

## Proactive Attack Through Declaratory Relief

By Stephan Mihalovits

**A** breach of contract accusation can worry any business. For smaller businesses, it can be terrifying. By bringing a preemptive action for declaratory relief, a business can take control of the situation and gain leverage to mitigate the harm.

To illustrate, suppose ABC Corp. sees an opportunity with a commercial partner: XYZ Corp. Both sides express optimism about collaboration. They enter into a written agreement. Both sides act in good faith. But despite best intentions, XYZ accuses ABC of breach. ABC denies the breach or looks to resolve the dispute, but the two sides can't settle. ABC feels like it's in legal limbo. Will XYZ sue? If XYZ does sue, will it act right away or wait? What are the chances of successfully defending? How much will that cost? For ABC, an active business, the uncertainty is unacceptable.

But ABC has options. The recent case of *Osseous Technologies of America Inc. v. DiscoveryOrtho Partners LLC* (2010) 191 Cal.App.4th 357 shows that ABC may proactively bring an action for declaratory relief instead of waiting to be sued. This removes uncertainty and allows ABC to proceed as plaintiff. This could improve ABC's chances of showing it is not in breach, or alternatively, give ABC more leverage in settlement discussions.

The declaratory relief action comes from statute. Code of Civil Procedure Section 1060 states, in cases of "actual controversy," a party to a contract may ask a court to declare its rights and duties under the contract. But, per Code of Civil Procedure Section 1061, a court may refuse to declare relief where it is "not necessary or proper at the time under all the circumstances." ABC's claim must fit within the statutes. But what qualifies as an "actual controversy?" When will an action be dismissed as "not necessary or proper?"

ABC can show an "actual controversy" is present, since XYZ is accusing ABC of breaching its legal obligations. An actual controversy exists when a matter is ripe for judicial determination, i.e. a real issue exists between the parties, which affects their legal relations. The matter cannot be a hypothetical dispute that might arise in the future. See *Meyer v. Sprint Spectrum L.P.* (2009) 45 Cal.4th 634, 648 (no declaratory relief where phone service subscribers sued over contractual arbitration provision, but no

agreed to find marketing opportunities for plaintiff's technology, and plaintiff agreed to compensate and use defendant's services exclusively. The plaintiff found an opportunity on its own and refused to pay defendant. The agreement then expired. Instead of waiting to be sued for breach, plaintiff sued, asking the court to declare it did not breach. In affirming dismissal of the declaratory relief claim, the appeals court held there was no allegation of an ongoing contractual relationship between the parties.

Has the agreement with XYZ already expired? If so, a court may conclude there is no future conduct for the court to decree, and the claim is not "necessary or proper." Alternatively, if the agreement is still in effect, ABC could argue declaratory relief is required to determine the parties' contractual rights and obligations going forward. ABC could point to deferential case law for support: "doubts regarding the propriety of an action for declaratory relief...generally are resolved in favor of granting relief." *Filarsky v. Sup. Ct.* (2002) 28 Cal.4th 419, 433.

Whether XYZ has a ripe claim for breach of contract is not as significant as the requirement for some future relations. "The mere circumstance that another remedy is available is an insufficient ground for refusing declaratory relief..." *Filarsky* at 433. Moreover, the "mere fact that the contract has already been breached...does not necessarily deprive the court of the power to grant declaratory relief..." *Emmoleff v. R.K.O. Radio Pictures* (1942) 19 Cal.2d 543, 547.

ABC's declaratory relief claim could help determine the outcome of its dispute with XYZ. If ABC can withstand Section 1061 by showing a judicial declaration will help guide future conduct, ABC can proceed as plaintiff and show it did not breach the agreement. Alternatively, a strong declaratory relief claim could help ABC by causing XYZ to doubt the strength of its own claim, and may encourage settlement. Declaratory relief may be just the claim ABC needs to resolve the dispute and get back to business.

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actual dispute had yet arisen over the provision).

A court would find an actual controversy, because the parties dispute whether ABC is in breach. Since ABC is already accused of breach, the success of ABC's claim rests on whether the matter is too ripe for declaratory relief. In other words, it is possible for ABC to wait too long to bring its claim. If ABC waits so long that its contract with XYZ terminates, then a court may decide it is not "necessary or proper" to declare relief, where such relief would only address past wrongs.

Even if a matter is ripe for adjudication, a court may refuse to grant declaratory relief where the action is not "necessary or proper at the time under all the circumstances." Section 1061. This means a court will declare relief only if it is being asked to decide something that has practical consequences to the parties' future legal relations. The recent case of *Osseous*, illustrates the situation and provides guidance for ABC.

In *Osseous*, the parties had a six-month agreement. The defendant

Without any future conduct to determine, a breach of contract claim was an adequate legal remedy.

**A**BC can learn from the court's analysis. The court noted that plaintiff failed abysmally to allege any future conduct. The complaint alleged only "past wrongs." The agreement already expired, so there were no future relations. The court noted that plaintiff had other plausible arguments to argue future relations, but "the trial court was not required to speculate in favor of plaintiff or accept its bare contentions."

ABC should focus on showing some future relations with XYZ.



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