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## *Selected Developments in California Law*

### *Renfrew v. Loysen: Fee Awards for Attorneys Appearing In Propria Persona*

The California Court of Appeal for the Second District recently held in *Renfrew v. Loysen*<sup>1</sup> that an attorney may be awarded attorney's fees pursuant to a representation agreement when the attorney appears *in propria persona*.<sup>2</sup> Yvonne Renfrew, a licensed attorney, rendered legal services to Joanne Loysen pursuant to a contract that provided for payment of attorney's fees.<sup>3</sup> The parties agreed that if either should initiate litigation regarding fees, the prevailing party would be entitled to attorney's fees for that proceeding, in addition to any award on the merits.<sup>4</sup> Renfrew, represented by the Law Offices of Yvonne M. Renfrew, prevailed at trial in an action to collect legal fees owed to her by Loysen.<sup>5</sup> A post judgment motion by Renfrew for attorney's fees pursuant to section 1717 of the California Civil Code was denied.<sup>6</sup>

Fees are generally awarded pursuant to statute, or contract under section 1717.<sup>7</sup> The trial court denied the motion on the basis of a long-standing general rule that attorney-litigants are not entitled to attorney's fees.<sup>8</sup> The rationale for the rule is that attorneys appearing *in propria persona* incur no attorney's fees.<sup>9</sup> The court of appeal

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1. 175 Cal. App. 3d 1105, 222 Cal. Rptr. 413 (1985).

2. *In propria persona*, also referred to as *pro se*, is defined as "in one's own person," and is used in the context of attorney self-representation. BLACK'S LAW DICTIONARY 404 (5th ed. 1983).

3. *Renfrew*, 175 Cal. App. 3d at 1107, 222 Cal. Rptr. at 413.

4. *Id.*

5. *Id.*

6. *Id.*

7. *See infra* note 19 and accompanying text (section 1717 printed in pertinent part).

8. *Renfrew*, 175 Cal. App. 3d at 1107-08, 222 Cal. Rptr. at 414; *see infra* notes 36-47 and accompanying text (legal background of prior common law rule).

9. *Renfrew*, 175 Cal. App. 3d at 1107-08, 222 Cal. Rptr. at 414.

reversed the decision of the trial court and awarded attorney's fees to Renfrew.<sup>10</sup> In reversing, the appellate court attached no significance to the fact that attorney Renfrew incurred no legal fee.<sup>11</sup> Part I of this note sets forth the facts of the case and the decision of the court.<sup>12</sup> Part II discusses both the legal background of the former common law rule denying attorney's fees to attorneys representing themselves, and recent developments that led to the decision in *Renfrew*.<sup>13</sup> Part III examines the legal ramifications of the ruling by focusing upon the types of actions for which attorneys may be awarded fees.<sup>14</sup> In addition, the jurisdictional scope of the ruling will be addressed.<sup>15</sup>

## I. THE CASE

### A. *The Facts*

Yvonne Renfrew, a licensed attorney, rendered legal services to Joanne Loysen pursuant to a representation agreement.<sup>16</sup> The agreement provided that if either party initiated litigation concerning attorney's fees, the prevailing party would be entitled not only to the attorney's fees that were the basis of the action, but also those fees associated with subsequent actions for recovery.<sup>17</sup> Renfrew prevailed in an action to collect legal fees from Loysen.<sup>18</sup> A post judgment motion for the additional fees was filed pursuant to section 1717 of the California Civil Code.<sup>19</sup> The trial court denied the motion, however,

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10. *Id.* at 1110, 222 Cal. Rptr. at 415.

11. *See id.* at 1109-10, 222 Cal. Rptr. at 415.

12. *See infra* notes 16-35 and accompanying text.

13. *See infra* notes 36-62 and accompanying text.

14. *See infra* notes 63-70 and accompanying text.

15. *Id.*

16. *Renfrew*, 175 Cal. App. 3d at 1107, 222 Cal. Rptr. at 413.

17. *Id.*

18. *Id.*

19. *Id.* Section 1717 of the California Civil Code provides:

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

Where a contract provides for attorney's fees, as set forth above, such provision shall be construed as applying to the entire contract, unless each party was represented by counsel in the negotiation and execution of the contract, and the fact of that representation is specified in the contract.

Reasonable attorney's fees shall be fixed by the court, upon notice and motion by a party, and shall be an element of costs of the suit.

Attorney's fees provided for by this section shall not be subject to waiver by the parties to any contract which is entered into after the effective date of this section.

based upon a long-standing rule of California case law that denies awards of legal fees to attorneys who represent themselves.<sup>20</sup>

### B. *The Opinion*

Renfrew claimed a right to attorney's fees pursuant to section 1717 of the California Civil Code.<sup>21</sup> Under section 1717, the court shall award attorney's fees to the prevailing party in a contract action if the contract provides that attorney's fees are recoverable by the prevailing party.<sup>22</sup> Attorneys representing themselves, however, have traditionally been denied fees recoverable pursuant to statutory provisions.<sup>23</sup>

The court in *Renfrew* analyzed the origin of the case law denying fees to attorney-litigants.<sup>24</sup> The court questioned the continued validity of the 1874 case of *Patterson v. Donner*,<sup>25</sup> in which the California Supreme Court created the rule.<sup>26</sup> The *Renfrew* court also cited dicta in the more recent supreme court decision in *Consumers Lobby Against Monopolies v. Public Utilities Commission*<sup>27</sup> to attack the logic of past decisions denying fees to attorneys appearing *in propria persona*.<sup>28</sup> The *Renfrew* court also derived support for a rule allowing fees from the Ninth Circuit case of *Ellis v. Cassidy*.<sup>29</sup> Finally, the court noted that the California Court of Appeal for the First District had recently allowed fees for an attorney appearing *in propria persona* in an inverse condemnation case.<sup>30</sup>

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Any provision in any such contract which provides for a waiver of attorney's fees is void.

(b)(1) The court, upon notice and motion by a party, shall determine who is the prevailing party, whether or not the suit proceeds to final judgment. Except as provided in paragraph (2), the prevailing party shall be the party who is entitled to recover costs of suit.

(2) Where an action has been voluntarily dismissed or dismissed pursuant to a settlement of the case, there shall be no prevailing party for purposes of this section.

CAL. CIV. CODE §1717.

20. *Renfrew*, 175 Cal. App. 3d at 1107-08, 222 Cal. Rptr. at 413.

21. *Id.* at 1107, 222 Cal. Rptr. at 413.

22. CAL. CIV. CODE §1717; *see supra* note 19 and accompanying text (section 1717 printed in pertinent part).

23. *See infra* notes 36-47 and accompanying text.

24. *Renfrew*, 175 Cal. App. 3d at 1108, 222 Cal. Rptr. at 414. The trial court derived the rule from the 1929 California Supreme Court case of *City of Long Beach v. Sten*, 206 Cal. 473, 274 P. 968 (1929). *Id.*

25. 48 Cal. 369 (1874).

26. *Renfrew*, 175 Cal. App. 3d at 1108, 222 Cal. Rptr. at 414; *see infra* notes 36-38 and accompanying text.

27. 25 Cal. 3d 891, 603 P.2d 41, 160 Cal. Rptr. 124 (1979).

28. *Renfrew*, 175 Cal. App. 3d at 1108, 222 Cal. Rptr. at 414 (citing *Consumers Lobby* at 915 n.13, 603 P.2d at 55 n.13, 160 Cal. Rptr. at 138 n.13 (dicta)).

29. 625 F.2d 227 (9th Cir. 1980) (cited in *Renfrew*, 175 Cal. App. 3d at 1108-09, 222 Cal. Rptr. at 414).

30. *Renfrew*, 175 Cal. App. 3d at 1109, 222 Cal. Rptr. at 414-15 (citing *Leaf v. City of San Mateo*, 150 Cal. App. 3d 1184, 198 Cal. Rptr. 447 (1984)).

The court in *Renfrew* found the reasoning of the cases awarding legal fees logical and persuasive.<sup>31</sup> Renfrew's contract action required time and skill for which Renfrew would have otherwise received compensation.<sup>32</sup> The loss of time available for Renfrew's regular law practice represented a loss of income.<sup>33</sup> The court found no justification for allowing Loysen to escape a contractual obligation to pay legal fees simply because Renfrew chose to appear *in propria persona*.<sup>34</sup> To deny fees would create a windfall for Loysen at the direct expense of attorney-litigant Renfrew.<sup>35</sup> The court therefore decided to reject the rule created in *Patterson*.

## II. LEGAL BACKGROUND

### A. Development of Early Case Law

In 1874, the California Supreme Court originated the general rule denying attorney's fees to attorney-litigants appearing *in propria persona* in *Patterson v. Donner*.<sup>36</sup> In an action to enforce a mortgage, an attorney representing himself sought an award of legal fees.<sup>37</sup> Although the mortgage contained a contractual provision allowing the award, the fees were denied without explanation.<sup>38</sup> In 1928, the California Supreme Court held in *City of Long Beach v. Sten*<sup>39</sup> that an attorney acting *in propria persona* to defend a condemnation action could not recover legal fees.<sup>40</sup> An award of fees was required by a

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31. See *Renfrew* at 1109, 222 Cal. Rptr. at 450.

32. *Id.*

33. *Id.* The court did not address the situation in which attorneys are represented by a professional law corporation owned by the attorney-litigants. See CAL. BUS. & PROF. CODE §§6160-72 (professional legal corporations). The court in *Leaf v. City of San Mateo* noted that if attorneys were to incur financial liability by employing a self-owned law corporation, the attorneys would be able to recover fees if the courtroom appearance were made by a member of the firm other than themselves. See *Leaf v. City of San Mateo*, 150 Cal. App. 3d 1184, 1189, 198 Cal. Rptr. 447, 449-50 (1984). If Renfrew had been represented by a colleague of her own firm, she would have been awarded fees at trial. See *id.*

34. *Renfrew*, 175 Cal. App. 3d at 1109, 222 Cal. Rptr. at 415.

35. *Id.*

36. 48 Cal. 369 (1878).

37. *Id.* at 380.

38. See *id.* The opinion stated: "The action was brought and prosecuted by the plaintiff personally. We do not think that the stipulation in the mortgage sued on, for counsel fee, can apply where no counsel fee was paid by the plaintiff." *Id.*

39. 206 Cal. 473, 274 P. 968 (1929).

40. *Id.* at 474-75, 274 P. at 969.

California statute,<sup>41</sup> but the supreme court cited *Patterson* as primary authority and denied the fees.<sup>42</sup>

In 1958, the California Court of Appeal for the Third District followed the supreme court rulings in *Patterson* and *Sten* in the case of *O'Connell v. Zimmerman*.<sup>43</sup> The court denied legal fees to an attorney-litigant in an action for specific performance of a contract.<sup>44</sup> Although the California Code of Civil Procedure provided for an award of legal fees, the court noted that the code only provided for fees actually incurred by the prevailing party.<sup>45</sup> Thus, an attorney appearing *in propria persona* could not recover fees because the attorney had paid no fees nor incurred any obligation to pay fees.<sup>46</sup> The holding in *O'Connell* denying fees to attorney-litigants remained the rule until *Consumers Lobby* was heard by the California Supreme Court in 1979.<sup>47</sup>

### B. Recent Trends

In *Consumers Lobby Against Monopolies v. Public Utilities Commission*, the California Supreme Court discussed the issue of attorney's fees for attorney-litigants in dicta.<sup>48</sup> The court held that an attorney representing a group of ratepayers in a Public Utilities Commission reparations hearing could be awarded fees although the attorney was a member of the group.<sup>49</sup> In a footnote, the court attacked past decisions denying fees to attorney-litigants.<sup>50</sup> The court reasoned that

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41. *Id.* at 473, 274 P. at 969. The claim was brought under a prior provision of the California Code of Civil Procedure which provided for an award of legal fees in condemnation proceedings. *Id.* at 474, 274 P. at 969. See CAL. CIV. PROC. CODE §1255(a) (repealed by 1975 Cal. Stat. c. 1275, §1 at 3409).

42. *Id.* at 474-75, 274 P. at 969.

43. 157 Cal. App. 2d 330, 337, 321 P.2d 161, 165 (1958).

44. *Id.* at 336-37, 321 P.2d at 165.

45. *Id.* at 337, 321 P.2d at 165. The claim was brought under section 386.6 of the California Code of Civil Procedure which provides for an award of attorneys fees in actions seeking specific performance of contracts. *Id.* at 336-37, 321 P.2d at 165. See CAL. CIV. PROC. CODE §386.6 (amended by 1974 Cal. Stat. c. 273, §1 at 498).

46. *O'Connell* at 337, 321 P.2d at 165. The modern rule was articulated as follows: "When an attorney represents himself in an action he may not recover the reasonable value of his fee, for he has paid no fee, nor incurred any liability to pay an attorney fee." *Id.*

47. 25 Cal. 3d 891, 603 P.2d 41, 160 Cal. Rptr. 124 (1979).

48. *Id.* at 915 n.13, 603 P.2d at 55 n.13, 160 Cal. Rptr. at 138 n.13.

49. *Id.* at 913-15, 603 P.2d at 54-55, 160 Cal. Rptr. at 137-38.

50. *Id.* at 915 n.13, 603 P.2d at 55 n.13, 160 Cal. Rptr. at 138 n.13. The supreme court stated:

Moreover, the logic of past decisions that do not allow an attorney to recover fees when he appears on his own behalf is unclear. Although such an attorney does not pay a fee or incur any *financial* liability therefor to another, his *time spent* in preparing and presenting his case is not somehow rendered less valuable because he is repre-

although the attorney neither paid nor incurred any fees, the time spent was just as valuable as time spent rendering services to a third party.<sup>51</sup> Attorneys appearing *in propria persona* should therefore be compensated whenever non-attorneys would be entitled to fees.<sup>52</sup>

The rationale of *Consumers Lobby* has been applied by other courts. The United States Court of Appeals for the Ninth Circuit recently held in *Ellis v. Cassidy*<sup>53</sup> that an attorney appearing *in propria persona* to defend against frivolous or harrassing claims may be awarded legal fees.<sup>54</sup> The purpose of the award in *Ellis* was to discourage frivolous litigation.<sup>55</sup> In addition, the attorney-litigant was required to take time away from normal legal practice to defend the suit, suffering a pecuniary loss.<sup>56</sup> The court emphasized that the attorney did not appear *in propria persona* to compensate for an inactive legal practice, but rather had been forced to defend against frivolous claims initiated by the opposing party.<sup>57</sup> A continuing trend toward allowing legal fees is discernable in recent California cases.

In *Leaf v. City of San Mateo*,<sup>58</sup> the California Court of Appeal for the First District held that an attorney appearing *in propria persona* in an inverse condemnation action could recover attorney's fees.<sup>59</sup> The court relied heavily on *Ellis* and *Consumers Lobby*, both of which favored awarding fees to attorney-litigants.<sup>60</sup> The court concluded that although no obligation to pay a fee was incurred, the attorney-litigant spent considerable time and effort in researching, preparing, and

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senting himself rather than a third party. Accordingly, it would appear he should be compensated when he represents himself if he would otherwise be entitled to such compensation, absent a showing in a particular case that such an award would place his interests in conflict with those whom he represents.

*Id.*

51. *Id.*

52. *Id.* The court was also concerned that a bar to recovery of fees would create a windfall to the opposing party at the expense of attorneys who represent themselves. *See id.* at 915, 603 P.2d at 55, 160 Cal. Rptr. at 138.

53. 625 F.2d 227 (9th Cir. 1980).

54. *Id.* at 230-31.

55. *See id.*

56. *Id.* at 231.

57. *Id.*

58. 150 Cal. App. 3d 1184, 198 Cal. Rptr. 447 (1984).

59. *Id.* at 1188-89, 198 Cal. Rptr. at 449-50. The claim was brought under section 1036 of the California Code of Civil Procedure which allows recovery of legal expenses in inverse condemnation actions. *Id.* at 1187, 198 Cal. Rptr. at 449. The holding of the court was framed narrowly. "Thus, we determine that where, as here, an attorney acts *pro se* in prosecuting an inverse condemnation action, such attorney is entitled to recover the reasonable value of the professional services necessarily rendered during pretrial and trial proceedings." *Id.* at 1189, 190 Cal. Rptr. at 449-50. *See* CAL. CIV. PROC. CODE §1036.

60. *Leaf*, 150 Cal. App. 3d at 1188-89, 198 Cal. Rptr. at 449-50.

presenting the case at trial.<sup>61</sup> The attorney's efforts had a substantial economic value that could have been realized had the attorney been representing a third party. Attorneys therefore should be compensated whenever a non-attorney litigant would be awarded fees.<sup>62</sup>

### III. LEGAL RAMIFICATIONS

#### A. *Applicability of the Ruling*

Although *Renfrew* involved payment of fees pursuant to a representation agreement enforceable under section 1717 of the California Civil Code, the reasoning of the court of appeal suggests a broad application of the holding.<sup>63</sup> The courts in *Consumers Lobby*, *Ellis*, *Leaf*, and *Renfrew* expressed concerns about the inequities resulting from denial of fees to attorneys representing themselves.<sup>64</sup> The time spent in preparation of cases represents a pecuniary loss for which an attorney would normally be compensated.<sup>65</sup> Denial of fees also creates a windfall for the opposing party who would otherwise be obligated to pay legal expenses.<sup>66</sup> The holding in *Renfrew* therefore would extend beyond cases concerning representation agreements arising under section 1717, and apply to any circumstance in which an attorney-litigant would otherwise be entitled to an award for legal expenses.<sup>67</sup> For example, attorneys should be awarded fees whenever the fees are provided by the statute giving rise to the action, and pursuant to section 1717 of the California Civil Code when a contract provides for an award.

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61. See *id.* at 1189, 198 Cal. Rptr. at 450.

62. *Id.*

63. See *supra* notes 16-35 and accompanying text.

64. See *Consumers Lobby*, 25 Cal. 3d at 914-15, 603 P.2d at 55, 160 Cal. Rptr. at 138; *Ellis*, 625 F.2d at 230-31; *Leaf*, 150 Cal. App. 3d at 1188-89, 198 Cal. Rptr. at 449-50; *Renfrew*, 175 Cal. App. 3d at 1109, 222 Cal. Rptr. at 415.

65. See *Consumers Lobby*, 25 Cal. 3d at 915 n.13, 603 P.2d at 55 n.13, 160 Cal. Rptr. at 138 n.13; *Ellis*, 625 F.2d at 230-31; *Leaf*, 150 Cal. App. 3d at 1188-89, 198 Cal. Rptr. at 449-50; *Renfrew*, 175 Cal. App. 3d at 1109, 222 Cal. Rptr. at 415.

66. See *Consumers Lobby*, 25 Cal. 3d at 914-15, 603 P.2d at 55, 160 Cal. Rptr. at 138; *Ellis*, 625 F.2d at 230-31; *Leaf*, 150 Cal. App. 3d at 1188-89, 198 Cal. Rptr. at 449-50; *Renfrew*, 175 Cal. App. 3d at 1109, 222 Cal. Rptr. at 415.

67. The dicta regarding attorney's fees by the California Supreme Court in *Consumers Lobby* is entitled to great weight. See *Smith v. Mt. Diablo Unified Sch. Dist.*, 56 Cal. App. 3d 412, 418, 128 Cal. Rptr. 572, 578 (1976). The language in *Consumers Lobby* clearly supports the proposition that "[an attorney] should be compensated when he represents himself if he would otherwise be entitled to such compensation." See *Consumers Lobby*, 25 Cal. 3d at 915 n.13, 603 P.2d at 55 n.13, 160 Cal. Rptr. at 138 n.13 (dicta).

### B. Jurisdictional Scope of the Ruling

The ruling in *Renfrew* is the second holding at the appellate level regarding legal fees in cases involving attorneys appearing *in propria persona*.<sup>68</sup> Although the *Renfrew* ruling represents the view of only two appellate districts, a trend supported by the California Supreme Court in *Consumers Lobby* can be discerned.<sup>69</sup> All three rulings use the same rationale: No sound basis exists for denying awards of attorney's fees when attorneys appear *in propria persona* because attorneys would otherwise be compensated if representing a client other than themselves.<sup>70</sup> The ruling in *Renfrew* may therefore be regarded as representative of existing California law.

### CONCLUSION

In *Renfrew v. Loysen*, the California Court of Appeal for the Second District held that an attorney appearing *in propria persona* could recover legal fees pursuant to a representation agreement. The ruling is the latest development in a trend that is contrary to the long-standing rule against awards of legal fees to attorneys who represent themselves. The California Supreme Court first challenged the rule in *Consumers Lobby Against Monopolies v. Public Utilities Commission*. The United States Court of Appeals for the Ninth Circuit awarded fees to an attorney who was forced to defend against frivolous claims. Finally, the California Court of Appeal for the First District in *Leaf v. City of San Mateo* established what appears to be the new rule: Attorneys should be compensated when appearing *in propria persona* if the services would be compensable in normal cases. The rationale for this rule indicates that fees should be awarded whenever a non-attorney under the same circumstances would have been allowed an award. Although the new rule has been declared in only the First and Second Appellate Districts, support for the decisions was based on California Supreme Court dicta. The rule is therefore likely to reflect a trend to be followed in all California jurisdictions.

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68. See *Leaf*, 150 Cal. App. 3d 1184, 198 Cal. Rptr. 447 (1984); *supra* notes 58-62 and accompanying text.

69. See *Consumers Lobby*, 25 Cal. 3d at 915 n.13, 603 P.2d at 55 n.13, 160 Cal. Rptr. at 138 n.13.

70. See *Consumers Lobby*, 25 Cal. 3d at 913-15, 603 P.2d at 54-55, 160 Cal. Rptr. at 137-38; *Ellis*, 625 F.2d at 230-31; *Renfrew*, 175 Cal. App. 3d at 1109, 222 Cal. Rptr. at 415.