

# AVOIDING PITFALLS ACQUIRING ATTORNEYS' FEES FROM AN ADVERSARY

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The recovery of attorneys' fees is an issue that affects attorneys on a daily basis. It affects our livelihoods, our businesses and our interactions with clients. With regard to the payment of attorneys' fees, our legal system generally follows the so-called "American Rule," under which, win or lose, the parties bear their own legal fees.<sup>1</sup> Exceptions to the American Rule arise by statute, rule or contract.<sup>2</sup> For example, under NRS 18.010, a court may award the prevailing party attorneys' fees where the opposing party brought claims without reasonable ground or to harass the prevailing party. Under both NRCPC 68 and NRS 17.115, attorneys' fees may be granted to a party that makes an offer of judgment that is refused and subsequently obtains a result more favorable than the offer.<sup>3</sup> Then, of course, there is the common provision of a commercial contract, whereby the prevailing party in a dispute may recover fees and costs.

While statutes, rules and contract terms make for interesting theoretical discussion, attorneys know that in practice, actually recovering all, or even some, attorneys' fees can be a difficult endeavor. Indeed, a contract allowing for the recovery of attorneys' fees is only as good as the language of the contract.<sup>4</sup> In some situations, the contract terms providing for an award of attorneys' fees might directly conflict with the statutes and rules also providing for (or preventing) an award of attorneys' fees. The complexity of the analysis surrounding the recovery of fees grows when an attorneys' lien is involved. In effect, whether and when attorneys' fees are recoverable can vary depending on the contract, the rule, and the attorney's and client's strategic decisions.

## When the Scope of an Attorneys' Fees Provision in a Contract is Not Broad Enough

An attorneys' fees provision is a standard term in any commercial contract. For example, such a term might state that if any legal action is brought for the enforcement of a specific agreement or because of an alleged dispute, breach, default or misrepresentation in connection with that agreement, the prevailing party is entitled to payment of costs and expenses, including reasonable attorneys' fees, from the other party.

Attorneys' fees provisions are routinely enforced and often result in an award of attorneys' fees for the prevailing party in a contract dispute. What happens, however, if it is not clear that the attorneys' fees term covers the dispute actually litigated between the contracting parties?

Providing guidance on this question, the Nevada Supreme Court held that an attorneys' fees provision will not be applied more broadly than its terms. In *Dobron v. Bunch*,<sup>5</sup> the attorneys' fees provision in a guaranty agreement stated that the Guarantor shall pay the Lender's reasonable attorneys' fees "in collecting or compromising any such indebtedness or in enforcing this Guarantee against Guarantor." After the Lender was sued by the Borrower in a usury action, the Lender sought attorneys' fees against the Guarantor.

In determining whether the attorneys' fees provision was enforceable, the *Dobron* court held that guaranty agreements will no longer be strictly construed but instead will be interpreted pursuant to general contract principles. As such, reiterating a prior holding, the court stated that "[w]here a contract provision purports to allow attorney's fees in an action arising out of the terms of the instrument, we will not construe the provision to have broader application."<sup>6</sup> However, the usury action did not involve an enforcement of the guaranty agreement nor did it involve any affirmative attempts to collect on the underlying debt. Indeed, the Lender elected to file separate actions to collect on the debt. Therefore, because the usury action did not fit into the specific language of the attorneys' fees provision, the guaranty agreement did not allow for the recovery of attorneys' fees.

The holding of the *Dobron* case is perhaps obvious and certainly makes sense. Without an attorneys' fees provision being limited to the express language of the term, a claim for attorneys' fees could include fees incurred for matters that extend far beyond a dispute over the contract containing the attorneys' fees clause and, in doing so, far beyond the intent of



the contracting parties. Given its importance, the scope of the attorneys' fees provision should be considered when drafting the contract, not just during litigation. At the drafting stage, both sides will want to consider whether and to what extent they are willing to pay or forego attorneys' fees in a later dispute, and limit the attorneys' fees provision accordingly.

While it is not easy to predict a disagreement between parties to a contract, the scope of the attorneys' fees provision could lead to certain strategic decisions in a later dispute. Indeed, if the Lender in *Dobron* had counterclaimed for recovery of the debt in the usury action, the Lender's demand for attorneys' fees may have fared better, as it would have been firmly tethered to the contract as a subject of the action. Attorneys are well-served by carefully studying the attorneys' fees provision of a contract early in the case (as well as other avenues for the recovery of fees), and to make any potential strategic decisions accordingly, not merely after a judgment when it is time to move for attorneys' fees.

### When the Prevailing Party Does Not Prevail as to Attorneys' Fees

In the attorneys' fees provision of a typical commercial contract, the *prevailing party* in a dispute shall be entitled to payment from the other party or parties for the *prevailing party's* costs and expenses, including attorneys' fees. Simple as that might seem, the application of such a contract term might conflict with rules and statutes, such as those for offers of judgment. For example, what happens when Party A is the prevailing party against Party B, but Party A previously rejected an offer of judgment from Party B that was better than what Party A actually recovered?

The Nevada Supreme Court has given some indication on how it might rule on such a question in *Albios v. Horizon Communities, Inc.*<sup>7</sup> In this Chapter 40 construction defect case, plaintiffs requested attorneys' fees under NRS 40.655, but had previously rejected offers of judgment under NRS 17.115 and NRCP 68. The court held that the mandatory offer of judgment penalties superseded the discretionary Chapter 40 attorneys' fees award. Any other result would be absurd, thwarting "the policy of NRCP 68 and NRS 17.115 – to save time and money for the court system, the parties and the taxpayer by rewarding the party who makes a reasonable offer and punishing the party

who refuses to accept such an offer."<sup>8</sup> Thus, where a party is foreclosed from recovering costs and fees under NRCP 68 and NRS 17.115, the party is also foreclosed from recovering costs and fees under NRS 40.655.

Although *Albios* does not speak directly to contractual provisions awarding attorneys' fees, it does demonstrate how rules governing the recovery of attorneys' fees might conflict with contracts and how the Nevada Supreme Court appreciates the importance of the offer of judgment rules in such a conflict. *Albios* indicates that even when a prevailing party in an action has contractual support for an award of attorneys' fees, if that party does not prevail to the extent of a previous offer of judgment, the prevailing party might not be entitled to the recovery of attorneys' fees (even despite contractual support). The potential for conflict between contract and rule therefore adds further layers to the subtlety and nuance in both offering and accepting offers of judgment.

### When an Attorneys' Lien is Not a Lien

Strategies regarding obtaining attorneys' fees also often involve attorneys' liens. Nevada recognizes two kinds of attorneys' liens: (1) a common law general or retaining lien that allows a discharged attorney to withhold the client file until the court adjudicates the client's rights and obligations with respect to the lien; and (2) a statutory special or charging lien on the judgment or settlement the attorney obtained for the client.<sup>9</sup> The special or charging lien is governed by NRS 18.015, the purpose of which is to encourage attorneys to take cases for those who otherwise could not afford to litigate.<sup>10</sup>

Among other issues that might arise with charging liens is whether or not the charging lien has priority over other liens. NRS 18.015 does not directly address priority of attorney liens.

However, in *John W. Muije, Ltd. v. A N. Las Vegas Cab Co.*,<sup>11</sup> the Nevada Supreme Court concluded that a perfected attorney's lien attaches to a net judgment received by the client after all setoffs arising from that action have been paid. In *Michel v. Eighth Judicial Dist. Court ex rel. County of Clark*, the Nevada Supreme Court concluded the attorney lien had priority over a medical provider lien.<sup>12</sup> However, what happens when an attorney with an attorneys' lien and a secured creditor assert interest in the same proceeds?

In considering the attorney versus secured creditor conflict, the Nevada Supreme Court has set forth policy reasons supporting a finding that an attorneys' lien is superior to that of other creditors. Indeed, without assurance that fees will be paid, a claimant may be deprived of legal representation, resulting in detriment to both litigants and their creditors.<sup>13</sup> On the other hand, courts generally abide by the rule that the lien that is first in time is superior to subsequent liens.<sup>14</sup> Under these circumstances, counsel for secured creditors alleging priority against an attorneys' lien should prepare to be confronted by the policy considerations explained in *Michel* and should expect a court's sympathies to favor the holder of an attorneys' lien.

Nevertheless, one thing is clear: under NRS 18.015(2), an attorney must properly perfect an attorneys' lien "by serving

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notice in writing, in person or by certified mail, return receipt requested, upon his or her client and upon the party against whom the client has a cause of action, claiming the lien and stating the interest which the attorney has in any cause of action.” In the absence of proper perfection, an attorneys’ lien may be rendered unenforceable<sup>15</sup> and counsel risks the distribution of proceeds to which the attorneys’ lien could attach to other secured creditors. NRS 18.015(2) provides clear instruction for the perfection of a lien, and it is a requirement that should not be overlooked. In a priority fight over the allocation of settlement or judgment proceeds against a secured creditor armed with proper and timely perfection of its interest, a lawyer relying on an unperfected attorneys’ lien will likely have the “uphill side” of the battle for the limited funds at stake. Thus, NRS 18.015 and its perfection requirement is yet another critical consideration for a lawyer attempting to obtain attorneys’ fees from a source other than the client.

The following refrain is recited in many of the Nevada Supreme Court cases analyzing disputes over the recovery of attorneys’ fees: “The district court may award attorney fees only if authorized by a rule, contract, or statute.”<sup>16</sup> Although it is an important principle of Nevada law, it only scratches the surface of the numerous issues that may arise when pursuing the recovery of attorneys’ fees.

It is never too early for counsel to consider when and how attorneys’ fees may be successfully recovered from an adverse party. Smart drafting of contracts by counsel cognizant of problems posed in the pursuit of attorneys’ fees from an adversary is critical to a client’s success. Litigation counsel should be sure to consider how a particular strategy impacts a potential award of attorneys’ fees, so that the tactics employed do not inadvertently undermine the case for fees and costs. Dedicated attention to protecting and preserving a client’s right to recover fees and costs in the context of Nevada’s framework not only strengthens a client’s position in a specific matter, but is an important key to developing and keeping content clients. ■



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- 1 *Fox v. Vice*, 131 S. Ct. 2205, 2213 (2011).
- 2 *Thomas v. City of N. Las Vegas*, 122 Nev. 82, 90, 127 P.3d 1057, 1063 (2006).
- 3 *See Beattie v. Thomas*, 99 Nev. 579, 588-89, 668 P.2d 268, 274 (1983) (setting forth factors to consider when deciding a motion for attorneys’ fees under NRCP 68 or NRS 17.115).
- 4 Of course, a contract providing for the recovery of fees and costs also depends on the solvency of the responsible party. As the old joke goes, “\$3.15 and a contract provision for the recovery of fees might buy you a latte.”
- 5 125 Nev. 36, 215 P.3d 35 (2009).
- 6 *Id.* 215 P.3d at 38 (alteration in original) (quoting *Campbell v. Nocilla*, 101 Nev. 9, 12, 692 P.2d 491, 493 (1985)).
- 7 122 Nev. 409, 132 P.3d 1022 (2006).
- 8 *Id.* at 419, 132 P.3d at 1029.
- 9 *Argentina Consol. Min. Co. v. Jolley Urga Wirth Woodbury & Standish*, 125 Nev. 527, 531-32, 216 P.3d 779, 782 (2009).
- 10 *BeroWachs v. Law Office of Logar & Pulver*, 123 Nev. 71, 75, 157 P.3d 704, 706-07 (2007).
- 11 106 Nev. 664, 799 P.2d 559 (1990) (concluding defendant’s setoff to the judgment against defendant was superior to plaintiff’s attorney’s lien and therefore plaintiff’s attorney was entitled to no fees).
- 12 117 Nev. 145, 17 P.3d 1003 (2001).
- 13 *Id.* at 149-50, 17 P.3d at 1006.
- 14 *See John W. Muije, Ltd.*, 106 Nev. at 666, 799 P.2d at 560; *McGonigle v. Combs*, 968 F.2d 810, 829 (9th Cir. 1992).
- 15 *See Schlang v. Key Airlines, Inc.*, 158 F.R.D. 666, 670 (D. Nev. 1994) (“Because Kennedy failed to properly perfect his lien prior to settlement, there no longer existed any proceeds to which the lien could attach. Thus, the lien is unenforceable.”).
- 16 *Barney v. Mt. Rose Heating & Air Conditioning*, 124 Nev. 821, 825, 192 P.3d 730, 733 (2008).