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## Fourth DCA opens door to get fees for litigating fees

By Commentary Jed Frankel

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**PRACTICE FOCUS:  
ATTORNEY FEES**

Jed Frankel writes that any party already involved in or contemplating litigation of a contract with a prevailing-party fee provision must review it carefully to determine whether fees for litigating fees may ultimately be allowed. **A8**

Florida's Fourth District Court of Appeal has determined that a prevailing party in a lawsuit involving a contract can recover attorney fees from the non-prevailing party for time spent not only winning the case and establishing its entitlement to fees but for time spent litigating the amount of fees eventually awarded as well. The case is *Waverly at Las Olas Condominium Ass'n, Inc. v. Waverly Las Olas, LLC*, and the contractual provision at issue provided for an award of attorney fees for "any litigation between the parties under this agreement."

This decision is important for cases where contractual attorney fees provisions are involved.

The prevailing party, a condominium developer, successfully defended claims brought against it by a condominium association involving parking. The trial court awarded the developer attorney fees incurred through the entry of final judgment and an additional sum for litigating the amount of those fees post-judgment — that is, all fees incurred in the litigation.

The condominium association appealed the final judgment on the substantive aspects of the case as well as the amount of the fees awarded by the trial court.

The challenge to the amount of fees was based upon the Florida Supreme Court's decision in *State Farm Fire & Casualty Co. v. Palma*, 629 So.2d 830 (Fla. 1993). The condominium association unsuccessfully argued, to both the trial and appellate courts, that the *Palma* case prevented recovery for attorney fees incurred in litigating the amount of fees.

### Precedence

In *Palma*, the Supreme Court ruled that an insurance company that lost a suit to its insured and then contested entitlement to and the amount of attorney fees incurred in the case could not be held liable for attorney fees spent litigating the amount of fees based upon the language of the Florida statute at issue, section 627.428. The *Palma* court observed that litigating the amount of fees benefitted only the lawyers as the insured did not have an interest in the fees.

In the years since *Palma*, numerous Florida court decisions denied prevailing parties recovery of fees for litigating fees in all types of cases. Creative attorneys attempted to circumvent *Palma*, without success, by drafting fee agreements that they argued gave the client an interest in the attorney fee recovered.

But in affirming the trial court's award of fees against the condominium association in *Waverly at Las Olas* , the Fourth DCA distinguished *Palma* : that decision was based on a statute. In contrast to the statute in *Palma* , the condominium association sued under a contract that contained a broad fee provision and the trial court awarded fees based upon the contract's broad fee provision.

### **Precedence distinguished**

In writing for a unanimous panel affirming the lower court, Judge Melanie May reasoned that *Palma* was based on statutory construction and therefore did not prevent an award for litigating fees when the contractual provision governing the relationship between the parties contained language allowing for it.

As precedential support for the decision, Judge May looked to two Fourth DCA post-*Palma* decisions that allowed for awards for litigating the amount of fees. In one, a trial court awarded attorney fees and costs as a sanction for bad-faith-litigation conduct in a probate case. And the second, a post-judgment dissolution of marriage case, determined that the Florida statute governing awards of attorney fees in family law cases — section 61.16 — allowed the trial court to award fees for litigating fees within its discretion. But neither case involved attorney fees awarded on a prevailing-party fee provision. *Waverly* , in contrast, featured a fee award to a prevailing party based upon a contractual fee provision.

### **Going forward**

In light of the *Waverly* decision, any party already involved in or contemplating litigation of a contract with a prevailing-party fee provision must review it carefully to determine whether fees for litigating fees may ultimately be allowed. Oftentimes, the presence — or absence — of a basis to recover fees and costs from the adverse party is a critical factor to be considered in formulating a strategy for such contested litigation and can make the difference in accepting or rejecting settlement offers during the course of the case.

In addition, due consideration must also be given when entering into a contractual relationship with such a provision.

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