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## When Is A Win A Win With Attorneys' Fees?

*Law360, New York (May 17, 2010)* -- It is well known that under the American Rule concerning attorneys' fees, as opposed to the English Rule, each party in litigation is responsible for its own attorneys' fees. Nevertheless, contracting parties may — and often do — agree that if the contract leads to litigation, the losing party will pay the prevailing party's fees. These so-called fee-shifting agreements are designed, in part, to make the prevailing party whole and to discourage frivolous litigation.

This article delves into the intricacies of enforcing contractual fee-shifting awards for a prevailing party.[1] In short, after carrying the proverbial football into the end zone, can the winning party expect to get the attorneys' fees it bargained for when the fee-shifting clause was drafted? The answer is less than satisfying — sometimes.

### Enforcing Contractual Awards for Attorneys Fees

It is important to recognize the distinction between claims for attorneys' fees that arise from statutes as opposed to those that arise from contracts. Statutory claims for attorneys' fees may be authorized by civil rights claims, trademark violations or other statutes. Each statute, naturally, must be interpreted according to its terms. Public policy and other enumerated considerations often factor into the analysis concerning these statutory awards of attorneys' fees.

Contract-based claims for attorneys' fees are not without intricacies, but they tend to be less complicated. Under New York law, courts require the losing party to pay the prevailing party's attorneys' fees so long as those amounts are reasonable. *F.H. Krear & Co. v. Nineteen Named Trustees*, 810 F.2d 1250, 1263 (2d Cir. 1989).

Courts enforce fee-shifting agreements as the rule, rather than the exception, and there is a strong presumption that a prevailing party is entitled to all of the reasonable fees incurred. Initially, the contract itself must be clear because by the time litigation ensues, of course, it is too late to correct a vague contract. Assuming a contract is clear, courts generally enforce the terms of the parties' agreement. Two areas where disputes commonly arise are in whether the contract contemplated litigation between the parties and which party prevailed.

### Indemnification Clauses are Different

Indemnification clauses that address attorneys' fees do not necessarily have the same legal effect as a standard fee-shifting clause. Courts have recognized that indemnification clauses are often designed to address claims by third parties, as opposed to claims between the contracting parties. *Mid-Hudson Catskill Rural Migrant Ministry v. Fine Host Corp.*, 418 F.3d 168, 177 (2d Cir. 2005).

As a result, courts interpret indemnification clauses narrowly. Therefore, an indemnification clause is only effective with respect to attorneys' fees if it "exclusively" or "unequivocally" applies to claims between the parties.

## **What Does It Mean to Prevail?**

While litigants often debate who prevailed or to what extent, a claimant who has obtained “some measure of relief usually will be regarded as the prevailing party even if he does not sustain all of his claims.” 10 Charles A. Wright, Arthur R. Miller, & Mary Kay Kane, *Federal Practice and Procedure* § 2667 at 212 (3d ed. 1998).

Many contracts call for an award of fees to the “prevailing party,” but the parties may select their own terms. For example, a contract may define the loser in litigation as the party against whom final judgment is entered.

Regardless of how a contract defines the “winner” or “loser,” losing parties often contend that they did not really lose, or that the prevailing party’s win was hardly a win. Attempts to minimize a victory, however, are generally unrelated to the threshold question of entitlement to a fee award. The extent of a victory is pertinent to the reasonableness of a fee award.

## **Is Entitlement to a Fee Award a Jury Question?**

Federal Rule 54(d)(2)(A) provides a mechanism for filing a motion for an award of attorneys fees and has provoked debate concerning whether — or when — a jury must make a finding of fact concerning entitlement to attorneys fees. It provides as follows:

"A claim for attorneys’ fees and related nontaxable expenses must be made by motion unless the substantive law requires those fees to be proved at trial as an element of damages."

Rule 54(d)(2)(A), therefore, begs the questions, when should entitlement to fees be presented to and decided on by a jury, and when should a party seek attorneys’ fees by a post-trial motion. The key to answering that question is understanding, “unless the substantive law requires those fees to be proved at trial as an element of damages.” The Advisory Committee’s Notes to Rule 54, as amended in 1993, elaborate as follows:

"This new paragraph establishes a procedure for presenting claims for attorneys’ fees, whether or not denominated as 'costs.' ... As noted in subparagraph (A), it does not, however, apply to fees recoverable as an element of damages, as when sought under the terms of a contract; such damages typically are to be claimed in a pleading and may involve issues to be resolved by a jury."

The Advisory Committee Notes reflect that in contract cases, claims for attorneys’ fees “may” involve issues for the jury. It seems to follow that if a plaintiff prevails on a claim for breach of contract, and the contract contains a fee-shifting provision, the jury “may” have to make a finding of fact that plaintiff proved its entitlement to attorneys fees as part of its damages. However, there is disagreement among courts on how and when to apply this rule.

The Second Circuit stated that “when a contract provides for an award of attorneys’ fees, the jury is to decide at trial whether a party may recover such fees; if the jury decides that a party may recover attorneys’ fees, then the judge is to determine a reasonable amount of fees.” *McGuire v. Russell Miller Inc.*, 1 F.3d 1306, 1313 (2d Cir. 1993).

While McGuire unquestionably established that a judge, not a jury, should determine the amount of attorneys’ fees, the court arguably overstepped its bounds in holding that a jury must decide entitlement to a fee award (the “McGuire rule”).

Initially, the McGuire court was not required to address whether entitlement to attorneys’ fees is always a jury question. See *New Shows S.A. v. Don King Productions Inc.*, 1999 WL 553780, \*11 (S.D.N.Y. Jul. 29, 1999) (McGuire’s finding that entitlement to fees is a jury question “was dicta, and need not be followed”). In addition,

the Advisory Committee Notes state that entitlement to attorneys' fees "may" be a jury question, clearly indicating that it is not necessarily a jury question.

Moreover, several years before McGuire, the U.S. Supreme Court found that, as a matter of operational consistency for the courts, a judgment could be final while both the "recoverability or amount of attorney's fees for the litigation remains to be determined," implying that entitlement to attorneys' fees can be addressed post-trial without a jury. *Budinich v. Becton Dickinson and Co.*, 486 U.S. 196, 200 (1988).

Rather than overtly questioning the McGuire rule, some courts (like *Don King Productions*) have found that the terms of the specific fee-shifting clauses required a different result. See also *Morse/Diesel Inc. v. Trinity Indus. Inc.*, 875 F. Supp. 165, 179 (S.D.N.Y. 1994).

The *Morse/Diesel* court held that a jury did not have to decide entitlement to attorneys' fees because the jury had decided the sole factual issue upon which entitlement turned — whether the defendant defaulted under the parties' contract.

The Supreme Court of Vermont interpreted McGuire and came to the same conclusion, applying a set of procedural rules modeled squarely on the Federal Rules of Civil Procedure and held, "The fact that the jury did not make an entitlement decision in this case is no bar to [plaintiffs'] award." *Murphy v. Stowe Club Highland*, 171 Vt. 144, 163, 761 A.2d 688, 701-02 (2000).

These cases acknowledge McGuire, but reflect the reality that fee-shifting issues are fact sensitive and turn, in large part, on the contractual language specific to each case. Additionally, the McGuire rule should not preclude a party from seeking attorneys' fees through a Rule 54(d) motion for prevailing on a defense, where the defending party is not required to show damages to prevail.

While the McGuire rule is not followed as a matter of course, attorneys are well advised to pay attention to it for three reasons. First, in certain circumstances, the McGuire rule should be followed — when attorneys' fees are an element of damages and the contract warrants a finding of fact by the jury.

Second, complying with McGuire is not onerous. Counsel would typically question the parties on the fee-shifting provisions and include an appropriate question in the jury charge. Third, as a practical matter, compliance with McGuire while a jury is empanelled, may be easier than convincing a court that McGuire is inapplicable under the contract during post-trial proceedings.

### **The Amount of a Fee Award Must be Reasonable**

As noted above, the question of entitlement to fees is entirely different from the reasonableness of the amount of an award. Most courts calculate attorneys' fees based upon the "lodestar" method, which has been rebranded in the Second Circuit with few, if any changes, as the "presumptively reasonable fee." *Arbor Hill v. County of Albany*, 484 F.3d 162, 163 (2d Cir. 2007).

The analysis involves determining the reasonable hourly rates for counsel in the relevant market and the number of hours reasonably expended. The court should recognize that a reasonable client would seek to negotiate hourly rates and to pay the minimum necessary to litigate a case effectively. Then the court has considerable discretion to consider all case-specific factors that have been recognized by other courts. See e.g., *Johnson v. Ga. Highway Express, Inc.*, 488 F.2d 717, 719 (5th Cir. 1974) (establishing the twelve widely considered "Johnson" factors).

As a best-practices point, it is not uncommon for courts to find that attorneys support their applications with time records that lack sufficient precision to enable the court to make an informed decision on the reasonability of the

attorneys fees. F.H. Krear, 810 F.2d at 1267. Attorneys, therefore, who should always keep accurate time records, have an extra incentive to do so in cases involving fee-shifting provisions. It is well settled, however, that fees incurred in moving for an award cannot be part of a fee award. Id.

## **Conclusion**

A prevailing party in litigation that relates to a contract with a fee-shifting provision is entitled to an award of reasonably incurred attorneys' fees. The entitlement to fees is not always, but may be, a question of fact for a jury. Once a prevailing party establishes entitlement to fees, the losing party has the burden of proving that the lodestar amount is unreasonable and should be reduced. A party that considers these guidelines should have a good shot at marching the ball into the attorney fee end zone.

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*The opinions expressed are those of the author and do not necessarily reflect the views of Portfolio Media, publisher of Law360.*

[1] This article focuses on the enforceability of fee-shifting agreements in New York's federal and state courts. It addresses other jurisdictions only to make points of comparison.