

January 2009

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Stephen R. Ginger

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Recommended Citation

Stephen R. Ginger, *Attorneys' Fees Awards to Contract Nonsignatories: Should Equitable Estoppel Inform the Discretion of the Courts?*, 40 Golden Gate U. L. Rev. (2009).
<http://digitalcommons.law.ggu.edu/ggulrev/vol40/iss1/2>

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ARTICLE

ATTORNEYS' FEES AWARDS TO
CONTRACT NONSIGNATORIES:
SHOULD EQUITABLE ESTOPPEL
INFORM THE DISCRETION OF THE
COURTS?

*STEPHEN R. GINGER**

I. INTRODUCTION

More than two hundred years ago, the United States Supreme Court established the “American Rule” of attorneys’ fees in civil cases, which provides that a party to a lawsuit must bear the expense of his or her own attorneys.¹ Since that time, several exceptions to the American Rule have been created by the courts and legislatures. Probably the most frequently employed exception is the “contractual” exception, in which the parties to a contract allocate the risk of loss arising from actions to enforce the contract by imposing an obligation

* General Counsel, Teledyne Continental Motors, Inc., Mobile, Alabama 2003-present; Partner, Condon & Forsyth LLP, Los Angeles, California 1992-2003; Associate Attorney, Condon & Forsyth LLP, 1984-1992; Law Clerk to Honorable Albert Lee Stephens, Jr., United States District Court, Central District of California, 1982-1984; J.D., Southwestern University School of Law, 1982 (*cum laude*); admitted to the State Bar of California, 1982. The author was trial and appellate counsel in *First Republic Bank v. Kim*, No. BC035695 (L.A. Super. Ct.), *aff'd*, No. B103416 (Cal. 2d Dist. Ct. App. 1998) (unpublished), in which an award of attorneys’ fees to a contract nonsignatory based on the doctrine of estoppel was upheld on appeal. The views expressed in this article are the author’s own.

¹ See *Arcambel v. Wiseman*, 3 U.S. (3 Dall.) 306 (1796).

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on the losing party to pay the prevailing party's attorneys' fees.² The use of contractual fee-shifting provisions has become so widespread that, in the modern world of commercial transactions, it is virtually impossible to find a contract that does not contain an attorneys' fees provision.

Attorneys' fees provisions, which have their roots in notions of equity and fairness, also have another salutary, although perhaps unintended, effect. In light of the substantial costs of litigating commercial disputes in the courts, and the uncertainty of a favorable result, the very existence of an attorneys' fees provision in a contract can operate as a "nuclear deterrent" that forces the parties to settle their dispute without invoking the judicial process. The typical boilerplate attorneys' fees provision, to which almost no attention is paid in the drafting process, can have a significant effect on the parties' actions after a contractual dispute arises.

Cost considerations, which force the parties to negotiate instead of litigate, may not be readily apparent when one of the parties seeks to impose contractual liability on an individual or entity who is not a signatory to the contract. The attempt to impose such liability takes a variety of forms, and the imagination of counsel appears to be the only limitation on the initiation of these types of actions.³ However, there is great potential for an action against a nonsignatory to backfire in the event of an adverse judgment, either on a pretrial ruling by the court or after a trial. California law provides that a nonsignatory to a contract who successfully defends an action may, under certain circumstances, recover his or her attorneys' fees when sued on a contract as if he or she were a party to it.⁴ Although the attorneys' fees issue may escape the notice of the litigants during the course of the litigation, the entry of judgment by the court, with its provision for costs to the prevailing party, usually precipitates an attorneys' fees motion.⁵

The rule of law granting nonsignatories attorneys' fees seems on its face anomalous. If a person is not a party to a

² See *Reynolds Metals Co. v. Alperson*, 599 P.2d 83, 85 (Cal. 1979).

³ Some of the more popular theories of liability gleaned from the cases include *alter ego*, *Arnold v. Browne*, 103 Cal. Rptr. 775 (Ct. App. 1972), and joint venture, *Babcock v. Omansky*, 107 Cal. Rptr. 512 (Ct. App. 1973).

⁴ See CAL. CIV. CODE § 1717(a) (West 2009).

⁵ See CAL. RULES OF CT. 3.1702.

contract, and is not deemed a third party beneficiary, how can he or she be entitled to the benefit of one of the contract's provisions? Moreover, in interpreting a contract, the court's primary function is to ascertain the intent of the parties.⁶ How can the court know what the contracting parties intended when the party asserting the right to attorneys' fees was not a signatory to the contract?

Although the cases have clearly established the right of nonsignatories to recover their attorneys' fees, there is considerable confusion in the courts as to the foundation on which this right exists. In the early cases, it was thought that the right emanated from the doctrine of estoppel.⁷ Early estoppel cases reasoned that if a party pursues a contract action against a nonsignatory, forcing the nonsignatory to defend the action, the party initiating the action should be estopped from later denying that the nonsignatory is not a party to the contract for purposes of an award of attorneys' fees.⁸

Thereafter, in a series of cases first adopting the doctrine of estoppel, then discarding it, and then recognizing its validity again, the courts have shown a sensational inability to formulate a coherent doctrine to inform the decision as to when a nonsignatory will be awarded fees and when they will be denied. While some courts continue to recognize the doctrine of estoppel as the basis on which fee awards to nonsignatories should be made, other courts require a showing that, as a matter of law, the losing party could have actually recovered a fee award against the nonsignatory, assuming the loser had prevailed on the merits of the lawsuit. This latter approach is manifestly unfair and imposes a substantial and unjustified financial burden on the nonsignatory.

This Article argues that, although the doctrine of estoppel has fallen into disrepute in recent cases, it is still the fairest and most equitable basis on which to adjudicate the right to attorneys' fees in nonsignatory cases. Part II puts the problem of nonsignatory recovery of attorneys' fees in historical context by examining the roots and rationale of the "American Rule" of

⁶ See *Pac. Gas & Elec. Co. v. G. W. Thomas Drayage & Rigging Co.*, 442 P.2d 641 (Cal. 1968); *Trident Ctr. v. Conn. Gen. Life Ins. Co.*, 847 F.2d 564 (9th Cir. 1988).

⁷ See *infra* notes 44-64 and accompanying text.

⁸ *Id.*

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attorneys' fees. Part III describes section 1717 of the California Civil Code and case law interpretation of that section. Part IV will trace the development of the doctrine permitting recovery of attorneys' fees by nonsignatories to a contract through California case law and identify the basis that courts rely on to grant or deny such recovery. Part V provides an explication of the erroneously decided case of *Leach v. Home Savings & Loan Ass'n*, and Part VI explains the judicial response to *Leach* and the confusion it created. In Parts V and VI, the steady erosion of the doctrine of estoppel is analyzed in the post-*Leach* era, and an argument is presented as to why this trend should be reversed.

II. THE "AMERICAN RULE" AND THE EQUITABLE IMPULSE TO GRANT FEES

In determining whether attorneys' fees may be awarded in a civil case, most courts follow the so-called "American Rule," which generally provides that "each party must pay his own attorney fees."⁹ The "American Rule" received its name as a means to distinguish it from the longstanding practice English courts used to award attorneys' fees to the prevailing party in civil lawsuits.¹⁰ The Statute of Gloucester, enacted in 1278, allowed a successful plaintiff the "costs of his writ purchased."¹¹ These costs were "from the outset liberally construed to encompass all legal costs of suit, including counsel fees."¹² Subsequently, in the seventeenth century, the English courts expanded the rule to cover prevailing defendants as well as plaintiffs.¹³

The early English cases in which attorneys' fees were

⁹ *Gray v. Don Miller & Assocs., Inc.*, 674 P.2d 253, 256 (Cal. 1984); *see also Santisas v. Goodin*, 951 P.2d 399 (Cal. 1998). The American Rule has been codified by the California Legislature in section 1021 of the California Code of Civil Procedure, which states that each party is to bear his own attorneys' fees unless such an award is permitted by statute or contract. *See* CAL. CIV. PROC. CODE § 1021 (Westlaw 2009).

¹⁰ *See Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 247 (1975); *see also Note, Distribution of Legal Expense Among Litigants*, 49 YALE L.J. 699, 704-06 (1940).

¹¹ Statute of Gloucester, 1278, 6 Edw. 1, c 1; *see also* 2 POLLOCK & MAITLAND, THE HISTORY OF ENGLISH LAW 597 (2d ed. 1898); *Day v. Woodworth*, 54 U.S. (13 How.) 363, 372 (1851).

¹² *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 717, n.7 (1967) (citing Arthur L. Goodhart, *Costs*, 38 YALE L.J. 849, 852 (1929)).

¹³ Statute of Westminster, 1607, 4 Jac. 1, c 3; Goodhart, *supra* note 12, at 851-54.

awarded generally fell into three categories: (1) where allegations of fraud and misconduct were made but not proven; (2) where the gravamen of the lawsuit was false, unjust, vexatious, wanton, or oppressive; and (3) where a fiduciary relation existed, such as trustee and trustor, pledgor and pledgee, or principal and agent, and the fiduciary was put to expense in defending an unfounded suit or in protecting the trust property.¹⁴ An award of fees by an English court of equity was entirely discretionary and made “solely according to the conscience of the court” when “the justice of the case might so require.”¹⁵ It is clear that deterrence of frivolous or unfounded lawsuits, in addition to the sense of fairness expressed by compensating the aggrieved party, was a major objective of the English rule on attorneys’ fees.¹⁶

The courts of colonial America largely adopted this English practice of awarding attorneys’ fees in civil litigation.¹⁷ However, by the time of the ratification of the United States Constitution, the states had begun to regulate fee awards by establishing schedules to be applied by the courts.¹⁸ These early state fee schedules failed to keep pace with inflation and became so outdated that they were, as one commentator characterized them, “in the arrested development stage” with the fees “entirely inadequate and trivial.”¹⁹ Unlike state courts, federal courts made fee awards based on their “inherent power,” which they believed had been inherited from the English courts.²⁰ However, they borrowed the state schedules to guide them in the amounts awarded.²¹

As a result, “the statutorily awarded fees soon became little more than nominal awards,”²² and in 1796 the United States Supreme Court established the “American Rule” in the

¹⁴ See *Guardian Trust Co. v. Kansas City S. Ry. Co.*, 28 F.2d 233, 241 (8th Cir. 1928).

¹⁵ *Id.* at 240.

¹⁶ See generally MARY FRANCES DERFNER & ARTHUR D. WOLF, COURT AWARDED ATTORNEY FEES, § 1.02 (1985).

¹⁷ *The Baltimore*, 75 U.S. (8 Wall.) 377 (1869).

¹⁸ DERFNER & WOLF, *supra* note 16, § 1.02.

¹⁹ Charles T. McCormick, *Counsel Fees and Other Expenses of Litigation as an Element of Damages*, 15 MINN. L. REV. 619, 626 (1931).

²⁰ DERFNER & WOLF, *supra* note 16, § 1.02.

²¹ *Id.*

²² *Id.*, § 1.02 n.12.

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case of *Arcambel v. Wiseman*.²³ In *Arcambel*, the Court struck an attorneys' fees award in an admiralty case, holding that the "general practice of the United States is in opposition to it."²⁴

The response to *Arcambel* has not been favorable, and several exceptions to the rule have been created and expanded by the courts and legislatures.²⁵ Exceptions — such as private-attorney-general, substantial-benefit, common-fund, and bad-faith exceptions — were created by the "equitable impulse" of the courts, "fueled by a desire to make the prevailing party whole, by a perceived unfairness in requiring the prevailing party to shoulder the expenses of litigation in a particular case"²⁶ Because of this, some of these exceptions have not survived the scrutiny of the Supreme Court.²⁷ Although the American Rule appears to be in no danger of repudiation by the Supreme Court,²⁸ the exceptions to the rule, whether common-law or statutory, seem to remain firmly rooted in the "conscience" of the English courts of equity.

III. SECTION 1717 OF THE CALIFORNIA CIVIL CODE

One of the most widely employed exceptions to the

²³ *Arcambel v. Wiseman*, 3 U.S. (3 Dall.) 306 (1796).

²⁴ *Id.*

²⁵ DERFNER & WOLF, *supra* note 16, § 1.03. See also CHARLES T. MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES § 60-71 (1935); Albert A. Ehrenzweig, *Reimbursement of Counsel Fees and the Great Society*, 54 CAL. L. REV. 792 (1966); Comment, *Court Awarded Attorney's Fees and Equal Access to the Courts*, 122 U. PA. L. REV. 636, 637 (1974); William B. Stoebuck, *Counsel Fees Included in Costs: A Logical Development*, 38 U. COLO. L. REV. 202, 206-07 (1966).

The first formal attack on the American Rule was issued by the Massachusetts Judicial Council in 1925. See *First Report of the Judicial Council of Massachusetts*, 11 MASS. L. Q. 63-64 (1925). The Council stated in its report:

On what principle of justice can a plaintiff wrongfully run down on a public highway recover his doctor's bill but not his lawyer's bill? And on what principle of justice is a defendant who has been wrongfully haled into court made to pay out of his own pocket the expense of showing that he was wrongfully sued?

²⁶ DERFNER & WOLF, *supra* note 16, § 1.03.

²⁷ See *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714 (1967) (trademark exception disallowed); see also *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 241 (1975).

²⁸ "The Supreme Court has consistently felt that it is the function of Congress, not the federal courts, to determine when property (in the nature of attorneys fees) should involuntarily be taken from one party and given to another." DERFNER & WOLF, *supra* note 16, § 1.03 n.21.

American Rule of attorneys' fees is the "contractual" exception. Under this exception, parties to an agreement may allocate the risk of an adverse judgment in a legal dispute by requiring the losing party to pay the attorneys' fees of the prevailing party.²⁹ If a contract makes an award of attorneys' fees available to only one party, section 1717 of the California Civil Code makes the right a reciprocal one.³⁰ Section 1717 was enacted in 1968 to ensure mutuality of remedy for attorneys' fee claims and to prevent "oppressive use of one-sided attorney's fees provisions."³¹ As originally drafted, section 1717 provided in pertinent part as follows:

In any action on a contract, where such contract specifically provides that attorney's fees and costs, which are incurred to enforce the provisions of such contract, shall be awarded to one of the parties, the prevailing party, *whether he is the party specified in the contract or not*, shall be entitled to reasonable attorney's fees in addition to costs and necessary disbursements.³²

The provision was "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."³³

²⁹ See Robert S. Miller, *Attorneys' Fees for Contractual Non-Signatories Under California Civil Code Section 1717: A Remedy in Search of a Rationale*, 32 SAN DIEGO L. REV. 535, 543 (1995).

³⁰ Reynolds Metals Co. v. Alperston, 599 P.2d 83, 85 (Cal. 1979); Int'l Indus., Inc. v. Olen, 577 P.2d 1031 (Cal. 1978); Xuereb v. Marcus & Millichap, Inc., 5 Cal. Rptr. 2d 154, 156-57 (Ct. App. 1992); Sys. Inv. Corp. v. Union Bank, 98 Cal. Rptr. 735, 752 (Ct. App. 1971) (quoting Review of Selected 1968 Code Legislation (Cont. Ed. Bar) pp. 35-36).

³¹ Santisas v. Goodin, 951 P.2d 399, 416 (Cal. 1998) (Baxter, J., concurring and dissenting) (quoting Hsu v. Abbara, 891 P.2d 804, 809 (Cal. 1995)); see PLCM Group v. Drexler, 22 Cal. 4th 1084 (2000); Reynolds, 599 P.2d at 85 (citing Coast Bank v. Holmes, 97 Cal. Rptr. 30, 39-40 (Ct. App. 1971); Sears v. Baccaglio, 70 Cal. Rptr. 2d 769, 775 (Ct. App. 1998); see also James D. Acoba, *Recovery of Attorney's Fees in Actions to Enforce Contracts: California Civil Code Section 1717*, 12 W. ST. U. L. REV. 751 (1985).

³² Santisas, 951 P.2d at 416 (Baxter, J., concurring and dissenting) (citing Cal. Stats. 1968, ch. 266, § 1, p. 578) (emphasis added).

³³ Coast Bank v. Holmes, 97 Cal. Rptr. 30, 39 n.3 (Ct. App. 1971); see also Legislative Counsel's Enrolled Bill Mem. on Assem. Bill No. 563 (1968 Reg. Sess.) prepared for Governor Reagan (June 5, 1968), p. 1 ("The bill is intended to protect persons of limited means who sign contracts with those in a superior bargaining

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Initially, the courts reached contradictory conclusions on whether section 1717 applies to nonsignatories. The first case to apply section 1717 to a claim for attorneys' fees by a nonsignatory to a contract was *Arnold v. Browne*.³⁴ In *Arnold*, plaintiffs were individual shareholders of a corporation who entered into a stock-purchase agreement with the members of a general partnership.³⁵ The stock-purchase agreement required that the partnership assume the form of a corporation and issue a promissory note to the shareholders for the purchase price of the stock, secured by a stock pledge and a chattel mortgage.³⁶ Although the partnership was incorporated as required by the stock-purchase agreement, it subsequently went bankrupt and defaulted on the promissory note.³⁷ The shareholders sued the corporation for breach of the promissory note.³⁸ They also sued the principals of the corporation on a theory of *alter ego* liability to hold them personally liable for the promissory-note debt.³⁹ The shareholders obtained a default judgment against the bankrupt corporation.⁴⁰ However, the individual defendants prevailed at trial, with the court finding that the elements of *alter ego* liability had not been proven.⁴¹ The defendants made a motion for attorneys' fees based on a fee provision contained in the promissory note, which was denied by the trial court.⁴² The First District Court of Appeal affirmed, holding simply that under section 1717, "the individual defendants were not entitled to attorneys' fees, as they were not 'parties' to the contract."⁴³

A year later, the Second District Court of Appeal reached

position."); *see also* *Moallem v. Coldwell Banker Commercial Group*, 31 Cal. Rptr. 2d 253, 256 (Ct. App. 1994) (quoting *Sys. Inv. Corp. v. Union Bank*, 98 Cal. Rptr. 735, 752 (1971) (stating that the purpose of section 1717 was to advance "the policy of the state to protect the unequal bargaining power of the 'little man' in contracts of adhesion")).

³⁴ *Arnold v. Browne*, 103 Cal. Rptr. 775 (Ct. App. 1972). For a discussion of the early judicial response to section 1717, *see* Miller, *supra* note 29, at 548-553; Saxon, *Recovery of Attorneys Fees by the Non-Contracting Defendant*, 55 CAL. STATE BAR J. 150 (1980).

³⁵ *Arnold*, 103 Cal. Rptr. at 778-79.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Arnold*, 103 Cal. Rptr. at 778-79.

⁴² *Id.*

⁴³ *Id.*

the opposite conclusion in *Babcock v. Omansky*.⁴⁴ *Babcock* involved an action for breach of promissory notes signed by one of the defendants.⁴⁵ One of the numerous causes of action pleaded by plaintiff alleged that defendant's wife was also liable on the promissory notes on the ground that she acted as a co-venturer and agent of defendant.⁴⁶ The promissory notes contained a standard attorneys' fees provision.⁴⁷

The trial court granted a nonsuit in favor of defendant's wife but denied her request for attorneys' fees pursuant to section 1717, holding that defendant's wife was not a prevailing party because she was found liable for fraud on another cause of action.⁴⁸

The court of appeal reversed.⁴⁹ The court construed the language of section 1717 and held that

[a]s the language of the statute expressly indicates, a party need not be a signatory to the contract in order to recover attorney's fees as the prevailing party — as such prevailing party he becomes entitled to fees “whether he is the party specified in the contract *or not*.”⁵⁰

The *Babcock* court noted that plaintiff clearly pleaded a cause of action against defendant's wife for breach of the promissory notes, and that “having won an order of nonsuit as to this tenth cause of action, [defendant] was the ‘prevailing party’ and entitled to attorney's fees under section 1717.”⁵¹ The *Babcock* court rejected plaintiff's argument that defendant could not be the prevailing party for purposes of an attorneys' fees award because she had been found liable for fraud, holding that the fraud cause of action was *ex delicto*, not *ex contractu*.⁵²

In 1976, the Fourth District Court of Appeal cited *Babcock*

⁴⁴ *Babcock v. Omansky*, 107 Cal. Rptr. 512, 518-19 (Ct. App. 1973).

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Babcock*, 107 Cal. Rptr. at 518-19; *see also* *Brusso v. Running Springs Country Club, Inc.*, 278 Cal. Rptr. 758, 768 (Ct. App. 1991); *Manier v. Anaheim Bus. Ctr. Co.*, 207 Cal. Rptr. 508, 510 (Ct. App. 1984); *Jones v. Drain*, 196 Cal. Rptr. 827, 830 (Ct. App. 1983).

⁵¹ *Babcock*, 107 Cal. Rptr. at 518.

⁵² *Id.*

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with approval in *Care Construction, Inc. v. Century Convalescent Centers, Inc.*,⁵³ in which an attorneys' fees award was upheld in favor of a defendant who successfully defended a contract action on the ground that the contract was unenforceable.⁵⁴ However, only two years later, the Fourth District repudiated *Babcock* in *Canal-Randolph Anaheim, Inc. v. Wilkoski*.⁵⁵ *Canal-Randolph* was an unlawful detainer action against an attorney who had assumed office space in plaintiff's building without signing a lease.⁵⁶ After a bench trial, the trial court entered a judgment for defendant, finding plaintiff's three-day notice to pay rent or quit defective.⁵⁷ The trial court made an award of attorneys' fees to defendant under the lease, and plaintiff appealed.⁵⁸

On appeal, the *Canal-Randolph* court reversed, holding that the trial court's findings were insufficient to support the judgment.⁵⁹ The court took the position that, as a matter of law, no attorneys' fees could be recovered by defendant, because defendant was not a party to the lease agreement.⁶⁰ The court rejected defendant's argument that section 1717 provided the trial court with authority for the attorneys' fees award, on the ground that under section 1717, "recovery of and liability for attorney fees is restricted to parties to the contract."⁶¹ Ignoring the plain language of section 1717, the *Canal-Randolph* court, in a *tour de force* of tortured statutory construction, asserted that

[t]he introductory clause [of section 1717] sets forth the predicate for applicability of the section, to wit, a contract providing for recovery of attorney fees by only one of the parties to the contract. The language "the party specified in the contract" refers to the party to the contract authorized by the terms of the contract to recover attorney fees should he

⁵³ *Care Constr., Inc. v. Century Convalescent Ctrs., Inc.*, 126 Cal. Rptr. 761 (Ct. App. 1976).

⁵⁴ *Id.* at 762.

⁵⁵ *Canal-Randolph Anaheim, Inc. v. Wilkoski*, 144 Cal. Rptr. 474 (Ct. App. 1978).

⁵⁶ *Id.* at 475-76.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.* at 476. The action was remanded back to the trial court with directions to make specific findings on all of the issues raised by the parties. *Id.*

⁶⁰ *Id.* at 475-76.

⁶¹ *Id.* at 476.

prevail. “[T]he prevailing party, whether he is the party specified in the contract or not” means the prevailing party, whether or not he is the party authorized by the terms of the contract to recover attorneys fees should he prevail. In either case, the reference is to the party to the contract who prevails. It was the purpose of the statute to make unilateral attorney fee provisions in a contract reciprocal, not to extend the benefit of a contractual provision for the recovery of attorney fees to a person not a party to the contract.⁶²

The hostility of the *Canal-Randolph* court to the notion of awarding attorneys’ fees to a nonsignatory was manifestly expressed by its summary dismissal of defendant’s equitable argument.⁶³ As for *Babcock*, the *Canal-Randolph* court bluntly concluded that it was erroneously decided, and in an unusual opinion issued on the denial of defendant’s request for rehearing, the court expressly disapproved of its own citation to *Babcock* in the earlier *Care Construction* decision.⁶⁴ The conflict in the courts of appeal regarding the proper interpretation of section 1717 set the stage for a resolution of the problem by the California Supreme Court.

IV. *REYNOLDS V. ALPERSON* AND ITS PROGENY

In the landmark case of *Reynolds Metals Co. v. Alperson*,⁶⁵ the California Supreme Court put to rest the question whether a nonsignatory to a contract may recover attorneys’ fees when the nonsignatory is sued on the contract as if he or she were a party to it, and the contract contains an attorneys’ fees provision.⁶⁶ In *Reynolds*, plaintiff was the supplier of aluminum goods to a metal-supply company, Turner Metals.⁶⁷ Turner Metals, a wholly owned subsidiary of TMI, Inc.,

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.* The *Canal-Randolph* court could not seem to get over the apparent contradiction resulting from a literal interpretation of section 1717: “If ‘the unsuccessful party to such litigation’ is interpreted as referring to a person not a party to the lease, an absurdity results; the parties to the lease would be attempting to bind a person not a party to the lease to pay attorney fees.” *Id.* at 475-76.

⁶⁵ *Reynolds Metals Co. v. Alperson*, 599 P.2d 83 (Cal. 1979).

⁶⁶ *Id.* at 85.

⁶⁷ *Id.* at 84.

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purchased several hundred thousand dollars' worth of aluminum goods from plaintiff on credit.⁶⁸ In the course of their dealings, plaintiff obtained from the supply company two promissory notes that contained attorneys' fees provisions.⁶⁹ When Turner Metals became insolvent and filed for bankruptcy, plaintiff filed a lawsuit, attempting to hold the shareholders and directors of TMI, Inc., responsible for the debts owed by Turner Metals on an *alter ego* theory of liability.⁷⁰ After a bench trial, the trial court found that plaintiffs had failed to prove their case and granted judgment for defendants.⁷¹ Defendants moved the court for an award of attorneys' fees based on the attorneys' fees provisions contained in the promissory notes, to which defendants were not parties.⁷² The trial court granted defendants' motion.⁷³

On appeal, the California Supreme Court reviewed the purpose of section 1717 and concluded that a nonsignatory who successfully defends against a breach-of-contract action may recover his or her attorneys' fees pursuant to a fee provision in the contract, despite the fact that he or she was not a party to the contract.⁷⁴ Relying on *Babcock v. Omansky*, the *Alperson* Court reasoned that

[h]ad plaintiff prevailed on its cause of action claiming defendants were in fact the alter egos of the corporation, defendants would have been liable on the notes. Since they would have been liable for attorney's fees pursuant to the fees provision had plaintiff prevailed, they may recover attorney's fees pursuant to section 1717 now that they have prevailed.⁷⁵

Subsequently, in cases applying the rule of *Reynolds*, the courts were careful to emphasize that the award of attorneys' fees to a nonsignatory had its roots in the doctrine of equitable estoppel. For example, in *Jones v. Drain*⁷⁶ defendants entered

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Reynolds Metals*, 599 P.2d at 84.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.* at 86.

⁷⁵ *Id.* (citation omitted).

⁷⁶ *Jones v. Drain*, 196 Cal. Rptr. 827, 830 (Ct. App. 1983).

into an exclusive real estate listing agreement with Sears Realty for the sale of their home.⁷⁷ Sears Realty entered into an oral agreement with another broker, Bob Jones Realty, for real estate broker services in connection with the sale of defendants' home.⁷⁸ Bob Jones Realty found a buyer for defendants' home, but defendants refused to sell because of a potential adverse tax consequence.⁷⁹ Defendants thereafter entered into an agreement to sell their home to a third party.⁸⁰ In the meantime, Bob Jones Realty had found another buyer for the home.⁸¹ Defendants refused to sell to the new buyer because they had previously entered into an agreement to sell their home.⁸²

Bob Jones Realty filed suit against defendants, alleging several causes of action for breach of the listing agreement. The listing agreement contained an attorneys' fees provision. Defendants prevailed on all causes of action, but the trial court denied their request for attorneys' fees on the ground that no contract existed between the parties.⁸³ However, the court of appeal reversed the trial court's order denying defendants' attorneys' fees. The court observed that section 1717 on its face requires an award of attorneys' fees to a nonsignatory, and that the cases holding to the contrary⁸⁴ run afoul of the rule announced in *Babcock* and *Reynolds*.⁸⁵ Furthermore, the *Jones* court explicitly held that, in determining whether an attorneys' fees award should be made, the courts should look to the pleadings to determine whether the nonsignatory was exposed to an attorneys' fees award.⁸⁶

The courts have consistently held that the award of Civil Code section 1717 contractual attorney's fees is to be governed by equitable principles. We believe that it is extraordinarily inequitable to deny a party who successfully

⁷⁷ *Id.* at 828.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Jones*, 196 Cal. Rptr. at 828.

⁸³ *Id.*

⁸⁴ *See* *Star Pac. Invs., Inc. v. Oro Hills Ranch, Inc.*, 176 Cal. Rptr. 546 (Ct. App. 1981); *Boliver v. Surety Co.*, 140 Cal. Rptr. 259 (Cal. App. Dep't Super. Ct. 1977).

⁸⁵ *Jones*, 196 Cal. Rptr. at 830.

⁸⁶ *Id.* at 829-30.

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defends an action on a contract, which claims attorney's fees, the right to recover its attorney's fees and costs simply because the party initiating the case has filed a frivolous lawsuit. As a consequence, we find that a prevailing defendant sued for breach of contract containing an attorney's fees provision and having had to defend the contract cause of action is entitled to recover its own attorney's fees and costs therefor, even though the trial court finds no contract existed.⁸⁷

Similarly, in *Manier v. Anaheim Business Center Co.*,⁸⁸ a case decided shortly after *Jones*, plaintiff executed a real-estate purchase agreement for commercial property owned by defendants.⁸⁹ Plaintiff failed to obtain necessary financing for the purchase, and defendants canceled the agreement.⁹⁰ Plaintiff sued defendants for specific performance and breach of contract, claiming that defendants had promised to assist plaintiff in obtaining financing.⁹¹ The trial court found that defendants had made no such promise and ruled in defendants' favor.⁹² Defendants then moved the court for an award of attorneys' fees. In denying the motion, the trial court ruled that no contract existed between the parties because defendants had inserted a handwritten note on the bottom of the agreement that plaintiff had not initialed.⁹³ The trial court treated the handwritten note as a counteroffer to which plaintiff had not agreed, and concluded that there was no contract on which an award of attorneys' fees could be based.⁹⁴

The Fourth District Court of Appeal reversed, holding that "[t]he existence of an enforceable agreement is not a prerequisite to an award of attorneys fees under Civil Code section 1717. That section is available even where the prevailing party succeeds on the theory there was never an enforceable contract."⁹⁵ The *Manier* court also rejected plaintiffs' argument that because they were not entitled to an

⁸⁷ *Id.* at 489-90 (citations omitted).

⁸⁸ *Manier v. Anaheim Bus. Ctr. Co.*, 207 Cal. Rptr. 508 (Ct. App. 1984).

⁸⁹ *Id.* at 509.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Manier*, 207 Cal. Rptr. at 509.

⁹⁵ *Id.* at 509-10.

award of attorneys' fees if they had prevailed, defendants were foreclosed from recovering their attorneys' fees.⁹⁶ Plaintiff "would have been entitled to attorneys fees if their complaint had merit, which it concededly did not."⁹⁷

Under *Reynolds* and its progeny, the basis for attorneys' fees awards under section 1717 became firmly rooted in the doctrine of equitable estoppel. Subsequently, the equitable estoppel doctrine was eroded in an erroneous court of appeal decision that introduced substantial confusion into this area of the law.

V. *LEACH V. HOME SAVINGS & LOAN ASS'N*

The first court of appeal decision after *Reynolds* to reject the doctrine of estoppel as a basis for an award of attorneys' fees to a nonsignatory was *Leach v. Home Savings & Loan Ass'n*.⁹⁸ In *Leach*, plaintiff was the beneficiary of a testamentary trust established upon the death of her mother.⁹⁹ The trust *res* consisted of a residence and some cash.¹⁰⁰ Plaintiff's brother, the trustee of the testamentary trust, borrowed \$33,600 from a bank, signed a promissory note, and secured the loan with a deed of trust on the trust residence.¹⁰¹ Plaintiff's brother subsequently borrowed another \$42,000 from a third party, securing the loan with another promissory note and second trust deed on the trust residence.¹⁰² At some point in time, plaintiff became aware that her brother had repeatedly

⁹⁶ *Id.* at 511.

⁹⁷ *Id.* Plaintiff's wife also argued that, because she did not sign the real estate purchase agreement, she could not be held liable for attorneys' fees under its attorneys' fees provision. The *Manier* court had no difficulty disposing of this argument. "Finally, it is of no moment that Marne Manier was not a signatory to the deposit receipt; she alleged entitlement to attorneys fees under it." *Id.* at 511-12 (citing *Jones v. Drain*, 196 Cal. Rptr. 827, 831 (Ct. App. 1983)).

⁹⁸ *Leach v. Home Sav. & Loan Ass'n*, 230 Cal. Rptr. 553 (Ct. App. 1986). At least two other court of appeal decisions have criticized *Manier* and *Jones* on the grounds that both of those decisions relied on a discredited estoppel theory to support their award of attorneys' fees to a nonsignatory to a contract. See *Super 7 Motel Assocs. v. Wang*, 20 Cal. Rptr. 2d 193 (Ct. App. 1993); *Myers Bldg. Indus., Ltd. v. Interface Tech., Inc.*, 17 Cal. Rptr. 2d 242, 250 n.12 (Ct. App. 1993). *But cf.* *Real Prop. Servs. Corp. v. City of Pasadena*, 30 Cal. Rptr. 2d 536 (Ct. App. 1994) (citing *Manier* and *Jones* with approval).

⁹⁹ *Leach*, 230 Cal. Rptr. at 555.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 555-56.

¹⁰² *Id.*

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mortgaged the trust residence without notifying her, in spite of the fact that he had been discharged as trustee.¹⁰³ Plaintiff filed an action to quiet title by having the various deeds of trust declared invalid.¹⁰⁴ Plaintiff contended that the various lending institutions that had made loans to her brother knew that he was acting without authority, because they had actual and constructive notice that he had been discharged as trustee.¹⁰⁵

Defendants moved for summary judgment on the basis of affidavits that showed they had no knowledge that plaintiff's brother had been discharged as trustee.¹⁰⁶ The trial court granted the motions for summary judgment, holding that defendants had proved that they had no actual knowledge that plaintiff's brother had been discharged as trustee.¹⁰⁷ Subsequently, the first and second trust-deed holders each moved the court for an award of attorneys' fees.¹⁰⁸ The trial court denied both of these motions.¹⁰⁹

The First District Court of Appeal affirmed. The *Leach* court, without any apparent need to do so, issued a broad holding that the doctrine of equitable estoppel was not the basis for an attorneys' fees award under section 1717.¹¹⁰ According to the *Leach* court, the "equitable estoppel theory was first announced in *Pas v. Hill*, a case that was criticized by legal writers and later overruled by the *Pas* court itself in *Saucedo v. Mercury Sav. & Loan Assn.* As such, *Jones and Manier* are not well-founded."¹¹¹

A close reading of *Pas* and *Saucedo*, however, reveals that these cases were entirely misread by the *Leach* court. Contrary to the *Leach* court's observation that the equitable estoppel theory was first "announced" in *Pas*, the *Pas* court did

¹⁰³ *Id.* at 556.

¹⁰⁴ *Id.*

¹⁰⁵ *Leach*, 230 Cal. Rptr. at 556.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ There is no indication in *Leach* that plaintiff requested an award of attorneys' fees in her complaint. A cryptic reference to "Leach's bare allegation that she is entitled to receive attorney's fees" appears to be a hypothetical statement intended to respond to an argument raised by defendants' counsel. *Id.* at 561.

¹¹¹ *Id.* (citations omitted); see also *Pilcher v. Wheeler*, 3 Cal. Rptr. 2d 533, 536 (Ct. App. 1992); *Alhambra Redevelopment Agency v. Transamerica Fin. Servs.*, 261 Cal. Rptr. 248, 253-54 (Ct. App. 1989).

not rely on equitable estoppel to reach its holding. In *Pas*, the court held that no attorneys' fees were recoverable by plaintiff because defendants, in their countersuit, were not attempting to establish plaintiff's liability under a promissory note, which would have made attorneys' fees recoverable under the reciprocity provisions of section 1717.¹¹² Rather, defendants in *Pas* "were seeking to sell the property at a trustee's sale pursuant to the deed of trust encumbering the property."¹¹³ Under these circumstances, "neither fairness nor the legislative purpose behind Civil Code section 1717 requires that plaintiffs be permitted to recover attorney fees from defendants."¹¹⁴ In reaching this conclusion, the *Pas* court did not rely on the doctrine of estoppel. The *Pas* court only mentioned the estoppel doctrine in dictum to explain the court's holding in *Babcock v. Omansky*.¹¹⁵

Subsequently, in *Saucedo*, plaintiffs argued on appeal that they should have been permitted to recover their attorneys' fees "under the equitable estoppel theory suggested in *Pas v. Hill*."¹¹⁶ In response to this argument, the *Saucedo* court recognized the viability of the estoppel argument but declined to adopt it as the basis of its ruling:

While plaintiffs' right to recover attorney fees might conceivably be established on that basis [equitable estoppel], our reanalysis of the problem leads us to the conclusion that our denial of the recovery of attorney fees in *Pas v. Hill* was in error, and we think it preferable to deal with the problem head on, rather than obliquely by adopting another theory.¹¹⁷

The *Saucedo* court then went on to revisit the conclusion reached in *Pas*: that persons seeking to sell a property at a trustee's sale, pursuant to a deed of trust, cannot recover their attorneys' fees.¹¹⁸ The *Saucedo* court held that this conclusion was in error, based on "the real relationship between a

¹¹² *Pas v. Hill*, 151 Cal. Rptr. 98, 108 (Ct. App. 1978).

¹¹³ *Id.* (citations omitted). It was this conclusion that the *Saucedo* court sought to revisit when it addressed the issue of attorneys' fees in that case.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Saucedo v. Mercury Sav. & Loan Ass'n*, 168 Cal. Rptr. 552, 554 (Ct. App. 1980).

¹¹⁷ *Id.* at 554-55 (footnote omitted).

¹¹⁸ *Id.*

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nonassuming grantee and the trust deed holder.”¹¹⁹ The court in *Saucedo* held that attorneys’ fees should be recoverable in such a situation because “as a practical matter, on foreclosure the beneficiary is entitled to recover its fees as a condition to redemption.”¹²⁰

Even though *Saucedo* effectively overruled *Pas*, it did not do so on the basis that equitable estoppel was an untenable theory to support an award of attorneys’ fees.¹²¹ Indeed, the *Pas* case itself was cited with approval by the California Supreme Court one year after it decided *Reynolds*,¹²² which established the principle that awards of attorneys’ fees are to be “governed by equitable principles.”¹²³ Therefore *Manier* and *Jones* retain their vitality as precedent to the extent that their holdings were based on equitable principles.¹²⁴

VI. POST-*LEACH* CONFUSION AND THE DOCTRINE OF ESTOPPEL

Instead of critically analyzing the court’s holding in *Leach*, several courts have simply accepted its holding and rejected the argument that an award of attorneys’ fees to nonsignatories should be based on the doctrine of estoppel.¹²⁵ For example, in *Super 7 Motel Associates v. Wang*, a purchaser of real property sued the seller and the seller’s broker for failing to disclose certain facts about the property.¹²⁶ The gravamen of plaintiff’s complaint was fraud, and plaintiff sought rescission or, alternatively, tort damages based on fraud.¹²⁷ Plaintiff prevailed against the seller but failed to prove his case against the broker.¹²⁸ The broker thereafter requested an award of attorneys’ fees, which the trial court

¹¹⁹ *Id.* at 555-56.

¹²⁰ *Id.*

¹²¹ *See Wilhite v. Callihan*, 185 Cal. Rptr. 215, 219 (Ct. App. 1982).

¹²² *Reynolds Metals Co. v. Alperson*, 599 P.2d 83, 86 (Cal. 1979).

¹²³ *Id.*

¹²⁴ *Montgomery v. Bio-Med Specialties, Inc.*, 228 Cal. Rptr. 709, 710 (Ct. App. 1986).

¹²⁵ *See, e.g., Super 7 Motel Assocs. v. Wang*, 20 Cal. Rptr. 2d 193 (Ct. App. 1993); *Myers Bldg. Indus., Ltd. v. Interface Tech., Inc.*, 17 Cal. Rptr. 2d 242, 250 n.12 (Ct. App. 1993); *Alhambra Redevelopment Agency v. Transamerica Fin. Servs.*, 261 Cal. Rptr. 248, 253-54 (Ct. App. 1989).

¹²⁶ *Super 7 Motel Assocs.*, 20 Cal. Rptr. 2d at 196.

¹²⁷ *Id.*

¹²⁸ *Id.*

granted. The Fourth District Court of Appeal reversed, holding that the broker was not a party to the portion of the real estate purchase agreement that contained an attorneys' fees clause covering disputes between the buyer and seller.¹²⁹ The broker argued, however, that if he was not considered a party to the real estate purchase agreement, he was nevertheless entitled to an award of fees under estoppel principles because he had been sued as a party to the agreement.¹³⁰ The court rejected this argument on the basis of *Leach*:

Thus, contrary to [the broker's] contention, *Reynolds* and similar cases do not rely on estoppel. . . . More importantly, *Leach* explained that "estoppel" is inconsistent with the *Reynolds* requirement that the nonsignatory show the plaintiff would *actually* have been entitled to fees.¹³¹

In *Myers Building Industries, Ltd. v. Interface Technology, Inc.*,¹³² the Second District Court of Appeal, in dictum, stated that the doctrine of estoppel did not apply to an award of attorneys' fees based on a unilateral attorneys' fees provision in a construction contract. The court reasoned that this was because the "mere allegation of a contractual right to attorney fees is not sufficient to create an estoppel where [defendant] would not *actually* have been entitled to attorney fees under the contract if [defendant] had prevailed."¹³³ In the view of the *Myers* court, both *Manier* and *Jones* were "disapproved" in *Leach*.¹³⁴ Neither the *Super 7* court nor the *Myers* court looked to see whether *Leach's* conclusion that the doctrine of estoppel had been discredited was correct.¹³⁵

In more recent decisions, courts have been similarly reluctant to reexamine the basis of the holding in *Leach*.¹³⁶

¹²⁹ *Id.* at 198.

¹³⁰ *Id.*

¹³¹ *Id.* at 199 (footnote and citations omitted).

¹³² *Myers Bldg. Indus., Ltd. v. Interface Tech., Inc.*, 17 Cal. Rptr. 2d 242 (Ct. App. 1993).

¹³³ *Id.* at 250 n.12.

¹³⁴ *Id.*

¹³⁵ In an attempt to harmonize *Leach* with *Jones* and *Manier*, the court in *Real Property Services Corp. v. City of Pasadena*, 30 Cal. Rptr. 2d 536 (Ct. App. 1994) stated that in both *Jones* and *Manier*, "the nonsignatory plaintiffs would have been entitled to attorney's fees if they had prevailed in the action on the contract." *Id.* at 541 n.5.

¹³⁶ See *Cal. Wholesale Material Supply, Inc. v. Norm Wilson & Sons, Inc.*, 117 Cal. Rptr. 2d 390, 396-97 (Ct. App. 2002); *Sessions Payroll Mgmt., Inc. v. Noble*

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However, one court has explicitly rejected it. In *International Billing Services, Inc. v. Emigh*,¹³⁷ the Third District Court of Appeal squarely addressed the *Leach* court's rejection of the estoppel theory and concluded that "[t]his makes little sense The *point* of an estoppel is to prevent a party from litigating an issue: Estoppel is not dependent on the potential merits of a claim but depends on the manner in which a claim is raised or not raised."¹³⁸ Clearly disturbed by the prospect of overreaching in litigation, the *Emigh* court stated flatly that "[t]he purposes of section 1717 are thwarted when a party is able to use the threat of fees as a club, and seek to avoid liability for fees later."¹³⁹

The view taken by the *Emigh* court has not been favorably received. Recently, in *Blickman Turkus, LP v. MF Downtown Sunnyvale, LLC*, the Sixth District Court of Appeal conducted a comprehensive survey of the case law interpreting section 1717.¹⁴⁰ The court observed that contract awards to nonsignatories based on an equitable estoppel theory have been "repeatedly criticized and rejected" and that several other courts have joined *Leach* "in rejecting estoppel as a basis for awarding attorney fees against a losing nonsignatory."¹⁴¹ The court acknowledged that "the estoppel view, or its equivalent, has also been repeatedly, if perplexingly and sometimes equivocally, resurrected"¹⁴² and proceeded to deliver a scathing critique of *Emigh*:

In [*Emigh*], the court opined that rejecting estoppel while adhering to contract language "ma[de] little sense" because, as the court offered interrogatively, "Why would any party

Constr. Co., 101 Cal. Rptr. 2d 127, 134 (Ct. App. 2000). *But see* *Loduca v. Polyzos*, 62 Cal. Rptr. 3d 780, 784-87 (Ct. App. 2007); *M. Perez Co. v. Base Camp Condos. Ass'n No. One*, 3 Cal. Rptr. 3d 563, 570 (Ct. App. 2003) ("[E]ven where the contract does not contain an attorney fee provision, if a party claims that it does and loses the case, it will be required to pay the prevailing party's attorney fees. However, we emphasized that this rule `applies only where a party brings a breach of contract action and the contract contains some provision which the party asserts operates as a fees provision.'" (quoting *Int'l Billing Servs., Inc. v. Emigh*, 101 Cal. Rptr. 2d 532, 540 (Ct. App. 2000))).

¹³⁷ *Int'l Billing Servs., Inc. v. Emigh*, 101 Cal. Rptr. 2d 532 (Ct. App. 2000).

¹³⁸ *Id.* at 541.

¹³⁹ *Id.* at 539.

¹⁴⁰ *Blickman Turkus, LP v. MF Downtown Sunnyvale, LLC*, 76 Cal. Rptr. 3d 325, 353-60 (Ct. App. 2008).

¹⁴¹ *Id.* at 356-57.

¹⁴² *Id.* at 357.

need to estop another party, where the provision actually-clearly-provided for fees?" We answer this question with one of our own: Why would a court predicate a holding, let alone a rule of law, on a party's "need[s]?" As the court there acknowledged, equitable estoppel generally "entails detrimental reliance" by one party on the words or conduct of the other. Merely praying for relief to which one is not entitled cannot ordinarily engender either reliance or detriment. . . . To visit a losing claimant's own demands upon him might appeal to a sense of playground justice, but it has no basis in our law. . . . We know of nothing in our law that justifies awarding such fees to a party merely because his opponent asked for them.¹⁴³

The *Blickman* court's statement that a prayer for relief cannot create reliance or detriment is surprising. It may well be that, in modern times, litigation is pursued with such ease and frequency that the courts have acquired a false impression that no one is harmed by the filing of a complaint. Nevertheless, defendants who become embroiled in litigation — particularly nonsignatories who are not parties to the disputed contract — do suffer harm from a prayer for relief against them, compounded by a request for attorneys' fees. Such harm may result in an unfair settlement to which the claiming party has no right under the law.

Moreover, the *Blickman* court's statements ignore the equitable tenets underpinning section 1717 and the coercive effect of uncertainty when a request for attorneys' fees is made. As noted by the *Emigh* court: "For section 1717 to function as intended, parties need reasonable prospective assurance of whether they will or will not be able to recover their attorney's fees if they win, and whether they will have to pay their opponent's fees if they lose.' . . . The *in terrorem* effect of uncertainty should not be underestimated."¹⁴⁴

¹⁴³ *Id.* at 357-58 (citations omitted). The *Blickman* court could not understand how it was unfair to allow a litigant to threaten a nonsignatory with an adverse attorneys' fees award and avoid "the same fate if unsuccessful." *Id.* at 357. "But this happens every time a party prays for relief to which he is ultimately held not to be entitled. Thus it might be said with equal justice that a plaintiff who prays for \$100,000 in damages to which he was not entitled acted 'unfair[ly]' by 'threaten[ing]' his opponent with the prospect of an adverse award. Yet no one would suggest that this entitles the defendant to a judgment for \$100,000." *Id.*

¹⁴⁴ *Emigh*, 101 Cal. Rptr. 2d at 541 (internal citations omitted).

VII. CONCLUSION

Although the courts continue to recognize that the contractual exception to the “American Rule” has its basis in equitable considerations, they largely have abandoned the equitable doctrine of estoppel when dealing with attorneys’ fees awards to nonsignatories. Nevertheless, parties who are sued as if they are signatories to a contract, who are required to defend such actions at great cost, and who have successfully defended such actions, should not be turned away when they seek to recover their attorneys’ fees. The doctrine of estoppel, although disapproved by some courts, still remains a viable basis on which to assert claims for such awards.¹⁴⁵ As a matter of fundamental fairness to nonsignatories who have been improperly sued as if they were parties to a contract,¹⁴⁶ a legislative amendment to clarify the equitable basis of the statute should be enacted.

¹⁴⁵ See, e.g., *M. Perez Co. v. Base Camp Condos. Ass’n No. One*, 3 Cal. Rptr. 3d 563, 569-70 (Ct. App. 2003); *Emigh*, 101 Cal. Rptr. 2d at 539-43.

¹⁴⁶ *Cf. Moallem v. Coldwell Banker Commercial Group*, 31 Cal. Rptr. 2d 253, 256 (Ct. App. 1994) (“Moallem’s position sounds a strong call of fairness. The same policy considerations that underlie section 1717’s provision for attorney fees for the prevailing party in a contract action . . . would appear to warrant such a reciprocal allowance when the contract provides for fees not only ‘incurred to enforce that contract’ but also on account of litigation, as here, ‘relating to’ it. But this is a judgment that is not ours to implement. 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.” (internal citations omitted)).