

When A Procedural Win Is "Win" For Attorney's Fees: California Court of Appeal, First District, Concludes That Prevailing Party In A Contested Hearing On A Petition To Compel Arbitration Is Entitled To Attorney's Fees Under A Contract

By: Edward F. Morrison, Jr., Esq.
Brett C. Drouet, Esq.

In what may be a dispositive ruling on an important issue in breach of contract cases, the California Court of Appeal, First District, concluded that the trial court may award attorney's fees to a party which successfully litigated a petition to compel arbitration even though the matter had not been resolved on the merits.

That decision was entered in the matter of Turner v. Schultz (2009) Westlaw 2006846 ("Turner Case"). In the Turner Case, a former shareholder employee brought an action against the company, shareholders of the company and another corporation alleging that shareholders had made false representations to induce the shareholder employee to enter into a share buyout agreement. The employer company filed a petition to compel arbitration under the share buyout agreement. The share buyout agreement contained two separate, broad clauses which provided that the prevailing party in any "proceeding" under the share buyout agreement would be entitled to attorney's fees.

The trial court granted a defense motion to compel arbitration and declined to intervene in the arbitration association's procedures for selecting an arbitrator. During the pendency of the litigation, the former employee shareholder also filed a separate suit against the company, the arbitration association and the shareholders of the company seeking a declaration that the defendants could not proceed with the arbitration without first obtaining a court order and seeking an injunction to stay the arbitration proceedings. The trial court in that action denied the shareholder employee's application for a preliminary injunction and the shareholder employee appealed. The Court of Appeal granted the defense motion to dismiss the first action and dismissed the shareholder employee's appeal of the second action as moot.

The defendants then filed a motion for judgment on the pleadings in the second action. The trial court granted the motion for judgment on the pleadings in the second action and awarded costs and attorney's fees. The shareholder employee then appealed that ruling on the basis that attorney's fees could not be awarded because there had not yet been a determination on the merits.

On appeal, the Court of Appeal acknowledged that the issue presented one of first impression although it acknowledged that there were cases which favored the award of attorney's fees involving procedural victories, see, Acosta v. Kerrigan (2007) 150 Cal.App.4th 1124; Otay River Constructors v. San Diego Expressway (2008) 158 Cal.App.4th 796 and Christensen v. Dewar Developments (1983) 33 Cal.3d 778, and there were other cases which held that no fees were to be awarded absent a decision on the merits. See, Lackhar v. Lackhar (1986) 182 Cal.App.3d 641 and Green v. Mount Diablo Hospital District (1989) 207 Cal.App.3d 63.

The Court of Appeal, in looking at the shareholder buyout agreement, focused on the fact that there were two separate provisions which provided for the prevailing party to be awarded attorney's fees and costs and noted that one of the provisions was quite broad as it established an entitlement to attorney fees: "[i]n the event *any legal action or arbitration is commenced of any kind or character, to enforce the provisions of this Agreement or to obtain damages for breach thereof.*" (italics added.) Given the broad language of the share buyout agreement, the Court of Appeal, while noting it was a "close question", upheld the trial court's award of attorney's fees and costs.

The Turner Case is significant. It will or should have two immediate impacts. First, in drafting prevailing party's language in an agreement which contains an arbitration clause, the drafter should consider whether it is in the interest of the client to limit instances of awards to the prevailing party to proceedings where there is a decision on the merits. Second, in seeking to compel arbitration, or to oppose a petition to compel arbitration, the opposing party should give serious consideration to the merits of their position. It is our belief that awards of attorney's fees will likely be limited to instances where there is an actual, contested hearing on the issue, but this issue will have to be tested in the courts.

About the Authors: Edward F. Morrison, Jr. is the founding partner and Brett C. Drouet is a partner of The Morrison Law Group, a professional corporation. Their biographies can be viewed at www.morrisonlawgroup.com.

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