



1 of action for breach of fiduciary duty. Both sides have filed  
2 supplemental briefing, and the Court has heard further argument  
3 on the issue. For the reasons set out hereafter, the Court  
4 concludes that California law does not allow recovery of  
5 attorneys fees either directly or as a component of compensatory  
6 damages for a breach of fiduciary duty.

7 The basic rule in California - the "American Rule" - is  
8 embodied in California Code of Civil Procedure (C.C.P.) § 1021,  
9 which provides:

10 Except as attorney's fees are specifically  
11 provided for by statute, the measure and mode  
12 of compensation of attorneys and counselors  
at law is left to the agreement, express or  
implied, of the parties . . . .

13 California Civil Code § 1717(a) provides in relevant part:

14 (a) In any action on a contract, where  
15 the contract specifically provides that  
attorney's fees and costs, which are incurred  
16 to enforce that contract, shall be awarded  
either to one of the parties or to the  
17 prevailing party, then the party who is  
determined to be the party prevailing on the  
18 contract, whether he or she is the party  
specified in the contract or not, shall be  
19 entitled to reasonable attorney's fees in  
addition to other costs.

20 As § 1021 recognizes, the parties are free to contract for  
21 payment of attorneys' fees. Section 1717 creates a mutuality of  
22 obligation so that a contract that would provide attorney's fees  
23 to one side only now extends the benefit of any contractual fee  
24 provision to all parties to the contract whether named in the fee  
25 provision or not.

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1 Finally, California Civil Code § 3333 provides:

2 For the breach of an obligation not  
3 arising from contract, the measure of  
4 damages, except where otherwise expressly  
5 provided by this code, is the amount which  
will compensate for all the detriment  
proximately caused thereby, whether it could  
have been anticipated or not.

6 Plaintiff first argues that Alliance has a contractual  
7 attorneys' fees provision in its standard form escrow  
8 instructions which gives rise to reliance on the reciprocity  
9 provision of § 1717. The Court disagrees. The language of the  
10 escrow instruction is clear and unambiguous, and is not the  
11 fee-setting or fee-shifting language contemplated by § 1717.  
12 The only fee language in the escrow instructions is at paragraph  
13 12, captioned "Conflicting Instructions and Disputes". It  
14 provides:

15 If Escrow Holder becomes aware of any  
16 conflicting demands or claims concerning this  
17 escrow, Escrow Holder shall have the right to  
18 discontinue all further acts on Escrow  
19 Holder's part until the conflict is resolved  
20 to Escrow Holder's satisfaction. Escrow  
21 Holder has the right at its option to file an  
22 action in interpleader requiring the parties  
23 to litigate their claims/rights. If such an  
24 action is filed, the parties jointly and  
25 severally agree (a) to pay Escrow Holder's  
26 cancellation charges, costs (including the  
funds held fees of \$25 per month) and  
reasonable attorney's fees, and (b) that  
Escrow Holder is fully released and  
discharged from all further obligations under  
the escrow. If an action is brought  
involving this escrow and/or Escrow Holder,  
the parties agree to indemnify and hold the  
Escrow Holder harmless against liabilities,  
damages and costs incurred by Escrow Holder  
(including reasonable attorney's fees and  
costs) except to the extent that such

1 liabilities, damages and costs were caused by  
2 the gross negligence or willful misconduct of  
Escrow Holder.

3 Clearly, the first portion of paragraph 12 involves Alliance  
4 recovering its fees and costs from both parties to the escrow if  
5 it must file an interpleader. There may be an argument that the  
6 last, long sentence is broader in applying to any action "brought  
7 involving this escrow and/or Escrow Holder . . . ." This Court  
8 need not decide whether such language is legally sufficient  
9 because assuming it is, it would only bring the analysis back  
10 to § 1717(a) which, by its express terms is limited in  
11 applicability to "any action on a contract . . . ." Plaintiff has  
12 no action on the contract. The only surviving cause of action is  
13 a tort claim for breach of fiduciary duty. See Trope v. Katz,  
14 11 Cal. 4<sup>th</sup> 274, 280 (1995).

15 The most relevant case is John Gray v. Don Miller &  
16 Associates, Inc., 35 Cal. 3d 498 (1984). There, the California  
17 Supreme Court undertook to resolve a conflict between two  
18 district courts of appeal. In one case, Walters v. Marler, cited  
19 by plaintiff here, the appellate court ruled that "a judgment  
20 against a fiduciary for fraud" may include attorneys' fees as an  
21 element of damages. 35 Cal. 3d at 501-02. The other, Pederson  
22 v. Kennedy, 128 Cal. App. 3d 976 (First Dist. 1982) ruled to the  
23 contrary. The California Supreme Court sided with the Pederson  
24 court, citing the American Rule under § 1021, and holding that  
25 damages under § 3333 do not include attorneys' fees in an action  
26 against a fiduciary, nor are they separately recoverable because

1 of § 1021. In doing so, the court reviewed the various  
2 exceptions to the American Rule, which are: 1) litigation created  
3 or preserved a common fund; 2) if a judgment confers a  
4 substantial benefit on a defendant; 3) "private attorney  
5 general"; and 4) "tort of another". None of those exceptions are  
6 applicable on the record in this case. As the California Supreme  
7 Court stated in John Gray v. Don Miller & Associates, Inc.:

8           The fact that the wrongdoing was  
9           committed by a fiduciary does not provide a  
10          sufficient reason for the exception; surely,  
11          if the award of attorney fees depended on the  
12          nature of the wrong, fees in tort actions  
13          would be awarded on a case-by-case basis, a  
14          result clearly prohibited by section 1021.

15 35 Cal. 3d at 507. See, also, Jahn v. Brickey, 168 Cal. App. 3d  
16 399, 408 (Fourth Dist. 1985).

17          The basic rules under California law are that damages under  
18 § 3333 for actions sounding in tort do not include as an element  
19 of damages attorneys' fees incurred. Allstate Insurance Co. V.  
20 Superior Court, 151 Cal. App. 4<sup>th</sup> 1512, 1528 (Fourth Dist. 2007).

21 Nor are attorneys' fees in such actions otherwise allowed in  
22 derogation of the basic rule of § 1021 unless the circumstances  
23 fit one or more of the recognized exceptions. Lastly, attorneys'  
24 fees are not recoverable in an action for breach of fiduciary  
25 duty. Cal-Jones Properties v. Evans Pacific Corp., 216 Cal.  
26 App. 3d 324, 329 (First Dist. 1989).

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1 For all the foregoing reasons, the Court finds and concludes  
2 that plaintiff cannot recover attorney fees in this proceeding on  
3 his claim for breach of fiduciary duty under any applicable  
4 provision of California or other law. Accordingly, defendant's  
5 motion for summary adjudication on that issue is also granted.

6 IT IS SO ORDERED.

7 DATED: AUG 29 2007

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10 PETER W. BOWIE, Chief Judge  
11 United States Bankruptcy Court  
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