: In a civil action which has resulted in the enforcement of an important right affecting the public interest, the court *may* award attorney's fees to the prevailing party. The statute in question has certain specified criteria to be satisfied, before the result at trial can be confirmed as having significantly affect the public interest. Civil Code sec. 1021.5.

Action To Correct Credit Card Billing Error: A consumer who is injured by the willful failure of a credit card company to correct a billing error may bring an action for damages, and in addition to treble damages they *shall* be awarded their attorney's fees. Civil Code sec. 1747.50.

Action For Damages Arising Out Of Trespass On Agricultural Or Livestock Property: In an action to recover damages to real or personal property arising out of trespassing on lands used for cultivation or for raising livestock, the prevailing plaintiff (only), *shall* be awarded their attorney's fees. Code of Civil Procedure sec. 1021.9.

Action For Wages or Labor Not Exceeding \$300.00: The prevailing plaintiff, only, *shall* be awarded their

attorney's fees, not to exceed 20% of the amount recovered. Code of Civil Procedure sec. 1031.

Action In Tort Against A Public Entity: In an action in tort (ie., negligence, etc.) against a public entity, if the plaintiff does not prevail then the governmental entity *shall* be awarded its attorney's fees if it is determined that the plaintiff did not bring the proceeding in good faith and with reasonable cause. Code of Civil Procedure sec. 1038.

Inverse Condemnation: Inverse condemnation is where the acts or omissions of a governmental entity operate to divest a private real property owner of the use or enjoyment of their property. The plaintiff, only, who prevails in such an action by trial or settlement *shall* be awarded their attorney's fees. Code of Civil Procedure sec. 1036.

Elder Abuse: The plaintiff, only, *shall* be awarded attorney's fees where it is proven by *clear and convincing evidence* (this requires a greater showing than the usual burden of proof in civil cases, which is by a preponderance of the evidence) that a defendant has engaged in acts of physical abuse, neglect, or financial abuse of an elder person (defined as age 65 or older), *and* that in doing so the defendant has been guilty of recklessness, oppression, fraud, or malice. Welfare & Institutions Code sec. 15657.

Petition To Release Real Property From Mechanic's Lien: Many times a building contractor or subcontractor will cause a mechanic's lien to be recorded in the county where their services were rendered, as in doing so they will create a lien on the customer's property. If the lien is disputed or is not timely perfected by the filing of a legal action to foreclose on it, then the property owner may file a petition to release the property from the lien. In such a petition, the prevailing party, be it the plaintiff or defendant, *shall* be awarded their attorney's fees, not to exceed the sum of \$2,000.00. Civil Code sec. 3154.

Failure To Appear For Judgment Debtor Examination: One of the procedures available to enforce the collection of an unsatisfied judgment is to secure a court order ordering the judgment debtor to appear in court and to then be subject to examination by the judgment creditor or their attorney as to the nature and extent of their finances. If the judgment debtor is validly served with such an order and then fails to appear without good cause, then not only may a warrant issue for their arrest for contempt of court, but the judgment creditor *shall* be awarded their attorney's fees, and which are then added to the amount of the judgment. Code of Civil Procedure sec. 708.170.

Landlord's Interruption of Utility Services Or Preventing Access By Tenant: If a landlord with the intent to terminate a tenant's occupancy of a rental or leasehold resorts to self-help by interrupting the tenant's utilities, changing the locks, removing outside doors or windows, or removing the tenant's personal property without permission, then the prevailing party in any action *shall* be awarded their attorney's fees. Civil Code sec. 789.3.

Parental Responsibility For A Minor's Graffiti: Any act of willful misconduct by a minor that results in defacement of another's property with paint or a similar substance is the legal responsibility of the minor's parent, and the prevailing party in any ensuing action *shall* be awarded their attorney's fees. Civil Code sec. 1714.1.

Domestic Violence: In legal actions arising out of an act of domestic violence resulting in physical injury (the perpetrator must be in a domestic, marital, parental or co-habitant type of relationship with the victim, as defined by statute), then the prevailing plaintiff, only, *may* be awarded their attorney's fees, in addition to other relief. Civil Code sec. 1708.6.

Vandalism At Construction Site: In an action for intentional and malicious destruction of real or personal property at a site where substantial improvements to real property are under construction, a prevailing plaintiff, only, *may* be awarded their attorney's fees, in addition to treble damages. Civil Code sec. 1721.

Violation of Federal Or State Civil Rights: A prevailing plaintiff, only, in an action alleging a violation of that person's civil rights under the Federal or California Constitution *may* be awarded their attorney's fees. Civil Code sec. 52.1.

Unconscionable Advantage of Residential Property Owner in Foreclosure: In an action predicated on a person entering into a transaction with a residential property owner whose property is in foreclosure, and who then takes unconscionable advantage of the property owner, the prevailing property owner, only, *shall* recover their attorney's fees, in addition to other specified relief. Civil Code secs. 1695.7, 1695.13.

Attempt To Compel Mediator To Testify Or Produce Documents: Mediation is intended to promote resolution of disputes, by having a neutral mediator assist the parties in a private and confidential setting to attempt to resolve their case. Comments made by parties and their attorneys in the course of a mediation are to remain inadmissible as evidence and are to remain confidential, or otherwise the whole purpose of

the mediation can matter for naught. Accordingly, if a party after a mediation attempts to compel the mediator to testify in later court proceedings and/or to produce documents that were produced during the mediation, the mediator *shall* be awarded their attorney's fees against the party seeking to disclose such matters in subsequent legal proceedings. Evidence Code sec. 1127.

Recreational Vehicle Parks: In legal action arising out of disputes involving recreational vehicle parks, the prevailing party *shall* be awarded their attorney's fees. Civil Code sec. 799.78.

The Asparagus Commission: The California Asparagus Commission (yes, there is such a commission) in any legal action against a defendant involving matters of concern to the Commission (asparagus would of course have to be at the heart of any such concern) *may* be awarded its attorney's fees if it prevails in the action. Food and Agricultural Code sec. 78297.

The Consumer's Approach To Attorney's Fees By Statute Or Contract In Litigation

Consumers who find themselves as a plaintiff or a defendant in any civil litigation should always inquire from their prospective attorney as to whether there exists legal authority, by contract, case law, or statute, that would provide for an award of attorney's fees to the prevailing party in the litigation.

Consumers should further bear in mind that as most of the statutes provide for attorney's fees to a party who actually prevails at trial, that a settlement of the case prior to trial will not per se invoke the attorney's fees statute, unless the party paying the settlement is willing to pay something extra in recognition that the party receiving the settlement is likely to prevail at trial and that the attorney's fees will be greater at that later point in time. When the attorney's fees are only discretionary vs. mandatory, then the incentive for the party paying the settlement to pay something extra for attorney's fees is usually diminished.

Of further concern to the consumer should be how the fee statute will affect their own liability for attorney's fees owed to their attorney. Relevant inquiries would include: **(1)** Is the attorney willing to look only to the adverse party for an award of attorney's fees and payment thereof? **(2)** Is the client expected to pay the attorney's fees on the front end, and if so, how will the subject of credit be addressed, if an award of attorney's fees is had after trial? **(3)** What if the amount of attorney's fees actually awarded at trial or settled for are greater or lesser than the actual amount of attorney's fees that are being charged to the client?

Consumers should not be timid in addressing these concerns with an attorney that they are contemplating

on retaining, and moreover all agreements with an attorney, especially when litigation is involved, should be reduced to a writing that is signed by both the client and the attorney, and with a copy preserved by each.