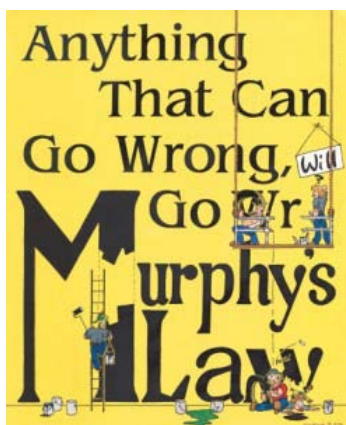




Why Attorney Fees Provisions Must Be in Your Contracts



This past July, the Roanoke Circuit Court reminded us all of the need to put attorney fees provisions in construction contracts. In the case of [Shen Valley Masonry, Inc. v. Thor, Inc., et al.](#), the Court, among other rulings, allowed the defendant to collect its attorney fees because Thor had such a provision in its contract. A [great analysis of this case](#) and its various holdings can be found at the [Virginia Real Estate, Land Use & Construction Law Blog](#) and I recommend that you look at this analysis that I won't repeat here.

What I wish to focus on here, however, is the fact that had Thor failed to put an attorney fees provision in its construction contract, the Court would not have even considered the request, much less provided the additional analysis of the procedural posture of the case. The reason for this is that Virginia, like many states, follows the so called "American Rule" relating to attorney fees. In short, this "rule" states that all parties to a lawsuit will pay their own attorney fees *unless a contractual provision or statute states otherwise*.

Throw in the fact that Virginia courts [strictly construe construction contracts](#) and *voila* we have a situation where, without a provision in the contract stating that one party or both will be able to collect attorneys fees should that contractor or subcontractor prevail, a construction professional that gets sued (whether rightly or wrongly) will be left with a hefty attorney fees bill and no way to recoup those fees through the courts or any other method.

The proper statement of such a provision can take the form of indemnity, straightforward fees provision, or any combination. These provisions can be one way (e. g. the general contractor can collect the fees if it prevails, but the subcontractor cannot) or "prevailing party" (e. g. whoever wins gets its fees). The more a subcontractor is likely to get in a negotiation is the prevailing party type. In any event, the assistance of a [construction lawyer versed in the preparation of such provisions](#) (and others that should be standard in construction contracts) will help make sure that you, as a construction professional, are able to collect your attorney fees in the event that you are forced into court or arbitration.

In a world where [Murphy was an optimist](#), a well drafted and enforced attorney's fee provision in your construction contract is a necessity. Without it you could be left holding a large lawyer's bill with no way to recover those costs.

Please check out my [Construction Law Musings Blog](#) for more on Virginia construction law and other topics.