

Life, Liberty, And... The Pursuit of Attorney's Fees Allowed by Contract

By: Louis J. Ebert and Harris W. Eisenstein

The world of recovering attorneys' fees incurred enforcing a contractual obligation has fundamentally changed, and it will not be back anytime soon.

Although the decision of the Court of Special Appeals in *SunTrust Bank v. Frank J. Goldman, et al.* did not receive much fanfare outside of the legal circles it affected, the opinion will forever change the way attorneys operate in seeking reimbursement for fees expended by their clients. Prior to *Goldman*, Maryland courts regularly awarded attorneys' fees as specified in a contract when entering judgment based on that contract, normally as a percentage of the total amount owed. The *Goldman* opinion eradicated this longstanding remedy, and the judiciary is now set to formally alter the procedure for obtaining a judgment that includes legal fees.

In response to *Goldman*, Maryland's highest appellate court requested that the Committee on Rules of Practice and Procedure (the "Rules Committee") draft a rule to combat the suddenly uncertain environment of recovering attorneys' fees allowed by contract. Maryland Rule 2-704, as proposed, outlines a new procedure for obtaining an award for legal expenses when a claim is based on a contractual undertaking by one party to pay the attorney's fees incurred by the other party. This proposal, as summarized below, is currently before the Court of Appeals for final review and adoption.

Under proposed Rule 2-704, the party pursuing a judgment that includes the legal fees incurred in enforcing a contract must offer evidence in support of its request. If the claim does not exceed the lesser of: (i) 15% of the principal amount of the debt; or (ii) \$4,500 (the "Ceiling"), the claimant need only prove a legal basis to recover the fees (e.g., the contract itself), the reasonableness of the fees requested, and that the fees do not exceed the maximum amount agreed to by contract. For claims exceeding the Ceiling, the party must also compose a detailed memorandum covering numerous issues specified by rule in support of its claim. Based upon this information, the finder of fact will determine: (1) whether a party is entitled to recover attorneys' fees; and, if so, (2) the amount of attorneys' fees to award. This means that juries will often decide the fate of one seeking reimbursement for legal fees and expenses, although the rule does allow a court to review the reasonableness of a jury award and amend that award if necessary. Furthermore, the rule specifically states that any award for attorneys' fees will be included in the underlying judgment.

It is certainly important that the judiciary address the fallout from *Goldman*, and the proposed rule does just that. What the Rules Committee draft fails to recognize, however, is the additional litigation costs that will ensue on what has always been a well settled issue. Consider the following pre-*Goldman* scenario: by contract, two parties agreed that legal expenses were recoverable as a specified percentage of the claim if one party is forced to seek judicial assistance to enforce an obligation. Although objections were sometimes made in challenging a party's entitlement to fees, most often such challenges were summarily denied. Now, post-*Goldman*, this negotiated contract term is unavailable, and the parties will battle in court over what are reasonable attorneys' fees. This will undoubtedly prolong and make more expensive

the judicial process, and will likely impair a party's ability to collect the entirety of what is spent to enforce a legal obligation.

What can one take away from the judiciary's response to *Goldman*? First, understand that courts will no longer award legal fees based on a percentage of your total award. Thus, your existing contracts should be modified to include a provision for recovery of actual attorneys' fees based on actual fees expended. Second, the importance of obtaining jury trial waivers has now become even more important. Most plaintiffs would not want juries determining the reasonableness of attorneys' fees. Third, while the proposed rule provides that the court will still make the decision on the reasonableness of the attorneys' fee portion of the requested judgment, it remains to be seen how judges will react to motions to vacate arguing that the requested attorneys' fees are not reasonable. At first blush, under the existing legal standard for vacating a confess judgment, most competent defense attorneys should be able to at least have the attorneys' fees portion of a judgment vacated.

Finally, despite the fact that the process will be more difficult, maintain persistence and patience in pursuing a judgment that includes legal fees. While the new procedure embodied in the proposed rule stands to delay the recovery of attorneys' fees, it does not eliminate such recovery nor does it limit what amount may be recovered except to the extent it is deemed unreasonable. It may take longer to obtain a judgment that includes an award for attorneys' fees, but if you retain an attorney who will fight to see that you are reimbursed for the maximum amount of legal fees incurred enforcing your contractual obligation, your patience will likely be rewarded.

Please feel free to contact members of the Creditors' Rights or Lending Transactions groups at Rosenberg | Martin | Greenberg if you have any questions concerning the above or would like assistance in suggesting specific modifications to your loan documents.

Louis J. Ebert

lebert@rosenbergmartin.com

William L. Hallam

whallam@rosenbergmartin.com

Bob Van Galoubandi

bgaloubandi@rosenbergmartin.com

Joshua D. Bradley

jbradley@rosenbergmartin.com

Harris W. Eisenstein

heisenstein@rosenbergmartin.com

Barry C. Greenberg

bgreenberg@rosenbergmartin.com

Shawn J. Sefret

ssefret@rosenbergmartin.com

Cynthia L. Spell

cspell@rosenbergmartin.com

Hilary J. O'Connor

hoconnor@rosenbergmartin.com

Matthew S. Wineman

mwineman@rosenbergmartin.com

Sheelagh M. Allston

sallston@rosenbergmartin.com

Kari M. Kelly

kkelly@rosenbergmartin.com

Hana Rose Kondratyuk

hkondratyuk@rosenbergmartin.com