

P A R K I N G I N D U S T R Y

## A L E R T

MAY  
2013ATTORNEYS' FEES PROVISIONS:  
NOT A BLANK CHECK TO OVERREACH

By Anne E. Kane

In the American legal system, attorneys' fees and costs are not recoverable as damages unless expressly authorized by statute. Legal fees are simply a cost of doing business unless the parties to a contract agree otherwise.

Attorneys' fee provisions come in all shapes and sizes. Some provisions are reciprocal and permit a non-breaching party to recover its fees and costs from the party in breach. Others are one-sided and authorize the recovery of fees by only one of the contracting parties. For example, a commercial lease may permit the landlord — but not the tenant — to recover fees if it prevails in a lease dispute. And a contract for the sale of goods may permit the seller to recover fees and costs incurred in a successful collection action.

In the attorneys' fees provision of a typical commercial contract, the party seeking fees must actually have prevailed in the underlying litigation. This sounds simple. However, what happens when A prevails in litigation against B but A previously rejected a settlement offer from B that was the same (or better) than what A actually recovered?

Consider the following scenario: A commercial tenant has some duty to maintain a parking facility under a lease with a 25-year term. The lease includes the following non-reciprocal provision concerning attorneys' fees:

Tenant agrees to pay any and all damages, costs and expenses which landlord may suffer or incur by reason of failure on tenant's part to comply with any of the terms, conditions or covenants of the lease.

At the outset of the lease, the garage has visible spalling and deterioration to the concrete reinforced rebar caused by chloride contamination. Halfway into the lease, the tenant retains an engineer to survey the garage and offer suggestions on repairs. The engineering firm suggests two solutions: (1) rebuild portions of the garage in order to arrest the corrosion over the long term; or (2) repair the portions of the garage that have rusted rebar, delaminated concrete and spalling.

Soon after the tenant receives the engineering report, it offers to structurally rebuild portions of the garage at its expense in exchange for an extension of the lease. The landlord rejects the proposal out of hand and refuses to negotiate. According to the landlord, the tenant is obligated to rebuild the garage without the benefit of a lease extension because the lease requires the operator to perform all repairs necessary to keep the garage in good order and repair. The tenant on the other hand contends that the lease requires it to perform only ordinary maintenance and that under the lease, its responsibilities are limited to patch repairs.

The landlord sues — demanding that the tenant demolish and rebuild the garage or pay \$10 million to finance a complete rebuild. The court orders arbitration and, after discovery and a full hearing, the arbitration panel orders that the tenant make the very same patch repairs it originally offered to make. Having “won” at arbitration, the landlord then files a separate action to recover its attorneys' fees.

Can the landlord recover its attorneys' fees on these facts? The U.S. Court of Appeals for the Third Circuit has said no. *See Parkway Garage, Inc. v. City of Philadelphia*, 5 F.3d 685 (3d Cir. 1993), *overruled on other grounds by United Artists Theatre Circuit, Inc. v. Twp. of Warrington*, 316 F.3d 392, 400 (3d Cir. 2003). In *Parkway*, the Court held that the landlord was not entitled to recover the costs and fees it had incurred in arbitration because the tenant had offered to do the repairs ordered by the arbitration panel before the landlord filed suit and thus “arbitration was unnecessary to gain [the tenant's] compliance with the lease.” 5 F.3d at 700.

*Parkway* shows that not every “victory” will result in an attorneys' fee award. A court is likely to consider the amount in controversy, the merits of the claims and defenses, the amount of damages awarded, the amount of the fees requested, and the timing and amount of settlement offers in determining reasonableness. *See Assoc. Indem. Corp. v. Warner*, 694 P.2d 1181, 1184 (Ariz. 1985) (identifying factors to be considered under state statute permitting at-

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torneys' fee awards in contract actions); *see also* Restatement (Second) of Contracts § 205 cmt. e (Every contract imposes upon each party a duty of good faith and fair dealing in its performance and this obligation "extends to the assertion, settlement and litigation of contract claims and defenses.").

In evaluating the litigation risks presented by a commercial lease or contract containing an attorneys' fee provision, keep the following questions in mind:

***Is the attorneys' fee provision enforceable?*** Do not assume that the attorneys' fee provision in your lease or contract is enforceable as written. For example, seven states have adopted reciprocal attorneys' fees statutes which reform contracts containing unilateral attorneys' fees clauses and make the attorneys' fees provision reciprocal. *See, e.g.*, Cal. Civ. Code § 1717; Fla. Stat. § 57.105(7); Wash. Rev. Code Ann. §4.84.330. Others jurisdictions will not enforce an attorneys' fee provision that is not reciprocal. *See, e.g.*, N.C. Gen. Stat. Ann. § 6-21.6. Know the applicable law in your jurisdiction.

***Is the litigation reasonable and necessary?*** Consider how your litigation strategy and the parties' settlement positions could impact a potential fee award. Be aware that an attor-

neys' fee provision is not a blank check to engage in overly aggressive and pointless litigation. ♦

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