A Roadmap to Recovering Attorneys' Fees the Next Time You Compel Arbitration

Newsletter - TerraLex Connections

A Roadmap to Recovering Attorneys' Fees the Next Time You Compel Arbitration

By David W. Salton*

Under the "American Rule," a party generally may not recover attorneys' fees unless authorized by statute or contract.[1] But many exceptions to this rule exist and permit the recovery of attorneys' fees when the fees themselves are actual damages.[2] "Texas law distinguishes between recovery of attorneys' fees as actual damages and recovery of attorneys' fees *incident* to recovery of other actual damages."[3] Three of the American Rule's more frequently cited exceptions include a party's ability to recover attorneys' fees: (i) under the "tort of another" exception[4]; (ii) when drawn into bad-faith litigation[5]; or (iii) when its pursuit of a lawsuit creates a fund benefitting other parties.[6] However, Texas entities—and foreign entities doing business in Texas or performing a contract governed by Texas law—should be aware of another exception flying under the radar and which may be available to a party that incurs attorneys' fees when enforcing its arbitration agreement. Three fact patterns provide the roadmap to recovery.[7]

First, courts permit attorneys' fees as damages when a party breaches a settlement agreement. In *Guffey v. Clark,* a Texas appellate court allowed as damages the attorneys' fees incurred to defend a lawsuit and enforce a settlement agreement, stating that "if these attorneys' fees and costs could not be recovered, a settling party could breach his settlement agreement with near impunity."[8] *Leibovitz v. Sequoia Real Estate Holdings, L.P.* was a similar case, where the court resolved a suit involving breach and enforcement of a settlement agreement that sought to bring an end to litigation or prevent future litigation, concluding that "the attorney's fees incurred by the non-breaching party in enforcing the settlement agreement are damages for the breach because they are a foreseeable consequence of the breach."[9]

Second, courts have allowed attorneys' fees as damages when a party breaches a forum selection clause. In *Vianet Group PLC v. Tap Acquisition, Inc.,* a defendant filed suit in Texas state court "despite a forum selection clause in the Agreement" providing that jurisdiction "shall be United States District Courts in the State of Texas."[10] Plaintiffs moved to dismiss the state court suit pursuant to the forum selection clause and also filed a complaint in federal court seeking attorneys' fees as damages.[11] The defendant argued that "attorneys' fees as damages are not standalone breach-of-contract damages under Texas law."[12] The Northern District of Dallas disagreed.[13] Specifically, the court—after considering "relevant Texas law"—"conclude[d] that the Supreme Court of Texas would characterize attorneys' fees as damages if they were incurred in prior litigation as a result of a breached forum selection clause, but not if they were subsequently incurred prosecuting a breach of contract claim for the prior fees."[14] In other words, the court ruled that the Texas Supreme Court "would characterize [plaintiffs'] attorneys' fees incurred in the" prior state court action/litigation "as damages, but would not characterize the fees they incurred prosecuting their breach of contract claim [in the federal court/subsequent action] as such."[15]

Third, courts have awarded attorneys' fees as damages when a party breaches a contractually-mandated appraisal procedure. In *Standard Fire Ins. Co. v. Fraiman*, for example, a dispute arose between the owner of an insurance policy, Fraiman, and his insurer, Standard, who refused to pay a claim for property damage resulting from a fire.[16] Fraiman demanded that the parties follow the insurance policy's appraisal procedure, but Standard refused. Fraiman filed suit seeking a declaratory judgment determining the parties' rights under the policy's appraisal provision. Fraiman prevailed, an appraiser was appointed, and Standard ultimately paid for damages in accordance with the appraisal.[17]

But that was not the end of the story. Fraiman *then* sued Standard *again* to recover "damages for [Standard's] breach of the appraisal provision of the policy."[18] The court rejected the remedy of specific performance as a "reason to prevent a cause of action for damages based on an insurer's breach of such provision," reasoning that:

> [T]he appraisal clause of the policy was designed to expedite claims settlement and to prevent litigation. To not allow damages would allow insurance companies to breach this provision without fear of any consequences and force insureds to bring suit to enforce the appraisal provision.[19]

The point from these three fact patterns is straightforward: when a party incurs attorneys' fees because another party breaches a specific contract provision—regardless of what that provision is—those fees may be recoverable as actual damages.

Why should the result be any different when a party has to compel another to comply with its contractual promise to arbitrate disputes? Fundamentally, the harm resulting from a party's breach of a forum-selection clause, contractually-mandated appraisal procedure, or a release is no different: in each case the opposing party has to incur attorneys' fees to fully realize the benefit of its bargain. Notably, the *Fraiman* court's decision to allow damages for breach of the appraisal provision turned on the "analogous situation[s] [where] Texas courts have sustained actions for damages for breach of an agreement to arbitrate."[20] The *Fraiman* court recognized "differences between an arbitration agreement and an appraisal provision, [but stated] there are also similarities in that they both are contractual methods for resolving disputes without litigation."[21]

So, when a party negotiates an arbitration clause in its contract, only to later find out it must incur attorneys' fees to get what it bargained for, those fees are likely recoverable as actual damages and should be sought either as part of a counterclaim or a motion to compel arbitration. Otherwise the dispute resolution clause is rendered meaningless and can be breached with impunity.

---

[1] *Wheelabrator Air Pollution Control, Inc., v. City of San Antonio,* 489 S.W.3d 448, 453 n. 4 (Tex. 2016).

[2] *Haubold v. Med. Carbon Research Institute, LLC,* 2014 WL 1018008 *8 (Tex. App.—Austin 2014, no pet.); *Turner v. Turner,* 385 S.W.2d 230, 234 (Tex. 1964) ("the general rule is that [] attorneys' fees are not recoverable in the absence of some statutory or contract provision permitting their recovery, but [] there are exceptions and modifications to this general rule.").

[3] *Tex. Elec. Util. Const., Ltd. v. Infrasource Underground Const. Services, L.L.C.,* NO. 12-09-00287-CV, 2010 WL 2638066 *2 (Tex. App.—Tyler 2010, pet. granted) (citing *Haden v. David J. Sacks, P.C.,* 2322 S.W.3d 580, 597 (Tex. App.—Houston [1st Dist.] 2007), *rev'd in part on other grounds,* 263 S.W.3d 919 (Tex. 2008) (emphasis in original).

[4] *Turner,* 385 S.W.2d at 234.

[5] *Thomas v. Prudential Securities, Inc.,* 921 S.W.2d 847, 851 (Tex. App.—Austin 1996, no writ).

[6] *Lancer Corp. v. Murillo,* 909 S.W.2d 122 (Tex. App.—San Antonio 1995, no writ).

[7] At a minimum, the following discussion should serve as a reminder that parties double-check their dispute resolution clauses before filing or answering a lawsuit—lest they may face a demand to pay the other side's fees or miss an opportunity to make such a demand.

[8] No. 05-93-00849-CV, 1997 WL 142750 *4 (Tex. App.—Dallas 1997, writ denied).

[9] 465 S.W.3d 331, 355 (Tex. App.—Dallas 2015, no pet.).

[10] No. 3:14-CV-3601-B, 2016 WL 4368302 *3 (N.D. Tex. 2016) (August 16, 2016).

[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] *Id.* at *9.

[15] *Id.*

[16] 588 S.W.2d 681, 683 (Tex. App.—Houston [14th Dist.] 1979, writ ref'd n.r.e.).

[17] *Id.*

[18] *Id.*

[19] *Id.*

[20] *Id.* (emphasis added) (citing *Owens v. Withee,* 3 Tex. 161 (1848); *Brown v. Eubank,* 443 S.W.2d 386 (Tex. Civ. App.—Dallas 1969, no writ); *see also Fogal v. Stature Const., Inc.,* 294 S.W.3d 708, 722 (Tex. App.—Houston [1st Dist. 2009, pet. denied] (upholding arbitration award that "included attorneys' fees as the damages caused by [plaintiff's] breach of the arbitration agreement"). Other jurisdictions have reached similar conclusions. *See Yakima County v. Yakima County Law Enforcement Officers Guild,* 257 Wn.App. 304, 341, 237 P.3d 316 (2010) (reinstating arbitrator award of attorneys' fees incurred in court action to enforce arbitration agreement); *Intern'l Broth. of Elec. Workers, Local 1417 v. Thomas Electronics, Inc.,* No. CA 4-76-333, 1977 WL 1723 (N.D. Tex. 1977) (stating that a party can recover fees when compelling arbitration if the opposing party's argument against arbitration is in bad faith, *i.e.,* without justification, and lacks a reasonable chance of prevailing); *Intern'l Longshoremen's and Warehousemen's Union, Local 6 v. Cutter Lab.,* 552 F. Supp. 979, 981 (N.D. Cal. 1982) (same).

[21] *Id.* (emphasis added). Indeed, "arbitration is preferred by many as a way to resolve commercial disputes. It has many advantages over litigation in court, such as party control of the process," as well as "typically lower costs and shorter time to resolution." Alternative Dispute Resolution Section, State Bar of Texas, and the Texas Arbitration Council, The Benefits of Arbitration in Texas, 1 (December 2014). Additional advantages include privacy, awards which are final and enforceable, and "decision makers who are selected by the parties on the basis of desired characteristics and experience." *Id.*

---

* David S. Salton is an associate in the Litigation Practice and International Arbitration Groups in the Houston, Texas office of Porter Hedges LP. Mr. Salton can be contacted at dsalton@porterhedges.com.

David W. Salton
D. Salton
Houston, TX UNITED STATES US
PROFILE | VCARD

Posted: Wednesday, April 19, 2017

Topics: Litigation (Civil, Business and Commercial), Alternative Dispute Resolution