



What Litigants Need to Know About Recovering Attorney's Fees

C. Knox Withers

"Will I be able to recover my attorney's fees?"

No matter the nature of the case, this is often one of the first questions our clients ask at the outset of each matter. Whether you are a plaintiff who wants to file a lawsuit or a defendant who has no choice but to participate in a case you did not initiate, the cost of litigation is a significant factor that will guide your litigation strategy.

State law may allow litigants to recover their attorney's fees in certain situations. It is important to think strategically about the recovery of attorney's fees, however, because, although courts may *award* attorney's fees, *collecting* those attorney's fees often presents its own difficulties. Further, courts frequently have significant discretion in awarding attorney's fees, including the authority to limit the amount of fees or even whether to award them at all. Thus, whether you are a plaintiff or a defendant, remember this important rule of thumb: *never base your litigation strategy on the assumption that you will recover your attorney's fees.*

Contractual Attorney's Fees and "Prevailing Party" Provisions

Many contracts contain a provision allowing one party to recover reasonable or actual attorney's fees from the other in the event of litigation. Such provisions are especially common in contracts requiring the payment of money from one party to another over a period of time, such as loan contracts or leases. As long as the attorney's fees provision complies with the restrictions imposed by state law, courts will enforce them. Alternatively, some contracts contain a "prevailing party" provision, which provides that, in the event of litigation arising out of the contract, the prevailing party will recover its attorney's fees from the losing party. Courts are obligated to enforce such provisions, but beware: determining which party "prevails" is not always as easy as it seems. And, although you may be tempted to include a prevailing party provision in your contracts, the provision usually cuts both ways: if you lose your lawsuit, you will be liable for your opponent's attorney's fees.

"Bad Faith" Attorney's Fees

Some states may allow a plaintiff to recover his attorney's fees where the defendant acts in bad faith, is overly litigious, or puts the plaintiff to unnecessary trouble and expense. Even in states allow for the recovery of fees in such circumstances, however, attorney's fees may only be available to plaintiffs, as is the case in Georgia; in such states, defendants may not be able to recover attorney's fees unless they assert an independent counterclaim unrelated to the plaintiff's claim. Moreover, even a plaintiff will be unable to recover his attorney's fees if a bona fide dispute exists between the parties; that is, a defendant's refusal to honor his contractual obligations will not necessarily subject him to liability to pay the plaintiff's attorney's fees if he has a good faith reason for his non-performance—even if the defendant eventually loses the lawsuit. Finally, in determining whether to make an award of attorney's fees, the court will often only consider the defendant's conduct *prior to the commencement of the litigation*, not the defendant's conduct once litigation has begun.

Recovery of Attorney's Fees for Abusive Litigation

The laws of some states may allow a litigant to recover for an opponent's abusive conduct within the litigation, itself. Frequently, such statutes fall into one of two categories. First, some states allow a party to seek attorney's fees within the action in which the abusive conduct occurs. For example, state law may allow an aggrieved litigant to file a motion during the pendency of the lawsuit (or within a short time following the entry of a final order) seeking to recovery attorney's fees if his opponent asserts frivolous claims, takes unsupportable positions, participates in abusive or dilatory discovery tactics, or engages in other improper conduct. Depending on the specific state law, and upon a finding of such improper conduct, an award of such fees may be mandatory or discretionary.

Second, some states may allow a party to recover attorney's fees for abusive litigation by filing a completely separate action *after* the conclusion of the case in which the abusive conduct occurred. The primary disadvantage of such a law is that the aggrieved party must first prevail in the underlying action and then bring an entirely new lawsuit for abusive litigation. This may result in significant expense, especially if the aggrieved party prevails in the initial action but loses his suit for abusive litigation. An advantage to proceeding under such a statute, however, is that the plaintiff may be able to recover not only his attorney's fees but also any other damages he suffered as a result of the defendant's abusive conduct.

Conclusion

Unquestionably, litigation is almost always an expensive proposition. Often, there are two sides to the story, and the existence of a good faith dispute will often result in each party bearing its own costs of litigation. But other times, one party's conduct will be truly egregious, and the law of the forum state may allow the aggrieved party to recover his attorney's fees and expenses of litigation. Again, though, the potential for such a recovery is only one factor that plays into litigation strategy; an award—and ultimate collection—of attorney's fees is never certain. Further, the law governing the recovery of attorney's fees varies by state. You should consult an experienced attorney to discuss your options for recovering attorney's fees and the procedure for doing so within your jurisdiction.

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