

# Defendant wins ‘prevailing party’ fees in split decision

By DEBORAH ELKINS

A defendant who won a suit alleging breach of a shareholder agreement was entitled to attorney’s fees under a provision that allowed fees to a party who hired a lawyer “to enforce” the agreement, the Supreme Court of Virginia said in a 4-3 decision.

Describing a portion of the fee clause in the shareholder agreement as “idiosyncratic,” the majority said the winner of the suit could collect her fees because she invoked separate terms of the agreement as a defense in the suit.

The dissent read the provision differently: “Dodging a blow, after all, is not the same thing as delivering one,” it said.

The fee dispute arose after Pilar Godoy successfully defended an action by Ronald DeCesare Jr. claiming Godoy breached the shareholder agreement by preventing the sale of PHR Holdings Inc. After a jury found Godoy had not breached the agreement, the circuit court granted her fee request.

According to the agreement, fees could be awarded in the event a party to the agreement “engages an attorney to enforce the provisions hereof or to secure performance by a defaulting party.”

The agreement included the “idiosyncratic requirement that the prevailing party is entitled to the award of its reasonable attorney’s fees incurred in enforcing the agreement and/or securing performance of its terms,” the Supreme Court said in its April 10 unpublished order.

The majority acknowledged that defense of a claim alleging breach of an

agreement may not, in many contexts, amount to “enforcing” the agreement. However, under the facts of *DeCesare v. Godoy* (VLW 015-6-029 (UP)), in which Godoy asserted separate terms of the agreement as a defense, the majority said the defendant incurred fees and costs while “enforcing” the agreement.

The three newest justices dissented from the majority’s interpretation of the fee clause, contrasting it with a “standard prevailing-party provision awarding attorney fees to any party that prevails in litigation arising out of the contract.” Such a standard clause would support the fee award, said Justice D. Arthur Kelsey,

joined by Justices Elizabeth McClanahan and Cleo E. Powell.

If you break down the separate clauses in the fee-award provision, it is properly interpreted to imply that the prevailing party entitled to fees is the party that hires counsel to “enforce” or “secure performance of” the agreement, according to Kelsey. The last clause of the provision makes clear that the only attorney fees the “prevailing party” can recover are those “incurred in enforcing and/or securing performance” of the agreement, he said.

“The ordinary reading of this limitation necessarily excludes an award of fees solely incurred in defending against another party’s effort to enforce, or to secure performance of, the agreement.

Although it may appear that a literal reading of the fee-shifting provision “results in an inequity in this particular case,” that possibility did not allow the court to rewrite the contract, Kelsey said.



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