



Contractual Provisions Can Aid in the Recovery of Attorneys' Fees, But Consider the Unintended Consequences

David L. Hobson

Although the “American Rule” provides that each side pay its own attorneys’ fees, if your dispute arises from a contractual relationship, a “prevailing party” provision or indemnification clause may obligate one of the parties to pay the other’s reasonable attorneys’ fees. But before you draft your contract, consider the unintended consequences of these provisions.

Prevailing Party Provisions

One of the most common ways that contractual partners allocate the financial risks of litigation between themselves in the event of litigation is by including a prevailing party provision in their agreements. Typically, these clauses provide that, “[i]n the event of any litigation arising from or related to this Agreement, the prevailing party shall be entitled to recover from the non-prevailing party, in addition to any other relief awarded, all litigation expenses, including reasonable attorneys’ fees, incurred in such litigation.” Provisions of this type, which are generally enforceable throughout the United States, can be useful in discouraging frivolous lawsuits. But be careful: such provisions are a double-edged sword because, although they can work in your favor, they can also benefit your opponent in the event that you are found liable. Further, there are other considerations that may counsel against negotiating for the inclusion of a prevailing party provision in your next contract. For instance, if you are more likely to be sued for insurable conduct (e.g., negligence insurable under a standard E&O policy), consider that your responsibility to pay the winner’s legal fees under a prevailing party provision may *not* be insurable under your policy. In that case, the absence of a prevailing party provision may work to your advantage.

Moreover, determining exactly who the prevailing party is in contract litigation can present a challenge. For example, is the defendant the prevailing party if the plaintiff voluntarily dismisses its action? If the plaintiff recovers on its claim *and* the defendant recovers on its counterclaim, is the prevailing party the party in whose favor a net judgment was entered, or have both parties prevailed? One way to avoid these types of headaches is to include a definition of “prevailing party” in the contract (e.g., the party who recovers substantially all of the relief it seeks). If the contract does not define the “prevailing party,” the court will seek to determine the parties’ intent in accordance with governing law. For instance, the Georgia Supreme Court has held that the prevailing party must obtain at least some of the relief sought and that therefore a party who “wins” on the merits but recovers nothing is not a prevailing party.

Indemnification Clauses

Another contractual mechanism for the recovery of attorneys’ fees is an indemnification provision, which, broadly defined, entitles the party being indemnified (the “indemnitee”) to recover from the party providing the indemnification (the “indemnitor”) certain costs incurred in connection with the types of claims identified in the indemnification provision. Most courts have held that an indemnification provision that generally provides indemnification for “any and all loss, damage or liability,” or similar language, includes the recovery of attorneys’ fees incurred by the indemnitee as a result of a third party’s claim against it. In other words, the indemnification provision need not specifically refer to attorneys’ fees so long as it otherwise evinces an intent to encompass a wide range of losses suffered by the indemnitee.

This general rule is reversed, however, with regard to suits by the indemnitee against the indemnitor to establish the indemnitee's right to indemnification. That is, most courts hold that a standard indemnification provision applies only to claims brought by third parties against the indemnitee—not to claims between the parties to the indemnification provision—unless the provision under consideration expressly so provides. Ultimately, therefore, you will need to consult the law of your particular jurisdiction to determine the extent to which attorneys' fees are recoverable under your indemnification provision.

Authors and Contributors

David L. Hobson

Associate, Atlanta Office
404.873.8588
david.hobson@agg.com

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Atlanta Office

171 17th Street, NW
Suite 2100
Atlanta, GA 30363

Washington, DC Office

1775 Pennsylvania Avenue, NW
Suite 1000
Washington, DC 20006

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