

Turning the Tables on Contracts with Attorney's Fees Clauses - Reciprocal Attorney's Fees Clauses for Consumers in Some Contracts – N.Y. General Obligations Law §5-327

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Today's topic, in a series of articles designed to uncover interesting and little known rights in New York's General Obligations Law, is about the reciprocal opportunity for consumers to recover attorney's fees in some contract settings. In limited circumstances, General Obligations Law §5-327 lets a consumer claim attorney's fees if the contract the consumer signed provides for attorney's fees against the consumer.

Whether you are the consumer, or the business or other party contracting with the consumer, the contract being signed often says that the consumer has to pay the other party's attorney's fees if they breach the agreement. The effect of §5-327 is to give the consumer a reciprocal right to claim attorney's fees in the event of a breach by the other side. You may or may not like this depending on what side you are on, and should be mindful of this statute.

The statute defines important terms that limit its use as follows:

- a) "Consumer contract" means a written agreement entered into between a creditor, seller or lessor as one party with a natural person who is the debtor, buyer or lessee as the second party, and the money, other personal property or services which are the subject of the transaction are primarily for personal, family or household purposes;
- b) "Creditor" means a person who regularly extends, or arranges for the extension of, credit which is payable by agreement in more than four installments or for which the payment of a finance charge is or may be required;
- c) "Seller" means a person who sells or provides or agrees to sell or provide the subject of a consumer transaction.
- d) "Lessor" means a person who regularly leases, or arranges for the lease of, personal property which is the subject of a consumer contract.

When we reviewed the cases reporting on its use, we did not see a lot of activity, but we learned a few things.

For example, a couple that had their vacation plans wrecked turned the tables and recovered their attorney's fees against the jet broker they made their plans through. Initially, this case was decided by an arbitrator, who applied §5-327 and since he found that the broker breached the contract, he awarded attorney's fees to the consumers. When the broker appealed, a N.Y. Federal Judge ruled that the award of attorney's fees was appropriate, because the broker's contract had an attorney's fees clause in its favor. Loeb v. Blue Star Jets, LLC, S.D.N.Y. 2009 (2009 WL 4906538; Lexis 118549).

In another case, a homeowner tried to recover attorney's fees under §5-327 when he sued a heating contractor for a bad job. Jones v. Hill's Heating and Air Conditioning, Inc., 67 A.D.3d 1432 (4th Dept. 2009). As is typical, the heating contractor had an attorney's fees clause in his contract and the consumer tried to turn the tables on the contractor by using the reciprocity of §5-327. The consumer was awarded its damages under a breach of warranty theory, but not under a breach of contract theory, and this was lucky for the heating contractor, because the Judge decided that §5-327 was not applicable if the homeowner did not succeed on the breach of **contract** theory, which is specifically required by the statute.

The importance of the definitions in §5-327 came into play in another case, involving artwork that was part of a loan. Even though the artwork was owned by an individual, it was being used in part as collateral to finance an investment. Christie's Inc. v. Croce, 5 F.Supp.2d 206 (S.D.N.Y. 1998). The purpose of the transaction was not primarily for personal, family, or household goods, so the plaintiff could not recover his attorney's fees under §5-327.

If you are a consumer entering a contract that contains an attorney's fees clause, or if you're someone that deals with consumers and you include an attorney's fees clause in your contracts, be mindful of New York's General Obligations Law §5-327 and how it works.

If you have any questions about this article or legal representation, please do not hesitate to contact Doug Mahr or the attorney in our firm with whom you typically work.