

Memorandum 2000-13

Award of Costs and Contractual Attorney's Fees to Prevailing Party

In 1999, the Commission began work on a study of costs and contractual attorney's fees. The Commission considered lengthy background materials, which identified numerous issues and problems. (See Memorandum 99-32 and its First and Second Supplements.) In particular, the Commission examined differences in the standards for determining the prevailing party in three different contexts: awarding costs, awarding contractual attorney's fees on a contract claim, and awarding contractual attorney's fees on a noncontract claim. The Commission made a number of preliminary decisions, which are described below and implemented in the attached draft. The staff now seeks input on the draft and guidance on some key points not previously resolved. Once the Commission addresses these matters, the next step will be to prepare a first draft of a tentative recommendation.

TERMINOLOGY

As before, we are using the following terminology:

(1) **"Contractual attorney's fees."** Shifting of attorney's fees pursuant to a contract between the parties (e.g., a contract providing that in the event of litigation to enforce the contract, the loser will reimburse the prevailing party's attorney's fees). Depending on how it is worded, the contractual attorney's fee clause can be limited to fees for contract claims, or can also encompass fees for noncontract claims. "[P]arties may validly agree that the prevailing party will be awarded attorney fees incurred in any litigation between themselves, whether such litigation sounds in tort or in contract.'" *Santisas v. Goodin*, 17 Cal. 4th 599, 608, 951 P.2d 399, 71 Cal. Rptr. 2d 830 (1998), quoting *Xuereb v. Marcus & Millichap, Inc.*, 3 Cal. App. 4th 1338, 1341, 5 Cal. Rptr. 2d 154 (1992).

(2) **"Nonstatutory litigation expenses."** Litigation expenses that are neither attorney's fees nor statutory costs (e.g., fees of experts not ordered by the court).

(3) **“Statutory costs.”** Litigation expenses that are listed as allowable in Code of Civil Procedure Section 1033.5 (e.g., filing fees). The loser of a lawsuit typically is required to reimburse the prevailing party for these amounts.

(4) **“Unilateral attorney’s fee clause.”** A contract clause that gives only one of the contracting parties the right to recover attorney’s fees upon prevailing in litigation to enforce the contract and/or litigation relating to the contract.

PREVIOUS ACTION

On considering the background memorandum, the Commission tentatively concluded:

- The standard for determining the prevailing party should be the same for purposes of awarding (1) statutory costs other than attorney’s fees, (2) contractual attorney’s fees on a contract claim covered by an attorney’s fee clause, and (3) contractual attorney’s fees on a noncontract claim covered by an attorney’s fee clause.
- As under existing law, the standard should apply to different claims depending on the type of award sought (e.g., in determining the prevailing party for purposes of awarding contractual attorney’s fees on a contract claim, the court should examine the outcome of the contract claim; in determining the prevailing party for purposes of awarding statutory costs other than attorney’s fees, the court should examine the outcome of the entire action, not just the contract claim).
- The standard should include guidelines for commonly occurring situations (including dismissal), so that the courts do not have to review every request for costs or fees. To account for differing facts and circumstances, parties should be given an opportunity to object to application of these guidelines.
- The standard should address the miscellaneous problems identified at pages 14-17 of Memorandum 99-32.

(Minutes of October 14-15, 1999, Meeting, pp. 7-8.) The Commission directed the staff to draft a proposal along these lines and present it for review.

CONTENT OF ATTACHED DRAFT

The attached draft attempts to implement the Commission's tentative decisions. It is intended to generate discussion and constructive suggestions for refinement.

The draft deliberately maintains the status quo on several important matters that were discussed in the background materials but not resolved by the Commission: (1) recovery of nonstatutory litigation expenses, (2) reciprocity of a unilateral clause covering nonstatutory litigation expenses and/or attorney's fees for noncontract claims, and (3) recovery of attorney's fees under Civil Code Section 1717 by an attorney who does not charge a fee or charges only a nominal fee. The first two of these matters are analyzed below. Unless the Commission otherwise directs, the staff will present the third issue for Commission consideration at its April meeting.

In preparing the attached draft, the staff was tempted to undertake nonsubstantive reorganization of the chapter on costs in the Code of Civil Procedure. This chapter consists of a jumble of 28 different provisions on attorney's fees, costs, treble damages, and miscellaneous expenses (including a stray provision on referee's fees). To make the chapter more user-friendly, it would make sense to insert some article headings, move some provisions into a logical order, and possibly transfer the substance of Civil Code Sections 1717 and 1717.5 into the chapter. Any such effort would have to be done very carefully, preferably without relocating well-known provisions, such as the private attorney general statute (Code Civ. Proc. § 1021.5).

Instead of undertaking this reform, the attached draft would revise only the key provisions governing the determination of a prevailing party. It implements the Commission's substantive decisions, improves the internal organization of the pertinent provisions, and makes various technical and stylistic corrections in those provisions. As this study progresses, the staff may present options for more substantial clean-up, either in connection with this proposal or as a separate, nonsubstantive proposal. For now, we just want to alert the Commission and interested parties to the possibility of nonsubstantive code reorganization, and provide an opportunity for persons to voice general suggestions or concerns regarding that prospect.

DETERMINATION OF THE PREVAILING PARTY

The key provision in the attached draft is proposed Code of Civil Procedure Section 1032.5 (see pages 3-5 of the draft), which would establish a uniform standard for determining the prevailing party for purposes of awarding costs and contractual attorney's fees. Civil Code Section 1717 and Code of Civil Procedure Section 1032 would be revised to conform to this new standard.

In drafting the proposed new standard, the staff drew on and sought to preserve the benefits of existing case law, so that issues do not have to be unnecessarily relitigated. Proposed Section 1032.5(b) lists six commonly occurring situations and identifies the prevailing party in these situations, subject to deviation if a party presents a specific reason for deciding otherwise, or the court states a specific reason for deciding otherwise. Are there other situations we should add to the list in subdivision (b)? Is the proposed new standard workable? Does it adequately address the relevant issues and concerns? Input on any of these points, from Commissioners, judges, practitioners, or other interested parties, would be very helpful.

EXPERT WITNESS FEES AND OTHER NONSTATUTORY LITIGATION EXPENSES

If the Commission proposes legislation on the "prevailing party" standards in Civil Code Section 1717 and Code of Civil Procedure Section 1032, it should also consider addressing another confusing area: Recovery of litigation expenses that are neither attorney's fees nor statutory costs. Such nonstatutory litigation expenses may include fees of experts not ordered by the court, photocopying charges for documents other than exhibits, investigation expenses, charges for CD-ROMs, telephone and postage charges, and other litigation expenses that are not listed in Section 1033.5(a) as allowable statutory costs. Some of these items are specifically disallowed in an award of statutory costs. Section 1033.5(b). Other items (those not enumerated in Section 1033.5) "may be allowed or denied in the court's discretion." Section 1033.5(c)(4).

Several cases address reimbursement of nonstatutory litigation expenses pursuant to contract:

Bussey v. Affleck: Nonstatutory Litigation Expenses Recoverable as “Attorney’s Fees” Pursuant to Clause for Reimbursement of “Costs and Attorney’s Fees”

In *Bussey v. Affleck*, 225 Cal. App. 3d 1162, 275 Cal. Rptr. 646 (1990), the First District Court of Appeal considered whether nonstatutory litigation expenses are recoverable as “attorney’s fees” pursuant to a contract providing for reimbursement of costs and attorney’s fees. The court concluded that these expenses *were* recoverable as contractual attorney’s fees, even though they were not recoverable as costs in Section 1033.5, so long as they “represent expenses ordinarily billed to a client and ... not included in the overhead component of counsel’s hourly rate.” *Id.* at 1166. In part, the court reasoned that an “agreement for attorney’s fees and costs would be less than effectual if it could not cover the actual costs of litigation, including disbursements of counsel, and a contrary conclusion would mean that the party prevailing on the contract could never be made whole.” *Id.*

Ripley v. Pappadopoulos: Nonstatutory Litigation Expenses Disallowed as Costs Are Not Recoverable as Contractual Attorney’s Fees in a Cost Award

Four years later, the Third District Court of Appeal reached the opposite result in *Ripley v. Pappadopoulos*, 23 Cal. App. 4th 1616, 28 Cal. Rptr. 2d 878 (1994). With regard to items not enumerated in Section 1033.5, the court concluded that these could properly be awarded as statutory costs in the discretion of the trial court. *Id.* at 623. With regard to items disallowed in Section 1033.5, however, the court determined that they cannot be awarded as *either* statutory costs *or* contractual attorney’s fees *in a cost award*.

In particular, the court focused on fees of experts not ordered by the court. From Section 1033.5(b)(1) and other statutes governing recovery of such fees, the court deduced that the “Legislature has reserved to itself the power to determine selectively the types of actions and circumstances in which expert witness fees should be recoverable as costs and such fees may not otherwise be recovered in a cost award.” *Id.* at 625; *see also Davis v. KGO-T.V., Inc.*, 17 Cal. 4th 436, 950 P.2d 567, 71 Cal. Rptr. 2d 452 (1998). The court then distinguished expert fees from attorney’s fees:

In *Bussey* the court attempted to avoid the statutory prohibition against the inclusion of expert witness fees in a cost award by equating expert witness fees and other nonallowable costs of litigation with attorney fees and by concluding that such costs may be included in an award of contractual attorney fees. We cannot

adhere to that approach. In the absence of some specific provision of law otherwise, attorney fees and the expenses of litigation, whether termed costs, disbursements, outlays, or something else, are mutually exclusive, that is, attorney fees do not include such costs and costs do not include attorney fees.

Ripley, 23 Cal. App. 4th at 625-26 (emphasis added).

The court did not go so far, however, as to determine that expert fees are never recoverable pursuant to a contractual provision for reimbursement:

[W]e are here concerned with the items of expense which may be included in a cost award after judgment and are not concerned with contractual remedies. Special contract damages are subject to pleading and proof in the main action and cannot be recovered by mere inclusion in a memorandum of costs.... As an exception to this rule, the Legislature has chosen to provide for the recovery of contractual attorney fees in a cost award.... But the Legislature has declined to adopt that procedure for the recovery of expert witness fees.... Accordingly, assuming expert witness fees may be recovered under a contractual provision, they must be specially pleaded and proven at trial rather than included in a memorandum of costs.

Id. at 627 (emphasis added).

Robert L. Cloud & Associates v. Mikesell: First District Repudiates Bussey and Follows Ripley

The First District Court of Appeal recently revisited the matter of expert's fees and decided that *Bussey* was wrongly decided. "For all the reasons stated in *Ripley*, the *Bussey* decision should not be followed." *Robert L. Cloud & Associates v. Mikesell*, 69 Cal. App. 4th 1141, 82 Cal. Rptr. 2d 143, 150 (1999). "Instead, in light of the Legislature's express prohibition against inclusion of expert witness fees within a cost award (Code Civ. Proc., § 1033.5, subd. (b)(1)), we shall modify the judgment to delete the expert witness fees of \$18,217." *Id.*

This recent decision eliminates the conflict between the First District and the Third District.

Arntz: Disallowed Nonstatutory Litigation Expenses Are Recoverable Under Broad Reimbursement Clause If Specially Pleaded and Proven at Trial

In *Arntz Contracting Co. v. St. Paul Fire & Marine Ins. Co.*, 47 Cal. App. 4th 464, 491, 54 Cal. Rptr. 2d 888 (1996), however, the First District considered a situation slightly different from the ones in *Bussey* and *Ripley*:

We recognize there is authority holding that an undefined general contractual provision entitling the prevailing party to “reasonable attorney’s fees and costs” must be interpreted in light of Code of Civil Procedure section 1033.5’s limited definition of costs.... However, *Ripley* expressly declined to address the situation of a broad contractual cost provision where litigation expenses are specially pleaded and proven at trial... That situation is presented here, since the contracts authorize recovery of all “costs, charges and expenses” and litigation expenses were pleaded and proven pursuant to a procedure stipulated by the parties. While it is reasonable to interpret a general contractual cost provision by reference to an established statutory definition of costs, we do not discern any legislative intent to prevent sophisticated parties from freely choosing a broader standard authorizing recovery of reasonable litigation charges and expenses.

47 Cal. App. 4th at 491-92. *Arntz* thus permits recovery of nonstatutory litigation expenses (including fees of experts not ordered by the court), but only where (1) the contractual reimbursement provision is broadly worded to encompass such expenses, and (2) the expenses are specially pleaded and proven at trial, as opposed to being sought in a costs award.

Preliminary Recommendation

As a commentator has pointed out, “requiring litigants to specially plead and prove litigation expenses pursuant to a contractual provision during trial may ... be inefficient.” *Huron, Recover Losses: Are Costs Obtainable Under Attorney Fee Provisions*, *San Francisco Daily Journal*, p. 5 (April 29, 1999). To address this concern and provide clarification on reimbursement of nonstatutory litigation expenses, **the staff suggests the following statutory reforms based on the research we have done thus far:**

(1) **Expressly permitting parties to contractually agree to shift reasonable nonstatutory litigation expenses to the loser.** If parties can contractually agree to shift attorney’s fees to the losing party, they should also be able to shift the other expenses of litigation, so long as those expenses are reasonable. Our research to date has not disclosed any policy reason for drawing a distinction. As the court observed in *Bussey*, a contrary conclusion would mean that the party prevailing on the contract could never be made whole.

(2) Allowing a party to recover nonstatutory litigation expenses in a costs award. This would eliminate the need to specially plead and prove such expenses at trial.

(3) Clarifying (by statute or in a Comment) that a contract clause providing for shifting of “attorney’s fees” or “costs” does not encompass nonstatutory litigation expenses. If parties desire to cover nonstatutory litigation expenses in their contract, they should make that intention clear, as by providing for recovery of all “costs, charges and expenses” (as was done in *Arntz*).

(4) Applying the same rules for determination of the “prevailing party” to a contractual provision covering nonstatutory litigation expenses as to a contractual attorney’s fee clause. Again, we are unaware of any policy reason to apply different rules in this context.

RECIPROCITY OF UNILATERAL CLAUSE COVERING NONSTATUTORY LITIGATION EXPENSES AND/OR ATTORNEY’S FEES FOR NONCONTRACT CLAIMS

Some unilateral attorney’s fee clauses cover not only attorney’s fees for contract claims, but also nonstatutory litigation expenses and/or attorney’s fees for noncontract claims. Reciprocity of such a contract clause is another important issue that the Commission should consider addressing in this study.

Existing Law

In *Arntz*, the court considered the argument that “Civil Code section 1717 relates to attorney fees alone, so that a contractual cost provision authorizing one party’s recovery of litigation expenses beyond statutory costs benefits that party alone, and is not a reciprocal right.” 47 Cal. App. 4th at 492. The court rejected that contention with little discussion: “We are satisfied that the Legislature’s express reference to ‘attorney’s fees and costs’ [in Section 1717] makes contractual provisions reciprocal as to both fees and costs.” *Id.* (emphasis in original). “Any other interpretation would render the costs reference surplusage.” *Id.*

In *Moallem v. Coldwell Banker Commercial Group, Inc.*, 25 Cal. App. 4th 1827, 31 Cal. Rptr. 2d 253 (1994), however, the contract essentially provided: “If Broker is required to institute legal action against Owner relating to this contact, Broker shall be entitled to reasonable attorney’s fees and costs.” *See id.* at 1829-30. Owner’s assignee (Moallem) prevailed on a tort claim against Broker, and sought attorney’s fees from Broker pursuant to this unilateral fee clause favoring Broker.

The court of appeal rejected the claim, concluding that although the clause was broad enough to cover the tort claim, the reciprocity requirement of Civil Code Section 1717 did not extend to the tort claim. *Id.* at 1830-32.

In reaching this conclusion, the court considered Moallem's reliance on a public policy that unilateral attorneys' fees provisions should be bilaterally enforced. *Id.* The court concluded that the "existence of such a public policy cannot be denied." *Id.* at 1832. The court also acknowledged that "Moallem's position sounds a strong call of fairness," because the policy considerations supporting reciprocity apply equally to attorney's fees for a tort claim as to attorney's fees for a contract claim. *Id.*

The court was persuaded, however, that the plain language of Civil Code Section 1717 makes the provision inapplicable to a tort claim. "In section 1717, the Legislature has prescribed with clarity that the public policy Moallem seeks to invoke presently applies only to attorney fees for contract actions, not tort claims." *Id.*

The court reached this conclusion with obvious reluctance, emphasizing the need for legislative reform:

In this case the asymmetry of statutory rights between contract and tort litigants painfully appears, because Moallem could have invoked section 1717 had he prevailed on his contract claim instead of his tort claims. But that situation is a consequence only of the Legislature's enactment as it now stands. Although we can suggest that the statute be rewritten to take into account *Xuereb* and its progeny, we cannot perform that revision. The public policy underlying section 1717 may be clear. But a court is not free to advance the public policy that underlies a statute by extending the statute beyond its plain terms and established reach.

Id. at 1833; see also *Sears v. Baccaglio*, 60 Cal. App. 4th 1136, 1166-67, 70 Cal. Rptr. 2d 769 (1998) (Kline, P.J., concurring and dissenting).

Preliminary Analysis and Recommendation

Any unilateral requirement to reimburse attorney's fees or other litigation expenses distorts access to the courts: It burdens one side with a financial risk that the other side does not have to bear in pursuing justice. Such manipulation of the judicial process should not be permitted. See generally *Kinney v. United Healthcare Services, Inc.*, 70 Cal. app. 4th 1322, 1332, 83 Cal. Rptr. 2d 348 (1999) (Unilateral obligation to arbitrate deprives party of benefits and protections of

judicial forum and thus “is itself so one-sided as to be substantively unconscionable.”); see also *California Teachers Ass’n v. State of California*, 20 Cal. 4th 327, 975 P.2d 622, 84 Cal. Rptr. 2d 425 (1999) (“[R]equirement that dismissed or suspended teachers pay half the cost of the hearing, including the costs of the administrative law judge, necessarily and impermissibly deters teachers from exercising their due process right to a hearing.”).

Civil Code Section 1717 “is part of an overall legislative policy designed to enable consumers and others who may be in a disadvantageous contractual bargaining position to protect their rights through the judicial process by permitting recovery of attorney’s fees incurred in litigation in the event they prevail.” *Coast Bank v. Holmes*, 19 Cal. App. 3d 581, 597 n.3, 97 Cal. Rptr. 30 (1971). To effectively promote the policy of equal access to justice, a clause for reimbursement of attorney’s fees and/or other litigation expenses — whether for a contract claim or any other type of claim — should not operate in a one-sided manner, no matter how it is worded.

The Commission could achieve this result by more than one means. A first possibility would be to revise Section 1717 to invalidate any unilateral clause for reimbursement of attorney’s fees and/or other litigation expenses. While this approach may be appropriate for future contracts, applying it to preexisting contracts may prove problematic. When Section 1717 was first enacted, application of its reciprocity requirement to preexisting contracts was challenged on constitutional grounds. See *Coast Bank*, 19 Cal. App. 3d at 593-97. Although this challenge was rejected, the Commission could expect a similar, perhaps more successful, challenge to a retroactive ban on unilateral fee clauses. The Commission should not pursue such an approach without very carefully researching and addressing the likelihood of a successful challenge.

A safer approach would be to **extend the reciprocity requirement of Section 1717 to (1) contractual attorney’s fees for noncontract claims and (2) nonstatutory litigation expenses**. Such an approach is likely to be upheld even if it is applied to existing contracts. See *San Luis Obispo Bay Properties v. Pacific Gas & Elec. Co.*, 28 Cal. App. 3d 556, 570, 104 Cal. Rptr. 733 (1972); *Coast Bank*, 19 Cal. App. 3d at 593-97; *System Inv. Corp. v. Union Bank*, 21 Cal. App. 3d 137, 162-63, 98 Cal. Rptr. 735 (1971).

If the Commission decides to address the reciprocity issues, whether in the manner recommended or otherwise, it will need to carefully differentiate between a unilateral attorney’s fee clause and an indemnity provision covering

attorney's fees. "An indemnitor in an indemnity contract generally undertakes to protect the indemnitee against loss or damage through liability to a third person,." *Myers Bldg. Industries v. Interface Technology, Inc.*, 13 Cal. App. 4th 949, 968, 17 Cal. Rptr. 2d 242 (1993) (emphasis added). The indemnitor's obligation may include reimbursement of attorney's fees that the indemnitee incurs in litigation against a third person. "Indemnification agreements are intended to be unilateral agreements." *Id.* at 973. "The Legislature has indicated no intent to make them reciprocal by operation of law." *Building Maintenance*, 55 Cal. App. 4th at 1029. This principle should be preserved, in statutory text or at least in a Comment.

Respectfully submitted,

Barbara S. Gaal
Staff Counsel

STAFF DRAFT STATUTE

1 **Civ. Code § 1717 (amended). Award of attorney's fees in contract action**

2 SECTION 1. Section 1717 of the Civil Code is amended to read:

3 1717. (a) In any action on a contract, where the contract specifically provides
4 that attorney's fees and costs, which are incurred to enforce that contract, shall be
5 awarded either to one of the parties or to the prevailing party, then the party who is
6 determined to be the party prevailing on the contract, whether he or she is the party
7 ~~specified in the contract or not~~, shall be entitled to reasonable attorney's fees in
8 addition to other costs, regardless of whether that party is specified to receive fees.

9 ~~Where a contract provides for attorney's fees, as set forth above, that provision~~
10 ~~shall be construed as applying to the entire contract, unless each party was~~
11 ~~represented by counsel in the negotiation and execution of the contract, and the~~
12 ~~fact of that representation is specified in the contract.~~

13 Reasonable attorney's fees shall be fixed by the court, and shall be an element of
14 the costs of suit.

15 Attorney's fees provided for by this section shall not be subject to waiver by the
16 parties to any contract which is entered into after the effective date of this section.
17 Any provision in any such contract which provides for a waiver of attorney's fees
18 is void.

19 ~~(b)(1) The court, upon notice and motion by a party, shall determine who is the~~
20 ~~party prevailing on the contract for purposes of this section, whether or not the suit~~
21 ~~proceeds to final judgment. Except as provided in paragraph (2), the party~~
22 ~~prevailing on the contract shall be the party who recovered a greater relief in the~~
23 ~~action on the contract. The court may also determine that there is no party~~
24 ~~prevailing on the contract for purposes of this section.~~

25 ~~(2) Where an action has been voluntarily dismissed or dismissed pursuant to a~~
26 ~~settlement of the case, there shall be no prevailing party for purposes of this~~
27 ~~section.~~

28 ~~Where the defendant alleges in his or her answer that he or she tendered to the~~
29 ~~plaintiff the full amount to which he or she was entitled, and thereupon deposits in~~
30 ~~court for the plaintiff, the amount so tendered, and the allegation is found to be~~
31 ~~true, then the defendant is deemed to be a party prevailing on the contract within~~
32 ~~the meaning of this section.~~

33 ~~Where a deposit has been made pursuant to this section, the court shall, on the~~
34 ~~application of any party to the action, order the deposit to be invested in an~~
35 ~~insured, interest-bearing account. Interest on the amount shall be allocated to the~~
36 ~~parties in the same proportion as the original funds are allocated.~~

37 (b) Reasonable attorney's fees shall be fixed by the court, and are an element of
38 the costs of suit.

1 (c) The court, on notice and motion by a party, shall determine who is the party
2 prevailing on the contract for purposes of this section, regardless of whether the
3 suit proceeds to final judgment. The court shall make this determination in
4 accordance with Section 1032.5 of the Code of Civil Procedure.

5 (d) Where a contract provides for attorney's fees as provided in subdivision (a),
6 the attorney's fee clause shall be construed as applying to the entire contract,
7 unless each party was represented by counsel in the negotiation and execution of
8 the contract, and the fact of that representation is specified in the contract.

9 (e) Attorney's fees pursuant to this section are not subject to waiver by the
10 parties to a contract entered into after the effective date of this section. Any
11 provision of a contract entered into after this section becomes effective that
12 provides for a waiver of attorney's fees is void.

13 ~~(e)~~ (f) In an action which ~~that~~ seeks relief in addition to that based on a contract,
14 if the party prevailing on the contract has damages awarded against it on causes of
15 action not on the contract, the amounts awarded to the party prevailing on the
16 contract under this section shall be deducted from any damages awarded in favor
17 of the party who did not prevail on the contract. If the amount awarded under this
18 section exceeds the amount of damages awarded to the party not prevailing on the
19 contract, the net amount shall be awarded to the party prevailing on the contract
20 and judgment may be entered in favor of the party prevailing on the contract for
21 that net amount.

22 **Comment.** Section 1717 is amended to incorporate the prevailing party standard of Code of
23 Civil Procedure Section 1032.5 and to improve organizational clarity.

24 The material formerly in the second paragraph of subdivision (a) is continued in subdivision (d)
25 without substantive change. The material formerly in the third paragraph of subdivision (a) is
26 continued in subdivision (b) without substantive change. The material formerly in the fourth
27 paragraph of subdivision (a) is continued in subdivision (e) without substantive change.

28 The material formerly in the first sentence of subdivision (b)(1) is continued in the first
29 sentence of subdivision (c) without substantive change. The material formerly in the second and
30 third sentences of subdivision (b)(1) and the material formerly in the first paragraph of
31 subdivision (b)(2), pertaining to determination of the party prevailing on the contract, is deleted
32 and superseded by the second sentence of subdivision (c).

33 The material formerly in the second and third paragraphs of subdivision (b)(2) pertaining to
34 tender of a deposit is continued in Code of Civil Procedure Section 1025 without substantive
35 change.

36 Attorney's fees pursuant to Section 1717 are recoverable as costs pursuant to Code of Civil
37 Procedure Section 1032. See Code Civ. Proc. § 1033.5. For authority to contractually allocate
38 responsibility for attorney's fees, see Section 1021.

39 Section 1717 is also amended to make technical changes.

40 **Code Civ. Proc. § 1025 (amended). Tender of deposit**

41 SEC. _____. Section 1025 of the Code of Civil Procedure is amended to read:

42 1025. ~~When, in~~ (a) Where, in an action on a contract or an action for the
43 recovery of money only, the defendant alleges in his the answer that before the
44 commencement of the action he the defendant tendered to the plaintiff the full
45 amount to which he the defendant was entitled, and ~~thereupon~~ at the time of filing

1 the answer the defendant deposits in court, for the plaintiff, the amount so
2 tendered, and the allegation is found to be true, the plaintiff cannot recover costs,
3 but must pay costs to the defendant, including reasonable attorney’s fees pursuant
4 to Section 1717 of the Civil Code, if applicable.

5 (b) Where a deposit has been made pursuant to this section, the court shall, on
6 the application of a party to the action, order the deposit to be invested in an
7 insured, interest-bearing account. Interest on the amount shall be allocated to the
8 parties in the same proportion as the original funds are allocated.

9 **Comment.** Subdivision (a) of Section 1025 is amended to continue without substantive change
10 material that was formerly in the second paragraph of Civil Code Section 1717(b)(2).

11 Subdivision (b) continues and broadens material that was formerly in the third paragraph of
12 Civil Code Section 1717(b)(2). The procedure is made expressly available not only in an action
13 on a contract, but also in any action for the recovery of money only.

14 Section 1025 is also amended to make technical changes.

15 **Code Civ. Proc. § 1032 (amended). Recovery of costs by prevailing party**

16 SEC. _____. Section 1032 of the Code of Civil Procedure is amended to read:

17 1032. (a) ~~As used in this section, unless the context clearly requires otherwise:~~

18 (1) ~~“Complaint” includes a cross-complaint.~~

19 (2) ~~“Defendant” includes a cross-defendant or a person against whom a~~
20 ~~complaint is filed.~~


21 (3) ~~“Plaintiff” includes a cross-complainant or a party who files a complaint in~~
22 ~~intervention.~~

23 (4) ~~“Prevailing party” includes the party with a net monetary recovery, a~~
24 ~~defendant in whose favor a dismissal is entered, a defendant where neither plaintiff~~
25 ~~nor defendant obtains any relief, and a defendant as against those plaintiffs who do~~
26 ~~not recover any relief against that defendant. When any party recovers other than~~
27 ~~monetary relief and in situations other than as specified, the “prevailing party”~~
28 ~~shall be as determined by the court, and under those circumstances, the court, in its~~
29 ~~discretion, may allow costs or not and, if allowed may apportion costs between the~~
30 ~~parties on the same or adverse sides pursuant to rules adopted under Section 1034.~~

31 (b) Except as otherwise expressly provided by statute, a prevailing party is
32 entitled as a matter of right to recover costs in any action or proceeding.

33 (c) ~~Nothing in this section shall prohibit parties from stipulating to alternative~~
34 ~~procedures for awarding costs in the litigation pursuant to rules adopted under~~
35 ~~Section 1034.~~

36 **Comment.** Subdivisions (a) and (c) of Section 1032, are deleted and superseded by Section
37 1032.5.

38  **Staff Note.** In assessing whether to move the standard for determining the prevailing party to
39 a new section, the staff searched for cross-references to Section 1032. We found only three
40 statutory cross-references (Code Civ. Proc. §§ 998, 1033.5; Gov’t Code § 25845), none of which
41 required revision.

42 **Code Civ. Proc. § 1032.5 (added). Determination of prevailing party**

43 SEC. _____. Section 1032.5 is added to the Code of Civil Procedure, to read:

1 1032.5. (a) For purposes of awarding costs pursuant to Section 1032, the court
2 shall determine the prevailing party by comparing the relief awarded or otherwise
3 obtained with the parties' demands and the parties' litigation objectives as
4 disclosed by the pleadings, points and authorities, opening statements, and other
5 matters on record. The court shall pragmatically assess the extent to which each
6 party has succeeded and failed to succeed in its contentions and objectives, and
7 shall determine the prevailing party accordingly. The court may not consider
8 factors unrelated to litigation success. Where the result is mixed, the court may
9 determine that there is no prevailing party.

10 (b) Unless a party presents a specific reason for deciding otherwise, in a motion
11 to tax costs, or the court states a specific reason for deciding otherwise, the
12 prevailing party is determined as follows:

13 (1) In a two-party action where the plaintiff obtains a judgment for all or
14 substantially all of the relief sought, the plaintiff is the prevailing party.

15 (2) In a multi-party action where the plaintiff obtains a judgment for all or
16 substantially all of the relief sought from a particular defendant, the plaintiff is the
17 prevailing party as to that defendant.

18 (3) In a two-party action where the court finds that the defendant is not liable,
19 the defendant is the prevailing party.

20 (4) In a multi-party action where the court finds that a particular defendant is not
21 liable, that defendant is the prevailing party.

22 (5) Where an action is settled, in whole or in part, and the settlement agreement
23 does not allocate or otherwise address responsibility for costs and attorney's fees,
24 each party to the settlement agreement shall bear its own costs and attorney's fees.

25 (6) Where an action is voluntarily dismissed, other than pursuant to a settlement
26 agreement, the defendant is the prevailing party.

27 (c) For purposes of awarding reasonable attorney's fees pursuant to a contract or
28 pursuant to Section 1717 of the Civil Code, the trial court shall determine the
29 prevailing party in the same manner that it determines the prevailing party for
30 awarding costs, but the court shall examine the parties' litigation objectives on the
31 claim covered by the attorney's fee provision of the contract, and shall compare
32 the relief awarded on that claim with the parties' demands on the same claim.
33 Where an action involves multiple contract claims covered by the same attorney's
34 fee provision, the court shall examine the parties' success on the claims
35 collectively. Where an attorney's fee provision covers both a contract claim and a
36 noncontract claim, and a party seeks fees pursuant to the reciprocity requirement
37 of Section 1717 of the Civil Code, the court shall separately determine which party
38 prevailed on the contract claim and which party prevailed on the noncontract
39 claim. Where fees are sought only pursuant to contract, the court shall examine the
40 parties' success on the contract and noncontract claims collectively. Where an
41 action involves multiple contracts, the court shall separately determine the
42 prevailing party for each contract with an attorney's fee provision.

1 (d) Where the prevailing party obtains only partial success, the court may adjust
2 the amount of the award to reflect the degree of litigation success, instead of
3 awarding the full amount of costs and fees incurred.

4 **Comment.** Section 1032.5 is added to establish a uniform standard for determining the
5 prevailing party for purposes of awarding (1) costs other than attorney’s fees, (2) attorney’s fees
6 for a contract claim subject to an attorney’s fee clause, and (3) attorney’s fees for a noncontract
7 claim subject to an attorney’s fee clause. See generally *Santisas v. Goodin*, 17 Cal. 4th 599, 951
8 P.2d 399, 71 Cal. Rptr. 2d 830 (1998). The new standard supersedes former Section 1032(a) and
9 (c), and material formerly in the second and third sentences of subdivision (b)(1) and the first
10 paragraph of subdivision (b)(2) of Civil Code Section 1717.

11 Subdivision (a) is drawn from *Hsu v. Abbara*, 9 Cal. 4th 863, 876, 891 P.2d 804, 39 Cal. Rptr.
12 2d 824 (1995). See also *Santisas*, 17 Cal. 4th at 622; *Mustachio v. Great Western Bank*, 48 Cal.
13 App. 4th 1145, 1150, 56 Cal. Rptr. 2d 33 (1996); *Bank of Idaho v. Pine Avenue Associates*, 137
14 Cal. App. 3d 5, 15, 186 Cal. Rptr. 695 (1982). The standard is intended to give courts flexibility
15 to reach a just result in a broad variety of contexts, including cases involving multiple claims,
16 cross-claims, multiple parties, partial victories, or mixed motives for litigation tactics such as
17 voluntary dismissal.

18 The court does not have complete discretion in determining the prevailing party under
19 subdivision (a). Its determination must be based on a pragmatic assessment of the litigation
20 success of the parties. In making this determination, the court should focus on substance rather
21 than form. *Hsu*, 9 Cal. 4th at 877; *Foothill Properties v. Lyon/Copley Corona Associates*, 46 Cal.
22 App. 4th 1542, 1555, 54 Cal. Rptr. 2d 488 (1996); *Sears v. Baccaglio*, 60 Cal. App. 4th
23 1136, 1152-55, 70 Cal. Rptr. 2d 769 (1998). For example, a party who is denied direct relief on a
24 claim may nonetheless be the prevailing party if “it is clear that the party has otherwise achieved
25 its main litigation objective.” *Hsu*, 9 Cal. 4th at 877; see also *Sears*, 60 Cal. App. 4th at 1155 (net
26 monetary recovery may not be best measure of who prevailed). The court may not consider
27 factors unrelated to litigation success, such as recalcitrance in discovery or lack of cooperation in
28 settlement negotiations. *Hsu*, 9 Cal. 4th at 877. It is not essential to show success on the central
29 issue or recovery of the primary relief sought. *Texas State Teachers Ass’n v. Garland*
30 *Independent School Dist.*, 489 U.S. at 784, 790-91. Where the results of the litigation are entirely
31 one-sided, the court has no discretion to deny costs and contractual attorney’s fees. *Id.* at 875-76.

32 Subdivision (b) identifies and provides guidance in commonly occurring situations. Under
33 subdivision (b)(6), the defendant ordinarily is the prevailing party in the event of a voluntary
34 dismissal. But a voluntary dismissal can result from circumstances other than an impending loss
35 on the merits. *Santisas*, 17 Cal. 4th at 621; *International Industries, Inc. v. Olen*, 21 Cal. 3d 218,
36 224, 577 P.2d 1031, 145 Cal. Rptr. 691 (1978). For example, the defendant may have become
37 insolvent, the claim may have become moot, or the plaintiff may have obtained relief through
38 voluntary corrective action or insurance proceeds. Where the plaintiff presents a specific reason
39 for determining that the defendant is not the prevailing party, the court must pragmatically assess
40 the circumstances of the voluntary dismissal in determining the prevailing party. *Damian v.*
41 *Tamondong*, 65 Cal. App. 4th 1115, 1129-30 & n.15, 77 Cal. Rptr. 2d 262 (1998).

42 Under subdivision (c), a court awarding contractual attorney’s fees is to determine the
43 prevailing party by examining the outcome of all causes of action covered by the attorney’s fee
44 clause. Fees are recoverable only on the causes of action covered by the attorney’s fee clause, not
45 on other causes of action, even if those causes are joined with a cause of action in which an award
46 is proper. *Reynolds Metals Co. v. Alperson*, 25 Cal. 3d 124, 129, 599 P.2d 83, 158 Cal. Rptr. 1
47 (1979). Where, however, a litigant incurs fees for an issue common to both a cause of action in
48 which fees are proper and one in which they are not allowed, all of those fees are recoverable. *Id.*

49 Fees are awardable pursuant to the reciprocity requirement of Civil Code Section 1717 only for
50 a contract claim, not for a noncontract claim. *Moallem v. Coldwell Banker Commercial Group,*
51 *Inc.*, 25 Cal. App. 4th 1827, 1830-32, 31 Cal. Rptr. 2d 253 (1994). Thus, where an attorney’s fee
52 provision covers both a contract claim and a noncontract claim, and a party seeks fees pursuant to
53 the reciprocity requirement of Section 1717 of the Civil Code, the court must separately

1 determine which party prevailed on the contract claim and which party prevailed on the
2 noncontract claim.

3 Where an action involves multiple independent contracts, each of which provides for attorney
4 fees, the prevailing party must be determined as to each contract regardless of who prevails in the
5 overall action. *Arntz Contracting Co. v. St. Paul Fire & Marine Ins. Co.*, 47 Cal. App. 4th 464,
6 491, 54 Cal. Rptr. 2d 888 (1996).

7 Subdivision (d) is added to address the problem identified in *Michell v. Olick*, 49 Cal. App. 4th
8 1194, 57 Cal. Rptr. 2d 227 (1996). Where the prevailing party obtains only a partial victory, it
9 may be inequitable to award the full amount of costs and fees incurred. *Id.* at 1200-01.

10 For recovery of costs by the prevailing party, see Section 1032. For items allowable in a costs
11 award, see Section 1033.5. For authority to contractually allocate responsibility for attorney's
12 fees, see Section 1021.
