



CCM+S Newsletter: Prevailing Party Clause – Don't Get Left with the Bill

It is a general principle of California law that each party to a lawsuit shall bear that party's own legal expenses and costs, unless otherwise permitted by statute or contract. Contracts often include a "prevailing party" clause, but these can be risky if not properly utilized or limited.

What Is a Prevailing Party Clause?

A prevailing party clause says that if a lawsuit should occur, the loser is going to be stuck with paying not only their own bill for legal fees and expenses, but also the winning party's bill as well.

Conversely, if you are the victor, this clause allows you to recover not only the damages awarded in the judgment, but also the attorney's fees and costs you were forced to expend in recovering the amount due you.

A prevailing party clause thus involves elements of a gamble, but there are ways to make it more of a calculated risk in seeking the benefit of a prevailing party clause while limiting your exposure.

Should You Include a Prevailing Party Clause in Your Contract?

Advantages

The most obvious benefit to including a prevailing party clause is that it creates the potential to end up with a judgment in your favor that would allow you to recover all of your attorney's fees and costs in addition to the damages awarded.

There are also more subtle benefits that come with including a prevailing party clause. It can be powerful settlement leverage, where the threat of being left with an unfavorable judgment, attorney's fees, and costs of suit *plus* the other party's fees and costs may be enough to force an opponent into a negotiated outcome or deter that party from filing a frivolous suit, saving time and money for all involved.

Disadvantages

With the obvious advantage of recovering your attorney's fees comes the obvious disadvantage you may face if you are *not* the prevailing party: paying someone else's attorney's fees and costs. This is a serious risk to consider.

How to Make it Work

So how can you benefit from this clause while minimizing the risk? One way is to include limiting language within the prevailing party clause.

For example, avoid broad language that could be interpreted to include a multitude of claims, such as, "In any litigation that arises out of this contract between the Client and Design Professional, the party prevailing in the litigation shall be compensated by the loser for attorney fees and court costs."

Whereas, if the language is tailored more narrowly, you can increase the chances of having your attorney's fees paid while taking on less risk that you will be left having to pay the opponent's litigation bill.



For example, you can limit the contractual language so it applies only to attorney's fees for a claim against a project owner for unpaid fees. One formulation might be: "If Architect initiates suit to recover delinquent sums owed by Client, the prevailing party shall be entitled to recover all reasonable costs incurred, including staff time, court costs, attorney's fees, expert fees and other related costs and expenses."

The aim of this kind of language is to allow recovery of money that is due to you for your services, and to make the project owner liable for the legal fees and costs you expended to recover that money, while at the same time excluding some of the risk of exposure to attorney fees related to other issues in the case such as professional errors and omissions.

This is one of those areas where consultation with an attorney is especially crucial; there is no "one size fits all" language that can be inserted without considering various elements of risk, including such things as the character and value of the project, the present and past relationship of the contracting parties, other entities or trades whose participation in the project may affect risk of a lawsuit, the financial positions of the parties to the contract, their relative bargaining power, your tolerance to risk, and so forth. Get your attorney's advice before signing a contract with a prevailing party clause.

Provisions for Attorney Fees Provided by Statute

Even without a prevailing party clause in your contract, there are some noteworthy, statutory means for recovering attorney's fees.

Under Civil Code § 3260, if an owner wrongfully withholds funds under a contract for a private work of improvement, a party may institute an action to receive payment. If the court finds that the owner was wrongfully withholding funds, the prevailing party will be entitled to attorney's fees and costs for bringing the action.

Similarly, Civil Code § 3260.1 provides the prevailing party will be entitled to attorney's fees and costs if progress payments under a contract for private works are wrongfully withheld by the owner.

Civil Code §§ 3320 and 3321 allow recovery for public contracts as well. In regards to contracts for improvements on public works, should payments or progress payments be wrongfully withheld, the prime design professional is entitled to be paid a penalty of 1½% for the improperly withheld amount per month, until the amount is paid. If successful on a claim for payment, the prevailing party is entitled to recover reasonable attorney's fees and costs.

The Code of Civil Procedure is another source of statutes that may provide for the award of attorney's fees and costs. Pursuant to Code of Civil Procedure 128.5, should an action be instituted against you in bad faith or solely to cause unnecessary delay, the court may order the party or their attorney to pay reasonable attorney's fees and costs.

Under Code of Civil Procedure § 1021.6, on a claim for implied indemnity, if the court finds that both the indemnitee was not at fault, and that the indemnitor should have acted in the indemnitee's interest, the prevailing party may bring a motion for attorney's fees. The circumstances where this applies are limited, however, and cannot be regarded as a "general attorney fee clause."



Conclusion

The benefits of including a tailored prevailing party clause in a contract may outweigh the inherent risks. Narrow language providing for attorney's fees applicable only to certain claims may assist in the negotiation for recovery of money owed to you, as well as ultimately leaving the bill for your legal efforts with the losing party.

While it is true that you could be on the losing end of this provision, it may be a calculated risk worth taking: not only would you receive money that is rightfully due to you, but you will have prosecuted your claim essentially free of charge.

If it seems a risk too big to take or you cannot convince the party on the other side of contract negotiations to include limiting language, remember that there are statutes that may fit your situation and enable you to recover at least some portion of prevailing fees and costs.

Please contact us at either the South Pasadena or Orange offices to discuss further.

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