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To Be or Not To Be: Can Attorney's Fees Be Recovered on a Void Contract

Minding Your Business Blog on **January 10, 2018**

Trying to collect attorney's fees based on a *void* contract? Surprisingly, you can, according to a recent California Court of Appeal case. In *California-American Water Co. v. Marina Coast Water Dist.*, the California Court of Appeal held that prevailing parties were entitled to recover attorney's fees and costs based on a contract, even though the underlying contract at issue in the litigation was declared – void.

In California, attorney's fees are usually recoverable by the prevailing party if provided for by statute or contract. Section 1717 of the California Code of Civil Procedure provides that "[i]n any action on a contract, where the contract specifically provides that attorney's fees and costs, 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 in addition to other costs." The question in *California-American* was whether a void contract is nonetheless a contract for purposes a claimed of section 1717 recovery.

Background

California-American, a water utility company, and Marina Coast Water District ("Marina") and Monterey County Water Resources Agency ("Monterey"), both public water agencies, entered into a contract to collaborate on a water desalination project. After it came to light that a member of Monterey's board of directors had a conflict of interest because he was paid to advocate on behalf of Marina, California-American sued to have the contract declared void. Monterey concurred that the agreement was void, but Marina disagreed, contending the contract was valid and enforceable. After years of litigation, the trial court declared the agreement was void.

As part of the underlying contract, the parties agreed to award attorney's fees and costs to the prevailing party to "any action or proceeding in any way arising from their agreement[s]." As the prevailing party, California-American moved for and was awarded attorney's fees payable by defendant, Marina. Not surprisingly, Marina appealed the trial court's order, arguing that section 1717 of California's Code of Civil Procedure authorizes a fees award *only* in cases involving an "action on a contract" – and given the underlying contract was declared void, no such attorney's fee award could be sustained.

Section 1717 Applies to Void Contracts

On appeal, Marina argued that section 1717 should not apply because the contract was void and the fee award was therefore contrary to public policy. The appellate court recognized Marina's argument had "some intuitive appeal" asking, "[h]ow can an attorney fees provision in a contract govern the parties' fees obligations when the contract itself is deemed to have been void from its inception?" Ultimately, however, the court of appeal found Marina's arguments unpersuasive and held that this case was an "action on a contract" for purposes of awarding attorney fees under section 1717, relying on a California Supreme Court case, *Santisas v. Goodin*.

In *Santisas*, the Supreme Court explained that section 1717 safeguards mutuality of remedy when "a person sued on a contract containing a provision for attorney fees to the prevailing party defends the litigation by successfully arguing the inapplicability, invalidity, unenforceability, or nonexistence of the same contract." This is precisely what California-American did in this case, i.e., successfully argue that the contract was void. Although California-American claiming attorney's fees as a contractual right seems inconsistent with a contractual claim based upon a void or unenforceable contract, section 1717 permitted recovery because otherwise the right to attorney fees would be unilateral in favor of the party seeking to affirm or enforce the contract.

Given the court's ruling, California attorneys may no longer need worry about recouping contractual attorney's fees for their clients when they successfully argue the very same contract is void. As Shakespeare said, "Though this be madness, yet there is method in't."

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