



When All Else Fails, Look to Fee-Shifting Statutes to Recover Attorneys' Fees

Megan P. Mitchell

Your company is considering a lawsuit. Or maybe you've just been served with a summons and complaint. You've evaluated the strengths and weaknesses of the claims, and you're confident that, when the case ends, you'll be the prevailing party. But victory notwithstanding, will you be able to recover the fees and costs associated with prosecuting or defending the case? Or worse, if you lose, will *you* have to pay your opponent's fees? Specific statutory mechanisms often allow parties to recover attorneys' fees.

Statutory Fee-Shifting Provisions

Statutory claims—that is, lawsuits based on a party's violation of a specific statutory obligation, as opposed to the breach of a general duty of care—often contain fee-shifting provisions. For example, claims based on federal intellectual property, labor & employment, civil rights, and consumer protection statutes allow a victorious plaintiff to recover its attorneys' fees. Many states have similar statutes that provide for a recovery of attorneys' fees.

Sometimes an award of attorneys' fees is mandatory; the court may not deny a fees award to a successful plaintiff. The federal Fair Labor Standards Act is an example of a statutory claim providing for a mandatory fees award. Other times, the court has discretion in determining whether to award fees. Either way, the threat of a recovery of attorneys' fees can provide powerful leverage to a party seeking to resolve a dispute prior to the filing of a lawsuit.

Whether a defendant can recover the expenses incurred in successfully defending a lawsuit depends on the specific statutory language. For example, the federal antitrust statute provides for a recovery of attorneys' fees only by "any person injured" by a violation of the statute; it does not contemplate an award of fees to a successful defendant. But other laws allow defendants to recover their attorneys' fees, especially as a means of discouraging frivolous lawsuits. Also, while the law may provide for a recovery of attorneys' fees by the "prevailing party," determining which party "prevails" is not always as easy as it might seem, especially when a lawsuit involves multiple claims and counterclaims or where parties seek equitable—as opposed to monetary—relief. It is therefore important to understand how courts have interpreted such statutes in your jurisdiction.

"Bad Faith" Fee-Shifting Statutes

Even if the claims in your case don't arise under a statute with a fee-shifting provision, you may still have a statutory basis for recovering your attorneys' fees if the other side has engaged in bad faith or is prosecuting a frivolous lawsuit. Although the general rule in America (aptly named "the American Rule") requires each party to bear its own attorneys' fees in the absence of a specific statutory exception, such exceptions are not uncommon. In federal court, Rule 11 allows a court to sanction a party (including by awarding attorneys' fees and expenses) if it presents arguments for an improper purpose, such as delay or harassment. Various states have similar laws. For example, Georgia law *mandates* an award of fees where a party asserts a claim or position that is wholly unsupported by law or fact. Further, courts have the discretion to award fees where a party prosecutes or defends a case without substantial justification or takes actions which unnecessarily delay the lawsuit. Although the statute only addresses litigants' conduct within the confines of

the lawsuit, a different Georgia statute provides for the recovery of attorneys' fees for pre-litigation bad faith, stubborn litigiousness, or conduct that puts the opposing party to unnecessary trouble and expense. It is important to check the law of the state where your lawsuit is filed to determine whether similar laws provide for a recovery of attorneys' fees.

Many states also allow successful litigants in one lawsuit to bring a second action to recover damages incurred as a result of the earlier case. These actions are based on laws with names like "abusive litigation" or "malicious prosecution" statutes. Significantly, unlike statutes that allow a party to recover attorneys' fees for its opponent's conduct prior to or within the lawsuit, abusive litigation/malicious prosecution statutes usually apply if an *entire lawsuit* was brought for an improper purpose. Although the rules governing these claims vary from state to state, common requirements include that the losing party in the underlying case acted with malice and without substantial justification. Further, a party bringing a claim for abusive litigation or malicious prosecution must usually prove damages *other than* attorneys' fees in the earlier suit (e.g., loss of business or damage to a party's professional reputation). Not all states have such comprehensive "punitive" attorneys' fees statutes, but you should always ask whether a similar state statute might apply in your case.

Critically, even though a fees award is a legal possibility, you should never base your litigation strategy on the assumption that a recovery of fees is a foregone conclusion. Unless mandated by statute, attorneys' fees awards are fairly rare, though not unheard of. If your opponent is prosecuting a frivolous lawsuit or defending a claim in bad faith, you should investigate whether a specific statute will allow you to recovery your attorneys' fees.

Authors and Contributors

Megan P. Mitchell

Associate, Atlanta Office
404.873.8164
megan.mitchell@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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