

MUTINY ON THE FEE BOUNTY: REDRAFTING FEE CLAUSES IN THE AGE OF TRUMP

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ABSTRACT

RIGHT FULL RUDDER-ALL AHEAD FLANK

As President of the United States, Donald Trump will become the Commander-in-Chief. Aside from captaining the helm of every United States Navy ship, he ascends the bully pulpit of everything Americana as President. That includes the ubiquitous lawsuit, and, of course, the attorneys who file and defend them. Traditionally, Republicans routinely seek “tort reform,” that would cap compensatory damages and eliminate punitive damages from medical malpractice cases.¹ They seek to enhance disciplinary measure to deter the filing of frivolous lawsuits by attorneys.² These attempts to reign in attorneys represent Republicans institutional antipathy attorneys in light of this campaign of suppressing tort liability and enhancing discipline.

Other critics of attorneys abound. For example, the literature that supports self-settled trusts (domestic asset protection trusts) treats attorneys with disdain.³

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¹ See Help Efficient, Accessible, Low-cost, Timely Healthcare (HEALTH) Act of 2011, H.R. 5, 112th Cong. (2011) (not passed) (seeking to restrict damages in medical malpractice cases); see also Charles J. Lockwood, *The HEALTH Act of 2011: Another Doomed Congressional Effort at Malpractice Liability Reform* (June 1, 2011), <http://contemporaryobgyn.modernmedicine.com/contemporary-obgyn/news/modernmedicine/modern-medicine-now/health-act-2011-another-doomed-congressio?page=full>.

² See Lawsuit Abuse Reduction Act of 2013, H.R. 2655, 113th Cong. (2013). The Act amends the sanctions provisions in Rule 11 of the Federal Rules of Civil Procedure (“FRCP”) to require the court to impose an appropriate sanction on any attorney, law firm, or party that has violated, or is responsible for the violation of, the rule with regard to representations to the court. *See id.* It also requires any sanction to compensate parties injured by the conduct in question. *See id.*

³ “The United States’ litigation system is often viewed as pro-plaintiff, giving injured plaintiffs more than their fair share when it comes to monetary judgments.” Kellsie J. Nienhuser, Comment,

Academics suggest a floodtide of fraudulent lawsuits prosecuted by attorneys and enabled by “insane juries” as justification for self-settled asset protection trusts.⁴ Domestic asset protection trusts (“DAPTS”) advocates claim that DAPTS protect the hard-working individuals from meritless lawsuit and unjust judgments.⁵ Whether arising from the Republican legislative hostility toward attorneys or the DAPT academic and commercial literature that accuses attorneys of prosecuting fraudulent lawsuits, tried before “insane juries” and snatching the life savings of hapless individuals, the antipathy toward the legal blossoms.⁶

Given a Republican House, Senate, President, and a possible right-shifted Supreme Court, these anti-lawyer harangues might leap from the law review articles and prior failed legislative attempts of legislation and onto the statute books or even onto the case law.⁷ Due to his penchant for threatening lawsuits and an overall history of litigation, President Trump offers a skewed view. The President is unlikely to impede access to the courts when his wealth and unfettered access to top-flight talent makes him into a formidable foe.⁸ In Trump’s hands, litigation is the “big stick,” coined by President Theodore

Developing Trust in the Self-Settled Spendthrift Trust, 15 WYO. L. REV., 551, 563-64 nn.111–16 (2015) (citing a collection of articles supporting this proposition).

⁴ See Ronald J. Mann, *A Fresh Look at State Asset Protection Trust Statutes*, 67 VAND. L. REV. 1741, 1749 (2014) (discussing “insane juries that hand out appalling verdicts for punitive damages”); see also Richard C. Ausness, *The Offshore Asset Protection Trust: A Prudent Financial Planning Device or the Last Refuge of a Scoundrel?*, 45 DUQUESNE L. REV. 147, 188 (2007) (“Self-settled spendthrift trusts also provide some protection against fraudulent or frivolous lawsuits. . . . [P]laintiffs and their lawyers are encouraged to bring meritless or even fraudulent lawsuits in the hopes of receiving a generous settlement from defendants who are concerned about the costs of litigation or the bad publicity associated with it.”).

⁵ See Ausness, *supra* note 4, at 188 (“For individuals whose life savings are currently threatened by civil liability, self-settled spendthrift trusts may be a legitimate way to deal with this problem.”); see also Nienhuser, *supra* note 3, at 563-64 n.116 (“The self-settled spendthrift trust is less of a means to avoid debts and more a mechanism to protect individuals from losing everything they have spent years earning.”).

⁶ See Darsi Newman Sirknen, *Domestic Asset Protection Trusts: What’s the Big Deal?*, 8 TENN. J. BUS. L. 133, 144 (2006) (“Because of the above-referenced case and many others like it, many people view the United States litigation system as extremely pro-plaintiff.”).

⁷ The Republicans have a majority in the House and Senate, and a President who is issuing Executive Orders consistent with the promises he offered during his campaign. See Jan Crawford, Major Garrett, & Adam Aigner-Treworgy, *Niel Gorsuch is President Trump’s Supreme Court Nominee*, CBS NEWS (Jan. 31, 2017, 9:41 PM), <http://www.cbsnews.com/news/neil-gorsuch-trump-supreme-court-nominee/> (“As a judge, Gorsuch has said that he follows the conservative philosophy embodied by Scalia during his nearly two decades on the nation’s top court.”).

⁸ See Sandy Fitzgerald, *Trump: I Won’t Settle Trump University Lawsuit* (Mar. 3, 2016, 10:10 AM), <http://www.newsmax.com/Headline/Trump-University-Lawsuit-Settle/2016/03/03/id/717221/> (“Probably I should, but I don’t want to because I give them a great soundbite, but I don’t settle cases. I don’t get sued because I don’t settle cases, I win in court.”).

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Roosevelt, the master of the bully pulpit.⁹ On the other hand, burnishing his business patina and running up the “lawsuits are job-killers” semaphore, the President might prosecute a campaign that hobbles plaintiffs’ access to the courts in a vast anagram of “suspect” cases.

The antagonism between the Republican Senate and President Obama allows the President to inherit one Supreme Court seat, four or more court of appeal seats, and nearly one hundred district court seats.¹⁰ The President announced his intention to appoint judges whose judicial philosophy tracks the late Justice Antonin Scalia’s thinking.¹¹ The overall tenor is anti-attorney originating DAPTS literature, or legislative forays whose over-arching theme is that attorneys abuse the litigation system. Fear of outrageous lawsuits or unjust judgments justify state legislature to offers state sanctioned asset protection that render a judgment near judgment proof and eviscerate liability.¹²

The audience for this article expands beyond the census of attorneys drafting contracts for commercial matters, such as, real estate, personal services, construction, and employment. Despite the President’s threats of punitive tariffs, not seen for the last one hundred and fifty years, international trade will flourish in light of rising global fortunes and fierce competition.¹³ Offshore manufacturers, and their global counsel—mindful of indemnity, contract and product warranty claims—study the fine print in any contract. Entertainers, sports figures, and celebrities, all too familiar with litigation, engage the best and brightest to flyspeck any contract; rightfully so when many millions are at stake.

This article rides on the crest of the post-Trump world when past federal rules and regulations are wiped off the books by a torrent of Executive Orders. Within weeks of the Inauguration, President Trump issued an Executive Order

⁹ The Twitter feed is the new bully pulpit. *See* Edward Niedermeyer, *Trump’s Twitter Bully Pulpit Has Automakers on Edge*, BLOOMBERG VIEW (Jan. 12, 2017, 11:47 AM), <https://www.bloomberg.com/view/articles/2017-01-11/trump-s-twitter-bully-pulpit-has-automakers-on-edge>.

¹⁰ *Current Judicial Vacancies*, USCOURTS.GOV, <http://www.uscourts.gov/judges-judgeships/judicial-vacancies/current-judicial-vacancies> (last visited Feb. 20, 2017).

¹¹ *See* Crawford, Garrett, & Aigner-Treworgy, *supra* note 7.

¹² *See* Ausness, *supra* note 4, at 185 (“However, Professor Lopucki believes that the existing system by which money judgments are enforced is beginning to fail as more and more potential defendants are developing ways to make themselves judgment proof, thereby achieving immunity from the deterrent aspects of the civil liability system. If individuals can protect against civil liability by transferring their property to a spendthrift trust, a ‘moral hazard’ situation will be created because these individuals can engage in unreasonably risky behavior without having to worry about personal liability for the harm that they cause.”).

¹³ *See The North American Free Trade Agreement (NAFTA)*, INT’L TRADE ADMIN., http://www.trade.gov/mas/ian/tradeagreements/fta/tg_ian_002425.asp (last visited Feb. 20, 2017) (“Trade between the United States and its NAFTA partners has soared since the agreement entered into force. U.S. Goods and services trade with NAFTA totaled \$1.0 trillion in 2007 (latest data available). Exports totaled \$452 billion; Imports totaled \$568 billion. The U.S. goods and services trade deficit with NAFTA was \$116 billion in 2007.”).

barring access to people from seven primarily Muslim countries.¹⁴ What was unfathomable during the Obama Administration is now commonplace with today's Executive Orders, ensuing Cabinet appointments and new legislation (Repeal Obamacare etc.). Times are changing before America's eyes on a daily basis when each new Executive Order is signed. O 'Brave New World, [Contract America], "That has such people in't!"¹⁵

This article presumes that settled expectations in America are being upset by Trump on a daily basis; that is his goal when he says that he wants to shake up everything.¹⁶ If the age of Trump is the age of change, good or bad, change is afoot; that includes reconfiguring attorney's fees clauses in contracts. Given daily changes over a broad sweep of issues, everything and anything is now fluid, and not fixed. This article reframes attorney's fees in the age of Trump's claimed uncertainty. Part I demonstrates that attorney's fees, as opposed to the financial goals of the client, are the driving force in litigation, if the contract has an unlimited fee clause, and the state provides reciprocity in favor of the prevailing party. Part I also explains that fee clauses protect a party's expectation that the party will emerge from a contract breach wholly compensated if the court orders the breaching party to pay for the attorney's fees arising from the litigation. Part II explains that fee clauses, as currently drafted, expose parties to open-ended liability that renders any breach inefficient. Given the tremendous investments of time and money, parties drive the case to trial in order to collect on the investment, or otherwise take a "big hit." Part III offers a safety valve that would enable a defaulting party an opportunity to pay the contract debt and escape liability for fees accruing from the filing of a collection lawsuit. Part IV contractually reduces the attorney's fees by fixing the contract rates that the parties can impose on each other through a fee clause enforced by the court (i.e., not to exceed rates). The purpose is to avoid imposing thousand dollar an hour fees claimed by the counsel for the prevailing upon the hapless debtor. Part V reconfigures litigation when attorneys drive the case forward based on contingent fees that are borne by the losing party but where the prevailing party bears no liability for the fees under any set of facts. Part VI enables parties to exit litigation with a modest fee burden if the defendant pays the debt within thirty days from date of service of the summons and complaint. Part VII explains why

¹⁴ *Washington v. Trump*, No. 17-35105, 2017 WL 526497, at *1 (9th Cir. Feb. 9, 2017) (upholding district court injunction barring enforcement of seven country ban).

¹⁵ WILLIAM SHAKESPEARE, *THE TEMPEST* act 5, sc. 1.

¹⁶ Noah Bierman, *Trump is Delivering on His Promise To Be Unpredictable on Foreign Affairs. Not Everyone's Convinced That's a Good Idea*, L.A. TIMES (Dec. 16, 2016, 6:00 AM), <http://www.latimes.com/politics/la-na-pol-trump-unpredictable-20161218-story.html> ("'We must, as a nation, be more unpredictable,' Trump declared during a major foreign policy address in April. 'We are totally predictable. We tell everything. We're sending troops: We tell them. We're sending something else: We have a news conference. We have to be unpredictable. And we have to be unpredictable starting now.'").

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or how cases settle when in fact the cases are the attorney's fee machines and hence the attorneys become the parties to the case and not their clients. Part VIII seeks to return the case to the clients, which requires the demonetizing of contracts for the attorneys.

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I. ATTORNEY'S FEE CLAUSES INCREASE THE FINANCIAL EXPOSURE OF THE DEFAULTING PARTY, AND IF CONTINGENT UPON JUDGMENT OR COLLECTION, FORCES THE CASES TO TRIAL.

A fee clause in a contract increases the financial exposure of the defaulting party.¹⁷ Upon the default in a contract, the aggrieved party threatens to file suit against the defendant and seek recovery of the principal, interest, costs

¹⁷ A lender loans the borrower the sum of \$10,000 with interest at the rate of 10%. In the event of default and ensuing suit, the borrower's prescribed liability is \$10,000 (assuming no payments) and interest to the date of judgment (based on the stated rate). Court costs are enumerated. *See* CAL. CODE CIV. PROC. § 1033.5 (West 2017). However, the fees are not pre-determined by the contract, and absent a default schedule that limits the fees, the court after litigation fixes the fees which is based on the a multiple of factors and subject the discretion of the court and the purpose of such adjustment is to fix a fee at the fair market value for the particular action. In effect, the court determines, retrospectively, whether the litigation involved a contingent risk or required extraordinary legal skill justifying augmentation of the unadorned lodestar in order to approximate the fair market rate for such services. The "experienced trial judge is the best judge of the value of professional services rendered in his court, and while his judgment is of course subject to review, it will not be disturbed unless the appellate court is convinced that it is clearly wrong." *Ketchum v. Moses*, 17 P.3d 735, 741 (Cal. 2001) (quoting *Serrano v. Priest*, 569 P.2d 1303, 1317 (Cal. 1977)) (fees set in anti-Slapp case).

and attorney's fees. The threat of compelling the defaulting party to pay, in addition to all relief, attorney's fees are coercive. This ability to impose attorney's fees upon the losing party shifts the balance of power in favor of the aggrieved party. This is assuming that the defaulting party is solvent, or at least fearful of facing large dollar liability. Fee clauses create risks borne by either party if losing the litigation and paying the payment fees due to the prevailing party.¹⁸ The risk of fees, whose amount is not specified in the contract, might well deter a party from breaching the contract for fear of accruing a greater liability based on the fee award.¹⁹ From a philosophical point of view, Mao would love attorney fee clauses ("Fee Clauses"). Mao wrote, "Political power grows out of the barrel of a gun."²⁰ If Mao & Associates, LLP were to be, Mao would have written while power might grow out of the barrel of a gun, "the gun is the fee clause." The risk of fees might well compel a party to resolve the conflict, pay the debtor or make arrangements. From another historical perspective, if Von Clausewitz said, "War is the continuation of politics by other . . . means,"²¹ Clausewitz & Associates, LLP would opine, "Fees are a continuation of litigation by other means." Cases that accrue staggering fees and bear a fee clause continue until trial because only at trial would the court award the fees, which would enable one party or the other to recover their fees against the losing party. In a more topical setting, if Dirty Harry brought to the screen, "Go ahead, make my day,"²² Harry Callaghan, Esq., would advise, "Fees make my day." For some parties, collecting fees from the losing party offers enormous satisfaction and a sense of justice.

No matter how squared, the fee clause exudes power in a contract because the fee award inflates the award due to the plaintiff, and conversely if there is no

¹⁸ California Civil Code section 1717 awards fees to the prevailing party even though the contract provides fees due one side.

¹⁹ Fees are mandatory in favor of the prevailing party. See *Hsu v. Abbara*, 891 P.2d 804, 809 (Cal. 1995).

²⁰ Charles E. Michaels, *For the Common Good*, VAND. LAW., https://law.vanderbilt.edu/alumni/lawyer-vol36num1/common_good.html (last visited Feb. 20, 17) ("My family's story is replayed every day somewhere in some city or village. It is the weak, the elderly, those who are different, and the poor who are usually the targets of the powerful, who believe, like Chairman Mao, that 'political power grows out of the barrel of a gun.'").

²¹ See *Techsearch, L.L.C. v. Intel Corp.*, No. 99 C 2601, 1999 WL 412610, at *1 (N.D. Ill. June 1, 1999) ("We think what is happening here has some correlation to von Clausewitz's description of war as a continuation of politics by other means.").

²² "On October 8, 2008, a somewhat harried AUSA responded to the *Ameline* ineffective assistance with, in essence, a 'go ahead-make my day' non-opposition." *United States v. Brown*, No. CR-03-0104MCEGGHP, 2010 WL 1404423, at *11 (E.D. Cal. Apr. 6, 2010). The quote, however, is from the 1983 movie, "Sudden Impact" [Dirty Harry movie]. Many movie quotes enter the case law, including *Casablanca* at the top of the list. See *People v. Padilla*, No. B149235, 2001 WL 1502642, at *4 (Cal. Ct. App. Nov. 26, 2001) ("Cf., *Renault, Casablanca (Metro-Goldwyn-Mayer 1942)* ["shocked; shocked to find gambling is going on here"].").

fee clause, it deflates the award due the plaintiff because the fees dilute the recovery due plaintiff.²³ On the other hand, if the plaintiff loses, this would inflate the award due to the defendant.²⁴ Including or excluding fee clauses on the basis of strategic or poor drafting, alters the balance of power in nearly all contract litigation.²⁵ When the fee quotient by any party dwarfs the amounts at issue—or the driving force of the litigation in the first place—fees, and hence the attorneys, drive the litigation beyond any realistic benefit to the parties save and except recovery of attorney’s fees.²⁶ This is common in FEHA cases, when the plaintiff, usually an employee, has been the subject of inappropriate conduct at the hands of the employer, but where the employer seeks to litigate the matter to the bitter end for the purpose of eradicating discrimination.²⁷ Fee driven litigation is sometimes the only means to exercise a statutory right, but it deputizes attorneys as the private enforcers of public rights.²⁸ Because fees are a reciprocal contractual right, the court cannot excise them, regardless of any equitable consideration.²⁹ California Civil Code section 1717(b)(1) enables the court to determine who the prevailing party is, even when the suit may not proceed to a final judgment.³⁰ In some instances, the court can find that neither party prevailed.³¹

²³ California Civil Code section 1717 awards fees to the prevailing parties.

²⁴ *See id.*

²⁵ *See Stokus v. Marsh*, 266 Cal. Rptr. 90, 96 (Ct. App. 1990) (“Plaintiff’s counsel were met at every step with learned, energetic, imaginative, concentrated, and extensive opposition by extremely able counsel who specialize in housing matters. Defendants appear to be able to put up the stoutest resistance, which they did. Pleadings, motions, and supporting papers are now into 5 volumes, best counted by the pound or linear foot.”). In these comments the court pointed out the substantial costs of litigation..

²⁶ Litigation is encouraged in FEHA cases. *See Tipton-Whittingham v. City of L.A.*, 101 P.3d 174, 178 (Cal. 2004) (“[S]ection 12965 [attorney] fees are intended to provide ‘fair compensation to the parties involved in the litigation at hand and encourage[] litigation of claims that in the public interest merit litigation.’” (alteration in original) (quoting *Flannery v. Prentice*, 28 P.3d 860, 868 (Cal. 2001))).

²⁷ *See id.*

²⁸ Anti-Slapp is admittedly fee driven litigation. *See CAL. CODE CIV. PROC. § 425.16(c)* (West 2017); *Ketchum v. Moses*, 17 P.3d 735, 741 (Cal. 2001) (“The fee-shifting provision also encourages private representation in SLAPP cases, including situations when a SLAPP defendant is unable to afford fees or the lack of potential monetary damages precludes a standard contingency fee arrangement.”).

²⁹ *See Hsu v. Abbata*, 891 P.2d 804, 809 (Cal. 1995) (holding that fees are mandatory in favor of the prevailing party).

³⁰ *See CAL. CIV. CODE § 1717(b)(1)* (West 2017) (“The court, upon notice and motion by a party, shall determine who is the party prevailing on the contract for purpose of this section, whether or not the suit proceeds to final judgment.”).

³¹ *See id.* (“The court may also determine that there is no party prevailing on the contract for purposes of this section.”). “In determining whether an action is ‘on the contract’ under section 1717, the proper focus is not on the nature of the remedy, but on the basis of the cause of action.”

Fee clauses might cover tort, contract claims or any other claims by and among the parties.³² A defendant who succeeds in quashing service of process of the suit might recover fees under Civil Code section 1717,³³ where the fees may be costs of the suit or contract damages.³⁴ Like Mao's "gun," Fees Clauses deter a party from a contract default lest the party face a big financial penalty, which is measured by "linear feet" of the case filings.³⁵ The reciprocity guaranteed under California Civil Code section 1717 deters the better-heeled party from filing and losing a lawsuit, lest that losing party face a financial penalty that is measured by "linear feet" of the case filings. Some courts analogized attorneys to landscape contractors for "making mountains out of mole hills" because attorneys file motions and briefs, engage in letter writing wars, or otherwise waste time and effort for minimal gain or benefit and solely for the purpose making the other side waste time and money.³⁶

Consequently, the fee clause guards the expectations of the parties under the contract because the aggrieved party can sue for damages, recover fees and costs, and emerge unscathed while shifting the total loss to the defaulting party. However, the larger picture is whether fee clauses unduly drive litigation, encourage marginal litigation—given a "big pot" the end of litigation rainbow—or prolong the litigation that could have been settled quickly, benefitting clients on both sides.³⁷ When parties enter into a contract and commence performance

Cussler v. Crusader Entm't, LLC, 150 Cal. Rptr. 3d 895, 902 (Ct. App. 2012) (quoting Kachlon v. Markowitz, 85 Cal. Rptr. 3d 532, 556 (Ct. App. 2008)).

³² See Santisas v. Goodin, 951 P.2d 399, 405 (Cal. 1998) ("On its face, the provision embraces all claims, both tort and breach of contract, in plaintiffs' complaint, because all are claims 'arising out of the execution of th[e] agreement or the sale.'" (alteration in original)).

³³ See Profit Concepts Mgmt., Inc. v. Griffith, 76 Cal. Rptr. 3d 396, 400 (Ct. App. 2008) ("Prevailing party attorney fees should be awarded based on the contract language, the statutory language, and the fact of dismissal of the case, not on speculation.").

³⁴ See Khavarian Enters., Inc. v. Commline, Inc., 156 Cal. Rptr. 3d 657, 670 (Ct. App. 2013) (noting that fees are an element of damages and are subject to proof at trial).

³⁵ *Stokus* was a pre-digital case, when all filings were in paper form. A file might consist of 500 pages, and given additional paper filings, the clerk would open up another "file." Each file bore a volume number and place on a shelf. Scorched-earth cases produced many volumes, which took up shelf space, hence the term "linear feet" of "shelf space." "Linear feet" means that length of something measured by feet (twelve inches for each foot). The phrase "linear feet" means something that is very long. The "linear feet" of the lumber is, say, twelve feet.

³⁶ See Karapetian v. Kia Motors Am., Inc., 633 F. App'x 476, 479 (9th Cir. 2016) ("[N]ature, not judges, should be in charge of making mountains out of mole hills." (quoting Hyundai Motor Am. v. Super. Ct., 185 Cal. Rptr. 3d 349, 351 (Ct. App. 2015))); Crum v. City of Stockton, 157 Cal. Rptr. 823, 826 (Ct. App. 1979) (Reynoso, J., concurring in part and dissenting in part).

³⁷ FRCP 68 and California Code of Civil Procedure ("C.C.P.") section 998 enable parties to offer judgment that would approximate the recovery sought by the plaintiff. In *Scott Co. of California v. Blount, Inc.*, 979 P.2d 974, 979 (Cal. 1999), the California Supreme Court held that post-offer attorney's fees (assuming a rejection) would be shifted to the party who spurned the offer. The inference is that the party who rejected the offer of settlement under FRCP 68 or C.C.P. section

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without a breach, neither party bears any liability for attorney's fees. The fee liability is innate and inherent as a potential liability when a party defaults. The typical fee clause states words to the effect of, "In the event of an action to enforce this contract, among other remedies, the prevailing party shall recover reasonable attorney's fees" The liability for attorney's liability borne by the party accrues upon default. Consider, for sake of example, that all contracts are a freeze-dried liability that expands exponentially when hydrated with a fee clause. If suit were filed, the winning party would recover \$100,000 for the principal damages, \$10,000 in interest, \$10,000 in costs, and \$100,000 in reasonable attorney's fees.

This article does not seek to hinder any party from seeking counsel, nor encourage precluding a party from seeking the reimbursement of fees that they are guaranteed by the statutory reciprocity of California Civil Code section 1717. This article does not seek to deter an attorney from representing an impecunious client who does not have the means to seek legal counsel, nor an attorney who risks ouster from the courts and victimization at the hands of vexatious litigants.³⁸ The fee clauses, proposed in this article wrest litigation from the grasp of attorneys by capping or limiting fees that are the subject to reciprocity. These changes deter attorneys from pursuing litigation solely to win the prize of the fee award borne by the losing party. This article seeks to remove the attorneys from the helm of the litigation and insert the client, which potentially tracks the prevailing political winds of reasserting control over political institutions. The Rust Belt Democrats voted for Trump because they perceived Trump as changing the status quo and restoring to them control of their destiny.

II. SOMETIMES THE FEES EXCEED THE CLIENTS' COMPENSATORY DAMAGES BY MANYFOLD.

Proportionality in fee litigation is a term used when the amount of the fees that might be accrued is somewhat proportional to the damages, i.e. the contractual loss. In the event of nonpayment of an undisputed debt, the defendant

998 made an error in judgment, or decided that litigating the case to the bitter end was the goal in and of itself. *See id.* Parties drive litigation to collect a debt, seek vindication or justice for their case, or seek their day in court. Whatever the motivation, the party, on all sides, accrue attorney's in a disproportionate amount to the money or issues at hand and might even dwarf the financial reality. At mediation, settlement, or other ADR vehicle, the case is incapable of settlement because no settlement could compensate the parties for their financial and emotional outlay. These fee driven cases are from claims where the defendant defrauded or severally damaged the plaintiff.

³⁸ *See Shalant v. Girardi*, 253 P.3d 266, 269 (2011) ("The vexatious litigant statutes ([C.C.P.] §§ 391–391.7) are designed to curb misuse of the court system by those persistent and obsessive litigants who, repeatedly litigating the same issues through groundless actions, waste the time and resources of the court system and other litigants."). Vexatious litigants file suits, or other actions, which accrue expense and waste time, effort, and energy.

can certainly engage in high-wire shenanigans solely to increase the expense of the litigation. These stunts might include proffering false claims of payment, forgery of signature, false claims of a settlement, accord and satisfaction, chaotic depositions, delays in the proceedings, or meritless cross complaints. At the conclusion of the case, the plaintiff undoubtedly will recover not only the debt, but the court will award a stupendous amount for attorney's fees based on the defendant's reprehensible conduct. If the defendant is impecunious, or files bankruptcy, the defendant succeeded in deepening the plaintiff's loss by the expenditure of non-compensable nor recoverable fees. Many young attorneys are startled to prosecute (or defend) a case where the adverse party blithely engages in litigation mayhem solely for the purpose of driving up expenses. These fees will never be proportional because the litigation serves its own purpose and is driven by a person whose motive is to create a loss and indifferent to the big fee award which is certain to be handed down.

On the other hand, proportionality might be accessible.³⁹ For example, a plaintiff sells equipment at a purchase price of \$10,000. The buyer then defaults, and breaches the contract that bears a fee clause. For no reason, the plaintiff accrues attorney's fees of \$50,000. Paying attorney fees that are five times the loss is disproportionate and even borders on bad judgment.

Litigation is unpredictable. Some attorney litigates cases to the "nines," because they are driven to "win" at any cost, a policy better known as scorched-earth. Some parties in litigation are extremely obstreperous and refuse to cooperate in discovery.⁴⁰ Combative litigation accrues fees that arise from the attorney battling over procedural matters, discovery, trial settings and other matters that should have been resolved. These fees increase the liability of the losing party exponentially and inefficiency because the parties engage in irrational and sometimes immature conduct. For example, in many depositions, the parties can bicker over the date, time and place of a deposition. No doubt that the party can depose the adverse side, but running up ten billable hours at six-hundred and fifty dollars an hour while over arguing where and when a deposition should take place renders the concept of fee burden inefficient. Attorneys also engage in "chest bumping" that runs run up everyone's meter, often solely for that purpose.⁴¹ There is little doubt that the clients urge their

³⁹ Proportionality means that the fees, which parties invest in the litigation, bear some relationship to the amounts at issue. The vernacular is making a mountain out of a molehill when the parties litigate for reason unrelated to the amount at issue. Superior Court post a fee schedule for default matters arising out of Limited Jurisdiction cases (\$25,000 and less). See Exhibit "A" to the Local Rules of the San Francisco Superior Court that are allowed in default matters on a sliding scale.

⁴⁰ See *Doppes v. Bentley Motors, Inc.*, 94 Cal. Rptr. 3d 802, 823 (Ct. App. 2009) ("The discovery referee's reports and recommendations, both approved by the trial court, found that Bentley engaged in persistent and serious misuse of the discovery process.").

⁴¹ Examples include frivolous discovery objections, repetitive motions, interruptions and distractions at depositions, excessive depositions, redundant pleadings, among other wasteful

attorneys aggressively assert every possible claim, refuse to cooperate with the other side, grant no extensions or courtesies, and refuse to cooperate in settings, hearings, and dates for discovery.⁴²

Excessive and unpredictable fees conflict with the doctrine of efficient breach. The doctrine states that a party who breaches a contract can anticipate the nature and breadth of the damages.⁴³ The paradigm of an inefficient breach was the introduction of unwieldy tort damages arising from a breach of contract action, i.e., the bad faith denial of a contract.⁴⁴ For example, Joe enters into an agreement to sell a widget to Fred for \$1,000. Joe makes delivery of the widget, and then Fred declines to pay for whatever reason. Joe sues for breach of contract, and Fred denies the existence of the contract. The “denial of the

conduct. Practice clinics at law schools, moot court, and civil procedure courses introduce attorneys to civil litigation that might include rounds of pleadings, discovery pretrial hearings, summary judgment motions, pre trial preparations, and trial. The academic perception is that practitioners will prosecute these remedies efficiently and without rancor. In fact, some civil litigators pride themselves based on their testosterone-fueled tactics that intimidate or browbeat others.

⁴² Evidence of this litigation is found in the order granting fees under C.R.C. 3.1702(b)(1). Prejudgment fees become a part of the judgment, which accrues interest at ten percent, even though the fee motion might be resolved months after entry of the judgment. *See Lucky United Props. Invs., Inc. v. Lee*, 152 Cal. Rptr. 3d 641, 650 (Ct. App. 2013). If the judgment provides for fees, the judgment creditor can recover fees arising from post judgment enforcement. *See CAL. CODE CIV. PROC. § 685.040* (West 2017); *Wong v. Genser*, No. A133837, 2012 WL 6028626, at *14 (Cal. Ct. App. Nov. 30, 2012) (“In this case, we would have been spared much effort if Murphy had accorded Roth the simple courtesy of providing a copy of the fax notice when he requested it. (See Atty. Guidelines of Civility & Professionalism (July 20, 2007) § 4(h) (Civility Guidelines) [“An attorney should agree to reasonable requests in the interests of efficiency and economy”].) We see no reason why this request was not accommodated.”).

⁴³ *See Freeman & Mills, Inc. v. Belcher Oil Co.*, 900 P.2d 669, 682 (Cal. 1995) (“This limitation on available damages serves to encourage contractual relations and commercial activity by enabling parties to estimate in advance the financial risks of their enterprise. . . . In contrast, tort damages are awarded to compensate the victim for injury suffered.” (quoting *Applied Equip. Corp. v. Litton Saudi Arabia Ltd.*, 869 P.2d 454, 460 (Cal. 1994))).

⁴⁴ *See id.* (“We held in that case that a tort cause of action might lie ‘when, in addition to breaching the contract, [defendant] seeks to shield itself from liability by denying, in bad faith and without probable cause, that the contract exists.’” (alteration in original)) (quoting *Seaman’s*, 686 P.2d at 1167). The doctrine of an efficient breach means that a party can contract, in advance, for their damages that they confront should they choose to default under a contract. For example, the buyer of goods decides to default under a contract for sale because the buyer found a seller would sell the same products at fraction of the cost. Likewise, as adroit bargainer, the buyer inserted a convenience clause that enabled the buyer to pay a small percentage of the purchase prices as damages to the first seller. The fixed damages made the first contract efficient in fixing the liability in the event of a default and thereby frees the buyer to purchase the same products at a lesser cost and hence a more productive use of its capital. The doctrine of an efficient breach stands for the proposition that breaching a contract is a viable option available to the parties if the financial benefit from the subsequent transaction outweighs the costs of the breach. The vernacular is that a party to a contract is entitled to a “do-over,” if the do-over is a much better deal.

contract,” is a standalone tort that entitles Joe to general damages, aside from the contract and punitive damages. A bad faith denial of a contract was a judicially crafted tort that enables a party to a contract to sue in tort damages when the adverse party denies the existence of the contract.⁴⁵ Like the repudiated tort damages arising from the denial of a contract that rendered any contract dispute into an unwieldy tort claim, unlimited fee liability increases the parties’ financial exposure beyond any ability to define and limit that liability in the first place. If the parties enter into a contract for a loan of money, and the borrower defaults, the liability borne by the defaulting party is the principal amount of the loan, the accrued interest, and court costs and fees, absent a contentious case. The breach of the loan of money is efficient because the parties have fixed the liability in the contract. However, when parties engage in high-stakes litigation, the fee clause render the contract inefficient because the amount of the fee liability is based on the prosecution of the litigation, the conduct of the attorneys, judicial management, and the vicissitudes of the trial and appeal. Given this level of uncertainty, the fees become unpredictable and replicate tort damages, which per se are difficult to calculate because only a trier of fact, (i.e., the jury) could calculate the tort award, including punitive damages. Tort claims enable a party to seek exponential damages that might even include punitive damages, which per se are unpredictable.⁴⁶ A jury under *Seaman’s* Adroit and under the influence of skilled attorneys with the right facts at hand, might be able to convince a jury to hand down significant punitive damages and thereby offer an incentive to drive the case to trial. *Seaman’s* infused contract cases with the risk of substantial damages including punitive damages, which were well beyond the parameters of the contract itself, and hence rendering all contract litigation uncertain and inefficient.⁴⁷

The flaw of *Seaman’s* was to render a breach of contract inefficient, which means that the breaching party determines, at the outset, the contractual liability should they, the breaching party, decide to breach the contract. The concept of an efficient breach is that the breaching party can accurately “price the breach,” which would enable the party to make an intelligent financial decision in expending resources. Given certainty at the outset, a party willingly enters into a contract by gauging the damages arising from the breach in abandoning the contract even through a breach.⁴⁸ Like a tort claim arising from the *Seaman’s*

⁴⁵ *Freeman & Mills, Inc. v. Belcher Oil Co.*, 900 P.2d 669, 682 (Cal. 1995) (explaining and repudiating the claim of bad faith denial of a contract).

⁴⁶ *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003) reigned in excessive punitive damages when they exceeded the outer parameters of due process.

⁴⁷ *Seaman’s Direct Buying Serv., Inc. v. Standard Oil Co.*, 686 P.2d 1158 (Cal. 1984), *overruled by Freeman & Mills, Inc. v. Belcher Oil Co.*, 900 P.2d 669 (Cal. 1995).

⁴⁸ The standard breach remedies are: repair and replacement remedies in the event that the goods are defective; cancellation for convenience that enables a buyer to terminate a contract, waiver of

denial of contract tort claim that rendered damages uncertain and incalculable, the fee clause undermines the doctrine of the efficient breach because the amount of the fees might well distort the economic value of the claim and ensuing litigation or worse drive the case forward solely for the purpose of recovering the attorney's fees. *Seaman's* was repudiated by the court, among other reasons, because the breaching party could not calculate the costs of the breach which and therefore renders deterred a party from considering a breach, in light of the certainty of the damages.⁴⁹

Granted that the amount of the fees is subject to judicial discretion and an appeal, fees are nonetheless mandatory under *Hsu v. Abbara* and nearly part and parcel of most cases.⁵⁰ Calling for the wholesale revision of California Civil Code section 1717, or the overruling of California case law, is problematic at best. However, redrafted fee clauses might shrink the fee footprint in any major case. The goal is to mitigate the uncertainty, or inefficiency, brought forth by Fee Clauses that entice parties to file suit in the first place when the matter might have been subject to a pre-suit resolution. Alternatively, the goal could also be to entice the parties to bring the case to trial for purpose of recovering the attorney's fees. The fact that a party can recover attorney's fees, based on the fee clause,

the warranties for fitness for particular purposes and waiver of express warranties if the goods are defective; waiver of punitive damages, which is common in all contracts for goods; and the waiver of consequential and incidental damages in goods, software, and other contracts. These standard terms quantify the damages liability of the seller should the seller face a claim that its goods were damaged, defective or non-conforming. A party to a contract should be able to measure the contract damages in the event of breaches. If the gain (i.e., exploitation of capital) exceeds the damages arising from the breach, the capital market profits from the breach by letters the breaching party generate a *net* gain from the breach.

⁴⁹ See *Freeman & Mills, Inc. v. Belcher Oil Co.*, 900 P.2d 669, 680 (Cal. 1995) ("As set forth above, the critics stress, among other factors favoring *Seaman's* abrogation, the confusion and uncertainty accompanying the decision, the need for stability and predictability in commercial affairs, the potential for excessive tort damages, and the preference for legislative rather than judicial action in this area."). Here is a classic example: Joe agrees to buy a widget from Fred for \$1,000, but Fred will require 30 days to deliver the widget. The next day, Joe locates a buyer for the widget who is willing to pay \$100,000, but must be delivered tomorrow. Joe finds another seller for \$10,000, buys the widget, and makes \$90,000 profit. Paying \$1,000 to Fred is a small price to pay. Clearly Joe breached the contract, but calculated that his liability is only \$1,000 and therefore a cost in the second resale transaction. No doubt, the \$100,000 sale, and \$90,000 is the free market benefit that accrues when the seller can breach based on the ability to calculate the costs of the breach.

⁵⁰ See *Hsu v. Abbara*, 891 P.2d 804, 809 (Cal. 1995) ("Here, the judgment was a 'simple, unqualified win' for the Abbaras on the only contract claim between them and the Hsus. In this situation, the trial court had no discretion to deny the Abbaras their attorney fees under section 1717 by finding, expressly or impliedly, that there was no party prevailing on the contract." (citation omitted) (quoting *Deane Gardenhome Assn. v. Denktas*, 16 Cal. Rptr. 2d 816, 818 (Ct. App. 1993))). The standard of review is abuse of discretion. See *Ramos v. Countrywide Home Loans, Inc.*, 98 Cal. Rptr. 2d 388, 391 (Ct. App. 2000).

encourages the filing of suit because the plaintiff believes that the defendant will fully reimburse the plaintiff for all legal expenses.⁵¹

Some attorneys accept cases based on a contingency basis. The contingency might be a percentage of the recovery, or an hourly rate, but payable upon prevailing and the court awarding the fees. A contingency means that the attorney will not collect fees unless the client prevails and the court actually awards fees.⁵² The attorney will never collect a fee unless and until (a) the parties settle and the defendant (assuming the party who is going to pay) agrees to pay the attorney fees in some amount, or (b) the case goes to trial and the court award fees. The parties can litigate cases for years, or even a decade if the case is appealed which compels the attorney continues to invest time and effort without getting paid and necessarily forgoing other cases that are more remunerative.⁵³

Whether fees are hourly or a percentage, but contingent upon winning, the attorney's recompense might solely arise from taking the case to trial in the anticipation that the client will win the case and shift the fees to the defendant. Absent the court imposing fees on the losing party, the attorney exits empty handed.⁵⁴ As a result, this contingency fee agreement pits the attorney, seeking to

⁵¹ Clients would readily file suit because they perceive that the defendant will bear one hundred percent of the fee burden based on the fee clause. While the fee clause might well obligate the defendant to pay all fees that the plaintiff might accrue, the fact of the matter is that the courts are not a substitute for a business solution that resolves the matter, if possible.

⁵² See *Ketchum v. Moses*, 17 P.3d 735, 746 (Cal. 2001) ("Moses entered a contingent fee arrangement under which counsel would receive no attorney fees in the event the anti-SLAPP motion failed; counsel indicated that, absent a contingent fee arrangement, he would not have agreed to representation because of Moses's inability to pay hourly fees.") (discussing a fee agreement arising from anti-Slapp litigation).

⁵³ See *Pena v. Cent. Freight Lines, Inc.*, No. A134753, 2013 WL 5503036, at *9 (Cal. Ct. App. Oct. 4, 2013) ("Pena's counsel represented her on a contingent basis, worked on her case for four years without receiving any fees, and incurred liability for \$38,000 in costs. Moreover, Central informed Pena after the trial that it has virtually no assets amenable to execution in California, and she would find it impossible to collect on the judgment."). The fact that the attorney cannot accept other cases becomes part of the fee calculus in setting fees in public interest cases. This is not an empty statement. An attorney, whether a sole practitioner or a law firm, has finite resources that are best and necessarily tasked to generate a financial return (i.e., pay bills and generate an income). See *Ketchum*, 17 P.3d at 741 (Anti-Slapp case) ("Under *Serrano III*, the lodestar is the basic fee for comparable legal services in the community; it may be adjusted by the court based on factors including, as relevant herein, (1) the novelty and difficulty of the questions involved, (2) the skill displayed in presenting them, (3) the extent to which the nature of the litigation precluded other employment by the attorneys, (4) the contingent nature of the fee award.").

⁵⁴ An attorney can accept an engagement on a purely contingency fee basis that provides that the sole source of payments is the fees awarded by the court against the other side. The ethics of this arrangement comes into play if the client is offered payment of the claim, including interest and courts costs to date. The offer might compel the client to instruct the attorneys to accept it, which would foreclose the attorney from recovering fees should the case go to trial. Ending the litigation curtails the right of the attorney to recover, and therefore creates a conflict between the client who wants to settle and the attorney who wants to take the case to trial.

recover fees solely from the adverse party only if the case goes to trial, against the client who may receive an offer for one hundred percent on the dollar plus interest while foregoing trial.

The overall concept of proportionality now appears on the legal horizon. For example, amended FRCP 26(b)(1) inserts proportionately into discovery, based “the needs of the case,” “considering the importance of the issues,” “the amount in controversy,” “the parties’ relative access to relevant information,” “the parties’ resources,” “the importance of the discovery in resolving the issues,” and “whether the burden or expense of the proposed discovery outweighs its likely benefit.”⁵⁵ The subtext is that attorneys engage in discovery disproportionate to the case at hand that unduly burdened the adverse party without any justification. Using amended FRCP 26(b)(1) as a template and guide, redrafting fees clause follows in the footprints of doctrinal proportionality in FRCP 26(b)(1). If anything, amended FRCP 26(b)(1) is the weathervane that the court seeks to realign remedies based on the economics of a case.⁵⁶

III. STRUCTURING AN OPPORTUNITY TO PAY BEFORE SUIT IS FILED.

The drafting template is Uniform Commercial Code Section 2607(3)(A), which provides an opportunity to cure a breach for the parties in a commercial sale: “Where a tender has been accepted: (A) The buyer must, within a reasonable time after he or she discovers or should have discovered any breach, notify the seller of breach or be barred from any remedy.”⁵⁷ The plaintiff must plead and prove timely notice, or be barred from any relief.⁵⁸ By adopting this template, the fee clause offers a “last clear chance” to the defaulting party as follows:

In the event of a claimed breach of the agreement, or any provision hereof, the party claiming the breach shall provide the other party, allegedly in default, ten calendar days to cure in writing the claimed default before and as a condition of the filing suit save and except any exigent circumstances that justifies provisional remedies including but not limited to attachment, claim and delivery, or any injunctive relief.

⁵⁵ FED. R. CIV. P. 26(b)(1).

⁵⁶ “You don’t need a weatherman to know which way the wind blows.” BOB DYLAN, *Subterranean Homesick Blues*, on BRINGING IT ALL BACK HOME (Columbia Records 1965).

⁵⁷ CAL. COM. CODE § 2607(3)(A) (West 2017).

⁵⁸ See *Cortina v. Goya Foods, Inc.*, 94 F. Supp. 3d 1174, 1196 (S.D. Cal. 2015) (“The purpose of giving notice of breach is to allow the breaching party to cure the breach and thereby avoid the necessity of litigating the matter in court. This purpose would be completely undermined if it could be satisfied with the giving of post-suit notice.” (quoting *Alvarez v. Chevron Corp.*, 656 F.3d 925, 932 (9th Cir. 2011))).

Non-payment of a debt arises from an entire host of causes. A party to a contract defaults because the party misplaces the bills, discharges the office accountant, or loses tract of payables. Sometimes a party defaults because the party discovers that the goods or services were damaged, defective or substandard and refuses payment. In other cases, the party is financially distressed, lacked the cash on hand to pay the debt, and is unable to pay the debt. In other cases, a party defaults because they are headed down the path of financial Armageddon, i.e., bankruptcy, going out of business, or other liquidation. Whatever the circumstances, this clause offers the defaulting party fair notice of a pending lawsuit and the inherent risk of fees should suit be filed. Ten days' notice offers the party enough time to marshal the financial resources to pay the debt or contact the creditor and settle the claim, or demonstrate why no debt is owed at all. This requirement of a pre-suit warning notice likewise enables the creditor to file suit immediately in the face of exigent circumstances that might include the financial Armageddon scenario⁵⁹ jurisdiction.⁶⁰ The language offers the defaulting party, an opportunity to pay the debt and avoid the risk of lawsuit, but on the other hand enable the creditor to immediately file suit without waiting, if the debtor is about to face financial Armageddon.

Incorporating this pre-suit safe harbor offers an opportunity to the debtor to discharge its obligation without a financial penalty in the form of fees accruing upon the filing of a suit. The creditor is paid and paid promptly and without the necessity of hiring an attorney and paying fees and expenses in the filing of a suit. Should the debtor facing the risk of bearing these fees and expense, pay the debt upon demand. A party, such as a creditor, who files suit prior to the expiration of a ten-day written notice herein, shall not recover attorney's fees under the contract absent the proof of verifiable exigent circumstances, or just cause. Tracking the footsteps of Uniform Commercial Code Section 2607(3)(A), this language offers another opportunity for the defaulting party to cure the default or engage in negotiations to resolve the dispute before a lawsuit begins.

The role of the attorney drafting a contract ultimately depends upon whose interest is being protected. In complex, multi-layered contracts that involve substantial financial stakes, parties represented by top-tier attorneys, and parties that are wary of each other, a breach and ensuing suit could involve six to seven, or even eight, figure fee litigation. Forcing the parties to give fair notice of the breach gives those parties who did in fact breach the contract an opportunity to cure the breach and convince the other side that no breach occurred. As a hypothetical, parties of unequal bargaining power and very unequal financial

⁵⁹ Non-payment of a large undisputed debt that might lead to a major lawsuit would raise the alarm bells that the debtor is gravely distressed, and thus prone to liquidate assets to pay other debts, hinder creditors from reaching assets, or liquidate everything and flee the jurisdiction.

⁶⁰ *Id.*

ability create risk where that party with the aforementioned powers and abilities would eviscerate the contract benefit by filing suit. Incorporating the ten-day pre-suit notice enables the party in the weaker position an opportunity to resolve the matter, or convinces the other side that no breach occurred.

Section 2607(3)(A) offers the defaulting party “breathing room” to cure the default, settle the claim or do something else to resolve the claim short of suit. The Uniform Commercial Code’s intention is for parties to deal with each other to resolve their differences before expensive legal proceedings. The UCC drafters included a provision that imposes a requirement that provides a “last clear chance” before parties resort to legal redress. Failing to provide notice might well bar any relief through the courts. The concept of “last clear chance” means that a party has the ability to resolve a conflict, pay the outstanding bills, seek a settlement or offer mediation, or prosecute some meaningful strategy that would ameliorate the consequences of a contractual default and ensuing litigation.⁶¹ The classic example of a “last clear chance” provision is in California foreclosure procedures where the lender gives the borrower 90 days to bring the loan current when sending out the “notice of default.”⁶² The consequences of significant fees might well compel the defaulting party to consider curing the default.⁶³ Assuming that a customer who owes money to a vendor is the defaulting party, and the customer bears signs of obvious financial distress, the vendor is excused from the notice provision, based on the exigency defined under provisional remedies.⁶⁴

A fee clause that offers the “last clear chance” provision enables parties that may bear big egos, an opportunity to sober up to the realities of million-dollar litigation that gins up a million-dollar fee liability. This is a reality in entertainment and sports where, by necessity, everyone has a big ego maximized through their celebrity status.

⁶¹ Absent immediate intervention by counsel, the creditor has yet to hire an attorney and incur a fee expense. Sans the expense of counsel, the creditor might engage in a settlement of the claim that might include a payment program, return of the products, accept a discount of the debt if paid immediately, or rewrite the obligation and demand security or a personal guaranty, all generally understood as a “work-out.”

⁶² CAL. CIV. CODE § 2924- 2429I (West 2017) (allowing ninety days to bring the loan current, and twenty-one days to pay off the loan, or otherwise face foreclosure).

⁶³ Pre-suit communications are privileged, and subject to protection under anti-Slapp. *See Lerette v. Dean Witter Org., Inc.*, 131 Cal. Rptr. 592, 594-95 (Ct. App. 1976) (holding that a pre-suit demand letter is privileged).

⁶⁴ Remedies include the right to seek ex parte writ of attachment, claim and delivery, or other provisional relief. *See, e.g.*, CAL. CODE CIV. PROC. § 485.010(b) (West 2017) (stating that financial distress, risk of asset dissipation, bulk sale, or other risk that the debtor’s asset will unavailable for levy may authorize an ex parte writ of attachment).

IV. WELL-DRAFTED CONTRACT LANGUAGE MANAGES ACCESS TO THE COURTS AND OFFERS EFFICIENCY IN THE LITIGATION

Nothing in U.S. law prohibits or restricts the scope or depth of representation that a party can bring to litigation.⁶⁵ Litigation brought by well-heeled parties might bear three or four attorneys at trial, with half a dozen or more attorneys drafting papers, evidence books, courtroom exhibits, preparing evidence for submission, conducting discovery or investigation, or sorting through millions of pages of documents.⁶⁶ Million-dollar fee awards are common. Suffice it to say, hopefully contracting with “Mega Oil” works, lest it engages an army of attorneys to prosecute a claim or mount a stout defense.

This is not academic. Experienced contract drafters warn their clients that should they default or should the adverse party balk, and civil litigation ensues, the client might encounter a legal team backed by unlimited resources. “Mega Oil” hiring “Mega Litigators” is going to put up a fight and outspend the adverse party client, primarily through discovery.⁶⁷ In light of these risks, fee shifting

⁶⁵ This is called zealous advocacy, which is integral to all civil litigation, and arises in the context of the litigation privilege. “The privilege ‘promotes the effectiveness of judicial proceedings by encouraging attorneys to zealously protect their clients’ interests.’” *Wentland v. Wass*, 25 Cal. Rptr. 3d 109, 115 (Ct. App. 2005) (quoting *Sillberg v. Anderson*, 786 P.2d 365, 370 (Cal. 1990).

⁶⁶ See *In re TFT-LCD (Flat Panel) Antitrust Litig.*, No. M 07-1827 SI, 2013 WL 149692, at *1 (N.D. Cal. Jan. 14, 2013) (“The attorneys’ fees requested were entirely contingent upon success. Co-Lead Class Counsel risked time and effort, including a six week jury trial against Toshiba, and advanced significant costs and expenses with no ultimate guarantee of compensation. The award of 30% is warranted for reasons set out in Co-Lead Class Counsel’s moving papers, including but not limited to the following: the excellent result obtained for the Class; the quality and quantity of work performed by all the firms representing Direct Purchasers (collectively, ‘Plaintiffs’ Counsel’), including extensive motion practice, trial preparation, mediation, and trial, all involving complex and difficult issues of fact and law; the risks faced throughout the litigation, which existed from the outset and continued to exist through trial; and a reasonable lodestar ‘cross-check,’ discussed above.”). Modern litigation requires exhaustive review of emails, social media and other online sources of information. Large cases require staffing by counsel to review records, prosecute discovery, and prepare the case for trial.

⁶⁷ See *Mancia v. Mayflower Textile Servs. Co.*, 253 F.R.D. 354, 359-60 (D. Md. 2008) (“Deserving cases are not brought because the cost of pursuing them fails a rational cost-benefit test, while meritless cases, especially smaller cases, are being settled rather than being tried because it costs too much to litigate them.” (quoting Am. Coll. Of Trial Lawyers & Inst. for the Advancement of the Am. Legal Sys., *Interim Report on the Joint Project of the American College of Trial Lawyers Task Force on Discovery and the Institute for the Advancement of the American Legal System*, USCOURTS.GOV 3 (Aug. 1, 2008), http://iaals.du.edu/sites/default/files/documents/publications/interim_report_final_for_web.pdf)); Gregory P. Joseph, *Trial Balloon: Federal Litigation—Where Did It Go Off Track?*, 34 LITIGATION 5, 62 (2008) (observing that discovery costs, particularly related to ESI discovery, are partly responsible for making federal litigation “procedurally more complex, risky to prosecute, and very expensive,” causing litigants to avoid litigating in federal court); Kent D. Syverud, *ADR and the Decline of the American Civil Jury*, 44 UCLA L. REV. 1935, 1942 (1997) (“Our civil process before and during trial, in state and federal courts, is a masterpiece of complexity that dazzles in its details—in discovery, in the use of

forces parties to carefully consider their options in the event of a default when drafting the contract.

At the outset, every adroit contract drafter works through the ramifications in the event of default (e.g., mandatory arbitration, forum selection, choice of law, a limited statute of limitation, exclusion of certain claims, or limitation of liability (i.e., repair and replacement as the sole remedy)).⁶⁸ Nearly all insurance contracts lack an attorney's fees clause because the insured is likely to sue the insurance company for denial of coverage.⁶⁹ On the other hand, sports, entertainment, and construction contracts require binding arbitration and a favorable forum selection.⁷⁰

Fee clauses likewise are the subject of intense drafting scrutiny.⁷¹ The starting point in fee drafting is who bears liability in a dispute. Absent a fee clause or statutory entitlement and requirement of reciprocity, the U.S. Rule

experts, in the preparation and presentation of evidence, in the selection of the factfinder and the choreography of the trial. But few litigants or courts can afford it.”); *The Sedona Conference Cooperation Proclamation*, THE SEDONA CONFERENCE 1 (July 2008), http://www.thesedonaconference.org/content/miscFiles/cooperation_Proclamation_Press.pdf (“The costs associated with adversarial conduct in pre-trial discovery have become a serious burden to the American judicial system. This burden rises significantly in discovery of electronically stored information (“ESI”). In addition to rising monetary costs, courts have seen escalating motion practice, overreaching, obstruction, and extensive, but unproductive discovery disputes—in some cases precluding adjudication on the merits altogether . . .”).

⁶⁸ See, e.g., *Intershop Commc'ns v. Super. Ct.*, 127 Cal. Rptr. 2d 847, 851 (Ct. App. 2002) (forum selection in Hamburg, Germany); see also *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 586 (1991) (upholding forum selection in the cruise line ticket). These cases are known as the “steamship ticket cases,” which require forum selection.

⁶⁹ An insurance company might well deny coverage, which would compel the insurer to file suit to compel coverage. In some cases, the insurance company would deny coverage if the insured failed to give timely notice of the claim and opportunity to defend on the claim. These facts took center in *Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison*, 958 P.2d 1062 (1998), when the client, Jordache Enterprises [a jean manufacturer], sued counsel for the failure to timely notify the insurance company, which led to ensuing coverage litigation. A fee clause in coverage litigation would both (a) increase the insurance company's liability by fees and infuse risk in deciding to deny coverage, and (b) potentially deter the insurer from a coverage suit in the face of potential fees.

⁷⁰ See, e.g., *Slaney v. Int'l Amateur Athletic Fed'n*, 244 F.3d 580 (7th Cir. 2001) (sports); *Kvaerner ASA v. Bank of Tokyo-Mitsubishi, Ltd., N.Y. Branch*, 210 F.3d 262 (4th Cir. 2000) (guaranty on construction contract); *Valente v. Int'l Follies, Inc.*, No. 1:15-CV-02477-ELR, 2016 WL 3128528 (N.D. Ga. Jan. 6, 2016) (entertainment).

⁷¹ See *Fortier v. Dona Anna Plaza Partners*, 747 F.2d 1324, 1338 (10th Cir. 1984) (“Any ambiguities in the interpretation of the attorney fee clause of the contract ought to be construed against the drafter.” (citing New Mexico law)); *Victoria v. Super. Ct.*, 710 P.2d 833, 835 (Cal. 1985) (“Finally, ambiguities in standard form contracts are to be construed against the drafter.”); *Benedek v. PLC Santa Monica, LLC*, 129 Cal. Rptr. 2d 197, 204-05 (Ct. App. 2002) (“However, the language of the release was ambiguous and, therefore, narrowly construed against its drafter.”).

provides that parties bear their own costs and attorney's fees.⁷² In contrast, the English Rules provides that the loser pays the fees.⁷³ The "loser pays" approach deters parties from pursuing litigation if the defeat is financial destruction.⁷⁴ On the other hand, litigation driven by attorneys who are retained on contingency, might drive the dispute to trial beyond its merits. These cases might arise from contract claims or claims based on a statutory right (i.e., Fair Debt Collection Practices Act) that entitles the party claiming the right, attorney's fees when they prevail.⁷⁵

Fee clauses that open parties up to staggering fees because of the costs of modern litigation deters parties from litigation whose claims are tenable, but does not necessarily assure winners as they might lack the financial ability to afford the expense of civil litigation.⁷⁶ Fees become doctrinal because the risk of fees should litigation go sideways precludes a party from seeking redress against an adverse party with far greater resources. Doctrinal means here that the few parties to a contract would pause before engaging in litigation with an adverse party

⁷² See *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 247 (1975) ("In the United States, the prevailing litigant is ordinarily not entitled to collect a reasonable attorneys' fee from the loser.").

⁷³ See *Bensen v. Am. Ultramar Ltd.*, 1997 WL 317343, at *8 (S.D.N.Y. June 12, 1997) "Finally, it is widely recognized that the English rule has significant consequences both with respect to whether litigations are commenced and with respect to settlement. The English rule is likely 'to discourage complex suits with a low probability of success. . . . *It is generally accepted that the English rule discourages privately funded parties from bringing meritorious claims.*' More specifically, '[t]his type of cost-shifting arrangement probably would discourage speculative litigation that advances unique legal theories or new causes of action, thus dampening the entrepreneurial tendencies of the plaintiff bar.' Similarly the English rule creates severe pressures, particularly on privately funded parties, to settle." (alteration in original) (emphasis added).

⁷⁴ Facing a fee claim, a litigant can choose to either voluntarily settle, or prosecute a strategy of an offer of judgment under FRCP 68 or its California equivalent, C.C.P. section 998.

⁷⁵ See, e.g., Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692-1692p (2012); see *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 559 U.S. 573, 617 (2010) (Kennedy, J., dissenting) ("Today's holding gives new impetus to this already troubling dynamic of allowing certain actors in the system to spin even good-faith, technical violations of federal law into lucrative litigation, if not for themselves then for the attorneys who conceive of the suit." (citing *Home Loan Mortgage Corp v. Lamar*, 503 F.3d 504, 513 (6th Cir. 2007) as "referring to the 'cottage industry' of litigation that has arisen out of the FDCPA").

⁷⁶ See *Mancia v. Mayflower Textile Servs. Co.*, 253 F.R.D. 354, 359 (D. Md. 2008) ("Deserving cases are not brought because the cost of pursuing them fails a rational cost-benefit test, while meritless cases, especially smaller cases, are being settled rather than being tried because it costs too much to litigate them." (quoting Am. Coll. of Trial Lawyers & Inst. for the Advancement of the Am. Legal Sys., *Interim Report on the Joint Project of the American College of Trial Lawyers Task Force on Discovery and the Institute for the Advancement of the American Legal System*, USCOURTS.GOV 3 (Aug. 1, 2008), http://iaals.du.edu/sites/default/files/documents/publications/interim_report_final_for_web.pdf)).

whose deep pockets can defend or prosecute any litigation beyond the economic value of any dispute.⁷⁷

Fee clauses enable parties to shift the financial burden of litigation to the party who defaulted under the contract that initiated the litigation in the first place.⁷⁸ Without a fee clause, a party that defaults could depress the recovery due to the aggrieved party with the burden of attorney's fees. The middle ground then, is to democratize the attorney's fee rate charges by the following example clause:

In the event of an award of attorney's due either party, the hourly rate for the attorneys shall not exceed the sum of \$300.00 for lead attorneys, including trial counsel, and \$250.00 for all other attorneys, unless the court finds that the losing party, or counsel, engaged in bad faith tactics, obstruction or unnecessarily prolonged, or litigated, the proceeding, without good cause either in part or in whole, or that the complexity or circumstances of the case, financial burden of the fees or costs of the case, the financial disparity of the parties, or interests of justice to assure access to the courts and competent counsel, and award fees proportionately.

This clause sets a ceiling that ratchets down the fee thermostat, but also threatens the losing side with astronomical fees, should they bear moral responsibility for extraordinary efforts that obstruct the litigation.⁷⁹

This fee clause puts everyone on their best behavior, because it opens up the losing party's wallet to compensate the prevailing party, if the attorneys for

⁷⁷ This stance is consequential. Corporate players, and their attorneys, might well broadcast a resolute posture, which deters any litigation. See, for example, *Franklin Mint Co. v. Manatt, Phelps & Phillips, LLP*, 109 Cal. Rptr. 3d 143 (Ct. App. 2010), which discussed a malicious prosecution brought against a law firm based on the prior litigation that was concluded adversely.

⁷⁸ See *Hsu v. Abbara*, 891 P.2d 804, 809 (Cal. 1995) (holding that mandatory fees are due to the prevailing party).

⁷⁹ "Courts often use the phrase 'scorched earth' to describe hardball litigation tactics designed to complicate and prolong litigation and drive up litigation costs." *Da Silva Moore v. Publicis Groupe*, 868 F. Supp. 2d 137, 168 (S.D.N.Y. 2012); see *id.* at n.45 (first citing *Burlington N. & Santa Fe Ry. v. United States*, 556 U.S. 599, 615 (2009) ("The District Court criticized the [plaintiffs] for taking a 'scorched earth,' all-or-nothing approach to liability . . . (alteration in original)); then citing *T-Peg, Inc. v. Vt. Timber Works, Inc.*, 669 F.3d 59, 62 n.5 (1st Cir. 2012) ("But it hardly violates [the Copyright Act's] purpose to discourage scorched-earth litigation tactics that tie up intellectual property for years." (alteration in original)); then citing *United States v. Kimsey*, 668 F.3d 691, 692 (9th Cir. 2012) (noting that the parties "became embroiled in a contentious, scorched-earth lawsuit, in which eighteen lawyers bombarded each other and the district court with over 500 pleadings"); then citing *Young Again Prods. Inc. v. Acord*, 459 F. App'x. 294, 295 n.2 (4th Cir. 2011) (stating that the parties "pursued a scorched-earth policy for resolving this dispute and are now embroiled in litigation nationwide"); and then citing *Hyperquest, Inc. v. N'Site Solutions, Inc.*, 632 F.3d 377, 383 (7th Cir. 2011) ("These kinds of scorched-earth tactics are an unfortunate waste of everyone's time.")).

the losing party engage in scorched earth tactics. Perpetrators of these tactics, litigation tyrants, or bullies, will not get a free pass. Fee clauses shift the risk of fees to the losing party and thereby compensate the winning party (i.e., usually the party who has suffered a breach at the hands of the adverse party). The risk of fees deters parties from defaulting on a contract because the court will include in the judgment the fees accrued by the plaintiff. Fee clauses serve their purpose, unless parties or their attorneys use litigation as their boxing ring to even “old scores” or other unrelated issues. If alerted to the risk of uncontrollable litigation, a prudent counsel can insert language that reduces the risk of litigation “gone wild.”

V. TAKING THE WIND OUT THE SAILS OF CONTINGENCY

An attorney might agree to accept compensation, whether hourly or a percentage, which is based on the actual collection of the claim.⁸⁰ Upon losing the case and facing liability under the fee clause (or statute), the defendant would be obligated to pay for the fees due to the plaintiff.⁸¹ This contingency is common because plaintiff might lack the financial ability to finance the litigation. The attorney makes a business decision to accept or reject the case on the understanding that the attorney will collect fees when the case is won or settled.⁸² Plaintiff’s counsel would claim fees, even if they were contingent and not financially incurred by the plaintiff, based on a lodestar that might even increase the overall amount.⁸³ Lodestar is the methodology courts use to set fees that are typically applied in public interest cases, antitrust and anti-Slapp litigation. The attorney for plaintiff would seek to recover fees, e.g. in a fee motion, post

⁸⁰ See *Pena v. Cent. Freight Lines, Inc.*, 2013 WL 5503036, at *9 (Cal. Ct. App. Oct. 4, 2013) (“Pena’s counsel represented her on a contingent basis, worked on her case for four years without receiving any fees, and incurred liability for \$38,000 in costs. Moreover, Central informed Pena after the trial that it has virtually no assets amenable to execution in California, and she would find it impossible to collect on the judgment. Therefore, according to Central, ‘the best [Pena] can hope for’ was to settle ‘in a reasonable amount, with installment payments.’ We would be hard pressed to find a clearer illustration of *Ketchum*’s observation that ‘[a] lawyer who both bears the risk of not being paid and provides legal services is not receiving the fair market value of his work if he is paid only for the second of these functions. If he is paid no more, competent counsel will be reluctant to accept fee award cases.’” (quoting *Ketchum v. Moses*, 17 P.3d 735, 742 (Cal. 2001))).

⁸¹ See *Hsu*, 891 P.2d at 876.

⁸² The attorney might charge a fee based on the total collection, including the principal of the debt, interest, and fees itself; or, the attorney might charge a contingency on the principal and interest, and that the fees awarded by the court are additional compensation.

⁸³ See *PLCM Grp. v. Drexler*, 997 P.2d 511, 518 (Cal. 2000) (“As the Court of Appeal herein observed, the fee setting inquiry in California ordinarily begins with the ‘lodestar,’ i.e., the number of hours reasonably expended multiplied by the reasonable hourly rate. ‘California courts have consistently held that a computation of time spent on a case and the reasonable value of that time is fundamental to a determination of an appropriate attorneys’ fee award.’”).

judgment, for the time and efforts expended on behalf of the client which accrues when the plaintiff wins. Should the plaintiff lose the case, the attorney would not recover any fees, notwithstanding the time, energy and effort.

Without the financial risk, a plaintiff would be more inclined to use the courts. Yet, bearing significant financial burden for fees, a plaintiff would decline to litigate a claim, no matter how meritorious in light given the financial inability or a business decision. Some insertion of business reality helps here. Borrowers, buyers, licensees or others who seeks goods, services, or IP enter into an agreement without any intention of paying the obligation accruing from the purchase. To reduce these risks slightly, the obligor intends to default on the obligation and only to pay the obligation when coerced into the payment by suit, threatened foreclosure or other remedy. In the “real world,” some business people enter into contracts, purchase goods on credit, borrow money, or execute real and personal property leases without the slightest intention of meeting their contractual obligation. In such cases, the recalcitrant debtor will be prompted to pay the debt only if a competent and experienced attorney compels the debtor to do so.

Inserting a fee clause that requires a party to pay fees as a precondition to filing an action will certainly eliminate some suits prior to initiation of litigation. Worse fee clauses might not pass the constitutional challenges, or a claim of unconscionability. The conundrum is that on one hand, some parties to a contract will never, absent a lawsuit, pay what is owed, but on the other hand, constricting access to the courts by contractually precluding a party from hiring an attorney on a contingency fee basis is unconscionable. The problem is that the attorney takes on a case on the premise that the attorney will only be paid if the case goes to trial, and the judge awards fees sought by the attorney. The client would gladly enter into this contract as long as the client has no personal liability for the fees or costs. No matter the outcome, the client gets a “free ride” for services provided by his or her own attorney. The only way such a fee structure would be worthwhile to the attorney is if the case would go to trial and receive a favorable judgment. The better solution then, is to limit fee claims against the losing party to fees actually incurred by the winning party as follows:

In the event that a party hereto prevails in any action in which the court may award attorney’s fees and cost in favor of the prevailing party, the liability of the losing party shall be limited to only those attorney’s fees and costs actually incurred by the prevailing party, unless the court finds that the losing party engaged in bad faith tactics, obstruction or unnecessarily prolonged, or litigated, the proceeding without good cause either in part or in whole or that the complexity or circumstances of the case, financial burden of the fees or costs of the case, the financial

disparity of the parties, or interests of justice to assure access to the courts and competent counsel, and award fees proportionately.

This language aims to shrink the losing party's liability to fees and costs accrued, but not necessarily paid. It also enables a party such as the creditor to engage an attorney on a contingency basis, but immunizes the losing party from the pure risk driven contingency. This formula burdens the plaintiff with the fee obligation if purely contingent upon the outcome of the case and absent extenuating circumstances. The consequences are that the party would still prosecute an action, and if victorious, pay the attorney the contingency fee. Absent an actual accrual of the fees, the prevailing party would more carefully consider settlement at an earlier stage lest the case shrinks in value based on the non-compensable efforts of the attorney and potential future costs. If the client is not accruing fees, i.e., bound to pay the attorney, the client has zero incentive to ever settle, save and except inconvenience. Non-compensable means that the attorney will not be paid for their time and effort spent on the case. Accrual in this context means the legal obligation to pay the fees, i.e., that the client must pay for the time and efforts of the attorney, notwithstanding the result of the case.⁸⁴ Similar to the language that tamps down the hourly fees regime, the court awards the fees, contingent upon prevailing, against parties engaging in a scorched earth campaign either in part or in whole, and award fees proportionately.

Burdening the prevailing party with the contingent fees shrinks the losing party's fee exposure if and only if the losing party engaged in "good behavior," which means that the losing party likewise sought to shrink the attorney's fee (and cost) exposure. Scorched earth tactics scorches the loser.

VI. OFFERING SAFE HARBOR BEFORE SUIT IS FILED.

A suit begins when parties file a claim to collect a debt that might have arisen from a commercial sale, loan, or breach of contract. Common to most commercial collection cases, the principal amount of the debt, accrued interest and interest rate are fixed and therefore, readily ascertainable from the face of the complaint.⁸⁵ Upon service, the defendant (qua debtor), facing fee and cost exposure, will often seek to exit the litigation.

⁸⁴ Whether the attorney would ever enforce the fee agreement is another matter, but the fact of the accrual both makes the client a financial participant in the civil litigation, and motivates the client to resolve the case in the face of risk of fees owed to the attorney.

⁸⁵ See CAL. CODE CIV. PROC. § 483.010(a) (West 2017) (stating that a fixed and readily ascertainable debtor supports a prejudgment writ of attachment).

⁸⁶ See *Sw. Concrete Prods. v. Gosh Constr. Corp.*, 798 P.2d 1247, 1249 (Cal. 1990) (holding that a commercial sale of goods or services is not subject to usury).

California Civil Code section 1717(b)(2) enables a party to tender the amount due the creditor and escape any liability for attorney's fees.⁸⁷ A rejection of full payment will allow the debtor to emerge as the prevailing party because the creditor is obligated to accept the tender.⁸⁸ Rejecting the tender is considered tantamount to an irrational refusal. If the creditor files suit even though complete tender has been made, the court will hold that the debtor is the prevailing party, and award fees to the debtor. Tender of the debt (that includes interest, penalties, and fees accrued to date) is a complete defense to a civil action, and renders the obligor the prevailing party if the tender has been made.⁸⁹

Common practice is that the creditor must file suit and accrue fees and costs in order to compel the debtor to "wake-up" and pay the debt itself, even in the event of a default.⁹⁰ Accrual of fees and costs obligation under California Civil Code section 1717 might well have motivated the debtor to pay in order to shrink, or eliminate, any continuing fee exposure. As a practical matter, if the debt plus interest is paid in full, the creditor might reconsider the wisdom of accruing additional legal expenses to recover the fees. On the other hand, the

⁸⁷ If the creditor is owed \$100.00, and the debtor prior to suit tenders \$100.00 (i.e., the total amount due the creditor), the debtor is deemed to have discharged the debt. Should, for whatever reason, the creditor reject the tenders, file suit, and the court find a pre-suit tenders, the court declines to render fees sought by the creditor and awards fees sought by the defendant. This statutory fee shifting imposes on counsel for the creditor the obligation to advise whether the tender made by the debtor is "perfect," i.e. pays all obligations which are due, and do so with great care and accuracy. Common errors include miscalculating the accrual of interest, the correct rate of interest, the application of prior payments, the accrual of fees, as contract damages, the accrual of penalties or other credit, or whether the obligation is subject to usury, or other consumer protection statutes.

⁸⁸ See CAL. CIV. CODE § 1717(b)(2) (West 2017)

"Where the defendant alleges in his or her answer that he or she tendered to the plaintiff the full amount to which he or she was entitled, and thereupon deposits in court for the plaintiff, the amount so tendered, and the allegation is found to be true, then the defendant is deemed to be a party prevailing on the contract within the meaning of this section."

⁸⁹ Tender is "alive and well" in the world of real estate residential financing. In the event of a default of a loan secured by a mortgage (or deed of trust) securing a residence, the debtor might well claim "tender" of the past and defaulted amount, which would stop the foreclosure process. Should the creditor (i.e., the financial institution) reject the tender and proceed with the foreclosure, the debtor would have a cause of action for wrongful foreclosure and seek substantial damages. Tender is intensively detail driven to the "penny."

⁹⁰ Nonpayment of the obligation entitles the aggrieved party to file suit given the unconstitutionality of cognovit notes. See *Isbell v. Cty. of Sonoma*, 577 P.2d 188, 193 (Cal. 1978) ("By parity of reasoning, the debtor's assent to a contract of adhesion with a cognovit clause, or to a confession of judgment form presented by the creditor, cannot operate as a valid waiver of constitutional rights."); see also CAL. COM. CODE § 2709(1)(a) (West 2017) ("When the buyer fails to pay the price as it becomes due the seller may recover, together with any incidental damages under the next section, the price . . . [o]f goods accepted or of conforming goods lost or damaged within a commercially reasonable time after risk of their loss has passed to the buyer . . .").

creditor paid, or will pay good money to the attorney to get the debtor's rapt attention and wants to be reimbursed.

Here is the classic scenario. The creditor sells a \$100,000 piece of equipment on credit (i.e. pay in 30 days) to the debtor. The creditor delivers the equipment that meets the contractual specifications. For whatever reason next, the debtor declines to pay the invoice.⁹¹ To get the debtor to pay, the creditor is forced to hire an attorney to write a demand letter, call the debtor, enter faux negotiations and even file suit should negotiations falter. Upon service of the lawsuit, the debtor pays the obligation, but sans the attorney's fees and costs. The creditor (now a plaintiff) must make a decision whether to pursue the litigation solely to recover fees and costs, or depending upon the presentment of the check (i.e., payment in full), reject the tender and litigate for the total amount due. Owed the sum of \$100,000 plus interest of \$10,000 the creditor may decide to incur litigation costs and file suit. In 24 hours, the debtor tenders the sum of \$110,000 on a take it or leave it basis. More than one creditor would accept the tender, forgo fees and dismiss the lawsuit. However, other creditors would reject the tender and pursue the cases with the case whose ostensible purpose of recovering fees. This is called the "fee tail that wags the principal dog." Pursuing litigation to recover a small percentage of the debtor might be financially counter-productive.⁹²

If the purpose of the litigation is a financial recovery, the fee clause should encourage prompt payment, but not at the expense of the creditor or the undue burden of the debtor. The following model language in a commercial contract (arising from the sale of goods, rendition of services or loan of money) does so:

Within 30 days after service of process of any initial filings, a party shall have the option to pay, in cash, the total due the plaintiff, which includes the principal amount of the debt, lawful interest, court costs under C.C.P. section 1033.5(a), and attorney's fees set under the default schedule of the court, if the principal

⁹¹ A reality outside *Corbin or Williston on Contracts*, or *White and Summers*, some debtors decline to pay their bills, unless and until they are threatened with a lawsuit suit (better known as the squeaky wheel). The purpose of the "stall" is that the debtor has use of its cash on hand. Given that the creditor has to hire an attorney and pay a fee in order to file a lawsuit, the debtor offers a cash discount because the creditor would rather have money in hand, than pay money out of pocket to an attorney and wade through months of civil litigation. The fact that the debt is undisputed is irrelevant. For some business people, a default is a negotiating tactic that comes as a shock to many young attorneys. More shocking to the young attorneys is that the debtor ignores the attorney's demand letters.

⁹² Most equipment sales are sold subject to a perfected security interest in the equipment, which is usually a purchase money security interest, and a financial filed with the secretary of state where the debtor is domiciled.

amount is within the Superior Limited Civil Jurisdiction [\$25,000], or if in excess, such amount that the court may determine upon five days' notice of a hearing thereof, unless the court finds that the losing party engaged in bad faith tactics, obstruction or unnecessarily prolonged, or litigated, the proceeding without good cause either in part or in whole, the complexity or that the circumstances of the case, financial burden of the fees or costs of the case, the financial disparity of the parties, or interests of justice to assure access to the courts and competent counsel, and award fees proportionately. Upon the timely payment, the action is dismissed with prejudice but declared a settlement between the parties. Absent timely payment, the prevailing party shall recover all fees, even if contingent as costs of suit.⁹³

This language offers a near fixed price to exit the litigation and encourages the prompt payment – better known as the “carrot.” While the creditor might not recover all fees shifted to the debtor under the fee clause, the creditor nonetheless may promptly exit the litigation only slightly worse for the wear. This language extinguishes the continuing obligation of the creditor to fund the litigation in order to fully recover. Fee clause solutions work when they provide both recompense to the creditor and some assurance for the debtor to exit the litigation unscathed. The “stick” is the big fee award to be had if a party engages down the path of a scorched earth campaign without good cause. Some cases start with a big bang if the defendant telegraphed its intention to fraudulently convey everything that prompts the creditor to seek exigent relief.⁹⁴

VII. WHAT ARE THE FINANCIAL OBSTACLES IN GETTING A CASE SETTLED, WHEN THE CASE HAS BEEN EXTENSIVELY LITIGATED?

Lawsuits require an investment of money to pay for the attorney, court costs and third party costs required in the prosecution of the case (i.e., expert witness fees, transportation, third party forensic services), and the time, effort and commitment of the attorney and client. Given this financial and non-financial cost

⁹³ C.C.P. section 1033.5 provides a long list of court costs, including, *inter alia*, filing fees, service of process, and deposition charges.

⁹⁴ An *ex parte* Writ of Attachment, a writ of possession, appointment of a receiver, or an injunction are common remedies at the outset of a case that require provisional relief. If the debtor received goods while insolvent, California Commercial Code section 2702 allows the creditor to secure a seizure order at the outset of the case to recover goods sold within ten days prior (i.e., a writ of possession). See CAL. CODE CIV. PROC. § 514.010 (West 2017).

investment, and the risk inherent in all of civil litigation, many claims settle.⁹⁵ Experienced civil practitioners and adroit clients appreciate that the financial and non-financial expenditures might dwarf the principal amounts involved. In mediations, settlement conferences, or even communications between counsel, the defendant might well capitulate at the end of the case and agree to pay the outstanding debt in a lump sum or finance the payment over time. However, the debtor may decline to pay for the total fees claimed by the plaintiff. This paradigm is worthy of parsing. If the fees exceed the principal of the debt, payment of the debt is a Pyrrhic victory, and certain to provoke an outright rejection. In other cases, the plaintiff retained a “high priced” law firm whose hourly rates are stratospheric and disproportionate to the work that has been done in the case but the defendant (i.e., the debtor) offers to reimburse fees at a lower rate or fixed amount insufficient to reimburse the plaintiff for the total fee expense. In mediation, the parties genuinely want to end the case, which well might have been motivated by the herculean efforts of the attorneys, but find the fees that have been paid, or unpaid, owed by each party a total impediment to any settlement. For example, litigation among family members is terribly contentious and accrues fees on all sides disproportionate with the stakes at hand, but the fees are astronomical given the level of personal animosity.⁹⁶ Even if meritorious,

⁹⁵ Among other reasons, cases settle because trial might require a team of attorneys, on both sides, to try the case. These attorneys include the “back office attorneys” to draft briefs, jury instructions, motions in limine (and oppositions), prepare witnesses, assemble evidence, prepare trial binders, prepare evidence and cross examination books, book hotels for the client or witnesses, arrange for meals, among a myriad of other tasks. This list is a short summary of the efforts necessary to try a major case. Trial teams of five to ten attorneys are very common, and that might accrue a \$100,000 daily fee burden.

⁹⁶ Business people settle lawsuits because the settlement meets their financial goals. For example, if the creditor has decided that spending \$25,000 to collect a \$50,000 debt is an improvident expenditure, the creditor might well accept \$40,000 cash and be satisfied with the overall result. Likewise, family litigation is driven by the economics of the case, but more than once, the parties bear longstanding personal grudges, seek “justice” for a betrayal of trust, or are out for vengeance for some perceived personal slight, real or imagined. Family litigation arises in the family law court, and frequently in the probate court when family members are fighting over an estate. Probate litigations always remind their clients to consider settlement lest “the attorneys get everything . . . and nothing is left for the parties.” Bringing this point home is “When Harry Met Sally”:

Harry Burns: Right now everything is great, everyone is happy, everyone is in love and that is wonderful. But you gotta know that sooner or later you’re gonna be screaming at each other about who’s gonna get this dish. This eight dollar dish will cost you a thousand dollars in phone calls to the legal firm of That’s Mine, This Is Yours.

Sally: Harry.

some cases are not practical because the amounts are too small, require too many witnesses, require expert testimony, or the defendant is obstinate. The colloquial expression is proof at trial requires “too many moving parts.”

Absent the parties and attorneys settling the fee quotient, the case does not settle at all. The case grows to bear a resemblance to Frankenstein as the parties create a fee monster together. Here, parties let the case get out of hand and find themselves facing financial liability to their attorneys for the accrued fees. Their options? To pay or seek reimbursement for fees from the adverse party. The case takes a life of its own as collecting fees from the losing side becomes the only means to salvage the entirety of the litigation from total disaster. The outcome is fee driven litigation. This can be the fault of the parties for letting the case spiral out of control or failing to settle sooner. The blame can also be placed on the attorneys for “over-lawyering” the case and not informing the clients of the risks. The reality is that if the parties attempt to settle on the eve of trial, the accrued fees already burdening the parties propels them to trial unless the settlement covers an acceptable portion of the fees.⁹⁷ In the event the parties are motivated to settle early in the case, the parties are more likely to do so given the reduced fee burden. The maxim is that parties to a lawsuit commonly settle cases when they decide to settle but are well advised to settle when only monumental fees render the case unable to be settled if the case is driven to trial.⁹⁸

At the apex of many mediations is the moment when the mediators and recognize that the case is one hundred percent *dead*. The case, which might be a contract case, has had the life drained out of it because the fees accrued by both sides eclipse any financial value to the parties. This statement might come as a shock here, but sometimes the extensive litigation makes any settlement futile. If, for example, the amount at issue is \$100,000, but the parties individually have spent spend or accrued \$100,000, then the case lost all value. Certainly, the plaintiff would be hard pressed to accept \$100,000 if the \$100,000 was already accrued or spent. Certainly, the defendant is reluctant to pay, or will not pay \$200,000 to the plaintiff, when in fact the defendant paid its own attorney \$100,000 which means that the total burden of the defendant is \$300,000. Absent

Harry Burns: Please, Jess, Marie. Do me a favor, for your own good, put your name in your books right now before they get mixed up and you won't know whose is whose. 'Cause someday, believe it or not, you'll go 15 rounds over who's gonna get this coffee table. This stupid wagon wheel ROY ROGERS GARAGE SALE COFFEE TABLE!

WHEN HARRY MET SALLY. . . (Columbia Pictures 1989).

⁹⁷ If the plaintiff has a weak case, the defendant could threaten for reciprocal fees, or malicious prosecution.

⁹⁸ C.C.P. section 664.6 requires the parties to sign a settlement agreement or appear in open court and put on the record that they settled. Settlements are contracts that the court enters as a judgment under section 664.6.

complete surrender, few defendants would pay a 200% premium in the defense of a debt and might be willing to take the case to trial, given that a loss at trial could not be too much worse. Given this scenario, the parties, through their attorneys, bury the case under a mountain of fees that render any settlement impossible, because no settlement, absent total capitulation, would ever generate sufficient a sufficient recovery to make a party near whole.

Redrafted fee clauses reduce the exposure of fees due to the prevailing party that enables the parties to reach a settlement given the significantly fewer dollars to pay.⁹⁹ Under the guise of third party mediation, some settlements cycle through a day, or days, of threats and counter threat that the skilled mediator transmits and add his or her spin in the process.¹⁰⁰ These redrafted fee clauses that impose unlimited fees upon the scorched earth aficionados might reshape the litigation, given that the attorneys practicing more parsimoniously and economically might immunize their client from the multi-million dollar fee exposure. Getting along, reducing the level of conflict, and upgrading the mutual courtesies can shrink but does not eliminate the fee exposure either party could face at the conclusion of the case.

VIII. DEMONETIZING CIVIL LITIGATION WHEN THE FEES OVERWHELM CIVIL LITIGATION

While fee clauses are specific to each contract, most fee clauses are drafted as following:

“In any action between Broker, BUYER or SELLER arising out of this agreement, the prevailing party shall be entitled to reasonable attorney’s fees and costs.”¹⁰¹

Other variations abound that might expand the scope of the fee clause to cover all disputes between the parties that are an action to recover a debt, or an action arising out of the contract, as here in *Hsu vs. Abbarra*, or some variation thereof. Yet, this language fails to manage the amount of the fees, and better allocate the liability for the fees accrued at the hands of the scorched earth connoisseur.¹⁰²

⁹⁹ Parties can avail themselves of relief under FRCP 68 by an offer of judgment.

¹⁰⁰ Many courts require a settlement conference or order parties to go to mediation before a private [and pricey] mediation services. See CAL. R. CT. 3.1380.

¹⁰¹ *Hsu v. Abbarra* 891 P.2d 804, 806 (Cal. 1995); see CAL. CIV. CODE § 1717.5(a) (West 2017) (“If there is a written agreement between the parties signed by the person to be charged, the fees provided by this section may not be imposed unless that agreement contains a statement that the prevailing party in any action between the parties is entitled to the fees provided by this section.”).

¹⁰² Fee clauses might cover all disputes between the parties even if suit is not filed, fees only if suit is filed, fees only if the suit is filed based on a breach only of the written agreement, fees based on any dispute between the parties without any connection or relationship to the terms of the

If the critics blame attorneys for needless litigation, the answer is to redesign fee clauses to demonetize civil litigation. A streamlined “smart” fee clause discourages the attorneys from litigating cases for no purposes other than driving the case to trial to recover their attorney’s fee, but still guarantees the parties have access to the courts and competent counsel. Litigation mavens win the day in championing the rights of their clients, and litigation bullies lose their incentive to litigate. Untouched, these fees might have skyrocketed because the bullies engaged in the scorched earth tactics in order to deter, deflate and delegitimize the litigation in the first place, which renders cases into catfights among attorneys to recover fees arising from litigation that has spiraled out of control. The attorney’s clients subsidize these catfights, where the payoff for the attorney becomes the cost of continuing services that can exceed the underlying value of the case. Limiting attorney’s fees on all sides might compel parties and their attorneys to embrace the financial realities of the situation before the cases spirals into excessive volumes of a clerk’s transcripts and exhibits for no apparent reason at all.¹⁰³

The goal here is permit the parties to better manage their fee parameters in civil litigation where the fee parameters might grow exponentially and control the outcome of the case. Therefore, the goals are to demonetize conflict in situations when the conflict serves no other purpose than to further monetize the

specific contract, or many other variations. Drafting a fees clause is consequential given that the fees clause compensates the parties for fees, and might protect a party (or imperil a party for fees) for claims that are ancillary or marginally related, or even unrelated, to the contract at issue. Fee clauses can include an entire anagram of related claims. *See, e.g., Santisas v. Goodin*, 951 P.2d 399, 405 (1998) (“On its face, the provision embraces all claims, both tort and breach of contract, in plaintiffs’ complaint, because all are claims ‘arising out of the execution of th[e] agreement or the sale.’ Plaintiffs do not argue otherwise. If a contractual attorney fee provision is phrased broadly enough, as this one is, it may support an award of attorney fees to the prevailing party in an action alleging both contract and tort claims: ‘[P]arties may validly agree that the prevailing party will be awarded attorney fees incurred in any litigation between themselves, whether such litigation sounds in tort or in contract.’” (citations omitted) (first quoting *Lerner v. Ward*, 16 Cal. Rptr. 2d 486 (Ct. App. 1993); and then quoting *Xuereb v. Marcus & Millichap, Inc.*, 5 Cal. Rptr. 2d 154 (Ct. App. 1992))).

¹⁰³ *See Hewlett-Packard Co. v. Oracle Corp.*, 191 Cal. Rptr. 3d 807, 815 n.8 (Ct. App. 2015)

“But a prompt dismissal, even of a frivolous appeal, is not always feasible. In this case, HP’s motion to dismiss the appeal was supported by four volumes of exhibits, which Oracle answered with another five volumes, with the result that the motion essentially duplicated the appeal itself. Top-drawer legal representation, such as both parties have engaged here, can obscure the core frivolousness of an appeal beneath layers of artful obfuscation which only the most painstaking examination can peel away. And where the stakes are high enough—as they certainly are here, judging from the multi-billion-dollar figures put forward by HP’s experts on damages—the threat or even the certain prospect of sanctions may not alter the economic calculus that makes an anti-SLAPP motion, and ensuing appeal, so attractive.”

attorneys. The reciprocity, or even the accrual, of fees under California Civil Code Section 1717 propels litigation to serve the interests of the attorneys to recover for the fees that have accrued over many years of litigation.

Many law reviews and journal articles suggest judicial or legislative changes that might find their way into the reported cases.¹⁰⁴ This article does not seek to vault itself into any reporter series, but instead offer templates that wrests control of the litigation from the attorneys at the helm of litigation, and restores the control to the hands of the client who is the paymaster and can better manage, expend or end the litigation with their own interest at hand. This article points out that excessive fees dwarfing the financial value of the case, actually kills the case whose only revival is aimed at driving the case to trial to recover fees that the parties have expended or accrued.

Given the anomaly of fee shifting under California law, and the trend towards extensive fees, commercial parties who are unaccustomed to high stakes litigation require extensive counseling and careful drafting of their contracts. Given a truly global economy, these clients are the offshore manufacturers who compete in Contract America, sans the risk of brutal litigation. The clients are also the entertainers, sports figures, and celebrities who negotiate out risk. If anything, this article offers many real-life scenarios where the parties or their attorneys might well drive their case off the road and into the litigation ditch. Fee clauses as proposed here, might help ameliorate this outcome.

¹⁰⁴ See *Freeman & Mills, Inc. v. Belcher Oil Co.*, 900 P.2d 669, 678 (Cal. 1995) (“Scholarly commentary on *Seaman’s* also has been generally critical of our *Seaman’s* holding and underlying analysis. (See, e.g., Ashley, *Bad Faith Actions; Liability and Damages* (1994) § 11.08, at p. 28 [the *Seaman’s* court, in creating a new tort of ‘stonewalling’ based on ‘inapposite’ authority, ‘can only be described as out of balance,’ having ‘lost touch with the traditions of contract law’]) . . .”).