

# Recovering Attorney's Fees

## There Are Some Exceptions to the So-called American Rule

By ROBERT S. MURPHY Jr.

Civil trial attorneys frequently encounter potential clients who have valid legal claims but simply cannot afford to pursue them because of the expense of litigation. It is a frustrating situation for both lawyer and client alike to abandon such claims; however, that is the nature of the so-called American Rule, which requires that each litigant, even a successful one, bear his or her own attorney's fees.

Unlike the tradition in some European countries, where the losing litigant pays the winner's attorney's fees, a business or person who successfully defends a case has, with limited exceptions, no recourse to obtain payment of his attorney's fees. This fact is equally frustrating to defendants and their attorneys.

As with most legal rules, there are exceptions to the American Rule. This article is intended to briefly identify and discuss those situations where a litigant can recover his attorney's fees.

Under Massachusetts law, a litigant may not recover his attorney's fees unless permitted by court rules, agreed to by contract or stipulation, or permitted by statute. An award of attorney's fees by court rule usually arises from some sort of litigant misconduct such as filing baseless pleadings, violating court orders, or engaging in over-aggressive litigation techniques. Misuse of the judicial process in a general sense may allow a court to award payment of attorney's fees as a sanction to discourage litigants in general, and the parties before the court in particular, from abusing the legal process.

Experience with the local bar has shown that this type of abuse is rare. A litigant cannot rely on

obtaining payment of their attorney's fees via court rules.

While the American Rule is that parties are responsible for their own attorney's fees, there is nothing to prevent parties from agreeing by contract to pay fees. Attorneys frequently encounter clients who do not realize that they have entered into a contract,

*The existence of the possible award of fees, particularly in a case where the facts of the violation are difficult to deny, gives a plaintiff an added advantage in bringing a claim.*

which provides that the prevailing party in any litigation arising out of the agreement can recover attorneys' fees. These fully enforceable provisions are often found tucked away in the fine print of a contract.

Signing such a contract puts you at a distinct disadvantage in the event that a dispute arises. Contracts can even provide that one party will be responsible for the legal fees of another regardless of the outcome of the dispute. These provisions, while less common, have been enforced by Massachusetts courts. It is obviously important when entering into contracts to read the fine print. While many suppliers of goods or services will treat the boilerplate contract provisions as non-negotiable, it is often worth the effort to attempt to strike certain provisions, including those relating to attorney's fees. However, when faced with a 'take it or leave it' negotiating stance, many clients feel they have no choice but to agree to the terms.

The most common exceptions

to the American Rule are found in state and federal statutes. Chapter 93A, the Mass. Consumer Protection Act, provides for the award of reasonable attorney's fees to a successful plaintiff who proves he or she has been the victim of unfair or deceptive business practices. Chapter 93A, §9 governs actions

exceptions to the American Rule in Massachusetts arise out of the employment relationship. They include: non-payment of wages; failure to pay employees during the first three days of jury duty; wage discrimination based on sex; retaliatory punishment or discharge of an employee for reporting violations of law or risks of public health, safety, or the environment; retaliation for reports to OSHA; and discrimination or adverse employment action against a person exercising rights under the Workers' Compensation Act.

Proof of violation of these statutory protections will give rise to an award of attorney's fees. From an employer's perspective, the exceptions to the American Rule seem to subsume the rule itself. In a sophisticated employment environment like Massachusetts, it is important that employers realize that unlawful discharge or discipline of employees can give rise to costly consequences. Fortunately for businesses, Chapter 93A does not apply to employer-employee disputes.

The citizens of the Commonwealth enjoy protection by statute to be free from discrimination. Many federal statutes also supplement these protections. Most, if not all, of these civil rights statutes provide for award of attorney's fees to a successful plaintiff. The Mass. Equal Rights Statute, Mass. Civil Rights Act, and the Mass. Anti-Discrimination Statute allow recovery of reasonable attorney's fees to a prevailing plaintiff upon proof of discrimination or denial of rights based on race, color, religion, national origin, sex, sexual orientation, ethnic origin, or handicap. Even after successfully

by consumers, while §11 governs similar actions between businesses. The level of deception for a consumer dispute is lower, and therefore more easily met than a business-to-business dispute. Consumer actions under §9 require that a demand letter be sent prior to resorting to litigation. No such letter is required under §11.

When counseling clients who believe they have been victimized by unfair or deceptive business practices, attorneys should caution them as to their expectations of actually obtaining an award of their attorney's fees. While not unheard of, an award of attorney's fees in a business-to-business dispute is unusual — the conduct must border on near-criminal behavior. Awards to consumers of attorney's fees under §9 are more common. In general a 93A claim may give one leverage in attempting to resolve the case, but since most cases settle prior to trial, parties are usually responsible for paying their own lawyer.

Other common statutory

defending claims of this type, clients understandably feel they have lost because they have to shoulder the costs of defense.

Massachusetts statutes provide for the protection of family and children. In furtherance of that goal, there are a host of statutes that allow for recovery of attorney's fees. Employers that discharge, discriminate, or retaliate against employees who provide information to the Department of Social Services about the abuse of a child are liable for attorney's fees. A health care provider who denies coverage to a child for reasons such as being born out of wedlock or not being listed on the parent's tax return as a dependent are liable for attorney's fees. Persons who violate domestic-abuse-prevention orders may be liable for an award of fees. Persons owing child support or violating a child-

custody agreement may also have to pay the reasonable attorney's fees of the prevailing party. A person who fails to pay alimony or child support is presumed to be liable for attorney's fees unless a probate court judge enters a specific finding that such attorney's fees shall not be paid.

Chapter 186 of the Mass. General Laws governs the resident landlord-tenant relationship. Landlords who remove or exclude a residential tenant from a premise without a court order are liable to the tenant for attorney's fees. Similarly, landlords who retaliate against tenants in residential units for reporting violations, exercising rights in court, joining tenants' unions or taking similar actions are liable to the tenants for their reasonable attorney's fees.

Other miscellaneous statutes that provide for fees include a

statutory right to recover attorney's fees against litigants who bring insubstantial, frivolous, or bad-faith claims for defenses in civil litigation. The anti-SLAPP statute protects defendants sued solely because of lawful exercise of their right to petition the government. These two statutes are the only ones that allow recovery to a defendant.

The above list of exceptions to the American Rule is comprehensive but not complete. While the possibility of the award of fees exists, it should not be the sole motivating factor in bringing a claim. You cannot assume that an award of fees will be forthcoming. The existence of the possible award of fees, however, particularly in a case where the facts of the violation are difficult to deny, gives a plaintiff an added advantage in bringing a claim. It may also encourage plaintiff's attor-

neys to accept a case on a modified-fee or contingent-fee basis.

While the American Rule has been significantly eroded by the adoption of so many exceptions to the general rule, it remains the law of the land. Migration to the European model which frequently places the onus of payment of attorney's fees squarely on the shoulders of the 'loser' in litigation has not, and most likely will not, be adopted in this country unless the balance of public opinion tips in favor of a radical overhaul of our current civil litigation system. ♦

*Robert S. Murphy Jr., a partner at Bacon & Wilson, P.C., is a civil litigator with extensive experience in representing both plaintiffs and defendants in cases involving recovery of attorney's fees; (413) 781-0560; [rmurphy@bacon-wilson.com](mailto:rmurphy@bacon-wilson.com)*