

# *Hiss v. Friedberg:* An Exception to the American Rule Barring an Award of Attorneys' Fees

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## INTRODUCTION

"Can I recover my attorneys' fees?" Who of us has not been asked that by a client considering the pros and cons in initiating litigation over a business deal gone badly or a broken contract? And, as has been drilled in our heads, we recite the "American rule"<sup>1</sup> that each party bears its own attorneys' fees unless a statute or contract provides otherwise. Virginia jurisprudence, however, recognizes one narrow exception to the "American rule" where certain, well-defined circumstances may provide an additional vehicle for the recovery of fees even in the absence of an applicable contract or statute.

## HISS v. FRIEDBERG

In what is commonly referred to as the "*Hiss* exception," the Supreme Court of Virginia, nearly 50 years ago, in the case of *Hiss v. Friedberg*, held that reasonable attorneys' fees are recoverable even if the contract contains no attorneys' fees provision when one party's breach of contract forces a non-breaching party to litigate with a third party.<sup>2</sup>

*Hiss* involved a real estate deal in which the purchasers of land in Fairfax County hired two attorneys, Hiss and Rutledge, to handle the transaction. The sellers assured the purchasers that the property was free of any encumbrances. Another individual, however,

claimed an unrecorded leasehold interest in the property.<sup>3</sup> To protect the purchasers, the parties entered into an escrow agreement with Hiss and Rutledge by which the attorneys agreed to hold the purchase money in escrow until a title company issued a policy insuring title "free and clear of any liens and encumbrances whatsoever."<sup>4</sup>

Hiss and Rutledge applied for the insurance policy, but they represented that no other parties had rights to possess the property aside from the seller. The individual claiming a leasehold interest had informed Hiss and Rutledge of his intention to retain possession of the property. Despite receiving this information, Hiss and Rutledge paid the purchase money to the seller. When the title insurance was issued, the policy contained an exclusion of claims by parties in actual possession of the property, other than the insured. Upon discovery of the lease and the terms of the title insurance policy, the purchasers sued the sellers. The parties reached a settlement agreement, which preserved the purchasers' right to sue Hiss and Rutledge. The purchasers then successfully sued Hiss and Rutledge for breach of the escrow agreement.<sup>5</sup>

As part of the judgment against Hiss and Rutledge, the trial court awarded the purchasers their attorneys' fees incurred in litigating against the sellers. The Supreme Court of Virginia affirmed this decision, holding that "where a breach of contract has forced the plaintiff to maintain or defend a suit with a third person, he may recover the counsel fees incurred by him in the former suit provided they are reasonable in amount and reasonably incurred."<sup>6</sup> The Court stated that the purchasers could recover their attorneys' fees because the purchasers' "employment of [trial] counsel . . . was a direct and necessary consequence of the breach of the contract of [Hiss and Rutledge] . . ."<sup>7</sup> Importantly, the exception does not deal with the cost of litigation with the defendant itself.<sup>8</sup> The rationale underlying the exception is that losses suffered by a plaintiff because of a defendant's breach of contract may include the expenses of litigation with the third party, and these expenses are properly recoverable from the defendant.

## **INTERPRETATION AND APPLICATION OF THE HISS EXCEPTION**

Since *Hiss* was decided, most cases have found the exception not applicable and declined to award attorneys' fees despite creative arguments by counsel.<sup>9</sup> Attorneys should consider the specific facts of the case within the context of the almost sixty decisions over nearly fifty years interpreting *Hiss* before asserting or defending a claim for attorneys' fees outside of the American Rule. For example, the Supreme Court of Virginia repeatedly has stressed that any award of attorneys' fees under the exception is inappropriate unless the damages were the "direct and necessary consequence" of the alleged breach of contract.<sup>10</sup> Thus, where a defendant was said to have violated an agency agreement, the Court held that, in order to recover attorneys' fees, a plaintiff had to have maintained or defended a suit with a third party because of the breach of the agency agreement.<sup>11</sup> Other instances where the *Hiss* exception did not apply include when the contract at issue provides for attorneys' fees,<sup>12</sup> where the plaintiff is partly responsible for the breach,<sup>13</sup> where no breach of contract exists,<sup>14</sup> or—obviously—where the plaintiff did not have to litigate against a third party.<sup>15</sup> So when *is* the exception available? Actually not very often.<sup>16</sup>

In *Owen v. Shelton*, the Supreme Court of Virginia affirmed the award of fees under the *Hiss* exception where sellers of real property instructed their broker not to close on the sale of property unless the buyers paid interest for failing to close by the original date.<sup>17</sup> The broker accepted the buyers' check for interest, along with a letter preserving the buyers' right to contest the interest payment. The buyers filed suit against the sellers, and the sellers obtained a judgment against the broker for the attorneys' fees incurred by the sellers in the litigation with the buyers.<sup>18</sup>

The Court also affirmed the award of attorneys' fees incurred by a buyer who purchased all of the stock of a corporation pursuant to an agreement under which the seller assumed responsibility for all of the undisclosed liabilities of the corporation. After the sale, the IRS asserted a deficiency claim against the corporation and the seller refused to negotiate with the IRS. The seller

was ordered to pay the buyer the fees incurred by the buyer in his dispute with the IRS, but not the fees incurred in litigation between the buyer and the seller.<sup>19</sup>

In other cases, courts have applied *Hiss* to award fees incurred during litigation with third parties, but not in prior litigation between the same parties.<sup>20</sup> *Hiss* also has been cited for the proposition that an indemnitee may recover its attorneys' fees to defend a third party claim, but not to establish the right of indemnity.<sup>21</sup> The Fairfax County Circuit Court even extended the *Hiss* exception to apply to situations in which a party's torts have caused the plaintiff to maintain a suit against a third party.<sup>22</sup>

## **CONCLUSION**

The bottom line is that a court typically will not award attorneys' fees absent an applicable contractual provision or statute. Courts have cautioned against an expansive interpretation of the *Hiss* exception in order to avoid "the first step toward obliterating the general rule."<sup>23</sup> In those few narrow cases that fall under the *Hiss* exception, the breaching party may be liable for more than compensatory damages, and a recovery of attorneys' fees may be a significant pro or con for your client. Given this potentially significant impact and ready opportunity for misapplication, attorneys should analyze with caution the possible application of the *Hiss* exception at the start of every case.

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<sup>1</sup> See, e.g., *Justus v. Kellogg Brown & Root Servs.*, 373 F. Supp. 2d 608, 613 (W.D. Va. 2005); *Gilmore v. Basic Indus., Inc.*, 233 Va. 485, 490, 357 S.E.2d 514, 517 (1987); see generally Charles E. Friend with Kent Sinclair, FRIEND'S VIRGINIA PLEADING & PRACTICE § 23.03[7]b), at

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23-21(2d ed. 2006) (observing that “[a]ttorneys’ fees are not normally awarded as an element of the plaintiff’s compensatory damages”).

<sup>2</sup> 201 Va. 572, 112 S.E.2d 871 (1960).

<sup>3</sup> *Id.* at 574, 112 S.E.2d at 873-74.

<sup>4</sup> *Id.* at 574-575, 112 S.E.2d at 874.

<sup>5</sup> *Id.* at 575, 112 S.E.2d at 874.

<sup>6</sup> *Id.* at 577, 112 S.E.2d at 876.

<sup>7</sup> *Id.* at 579, 112 S.E.2d at 876.

<sup>8</sup> *Id.* at 577-78, 112 S.E.2d at 876.

<sup>9</sup> See, e.g., *Ranger Constr. Co. v. Prince William Co. School Bd.*, 605 F.2d 1298, 1301-05 (4th Cir. 1979) (finding the *Hiss* exception inapplicable to fees to establish liability under a contract and performance bond); *Fisher v. Va. Elec. & Power Co.*, 258 F. Supp. 2d 445, 454 (E.D. Va. 2003) (holding that attorneys’ fees under *Hiss* were not appropriate for breach of warranty and covenant claim); *Cox v. Geary*, 271 Va. 141, 151, 624 S.E.2d 16, 22 (2006) (denying attorneys’ fees under *Hiss* because the fees were recoverable and compensable through legislative act); *State Farm Fire & Cas. Co. v. Scott*, 236 Va. 116, 123-24, 372 S.E.2d 383, 386-87 (1988) (concluding that obligations arose from contract and hence *Hiss* was not applicable); *Young v. M-C Co.*, 37 Va. Cir. 204, 209-10 (Shenandoah County 1995) (citing *Hiss* without discussion and denying plaintiff’s demand for attorneys’ fees); *Dulles Corner Prop. II v. Smith*, 27 Va. Cir. 425, 427 (Fairfax County 1992) (rejecting fee award under *Hiss* when pleadings did not make sufficient allegations that the attorneys’ fees were incurred in litigation with third party due to defendant’s breach of duty); see also *Imaging Sci. Techs. v. Scully*, Case Nos. 98-96 and 98-89, 1999 Va. Cir. LEXIS 748, at \*2 (City of Charlottesville 1999) (refusing to expand *Hiss* exception to include any breach of duty by a party).

<sup>10</sup> *Fidelity Nat’l Title Ins. Co. v. Southern Heritage Title Ins. Agency, Inc.*, 257 Va. 246, 254, 512 S.E.2d 553, 558 (1999); *Long v. Abbruzzetti*, 254 Va. 122, 128, 487 S.E.2d 217, 220 (1997); see also *Hitachi Credit Am. Corp. v. Signet Bank*, 166 F.3d 614, 631 (4th Cir. 1999) and *McCloskey & Co. v. Wright*, 363 F. Supp. 223, 230 (E.D. Va. 1973); see also John L. Costello, VIRGINIA REMEDIES § 19.01[1], at 19-7 (3d ed. 2005) (emphasizing that the application of the *Hiss* exception turns on “determinations of causality and directness of the relationship”) (citations omitted).

<sup>11</sup> *Fidelity Nat’l Title Ins. Co.*, 257 Va. at 254, 512 S.E.2d at 558.

<sup>12</sup> *Chesapeake & Potomac Tel. Co. v. Sisson & Ryan, Inc.*, 234 Va. 492, 502, 362 S.E.2d 723, 729 (1987).

<sup>13</sup> *Transduller Ctr., Inc. v. USX Corp.*, 976 F.2d 219, 228-28 (4th Cir. 1992).

<sup>14</sup> *Johnston v. Johnson*, No. 92-1623, 1993 U.S. App. LEXIS 98, at \*6 (4th Cir. Jan. 5, 1993).

<sup>15</sup> *Sanner v. Poli (In re Poli)*, 298 B.R. 557, 564 (Bankr. E.D. Va. 2003); *Smith v. Fleming*, 55 Va. Cir. 315, 316 (City of Charlottesville 2001); *Virginia Builder’s Supply v. Degaetani & Sons Drywall, Inc.*, 50 Va. Cir. 284, 286-87 (City of Richmond 1999); *Herat v. Keats*, 25 Va. Cir. 306, 307 (Fairfax County 1991); *R. L. Moore Inc. v. Shawn*, 23 Va. Cir. 117, 118 (Fairfax County 1991); *Riegel v. Knudsen*, 3 Va. Cir. 124, 125 (Arlington County 1983).

<sup>16</sup> Virginia Circuit Courts have cited *Hiss* to deny a defendant’s demurrer to plaintiff’s request for attorneys’ fees. See *Fidelity Nat’l Title Ins. Co. v. Southern Heritage Title Ins. Agency*, 42 Va. Cir. 408, 410 (City of Va. Beach 1997), *rev’d on other grounds*, 257 Va. 246 (1999); *Jurdi v. Bellamy*, Law No. 226503, 2005 Va. Cir. LEXIS 57, at \*3 (Fairfax County 2005); *First Am. Title Ins. Co. v. Moran*, Law No. 105380, 1992 Va. Cir. LEXIS 593, at \*\*3-4 (Fairfax County 1992). *Hiss* also has been relied on to award attorneys’ fees to a creditor who filed a nondischargeability action in bankruptcy court in *Elrod v. Bowden (In re Bowden)*, 326 B.R. 62, 94 (Bankr. E.D. Va. 2005). *Hiss* was cited without further discussion in holding that a plaintiff’s claim was within the *Hiss* exception in *RML Corp. v. Lincoln Window Prods.*, 67 Va. Cir. 545, 567 (City of Norfolk 2004), and was cited in passing for the general proposition that attorneys’ fees may be awarded when a defendant’s breach of contract forced the plaintiff to maintain a suit with a third party in *Patel v. Anand, L.L.C.*, 264 Va. 81, 87, 564 S.E.2d 140, 144 (2002), *Prospect Dev. Co. v. Bershader*, 258 Va. 75, 92, 515 S.E.2d 291, 301 (1999) and *Rappold v. Indiana Lumbermens Mut. Ins. Co.*, 246 Va. 10, 13, 431 S.E.2d 302, 304 (1993).

<sup>17</sup> 221 Va. 1051, 277 S.E.2d 189 (1981).

<sup>18</sup> *Id.* at 1056, 277 S.E.2d at 192.

<sup>19</sup> *Cemetery Consultants, Inc. v. Ware*, 211 Va. 784, 788, 180 S.E.2d 528, 531 (1971).

<sup>20</sup> *Rambus, Inc. v. Infineon Techs. AG*, 164 F. Supp. 2d 743, 760 (E.D. Va. 2001).

<sup>21</sup> *Tony Guiffre Distrib. Co. v. Washington Metro. Area Transit Auth.*, 740 F.2d 295, 298 (4th Cir. 1984); *General Elec. Co. v. Mason & Dixon Lines, Inc.*, 186 F. Supp. 761, 766 (W.D. Va. 1960); *Hill v. American President Lines, Ltd.*, 194 F. Supp. 885, 890 (E.D. Va. 1961); *Holley v. The Manfred Stansfield*, 186 F. Supp. 805, 811 (E.D. Va. 1960).

<sup>22</sup> *Green v. Zimpel*, 23 Va. Cir. 524, 529 (Fairfax County 1989); but see *R.L. Moore, Inc.* 23 Va. Cir. at 121 (refusing to apply *Hiss* exception when claim sounded in tort, and when plaintiff failed to allege that defendant’s actions caused plaintiff to litigate with a third party).

<sup>23</sup> *R.L. Moore, Inc.*, 23 Va. Cir. at 121. 