

2004

## Attorney fees clause for compensation but not fraud claims: Hasler v Howard, 2004

Roger Bernhardt

Golden Gate University School of Law, rbernhardt@ggu.edu

Follow this and additional works at: <http://digitalcommons.law.ggu.edu/pubs>

 Part of the [Property Law and Real Estate Commons](#)

---

### Recommended Citation

Bernhardt, Roger, "Attorney fees clause for compensation but not fraud claims: Hasler v Howard, 2004" (2004). *Publications*. Paper 251.

<http://digitalcommons.law.ggu.edu/pubs/251>

This Article is brought to you for free and open access by the Faculty Scholarship at GGU Law Digital Commons. It has been accepted for inclusion in Publications by an authorized administrator of GGU Law Digital Commons. For more information, please contact [jfischer@ggu.edu](mailto:jfischer@ggu.edu).

**Attorney fees clause for compensation but not fraud claims:**

***Hasler v Howard, 2004***

**Roger Bernhardt**

**Attorney fees clause in listing agreement, which was limited to actions regarding broker's compensation, did not cover fees incurred by broker in seller's failed fraud action.**

*Hasler v Howard* (2004) 120 CA4th 1023, 16 CR3d 217

Hasler listed his house for sale by broker Howard. The listing agreement provided for attorney fees to the prevailing party in an action regarding the broker's compensation. Hasler sued Howard for fraud, breach of fiduciary duty, and breach of duty to disclose, claiming she sold his house below its value. Hasler's complaint did not request return of Howard's commission. At a settlement conference, Hasler offered to compromise his claim for the amount of the commission; the case did not settle. After Hasler voluntarily dismissed his complaint, Howard moved for attorney fees, offering the settlement statement to show that the broker's commission was an element of Howard's damages claim. The trial court excluded the settlement statement and denied the motion for fees.

The court of appeal affirmed, holding that the settlement statement was inadmissible under Evid C §1152(a), which prohibits admission of an offer made in compromise, as well as statements made in negotiation thereof, for the purpose of proving a person's liability for loss. In this case, §1152 prohibits the admission of the settlement statement because it tended to establish Hasler's liability for attorney fees.

The court also rejected Howard's argument that the listing agreement's attorney fees clause covered Hasler's tort actions. The court pointed out that the clause was limited to actions "regarding the obligation to pay compensation" under the listing agreement and agreed with the trial court that Hasler's action did not involve the obligation to pay the broker's commission.

***THE EDITOR'S TAKE:*** A ruling that distinguishes—and upholds—a clause providing for attorney fees in fee actions but not in malpractice ones can be extremely useful to lawyers as well as brokers. At least, I assume that the same principles would apply to both professionals. For an attorney who sues a client for fees only when all other avenues have been exhausted, and only when she truly believes that she has earned them, the inclusion of an attorney fees clause in her retainer agreement not only justifies the litigation but also is an effective antidote against clients whose recalcitrance is generated mainly by a hope that it will lead to a reduced bill, regardless of the merits.

On the other hand, for attorneys who resist including such a clause—as many do—out of fear that it makes it too easy for the client to find an attorney willing to bring a dubious malpractice claim on his behalf, this case shows a way to get the good without the bad: An

attorney who shares those assumptions can include in her retainer a provision for attorney fees in compensation actions but not in any malpractice ones.

Of course, this requires that the client understand this arrangement and knowingly consent to it; its very attractiveness to the attorney makes it suspect and unlikely to be valid if slipped in under the radar. Also, the attorney had better be right about the compensation she deems herself owed, since a court decision that she is owed less than she claims could reverse the outcome on the attorney fee burden. And she had also better be right about the nonmalpractice, because—even if attorney fees aren't added in—that kind of award can be pretty high. —*Roger Bernhardt*