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Do Some California Companies Already Have Fee-Shifting Provisions (And Not Know It)?

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A lot of folks these days are arguing and writing about fee-shifting bylaws as if they were some kind of novel and sudden irruption, like Athena bursting from Zeus' skull. This overlooks the existence of fee-shifting provisions in a myriad of existing contracts. Arguably, some of these provisions may already applicable to derivative plaintiffs.

When it comes to attorney's fees, California follows (not surprisingly) the "American Rule" which is reflected in Section 1021 of the California Code of Civil Procedure:

> 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; but parties to actions or proceedings are entitled to their costs, as hereinafter provided.

Reasonable attorney's fees may be recovered when authorized by contract. This is because CCP § 1032(b) authorizes awards of costs to the prevailing party (except as otherwise provided by statute). CCP § 1033.5(a) then provides a long list of items constituting "costs") under Section 1032. One fo these items is attorney's fees when authorized by contract. Note that these provisions apply in both contract and tort actions so that a contract may provide for recovery of attorney's in tort as well as contract actions. Civil Code § 1717 provides the authority for recovery of attorney's fees when an action is *on the contract.* As most California attorneys should know, Section 1717 basically makes a unilateral attorney's fee provision bilateral.

In my experience, many contracts include attorney's fees provisions. In the corporate setting, these include employment agreements, indemnity agreements and compensation plans. These provisions may be very broadly drafted. For example, they may provide for the recovery of attorney's fees by the prevailing party in litigation arising under or related to the agreement. In the case of an employment agreement, this could reach litigation related to the executive's performance of that agreement.

Shareholders, of course, are not usually, if ever, parties to these agreements. However, California has found that a third party beneficiary of a contract may be liable for attorney's fees if (i) there is a sufficient nexus; and (ii) the signatory party prevails. *See, e.g., G. Voskanian Constr., Inc. v. Alhambra Unified Sch. Dist.,* 204 Cal. App. 4th 981 (2012).

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