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## Does An Attorney's Fee Clause Survive Contract Rescission?

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When a party is allowed to rescind a contract, the contract is quite literally torn up. Thus, Section 1688 of the California Civil Code provides "A contract is extinguished by its rescission". If a contract is extinguished by rescission, it would seem that all of its provisions, including a prevailing party attorney's fee clause, would be extinguished. According to a California Court of Appeal decision handed down yesterday, that isn't necessarily the case.

The case involved a suit by a tenant and a guarantor (Paul Orozco) against a landlord for fraud. The tenant won an award of compensatory damages on its fraud claim and Paul Orozco succeeded in rescinding his guaranty of the lease. Although the guaranty included an attorney's fee clause, the trial court declined to award Orozco his fees. The Court of Appeal disagreed:

"The guaranty includes a provision entitling a prevailing party in 'an action against the other arising out of or in connection with this Guaranty' the right to 'recover from the other attorneys' fees and costs, including collection costs incurred.' This expansive language, which applies to any prevailing party (unlike the unilateral language of the lease's attorney's fee provision) is sufficient to encompass Orozco's fraud action and rescission remedy. (*Lerner v. Ward* (1993) 13 Cal.App.4th 155, 159-161 [clause allowing fees in any action or proceeding arising out of the agreement includes a fraud action arising out of the agreement].) As discussed above, Orozco is entitled to rescind the guaranty as to Vornado [the initial lessor]. He has therefore prevailed in an action arising from the guaranty and is entitled to attorney's fees incurred in connection with his action related to the guaranty."

*Orozco v. WPV San Jose, LLC*, Cal. Ct. Appeal Case No. H044014 (June 17, 2019). The Court does not address the apparent inconsistency of rescinding a contract while enforcing a provision of that contract.

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