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Can we sue for attorney's fees? Not under 'American Rule'

BY MICHAEL A. BURGER

Probably every litigator has been asked to sue for the attorney's fees incurred by his or her client during a lawsuit.

This request would appear reasonable; if a bad guy wrongs your client, common sense says the bad guy should pay the freight to make your client financially whole. While this reasoning carries logical force, it does not state the general "American rule."

The 'American Rule' and 'English Rule'

Under the American rule, attorney's fees are generally not recoverable unless expressly provided for by contract, statute or court rule. *Baker v. Health Mgmt. Sys., Inc.*, 98 NY2d 80, 88, 772 NE2d 1099, 1104, 745 NYS2d 741, 746 (2002). Federal courts also "follow 'a general practice of not awarding fees to a prevailing party absent explicit statutory authority,'" *Buckhannon Bd. and Care Home, Inc. v. West Virginia Dept. of Health and Human Resources*, 532 US 598, 602, 121 SCt 1835, 1839 (2001) (citation omitted); accord *Alyeska Pipeline Serv. Co. v. Wilderness Society*, 421 US 240, 245, 95 SCt 1612, 1615 (1975) ("the prevailing party may not recover attorneys' fees as costs or otherwise").

The American rule is designed to allow the little guy access to the court system so he may stand up for his rights. Without the American rule, a middle class family in a cancer cluster might not risk suing a polluting chemical company for fear the company might prevail on a legal loophole, leaving the family stuck with the company's massive legal bills. The American "pay your own way" system favors greater access to justice for all, see the Pledge of Allegiance.

American courts prefer to leave the courthouse door open and use other safeguards against frivolous lawsuits, like sanctions that may be adjusted to apply equally to rich and poor defendants alike, see e.g., Federal Rules of Civil Procedure 11; CPLR 8303; 22 NYCRR § 130-1.1.

By contrast, under the English rule, the loser pays the winner's legal fees, *Engel v. CBS, Inc.*, 93 NY2d 195, 201, 711 NE2d 626, 629, 689 NYS2d 411, 414 (1999). The English "loser pays" system places greater emphasis on discouraging frivolous claims (while evidently encouraging blood pudding and cricket).

The American rule underscores the importance of analyzing a potential lawsuit for any foothold to recover attorney's fees. There are numerous statutes or court rules that provide for recovery of attorney's fees, see e.g., General Obligations Law § 5-327 (consumer contracts); General Business Law § 349 (deceptive trade practices); CPLR 8303 (frivolous claims); CPLR 8600 (equal access to justice); 22 NYCRR § 130-1.1 (sanctions); 42 USC § 1988 (civil rights violations).

A previous agreement or contract may provide that the loser of any dispute will pay the winner's fees, *Baker, supra*; see e.g., *Friends of Shawangunks, Inc. v. Knowlton*, 64 NY2d 387, 392, 476 NE2d 988, 990, 487 NYS2d 543, 545 (1985) (restrictive covenants governing land are private agreements).

Parties embarking on or embroiled in litigation may agree to do so as well, although instances of this are rare.



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Exceptions to the American rule

For every rule there is an exception.

◆ The 'Shindler' Third Party exception

Where "through the wrongful act of his present adversary, a person is involved in earlier litigation with a third person in bringing or defending an action to protect his interests, he is entitled to recover the reasonable value of attorneys' fees and other expenses thereby suffered or incurred [even where not provided for by contract, statute or court rule]," *Shindler v. Lamb*, 25 Misc2d 810, 812, 211 NYS2d 762, 765 (SupCt 1959), aff'd, 10 AD2d 826, 200 NYS2d 346 (First Dept. 1960), aff'd, 9 NY2d 621, 172 NE2d 79, 210 NYS2d 226 (NY1961) (citations omitted); see also *Donn v. Sowers*, 103 AD2d 734, 735 (Second Dept. 1984); *Her-mann v. Bahrami*, 654 NYS2d 158, 159 (Second Dept. 1997); *Central Trust Co., Rochester v. Goldman*, 70 AD2d 767, 767, 417 NYS2d 359, 361 (Fourth Dept. 1979).

Let's look at an example for which this exception might apply. Boris, a con man, drains Bullwinkle's savings account at the Bank of Natasha, by forging Bullwinkle's signature. Bullwinkle immediately retains Rocky the litigator to sue Boris for conversion of his money. Rocky is successful and collects from Boris the con man but Bullwinkle is still shy the bushel of acorns he paid to Rocky.

During the suit against Boris, Rocky pulls a rabbit out of a hat and discovers that Boris could not have carried out his dastardly scheme but for an error by the Bank of Natasha (as required by the laws of ninth grade foreshadowing). Under the Shindler Third Party exception to the American rule, Bullwinkle may sue the Bank of Natasha for the attorney's fees incurred in his suit against Boris. The American rule does not address how to contend with Boris and Natasha's inevitable quest to blow up "moose and squirrel" with a bomb so this will have to be the subject of a future essay.

◆ Federal court exceptions

Federal courts have exercised their inherent powers to create other exceptions to the American rule. There is a "common benefit" exception [that] spreads the cost of litigation to those persons benefiting from it," *Alyeska Pipeline Serv. Co.*, 421 US at 245, 95 SCt at 1616; *Mills v. Electric Auto-Lite Co.*, 396 US 375, 391-392, 90 SCt 616, 625 (1970).

A "federal court may award counsel fees to a successful party when his opponent has acted 'in bad faith, vexatiously, wantonly, or for oppressive reasons,'" *Hall v. Cole*, 412 US 1, 5, 93 SCt 1943, 1946 (1973) (citation omitted).

Conclusion

Clients in New York State will usually be barred from recovering the attorney's fees except provided by statute, court rule or agreement by the parties but the alert lawyer may occasionally invoke another exception to vindicate the client's rights. Of course, every client who sues is entitled to the unique American satisfaction of standing up for his or her rights.

Happy holidays.

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