

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

UNIONAMERICA INSURANCE CO., )  
LIMITED, Successor-in- )  
interest to ST. PAUL )  
REINSURANCE, )  
Plaintiff(s), )  
v. )  
THE FORT MILLER GROUP, INC., )  
THE FORT MILLER CO. and )  
BEECHE SYSTEMS CORP., )  
Defendant(s). )  
\_\_\_\_\_ )

No. C05-1912 BZ

**ORDER DENYING PLAINTIFF'S  
MOTION FOR ATTORNEY'S FEES**

Before the Court is plaintiff Unionamerica Insurance Company's ("Unionamerica") motion for attorneys' fees. Plaintiff seeks \$249,945.00 in attorneys' fees it spent prosecuting its rescission claim against The Fort Miller Group, Inc., The Fort Miller Co., and Beeche Systems Corp. (collectively "Fort Miller"), in which judgment was entered in favor of plaintiff on March 16, 2009.

Unionamerica contends that California Civil Code § 1692 permits courts to award attorneys' fees as consequential damages in order to afford a prevailing party complete

1 relief, citing Kass v. Weber, 261 Cal.App.2d 417 (1968).  
2 This case is not instructive, as it not only involved a cause  
3 of action for rescission of an agreement which had been  
4 fraudulently induced - a claim that Unionamerica did not  
5 allege- but it also upheld an award of consequential damages  
6 to the plaintiff for its attorney fees in a "prior action"  
7 that the plaintiff was forced to litigate because of the  
8 defendant's fraudulent acts. The court stated that  
9 "[r]ecovery in an action for deceit for fraudulently inducing  
10 a contract includes the expense of *other litigation* incident  
11 to the contract *as part of consequential damages.*" Id. at  
12 423 (emphasis in original). Here, Unionamerica did not  
13 claim, and the court did not find, fraud by Fort Miller and  
14 Unionamerica is not seeking fees for a "prior action" it had  
15 to litigate because of defendant's fraud. Other than Kass,  
16 Unionamerica provides no authority for its contention that  
17 attorneys' fees may be awarded as consequential damages  
18 pursuant to § 1692.<sup>1</sup>

19 Unionamerica also asserts that it is entitled to an  
20 award of attorneys' fees based on Fort Miller's litigation  
21 conduct, which it contends was "vexatious, wanton, and  
22 unreasonable." "Under the 'American rule,' attorney's fees  
23 may not be awarded absent statutory or contractual

---

24  
25 <sup>1</sup> Unionamerica also cites to Audre Recognition System  
26 v. Casey, 210 B.R. 360 (Bankr. S.D. Cal. 1997) and Gibson v.  
27 Rotunno, an unpublished case in which a fraudulently induced  
28 contract with an attorney's fee provision was rescinded, No.  
96-4076, 1996 U.S. App. LEXIS 33324 (10th Cir. Dec. 20, 1996).  
Neither case stands for the proposition that Unionamerica  
asserts.

1 authorization, or a finding of bad faith." Gotro v. R & B  
2 Realty Group, 69 F.3d 1485, 1487 (9th Cir. 1995) (citing  
3 Alyeska Pipeline Serv. Co. v. Wilderness Soc., 421 U.S. 240,  
4 257 (1975)). Fees may be awarded " . . . when the losing  
5 party has acted in bad faith, vexatiously, wantonly, or for  
6 oppressive reasons." Dollar Systems, Inc. v. Avcar Leasing  
7 Systems, Inc., 890 F.2d 165, 175 (9t Cir. 1989) (citations  
8 and quotations omitted); see also Allmerica Fin. Life Ins. &  
9 Annuity Co. v. Dalessio, No. 96-0385, 2006 U.S. Dist. LEXIS  
10 8994 at \*24 (N.D. Cal. Feb. 20, 2006); United States v.  
11 Standard Oil Co., 603 F.2d 100, 103 (9th Cir. 1979) ("An  
12 award of attorneys' fees for bad faith "is punitive, and the  
13 penalty can be imposed 'only in exceptional cases and for  
14 dominating reasons of justice.'" ) (quoting 6 J. Moore,  
15 Moore's Federal Practice para. 54.77[2] (2d ed. 1972)).

16 This litigation was bitterly contested and I regularly  
17 cautioned both parties regarding their litigation tactics.  
18 But neither Unionamerica nor Fort Miller acted vexatiously or  
19 in bad faith to the degree that would support an award of  
20 fees.

21 I find no need for argument and **VACATE** the hearing  
22 scheduled for **May 20, 2009**. **IT IS ORDERED** that  
23 Unionamerica's motion for attorneys' fees is **DENIED**.

24 Dated: April 24, 2009

25   
26 Bernard Zimmerman  
United States Magistrate Judge

27 G:\BZALL\BZCASES\UNIONAMERICA V. FORT MILLER\TRIAL\ORDER ON P'S MOT FOR  
28 ATTORNEY'S FEES.wpd