

Can I Recover My Attorneys' Fees if I Sue?

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North Carolina is a great place to live, work, and do business. Disputes arise here, however, just as they do elsewhere. When they do, the gauntlet often gets thrown down (before reason sets in) and litigation follows. The strange thing about litigation is that most parties enter into it believing not only that they are right and will be vindicated, but also that they ultimately will be able to make their point by forcing the other party to pay their attorneys' fees. For litigation brought in North Carolina courts, the belief regarding attorneys' fees is most often

badly mistaken. This article takes a quick look at the rules governing the recovery of attorneys' fees in North Carolina courts.

General Rule - No Recovery

Generally, there are two approaches to the recovery of attorney' fees - the English Rule and the American Rule. Under the English Rule, the losing party pays both its own attorneys' fees and those of the winning party. Under the American Rule, each party pays the party's own fees without regard to the outcome.

North Carolina follows a modified version of the American Rule. The general rule in North Carolina is that each party pays its own attorneys' fees unless the recovery of those fees is specifically authorized by a statute enacted by the General Assembly. This is true even if the parties have agreed in a contract that the loser of any litigation between them will pay the winner's attorneys' fees.

Exceptions - Recovery Permitted When Authorized By Statute

As is often the case, the North Carolina rule - no recovery of attorneys' fees unless authorized by statute - is far more simply stated than applied. There are many statutory exceptions permitting the recovery of attorneys' fees under certain circumstances. Here are a few of the more commonly applied exceptions:

- Claims involving the misappropriation of trade secrets;
- Claims involving certain employment issues, including retaliatory employment discrimination practices and wage and hour disputes;
- Claims arising out of a "note, conditional sales contract or evidence of indebtedness";
- Claims for unfair and deceptive trade practices;
- Claims involving liens arising out of improvements made to real property;
- Personal injury and property damage claims where the recovery is less than \$10,000;
- Claims that are altogether unsupported by fact or law;
- Claims involving certain domestic or family issues, including post-separation support, alimony, and child

support; and,

- Claims involving certain estate issues, including caveats or challenges to wills.

Not surprisingly, there has been interest for some time in convincing the General Assembly to enact a statute that will allow for the recovery of attorneys' fees at least when parties agree in a contract to abide by the English Rule (that is, loser pays) or some other method for the recovery of attorneys' fees. However, no such statute has yet to be enacted. Therefore, a prevailing party in North Carolina generally cannot recover attorneys' fees even when the other party has agreed to pay such fees unless a statute also allows the fees to be recovered.

Qualification

This quick look is directed at claims that are subject to North Carolina law. No attempt has been made to discuss the obligation to pay attorneys' fees in litigation based on federal law and brought in federal courts. Such claims often are governed by different rules.

Practical Observation - Don't Count On Recovery

As a practical matter, most statutes enacted by the General Assembly that provide for recovery of attorneys' fees include conditions that must be satisfied in order for the recovery to be allowed and that provide the courts with substantial discretion in making an award. Because the statutes do not mandate an award, and because most often there is no applicable statute at all, a party contemplating filing a lawsuit in North Carolina state courts (and particularly when making a reasoned decision as to whether it makes economical sense to litigate over a disputed issue) should not count on getting attorneys' fees paid by the other party even if the lawsuit is successful.

Conclusion

Litigation is the stuff of rainy days. It is almost always disruptive, unpleasant, and expensive. Taking attorneys' fees into account, and doing so without expectation of recovering them, generally is well advised when making decisions on how to resolve disputes.

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For further information regarding the issues described above, please contact Donald J. Eglinton.

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