

# Locke Lord QuickStudy: Florida Supreme Court Resolves Attorney's Fees Issues

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Over the festive holiday period the Florida Supreme Court went on an attorney's fees "*Ham-?Page*" in deciding two cases which address the application of Fla.Stat. 57.105(7) to contractual prevailing party attorney's fees disputes. The first case was *Ham v. Portfolio Recovery Associates, LLC*. The second was *Page v. Deutsche Bank Trust Company Americas*. Both cases have the effect of broadening attorney's fees liability in the State.

By way of background, Fla.Stat. 57.105(7) states: "If a contract contains a provision allowing attorney's fees to a party when he or she is required to take any action to enforce the contract, the court may also allow reasonable attorney's fees to the other party when that party prevails in any action, whether as plaintiff or defendant, with respect to the contract. This subsection applies to any contract entered into on or after October 1, 1988." The *Page* dispute addressed the first portion of the statutory language while *Ham* addressed the second clause.

### *Page v. Deutsche Bank Trust Company Americas*

*Page* stemmed from a mortgage foreclosure action filed by a bank which was involuntarily dismissed after a non-jury trial because the bank failed to prove it had standing when the lawsuit was initiated. Notably the bank was able to prove it had standing at the trial. After the dismissal, *Page* petitioned the trial court for an award of prevailing party's attorney's fees under the fee provision within the mortgage and Fla.Stat. 57.105(7). The trial court granted the motion and the bank appealed. On appeal the Florida Fourth District Court of Appeals reversed the attorney's fees award. In so doing the Court held "NO STANDING = NO FEES" and also certified conflict with existing cases to the contrary out of sister appellate jurisdictions. The Florida Supreme Court took jurisdiction of the dispute as a result of the cited conflict and ultimately reversed the Fourth District Court holding that the plain, objective meaning of the statute supports the result that *Page* should be awarded attorney's fees. The Florida Supreme Court reasoned the operative statute had two clauses, the first clause required "the existence of a contract that contains a provision allowing for attorney's fees to a party when he or she is required to take any action to enforce the contract" and the second "requires that the other party must prevail in any action, whether as plaintiff or defendant, with respect to the contract". The Court further reasoned that the first clause required not only that the contract itself contain a fee provision but also that the parties not be strangers to the agreement. In quashing the Fourth District's opinion, the Florida Supreme Court indicated that Fla.Stat 57.105(7) does not require mutual enforceability on the day the operative suit was filed and that judicial estoppel would not operate to prevent an award of prevailing party's attorney's fees in the present circumstances. To the Florida Supreme

Court it was sufficient that the bank and Page were at some uncertain day parties to the mortgage. The Court also noted there was not an adjudication that no contractual relationship between the parties existed nor was there an adjudication that the mortgage did not exist at all. As a result, the Court found an attorney's fees award was appropriate and quashed the Fourth District Court of Appeal's opinion to the contrary. This means that attorney's fees liability is once again a major concern for foreclosing lenders in Florida.

### *Ham v. Portfolio Recovery Associates, LLC*

The *Ham* case concerned common law account stated actions brought by a collection agency, on behalf of an issuing bank, on credit card accounts against the card holders. In the trial level the case proceeded to a trial where the collection agency failed to offer any evidence to support its complaint and accordingly a final judgment was entered against the agency and in favor of the debtors. The debtors petitioned for prevailing party's attorney's fees under Fla.Stat. 57.105(7) but their petition was ultimately denied in the trial level because the stated cause of action was not expressly based upon the contract which contained the attorney's fees provision. The debtors appealed this denial. On appeal the First District Court of Appeal upheld the trial court's denial of attorney's fees because the action did not rely on the contract containing the fee provision. The Florida Supreme Court took jurisdiction of the dispute to resolve a certified conflict on the fees issue between the Florida First and Second District Courts of Appeal. In examining the second clause of Fla.Stat. 57.105(7) the Florida Supreme Court analyzed the phrase "with respect to the contract". The Florida Supreme Court then broke down the meaning of "with respect to" at length and held that "with respect to" has a broadening effect ensuring that the scope of a provision covers not only its subject but also matters relating to that subject. The Supreme Court cited cases which held the ordinary meaning of the statutory phrase "relating to" is broad and means to stand in some relation; to have bearing or concern; to pertain; refer; to bring into association with or connection with. Bearing these matters in mind the Florida Supreme Court held there was a direct relationship between the credit contracts and the stated claims. Thus, the Court concluded that the unilateral fee provision in the credit card contracts was made reciprocal to the prevailing debtors by operation of the broad wording of Fl.Stat. 57.105(7) even though the pled action was not based on the contract itself. This ruling means it is possible that the loser of a lawsuit may be liable for their opponent's attorney's fees even if the suit is only somewhat related to the contract containing an attorney's fees provision.

### *Conclusion*

Therefore, in light of both *Ham* and *Page*, it will be important for Florida Plaintiffs to appropriately investigate and verify their cause of action, and understand their risks if they fail, prior to filing suit. Further afield, it may be time for the Florida Legislature to review Fla.Stat. 57.105(7) and amend it to limit its scope and application.

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