Winning the Battle but Losing the War: Towards a More Consistent Approach to Prevailing Party Fee Shifting in the Contractual Context

John R. Schleppenback

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WINNING THE BATTLE BUT LOSING THE WAR: TOWARDS A MORE CONSISTENT APPROACH TO PREVAILING PARTY FEE SHIFTING IN THE CONTRACTUAL CONTEXT

John R. Schleppenbach*

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* John R. Schleppenbach is counsel at Seyfarth Shaw LLP, as well as the coach for the Willem C. Vis International Commercial Arbitration Moot Team at Northwestern Pritzker School of Law. Mr. Schleppenbach has previously worked for the Illinois Attorney General's Office, arguing appellate matters before the Illinois Supreme Court, and as a partner in the litigation department at Jenner & Block LLP. Any opinions expressed in this article are solely Mr. Schleppenbach's and are not intended to reflect the views of Seyfarth Shaw LLP. Mr. Schleppenbach obtained his J.D. summa cum laude and Order of the Coif from the University of Illinois College of Law in 2003.
INTRODUCTION

As a general matter, history has not been very kind to losers. In the turmoil of the Middle Ages, loss on the battlefield could also mean the looting of one’s property, the sacking of one’s home, and potentially even the assault of one’s spouse. The nineteenth century was the era of “to the victors belong the spoils,” meaning that an electoral win allowed the prevailing political party a complete monopoly on political appointments and government contracts to the exclusion of the loyal opposition. Even today, professional athletes would sooner face anonymity than defeat on the playing field, living by the maxim that “winning isn’t everything; it’s the only thing.” And no less of an authority than the Swedish pop sensations ABBA have told us that, in matters of love, “the winner takes it all.” Winners get the best of everything in our culture, often at the expense of the losers. Just ask Al Gore.

Given the traditional cultural hegemony of the winner over the loser, one might expect that the U.S. legal system would reward prevailing parties and penalize their opponents to the fullest extent possible. But this is not generally the case. In the United States, the winning litigant may obtain damages (or prevent its opponent from obtaining them), but it will not under ordinary circumstances be entitled to have its attorneys’ fees and litigation costs paid by its opponent. There are some exceptions to this rule, including where the lawsuit has been brought under a statute or contract that authorizes the award of fees and costs. But in the majority of U.S. cases,


2. Martin Tolchin & Susan Tolchin, To the Victor: Political Patronage from Clubhouse to the White House 319 (1971). The origins of this saying have been attributed to nineteenth century New York governor William L. Marcy.


each party bears its own expenses of bringing or defending the suit.\(^7\)

Even where an exception to the general rule against shifting fees does apply, it has not always been easy for courts to determine whether fee shifting is warranted. Cases of statutory fee shifting are more common and a body of case law has developed in accordance with the general policy that fees are to be awarded liberally to encourage private citizens to act as attorneys general enforcing important civil rights.\(^8\) But in the context of contractual fee shifting, published decisions are not as frequent and tend to be very fact specific.\(^9\) And contractual cases can be far more complex than statutory cases, which are concentrated in certain subject areas where success or failure can be fairly clear cut.\(^10\) For example, in a contractual case, the party bringing suit may claim breaches of several different provisions of the contract and prevail on some but not others. The party suing might claim damages in the millions but be awarded only pennies. Or that party might win on its claims of breach of contract but lose on related tort counterclaims brought by its opponents. In each case, the question presented is the same and it is a challenging one: Where each party has both succeeded and failed to some degree, who is the prevailing party?

This article attempts to shed light on that question by analyzing the law and policy applicable to the shifting of attorneys' fees and costs in the United States. Section I examines the history of fee shifting from the English common law through the present, providing background on the general rules that can be discerned in both the statutory and contractual context. Section II then analyzes a number of cases that have dealt with fee shifting in complex contractual cases, distilling various principles the courts have applied in dealing with prevailing party fee shifting. Section III recommends that courts and parties adopt a more consistent approach to fee-shifting that considers


all of the facts and circumstances of the litigation in an attempt to reach a more equitable apportionment of fees, and the article briefly concludes in Section IV.

I. BACKGROUND

A. The English and American Rules on Fee Shifting

The modern English rule that the losing party in a lawsuit pays both parties’ costs can be traced as far back as the Statute of Glouster in 1275. That statute provided that in all cases where damages were recoverable, a successful plaintiff could recover from the defendant “the Costs of his Writ purchased, together with the Damages abovesaid.” Courts interpreted the term “costs” liberally so as to include all legal costs of a suit. A 1487 statute imposed similar fee shifting against parties who brought unsuccessful appeals. It was not until 1531, however, that fee shifting was extended to allow successful defendants at the trial level to recover their costs, and then only in certain specified actions including trespass, debt, covenant, and contract. By 1607, successful defendants could finally recover fees in all of the types of suits in which plaintiffs had that right. Importantly, the award of attorneys’ fees to a prevailing party under these statutes was automatic in England until 1875, when the Supreme Court of Judicature Acts made it discretionary with the court. Following that change, a court could deny a prevailing party fee shifting if it found good cause to do so.

It should be noted that the English fee-shifting regime does not necessarily require the losing party to pay its opponent’s legal fees and costs in their entirety. Rather, there is a complicated set of rules that governs what expenses are to be paid or not paid and in what amounts, and the ultimate recovery is determined by a taxing master, in the ab-

11. See Arthur L. Goodhart, Costs, 38 YALE L.J. 849, 852 (1929) (citing 6 Edw. I c. 1 (1275)).
12. Id.
13. Id.
14. Id. at 853.
17. Id.; Goodhart, supra note 11, at 854.
18. Goodhart, supra note 11, at 854.
sence of agreement among the parties. The prevailing party must submit a bill of costs, which the losing party then responds to in a concise document referred to as a points of dispute. The prevailing party may also file a reply, and the losing party may request a hearing for both sides to present argument about the bill of costs. Generally, the taxing master's focus will be on determining whether specific costs are proportionate, reasonably incurred, and reasonable in amount. Costs are considered proportionate if "they bear a reasonable relationship to the sums in issue in the proceedings, the value of any non-monetary relief in issue in the proceedings, the complexity of the litigation, any additional work generated by the conduct of the paying party and any wider factors involved in the proceedings, such as reputation or public importance." The master may also decide to shift (or decline to shift) fees based on a party's perceived misconduct during the litigation. The types of costs that generally may be recovered in some amount include court fees, counsel and solicitor fees, and necessary expenses of witnesses.

In addition, there are some classes of cases where fee shifting does not apply in England. Small claims cases are generally referred to informal arbitration and fee shifting is not available. This allows unrepresented individuals to bring these claims without the fear that they could be saddled with an opponent's fees and costs. Similarly, claims brought before specialized tribunals like the industrial tribunals that hear employment claims are not subject to fee shifting. And where legal aid represents one of the parties to a suit, that party may not normally be ordered to pay its opponent's fees in the event the suit is unsuccessful.

It appears that Colonial America followed some species of the English fee shifting practice. Colonial statutes at the turn of the

19. See generally Goodhart, supra note 11, at 855-72; Vargo, supra note 10, at 1571; Thomas W. Pridmore, Guide to the Preparation of Bills of Costs (1884).
20. U.K. CPR 47.6 & 47.9.
23. Id.
24. U.K. CPR 44.11.
27. Id.
28. Id.
29. Id.
eighteenth century regulated both the fees attorneys could charge clients and the fees that could be assessed as costs to a losing party.\textsuperscript{31} Federal statutes allowed federal courts to follow state law in this regard.\textsuperscript{32} Later, however, as American attorneys asserted the freedom to charge whatever the market would bear for their services and the public began to view fee shifting as an unjust penalty, the United States began to abandon the English tradition.\textsuperscript{33} In 1796, the Supreme Court struck an award of attorneys' fees from a judgment and stated "the general practice of the United States [was] in opposition to it."\textsuperscript{34} A similar decision in 1851 held that a jury could not include attorneys' fees as part of a damage award.\textsuperscript{35} Finally, Congress passed a bill in 1853 that barred the shifting of any fees or costs except for a modest docket fee.\textsuperscript{36} Another provision allows the taxing of some other modest administrative costs, such as printing costs.\textsuperscript{37} Otherwise, absent some applicable exception, fee-shifting is not available to litigants in the United States courts.

**B. Fee Shifting Under Federal & State Statutes**

Despite the presumption against fee shifting in the United States, federal and state statutes have long provided for fee shifting in certain classes of cases.\textsuperscript{38} By 1975, more than fifty such federal statutes were in effect; by 1995, the number was more than 150.\textsuperscript{39} The subject matter of these statutes varies widely, for instance, from civil

\textsuperscript{31} Vargo, \textit{supra} note 10, at 1572. Massachusetts, New Hampshire, New York, Virginia, and North Carolina established fee schedules and cost recovery. Other colonies had fee schedules but no provisions for cost recovery, although some scholars have suggested that the power to recover may have been implied. \textit{Id.}

\textsuperscript{32} \textit{Id.} at 1575.


\textsuperscript{34} Arcambel v. Wiseman, 3 U.S. 306, 306 (1796).


\textsuperscript{38} Daniel L. Lowery, "Prevailing Party" Status for Civil Rights Plaintiffs: Fee-Shifting's Shifting Threshold, 61 U. Cin. L. Rev. 1441, 1443-44 (1993). Lowery traces the practice as far back as the Enforcement Act of 1870. \textit{Id.}

\textsuperscript{39} \textit{Id.}
rights to environmental protection to pensions. What these statutes tend to have in common, however, is that they protect the public interest in such a way that Congress has deemed it advisable to encourage private parties to sue to ensure their enforcement. The idea is that individuals can shape the law in important ways that serve the public at large but, absent fee shifting, may not be able to afford to do so. These fee shifting statutes in essence deputize private individuals as "private attorney generals" who help implement the law in places the government might not otherwise reach. Indeed, at one point U.S. courts recognized a "private attorney general" doctrine, under which they read federal statutes that were silent on fee shifting as permitting it "when the interests of justice so required." The Supreme Court disapproved of the doctrine in 1975, however, forcing Congress to include express fee shifting provisions in all laws they wished to encourage private parties to bring suit to enforce.

Fee shifting statutes vary in the degree of success they require for a party to recover fees. Many allow fees to be awarded to a party that "prevails" or "substantially prevails." The Supreme Court has determined in this context that, a party "prevails" when "actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff." Such relief does not have to result from a final judgment, but may be obtained through a consent decree

42. See Shub, supra note 8, at 708-11.
43. Id.
44. Lowery, supra note 38, at 1444.
45. Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 270 (1975) ("We do not purport to assess the merits or demerits of the 'American Rule' with respect to the allowance of attorneys' fees. It has been criticized in recent years, and courts have been urged to find exceptions to it. It is also apparent from our national experience that the encouragement of private action to implement public policy has been viewed as desirable in a variety of circumstances. But the rule followed in our courts with respect to attorneys' fees has survived. It is deeply rooted in our history and in congressional policy; and it is not for us to invade the legislature's province by redistributing litigation costs in the manner suggested by respondents and followed by the Court of Appeals.").
46. See Lowery, supra note 38, at 1444.
or settlement.\footnote{49} And it need not be substantial; obtaining even nominal damages can constitute "prevailing" since it constitutes a modification of the defendant's behavior benefitting the plaintiff, no matter how small.\footnote{50} Other statutes eschew the "prevailing party" language in favor of a more narrow approach, requiring "exceptional" circumstances for the prevailing party to recover fees.\footnote{51} The Supreme Court has said that "there is no precise rule or formula" for determining if a case is "exceptional" for fee-shifting purposes, but the strength of the parties' litigating positions and the reasonableness of the parties' conduct are appropriate considerations.\footnote{52} Still other statutes allow fee shifting more broadly, whenever the court determines it is "appropriate."\footnote{53} The Supreme Court has determined that this language allows fee awards to parties "achieving some success, even if not major success."\footnote{54} As might be expected, courts have varied in how they have applied these different statutory thresholds for fee recovery.\footnote{55} Thus, what entitles a plaintiff to fees in one statutory case may not do so in another, based solely on the time and location of the suit.

The amount of fees to be paid under a fee shifting statute is generally not the actual amount of fees incurred, but rather an amount calculated pursuant to the so-called lodestar method endorsed by the Supreme Court.\footnote{56} With this method, which was developed by the Third Circuit in the 1970s, a court multiplies the amount of hours spent by the various attorneys involved in litigating a matter against a reasonable hourly rate for the attorneys' work.\footnote{57} The Third Circuit's formulation of this method also included other factors that increased or decreased the amount of fees to be paid, like the contingent nature of the case and the quality of the attorneys' performance,\footnote{58} and the Fifth Circuit subsequently enumerated twelve additional factors it deemed

\footnote{49} Id. at 111; Maher v. Gagne, 448 U.S. 122, 129 (1980) ("The fact that [a party] prevailed through a settlement rather than through litigation does not weaken her claim to fees.").

\footnote{50} Farrar, 506 U.S. at 113; Wiercinski v. Mangia 57, Inc., 787 F.3d 106, 116 (2d Cir. 2015).


\footnote{52} Octane Fitness, LLC v. ICON Health & Fitness, Inc., 134 S.Ct. 1749, 1756 (2014).


\footnote{58} Id. at 168-69.
relevant to determining a reasonable fee. The Supreme Court, however, has stated that the additional factors identified by the Third and Fifth Circuits should be used to enhance an award only where there has been “exceptional success” and that the amount of hours spent and the reasonable hourly rate will often be the only relevant considerations in determining the amount of an award. In particular, the court has disapproved of increasing the fee award based on the risk involved in taking a case.

The lodestar method of calculating attorneys’ fees has not been immune from criticism or confusion. First, courts have struggled to define what a “reasonable hourly rate” is. Some courts have taken what is termed the prevailing market rate approach, assessing the experience, reputation, and skill of each attorney involved in a case and determining what comparable lawyers in the community charge. Others have used a micro-market approach, which looks at what attorneys with similar experience, reputation, and skill in the community charge in cases similar to the one at issue. Still others have used an attorney’s own historical billing rates as the basis for determining what is reasonable.

Second, courts have disagreed about the extent to which risk already plays into the number of hours an attorney spends on a case and what the reasonable hourly rate is. It also noted that considering risk would raise the incentive to bring meritless claims as well as meritorious ones and increase the complexity of setting fee awards.

59. Johnson v. Ga. Highway Express, Inc., 488 F.2d 714, 717–19 (5th Cir. 1974). The factors are: (1) the time and labor required, (2) the novelty and difficulty of the questions involved, (3) the skill required to perform the necessary legal services, (4) the extent to which the case prevented the attorney from taking other cases, (5) the customary fee, (6) whether the fee is fixed or contingent, (7) time limitations imposed by the client or by circumstances, (8) the amount involved and results obtained, (9) the experience, reputation, and ability of the attorney, (10) the undesirability of the case, (11) the nature and length of the professional relationship with the client, and (12) awards in similar cases. Id.


61. City of Burlington v. Dague, 505 U.S. 557, 567 (1992). The court reasoned that risk already plays into the number of hours an attorney spends on a case and what the reasonable hourly rate is. Id. at 562. It also noted that considering risk would raise the incentive to bring meritless claims as well as meritorious ones and increase the complexity of setting fee awards. Id. at 563, 566.


63. Hanft, supra note 62, at 1378–79.

64. See, e.g., Elley v. District of Columbia, 793 F.3d 97, 100 (D.C. Cir. 2015); Chuadhry v. City of Los Angeles, 751 F.3d 1096, 1110 (9th Cir. 2014); Bryant v. Comm’r of Soc. Sec., 578 F.3d 443, 450 (6th Cir. 2009); Interfaith Cmty. Org. v. Honeywell Int’l, Inc., 426 F.3d 694, 708 (3d Cir. 2005).

65. See, e.g., Spegon v. Catholic Bishop of Chi., 175 F.3d 544, 556 (7th Cir. 1999); Brooks v. Ga. State Bd. of Elections, 997 F.2d 857, 869 (11th Cir. 1993); Ramos Colon v. Sec’y of HHS, 850 F.2d 24, 26 (1st Cir. 1988).

66. See, e.g., Sierra Club v. EPA, 769 F.2d 796, 805 (D.C. Cir. 1985); Shakopee Mdewakanton Sioux Cmty. v. City of Prior Lake, 771 F.2d 1153, 1160–61 (8th Cir. 1985).
which the Fifth Circuit’s additional reasonableness factors should be considered when calculating the fee award.\textsuperscript{67} Federal courts generally disregard these factors except in exceptional cases, while state courts continue to consider them much more freely.\textsuperscript{68} Third, some state courts have departed from the lodestar method and made fee calculation a matter of the trial court’s discretion, so long as the method chosen is reasonable and fair.\textsuperscript{69} Indeed, in some types of cases, simply awarding a percentage of the overall damages recovered as the fee award is favored over the lodestar method.\textsuperscript{70} So again, the end result is that different courts may make different fee awards in very similar cases. Overall, however, the lodestar method remains the dominant basis for determining attorneys’ fees for purposes of federal fee shifting statutes.\textsuperscript{71}

\section*{C. Other Non-Contractual Bases for Fee Shifting}

In addition to fee shifting authorized by contract or statute, U.S. law permits fee shifting where there has been bad faith, under the Common Fund Doctrine, under the Substantial Benefit Rule, or in contempt proceedings.\textsuperscript{72}

The bad faith exception relies on the courts’ inherent power to manage their own affairs and expeditiously resolve cases, and allows fee-shifting where a party has “acted in bad faith, vexatiously, wantonly, or for oppressive reasons.”\textsuperscript{73} It applies to conduct both before and after a lawsuit has been filed.\textsuperscript{74} It does not, however, apply to the conduct that gave rise to the lawsuit in the first place.\textsuperscript{75} Examples of the type of bad faith conduct that can lead to fee-shifting under this excep-

\begin{footnotesize}
\begin{enumerate}
\item 69. See Jandreau v. LaChance, 116 A.3d 1273, 1279 (Me. 2015); Shuette v. Beazer Homes Holdings Corp., 124 P.3d 530, 548-49 (Nev. 2005).
\item 70. Klaiber, supra note 67, at 246-48.
\item 72. Root, supra note 16, at 585-87; Vargo, supra note 10, at 1579-87.
\item 75. Centex Corp. v. United States, 486 F.3d 1369, 1372 (Fed. Cir. 2007); Towerridge, Inc. v. T.A.O, Inc., 111 F.3d 758, 768 (10th Cir. 1997).
\end{enumerate}
\end{footnotesize}
tion include knowingly raising frivolous arguments, purposefully delaying the litigation, or hampering enforcement of a court order.\textsuperscript{76}

The Common Fund Doctrine allows a party to recover its fees from a common fund that its litigation has created or preserved for the benefit of others.\textsuperscript{77} The idea is to prevent free riding where third parties benefit from litigation funded by a plaintiff.\textsuperscript{78} It is most often applied in class actions,\textsuperscript{79} but has been extended to other contexts like insurance cases\textsuperscript{80} and antitrust litigation.\textsuperscript{81} For a litigant to benefit from the doctrine, he must show that the people benefitted by the lawsuit are small in number and easily identifiable, that the benefits of the litigation are traceable with some accuracy, and that there is reason for confidence that costs can be shifted to those benefiting with some exactitude.\textsuperscript{82}

The Substantial Benefit Rule is similar to the Common Fund Doctrine in that it forces absent beneficiaries of litigation to share its costs.\textsuperscript{83} Unlike in Common Fund Doctrine cases, however, there is no common fund and the benefit conferred may be non-pecuniary.\textsuperscript{84} Generally, the rule is applied in cases involving shareholder litigation or unions, where there is an easily-identifiable group of beneficiaries (i.e. other shareholders or union members) who have received a clear non-pecuniary benefit (i.e. unwinding of a merger or cessation of oppressive labor practices).\textsuperscript{85}

\textsuperscript{76} Barnes v. Dalton, 158 F.3d 1212, 1214 (11th Cir. 1998); Primus Automotive Fin. Servs., Inc. v. Batarse, 115 F.3d 644, 649 (9th Cir. 1997).

\textsuperscript{77} US Airways, Inc. v. McCutchen, 569 U.S. 88, 133 (2013). The court noted that it has “recognized consistently that someone who recovers a common fund for the benefit of persons other than himself is due a reasonable attorney’s fee from the fund as whole” and that this rule “reflect[s] the traditional practice in courts of equity.” Id. at 133. It further observed that it has “applied [the rule] in a wide range of circumstances as part of [its] inherent authority.” Id.

\textsuperscript{78} Id. at 133.

\textsuperscript{79} Victor v. Argent Classic Convertible Arbitrage Fund L.P., 623 F.3d 82, 86 (2d Cir. 2010).

\textsuperscript{80} Travelers Property Cas. Ins. Co. of Am. v. Nat’l Union Ins. Co. of Pittsburgh, Pa., 735 F.3d 993, 1002 (8th Cir. 2013).

\textsuperscript{81} City of Detroit v. Grinnell Corp., 495 F.2d 448, 454, 468-69 (2d Cir. 1974).

\textsuperscript{82} Geier v. Sundquist, 372 F.3d 784, 790 (6th Cir. 2004).

\textsuperscript{83} F.D. Rich & Co., Inc. v. United States, 417 U.S. 116, 129-30 (1974) (“We have long recognized that attorneys’ fees may be awarded ... where a successful litigant has conferred a substantial benefit on a class of persons and the court’s shifting of fees operates to spread the cost proportionately among the members of the benefited class.”).

\textsuperscript{84} Mills v. Elec. Auto-Lite Co., 396 U.S. 375, 394-95 (1970); Lewis v. Anderson, 692 F.2d 1267, 1271 (9th Cir. 1982).

The Supreme Court has also recognized that attorneys' fees may be shifted, notwithstanding the American Rule, in civil contempt actions occasioned by willful disobedience of a court order. As in cases of bad faith, the rationale is punitive, seeking to avenge "the court whose dignity has been offended and whose process has been obstructed." Courts generally limit the fee award to the actual amount incurred in pursuing the contempt, without regard to the fees that might have been incurred in other aspects of the proceeding.

D. Contractual Fee Shifting Generally

The United States Supreme Court has long recognized that parties may contract out of the American Rule on fee shifting. This exception to the American Rule can be traced back to the nineteenth century and the dominance of the *lasseiz-faire* doctrine. Unlike statutory fee shifting, which is generally motivated by a desire to encourage private parties to bring lawsuits in the public interest, contractual fee shifting may be motivated by a desire to avoid litigation and encourage contractual compliance. Most fee shifting agreements are entered into well in advance of any litigation, but they can also validly be entered into after litigation has begun, for instance as part of a settlement framework. Fee shifting agreements (like other contracts) will not be enforced in cases where they are found to violate public policy or be unconscionable, however, such as by being one-sided or resulting from unequal borrowing power.

86. Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 718 (1967) ("In a civil contempt action occasioned by willful disobedience of a court order an award of attorney's fees may be authorized as part of the fine to be levied on the defendant.").


88. Fleischmann, 386 U.S. at 718; Feldman v. Am. Palestine Line, Inc., 18 F.2d 749 (2d Cir. 1927); Board of Trade of City of Chi. v. Tucker, 221 F. 305 (2d Cir. 1915).

89. Fleischmann, 386 U.S. at 717 ("The rule here has long been that attorney's fees are not ordinarily recoverable in the absence of a statute or enforceable contract providing therefor.").


91. *See, e.g.*, U.S. Foodservice, Inc. v. Shamrock Foods Co., 246 F. App'x 570, 577 n.8 (10th Cir. 2007) ("In general, the purpose of contractual fee-shifting provisions is to encourage compliance with contracts and discourage unfounded lawsuits."); Dimick v. Dimick, 915 P.2d 576, 577 (Colo. 1996); Ferrell v. Glenwood Brokers, Ltd., 848 P.2d 936, 940 (Colo.1993).


Fee shifting provisions can be and have been incorporated in virtually every kind of contract imaginable, including real estate contracts,94 employment contracts,95 construction contracts,96 contracts for the sale of goods,97 and insurance contracts.98 These provisions often mirror the language of fee shifting statutes by awarding fees to the "prevailing party."99

It should also be noted that there are some federal and state laws that impact the application of contractual fee shifting clauses. For example, the federal Trust Indenture Act of 1939 provides that, unless they specifically provide otherwise, all public bond indentures shall be deemed to include a provision giving courts the discretion to award fees to either party in litigation relating to the indenture, based on the merits of its position.100 Similarly, some states including California have statutes that transform one-way fee shifting clauses into two-way fee shifting clauses.101


101. See, e.g., CAL. CIV. CODE § 1717(a) (West 2016); OR. REV. STAT. § 20.096 (West 2015); WASH. REV. CODE § 4.84.330 (West 2016). The language of the Washington provision is representative of all three: “In any action on a contract or lease entered into after September 21, 1977, where such contract or lease specifically provides that attorneys’ fees and costs, which are incurred to enforce the provisions of such contract or lease, shall be awarded to one of the parties, the prevailing party, whether he or she is the party specified
York also has such a statute, but it is limited to landlord-tenant matters.\footnote{102}

II. Analysis

As this background suggests, courts in the United States have a long history of awarding attorneys’ fees to the prevailing party in litigation where some exception to the American Rule allows it.\footnote{103} But cases defining what it means to be a “prevailing party,” especially in the contractual context, are not exceedingly numerous or entirely consistent with one another.\footnote{104} The relative shallowness of case law in this area may be in part because many lawsuits do not allow for a reasonable dispute as to which party prevailed.\footnote{105} If one party wins all of the claims in the case along with a money judgment, the prevailing party is clear and no discussion of that phrase’s meaning is required.\footnote{106} The seeming contradictions in the case law, meanwhile, may well result from the wide variety of jurisdictions and the many competing policy interests involved, as well as the relative scarcity of these issues.\footnote{107} Regardless, courts do occasionally find themselves with a genuine controversy as to the prevailing party, such as when a plaintiff has brought multiple claims but only won some of them,\footnote{108} when a defendant has raised counterclaims and both parties have won and lost claims,\footnote{109} or when a party has prevailed on legal issues but not obtained damages or, in some cases, even an affirmative judgment.\footnote{110} In

\begin{footnotes}
\item[102] N.Y. REAL PROP. LAW § 234 (2016).
\item[103] See, e.g., Root, supra note 16, at 1578-89.
\item[104] Allen, supra note 9, at 180.
\item[105] See, e.g., Kangarlou v. Progressive Title Co., Inc., 27 Cal. Rptr. 3d 754, 756 (Ct. App. 2005).
\item[109] See, e.g., Creyts Complex, Inc. v. Marriott Corp., 98 F.3d 321, 325 (7th Cir. 1996); Ken Cucchi Constr., Inc. v. O’Keefe, 973 S.W.2d 520, 528 (Mo. Ct. App. 1998).
\item[110] See, e.g., Med-Plus Neck & Back Pain Ctr., v. Noffsinger, 726 N.E.2d 687, 694 (Ill. App. Ct. 2000) (“A party can be considered to be a ‘prevailing party’ for the purposes of a fee-
those cases, there are few clear answers as to who should be deemed the prevailing party. There are, however, some general principles that can be drawn from the case law. This section looks at each of those principles in turn.

A. A Party’s Victory Need Not Be Complete to Be the Prevailing Party

Courts nationwide appear to agree that a party need not unequivocally win all issues in a case in order to be the prevailing party for fee shifting purposes, although they differ somewhat in how they express this. Some have cited with approval Black’s Law Dictionary, which defines a “prevailing party” as “[a] party in whose favor a judgment is rendered, regardless of the amount of damages awarded.” In a slightly different formulation, some courts have considered a prevailing party to be a party “prevailing on the main issue in dispute, even though not necessarily to the extent of its original contention.” Other courts have cast an even broader net, deeming any party who wins on “any significant issue in the litigation . . . achieving some of the benefit . . . sought” to be a prevailing party. Still others have borrowed the definition of “prevailing party” from the statutory fee shifting context for contractual fee shifting. These courts found that a party prevails “when actual relief on the merits materially alters the legal relationship between the parties by modifying the [second party’s] behavior in any way that directly benefits the [first party].”

shifting provision when it is successful on any significant issue in the action and achieves some benefit in bringing suit, when it receives a judgment in its favor, or when it achieves an affirmative recovery.”


Though the words used in each definition vary, the basic principle remains the same: a party may "prevail," and obtain fee shifting, without an unequivocal victory.

Indeed, a variety of courts have concluded that a party may be considered the prevailing party under a contractual fee shifting clause even if it did not recover damages in the main action.116 Although other courts have reached the opposite conclusion,117 in at least some cases their reasoning was expressly tied to the party's failure to obtain not just damages, but also any other kind of affirmative relief, such as an injunction, consent decree, or settlement.118 And the procurement of equitable relief, even in the absence of damages, has regularly been recognized as sufficient to support prevailing party fee shifting.119 In fact, in some cases, courts have found that a party "prevailed" in litigation even in the absence of a judgment, with for instance a favorable settlement establishing the basis for fee shifting.120

B. It Is Possible for Both Parties or Neither Party to Be the Prevailing Party

As the breadth of these definitions of "prevailing" would seem to suggest, it is not unheard of for both parties to a litigation to be deemed prevailing parties. For example, in Johnson Enterprises of
Jacksonville v. FPL Group, the Eleventh Circuit concluded that both parties prevailed because both had won major issues in the suit.\textsuperscript{121} The court considered the possibility that only a party that brought a claim could prevail on it, but ultimately determined that the parties to a contract would not wish to make the availability of fee shifting hinge on which party managed to make it to the courthouse first.\textsuperscript{122} Similarly, the Seventh Circuit in Creyts Complex, Inc. v. Marriott Corporation concluded that both a plaintiff and a defendant with a counterclaim could be considered the prevailing party on their opponent’s claim, reasoning that “the contract’s fees and costs provision does not limit itself only to the first action brought in a dispute.”\textsuperscript{123} The court then awarded both parties fee shifting, ordering each of them to pay their opponent’s defensive costs.\textsuperscript{124} Other courts have followed the same approach.\textsuperscript{125} At the same time, however, there are courts that have agreed that both parties prevailed where each won a major issue in the case, but have come to the opposite conclusion as to the appropriate result, declining to award fee shifting to either party.\textsuperscript{126} This outcome seems to stem from a sense that where both parties prevail, in essence neither party does, the litigation is “a draw.”\textsuperscript{127} Of course, it may be driven by simple pragmatism as well.

In a similar vein, a number of courts have concluded that there was no prevailing party, and that neither party should be awarded fee shifting, when both parties won significant issues in the litigation.\textsuperscript{128}

\textsuperscript{121} Johnson Enterprises of Jacksonville v. FPL Group, 162 F.3d 1290, 1330 (11th Cir. 1998).

\textsuperscript{122} Id.

\textsuperscript{123} Creyts Complex, Inc. v. Marriott Corporation, 98 F.3d 321, 325 (7th Cir. 1996).

\textsuperscript{124} Id.


This conclusion seems to be premised at least in part on the idea that contractual fee shifting provisions are to be strictly construed because they are in derogation of the American Rule, and in part on equitable concerns. As the Eighth Circuit stated in Walton General Contractors v. Chicago Forming, Inc., "the parties intended the attorneys' fees provision. . . to provide an additional remedy for a nonbreaching party," not to create a windfall for a breaching party whose actions simply happened to have caused less damage than its opponent's. And it would perhaps be inequitable to force a party that not only participated in an action in good faith but actually prevailed on some of its contentions to bear the entirety of its adversary's fees. Indeed, courts have expressed concern that attorneys' fees may "become the tail that wags the dog in litigation" when they exceed the amount of actual damages awarded in the case. Thus, faced with two parties that have both enjoyed limited success in an action, courts have not hesitated to declare that neither prevailed, and to order each party to bear its own costs.

C. The "Net Judgment" Rule is Commonly Applied, But Often Only as a Starting Point, and Other Factors Have Also Found Favor

At the same time, however, some jurisdictions have remained adamant that there can only be one prevailing party for fee shifting purposes. As a Florida appeals court has explained it:

133. Deane Gardenhome Ass'n v. Denktas, 16 Cal. Rptr. 2d 816, 819 (Cal. Ct. App. 1999); see also Logan Knitting Mills, Inc. v. Matrix Grp. Ltd., Inc., No. 04 C 7596, 2007 WL 1594482, at *2 (N.D. Ill. June 1, 2007) (courts must "ensure that fees do not rise to pie-in-the-sky numbers that one litigant seeks to collect from a stranger but would never dream of paying itself.").
Unless in the same lawsuit there are separate and distinct claims which would support independent actions, there can only be one prevailing party. When alternative theories of liability are litigated, only one party can prevail. Either appellant or appellees breached the contract. The breach by one party to a contract releases the other party from performing any future contractual obligations. Either appellant or appellee is entitled to attorney fees under the contract. If there could not be two breaches, there could not be two prevailing parties.135

Other courts have argued that to find that both parties or neither party prevailed because both parties won claims is to take too narrow a view of prevailing, noting that:

It transpires frequently that in the verdict each party wins on some of the issues and as to such issues he prevails, but the party in whose favor the verdict compels a judgment is the prevailing party. Each side may score, but the one with the most points at the end of the contest is the winner, and ... is entitled to recover his costs ... .136

These courts place the focus on which party ultimately won the case viewed in its entirety and declare that party to have prevailed.137

This determination to look at the overall results of a case in determining prevailing party status is perhaps best embodied in the so-called "net judgment rule," which compares the amounts recovered by plaintiff and defendant and awards fees to the party with the greater recovery.138 Courts discussing the rule have viewed it as "a device to do equity" and prevent undue focus on the outcome of a single claim at the expense of the larger picture.139 Indeed, outside of the contractual context, the net judgment rule seems to have developed as a way of preventing defendants from avoiding fee shifting where the plaintiffs recovered damages, but not on the specific claim as to which

139. Prosperv. Code, Inc., 626 So.2d 1360, 1363 (Fla. 1996); see also Szoboszlay v. Glessner, 664 P.2d 1327, 1334 (Kan. 1983). The Prosperv. court was dealing with prevailing party status under a mechanic's lien statute, but the net judgment rule operates the same way in that context as in contractual fee shifting cases. Id. at 1363.
fee shifting is explicitly authorized. The rule is generally simple to apply, and courts have recognized it as at least "a good starting point" or a "significant" factor to determine which party really accomplished more through the litigation. But it has also been criticized as "simplistic" and "mechanical," the suggestion being that it fails to take into account perspectives on the results of the litigation beyond the purely mathematical. For example, courts have noted that simply looking at the net judgment rule does not allow courts to take into account the relative importance or significance of the individual claims won or lost in the litigation, or the relationship between the amounts recovered and the amounts that were originally sought. Thus, courts have looked at other ways of determining a prevailing party for purposes of a contractual fee-shifting clause.

Some courts award fees to the party that prevailed on the "main issue" in the litigation. They seem to decide which issue was the main one by examining the emphasis each was given in the pleadings, the briefing, the evidence presented at trial, and the request for relief made of the finder of fact. As one court put it:

Not all of the claims were equal in terms of emphasis at trial or in terms of the relief sought. Some were essentially abandoned, and

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144. See Carlson Distrib. Co. v. Salt Lake Brewing Co., L.C., 95 P.3d 1171, 1181 (Utah Ct. App. 2004) (Declining to award fees to the party with the net judgment in the case; "prevailing party determinations must take into account the importance of the claims relative to each other and their significance in the context of the lawsuit considered as a whole.").


PREVAILING PARTY FEE SHIFTING

others were defeated in motions practice and were not submitted to the jury or raised in this appeal. The clear focus at trial, as it has been in the appeal, was on Bhatia’s claims for breach of contract and breach of fiduciary duty. These intermingled claims were the bases for the vast majority of the testimony and were the primary bases for Bhatia’s claim that he was entitled to $7.29 million in actual damages.\textsuperscript{148}

The main issue will often be a legal issue, such as whether there was a breach of contract, but a party need not win that issue on the same exact legal theory it originally raised in order to prevail.\textsuperscript{149} And “issues” are to be viewed as distinct from “remedies;” whether an agreement is enforceable is an issue—and potentially the main issue—whereas whether an injunction should issue is merely a question of remedies.\textsuperscript{150} Of course, in some cases, the way the parties frame the case will make the “main issue” whether one party owes the other money, in which case the application of the main issue test becomes basically identical to that of the net judgment rule.\textsuperscript{151}

The main issue test differs from the net judgment rule in the important respect that defeating an opponent’s claim can be given as much or more weight as obtaining a monetary recovery on a claim of one’s own. As the Supreme Court of Alaska put it, a litigant “who successfully defeats a claim of great potential liability may be the prevailing party even if the other side receives an affirmative recovery.”\textsuperscript{152} This is so because,

avoiding liability is as good for a defendant as winning a money judgment is for a plaintiff. . . . while a plaintiff with a large money

\textsuperscript{148} Bhatia, 396 S.W.3d at 671. The court went on to determine that the appellees were the prevailing party because “[t]he purpose of Bhatia’s lawsuit was to recover damages” and “he wholly failed to do so,” while “[t]he purpose of appellees’ defense to these main issues was to avoid paying any damages” and “[t]hey were successful and received a take-nothing judgment in their favor.” Id.


\textsuperscript{151} See Pinehurst/Fairmount Partners, L.P. v. Concrete Prods., Inc., No. 05-00-01223-CV, 2001 WL 832351, at *3 (Tex. App. July 25, 2001). In that case, the plaintiff sued the defendant for breach of contract, alleging a failure to perform under the lease agreement by not providing 8,700 square feet of space, resulting in an overpayment of rent. Id. The plaintiff did not seek more space from the defendant or recission of the contract; it sought only to recover overpaid rent. Id. Thus, the court concluded that “the main issue in the case is whether one party owed the other money” and that accordingly “it was necessary for [the plaintiff] to recover money damages in order to prevail on the main issue in the case.” Id.

judgment may be more exalted than a defendant who simply walks out of court no worse for the wear, courts must not ignore the value of a successful defense.153

Thus, if a defendant defeats the plaintiff’s main claim in an action, that defendant should be considered the prevailing party under this test, even if the plaintiff has obtained damages on less important ancillary claims.154 Indeed, a court applying this test may even go beyond simply looking at whether a plaintiff recovered on a claim to comparing the amount recovered against the amount initially sought; if a plaintiff obtained far less than desired, the defendant in a sense prevailed in defeating the majority of that claim.155

Other courts have given the comparative analysis of damages sought and received even greater weight in their prevailing party analyses.156 For example, the Utah Court of Appeals recently opined that in determining prevailing party status:

The focus should be on which party obtained a comparative victory, considering what a total victory would have meant for each party and what a true draw would look like. For example, where a plaintiff sued for $30,000 and the defendant claimed to owe nothing, a draw would have been a decision dividing the $30,000 equally, that is, a judgment in favor of plaintiff in the sum of $15,000. Similarly... defendants ordered to pay $7,339.44 on a $600,000 claim — slightly over 1% — were held to be the prevailing parties. Where the defendant advances a counterclaim, the calculus changes. For example... [in an earlier case] the plaintiff was claiming roughly $13,000, the defendants were claiming roughly $25,000, and the defendants reaped a net recovery of $527. The trial court properly declared a “draw” and awarded no attorney fees.157

The idea is to look at the parties’ objectives at the outset of the litigation, as set forth in the pleadings, and then assess the level of success

154. See Alaska Constr. & Eng’g, 130 P.3d at 936; see also DocMagic, 2012 WL 263091, at *11.
155. See DocMagic, 2012 WL 263091, at *11 (“It should be noted that in determining the prevailing party, Missouri places just as much emphasis successfully defending claims as they do on successfully prosecuting them. Lenders One prevailed on Summary Judgment and successfully defended five of the seven claims submitted by DocMagic.”).
each party attained in pursuing those objectives.\textsuperscript{158} Whichever party accomplished more of its goals—whether in establishing or avoiding liability—must be considered to have prevailed in the overall litigation.\textsuperscript{159}

In addition to the number and importance of issues on which each party prevailed and the relationship between the parties’ goals and the outcome, courts have identified other factors to consider in determining the prevailing party. For example, some courts have considered which party precipitated the litigation and how reasonable the parties’ respective settlement positions were.\textsuperscript{160} The rationale for the first factor appears to be that awarding fees may be inequitable if the party receiving them somehow acted improperly or unreasonably in bringing about the litigation.\textsuperscript{161} The second factor, meanwhile, seems to penalize parties for wasting judicial resources on a trial that does not provide a substantially better result than settlement would have.\textsuperscript{162} Other courts have considered the merits of the unsuccessful party’s claims or defenses, the novelty of the issues, whether fee shifting would cause extreme hardship, and whether it would potentially discourage other parties from litigating legitimate contract issues for fear of similarly incurring fees.\textsuperscript{163} Again, the concern animating the consideration of these factors appears to be equitable; courts are loath to deter parties from making viable legal arguments for fear of a devastating fee-shifting award.\textsuperscript{164}

\begin{footnotesize}
\begin{enumerate}
\item[158.] \textit{Susilo}, 796 F. Supp. at 1182.
\item[159.] \textit{Id.}
\item[160.] Interstate Power Sys. v. Drake Water Tech., Inc., 426 F. App’x 678, 681 (10th Cir. 2011); Doig v. Cascade, 935 P.2d 268, 272 (Mont. 1997).
\item[161.] Montoya v. Villa Linda Mall, Ltd., 793 P.2d 258, 260 (N.M. 1990) (quoting McClain Co. v. Page & Wirtz, 694 P.2d 1349, 1350 (N.M. 1985)) (“The court in its discretion could conclude that allowing attorney’s fees when both parties had acted improperly would be inequitable and unreasonable.”).
\item[162.] SCI Cal. Funeral Servs., Inc. v. Five Bridges Found., 137 Cal. Rptr. 3d 693, 717 (Ct. App. 2012).
\item[163.] Travelers Indem. Co. v. Crown Corr., Inc., No. CV 11-0965-PHX-JAT, 2012 WL 2798653, at *4 (D. Ariz. July 9, 2012); Assoc. Indem. Corp. v. Warner, 694 P.2d 1181, 1184 (Ariz. 1985). These factors arise in the context of determining whether the prevailing party is entitled to an award of fees (as opposed to determining which party is the prevailing party in the first place), but in practical effect being named a prevailing party but denied fees is equivalent to being denied prevailing party status.
\item[164.] See Mozingo v. Alaska Air Grp., Inc., 112 P.3d 655, 667 (Alaska 2005) (“We must be careful about allowing fee-shifting provisions to undercut provisions meant to encourage plaintiffs to bring meritorious claims.”); Brand v. Dep’t of Labor & Indus. of State of Wash., 989 P.2d 1111, 1115 (Wash. 1999) (fee shifting intended to “punish frivolous litigation and encourage meritorious litigation”).
\end{enumerate}
\end{footnotesize}
D. Courts May Reduce the Amount of Fees Awarded to a Prevailing Party Based on Reasonableness or Lack of Success

Simply being named the prevailing party under a contract does not necessarily mean that a party will be awarded the entirety of its attorneys’ fees related to the lawsuit. Some contractual fee shifting clauses expressly limit the prevailing party to a sum that is “reasonable.” Even if the clause does not so provide, however, some state statutes require that fee awards in contract cases be reasonable. And some states read a reasonableness requirement into fee shifting clauses under their common law. In fixing reasonable attorneys’ fees in contract cases, courts often multiply the number of hours reasonably expended by the lawyer’s reasonable hourly rate. They may gauge what is reasonable in light of a number of factors, including the time and labor required in the case; the likelihood that the case has prevented the lawyer from taking other employment; the novelty and difficulty of the questions involved; the skill requisite to perform the legal service properly; the fee customarily charged in the locality for similar legal services; the amount of money involved and the results obtained; the time limitations imposed by the client; the nature and length of the relationship between lawyer and client; the experience, reputation and ability of the lawyer or lawyers performing the services; and whether the fee was fixed or contingent.


166. See, e.g., OR. REV. STAT. § 20.082 (2010) (“Except as provided in this section, a court shall allow reasonable attorney fees to the prevailing party on any claim based on contract if: (a) The amount of the principal together with interest due on the contract at the time the claim is filed is $10,000 or less; and (b) The contract does not contain a clause that authorizes or requires the award of attorney fees.”); CAL. CIVIL CODE § 1717 (1987) (“In any action on a contract . . . the party prevailing on the contract, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney’s fees in addition to other costs.”); ARK. CODE ANN. § 16-22-308 (West 1989) (“In any civil action to recover . . . for breach of contract, unless otherwise provided by law or the contract which is the subject matter of the action, the prevailing party may be allowed a reasonable attorney’s fee to be assessed by the court and collected as costs.”).


Courts have also reduced awards under contractual fee shifting provisions to reflect the prevailing party's lack of complete success in the litigation. For example, courts have required that a prevailing party segregate its fees by claim, so that fees can be shifted only as to those claims on which the party succeeded and/or as to which fee shifting is authorized by the contract. Segregation has also been required as to fees related to claims directed against third parties not subject to a fee shifting agreement. Of course, it may happen that the legal services related to claims as to which fee shifting is permissible and not permissible are so intertwined that they cannot be segregated, in which case recovery of the total amount may be allowed. This generally occurs when both claims involve the same nucleus of facts, such that preparation of one claim is coextensive with preparation of the other. In other cases, courts have used a prevailing party's limited success as a basis for determining that the contractual fee award must be reduced to be reasonable. Though perhaps less precise than segregation, this approach allows courts to avoid overcompensating an only marginally successful party simply because determining which fees were related to which count proves challenging.


172. See Arlington Home, 361 S.W.3d at 783-84; Gruber v. Deuschle, 261 F. Supp. 2d 682, 697 (N.D. Tex. 2003). The court in Arlington Home determined that segregation was required because "it is only when discrete legal services advance both a recoverable and unrecoverable claim that they are so intertwined that they need not be segregated." 361 S.W.3d at 784.


175. See e.g., Phi Kappa Tau Housing Corp. v. Wengert, 86 S.W.3d 856, 862 (Ark. 2002) (finding no abuse of discretion where the trial court reduced an award of attorney's fees based on reasonableness where the work on winning and losing claims were "hopelessly intertwined" and "virtually impossible" to segregate).
III. RECOMMENDATIONS

A. Careful Drafting

Parties and their attorneys would be well advised to carefully delineate when fee shifting should be permitted at the time they execute their contract rather than waiting for litigation to ensue. After all, courts view their primary objective in construing a contract to be effectuating the intent of the parties. In fee shifting cases, courts frequently look fruitlessly in the parties' contract for guidance as to when fee shifting should be permitted before having to turn to other sources, like a law dictionary or case law, to determine whether to shift fees and in what amount. Parties can and should provide their views on the subject. By thinking about what sorts of disputes may arise between them and to what extent they wish to create the potential to recover fees (or the risk of having fees recovered, depending on their outlook), the parties can hope to better control the range of potential outcomes should litigation arise.

For starters, the parties can set a broad or narrow range of actions covered by the clause, from, for instance, "any action to enforce" or "interpret" the agreement on the narrow end to "any action relating to" or "arising out of" the agreement (or just any litigation at all) on the broad end. The contractual language may well determine whether fee-shifting is allowed for all claims in the action or just a subset; "if a contractual attorney fee provision is phrased broadly enough... it may support an award of attorney fees to the

176. See Macey v. Carolina Cas. Ins. Co., 674 F.3d 125, 129 (2d Cir. 2012); Mont. Pub. Emps.' Ass'n v. City of Bozeman, 343 P.3d 1233, 1235 (Mont. 2015); Hawaiian Ass'n of Seventh-Day Adventists v. Wong, 305 P.3d 452, 461 (Haw. 2013); India Breweries, Inc. v. Miller Brewing Co., 612 F.3d 651, 658 (7th Cir. 2010).


prevailing party in an action alleging both contract and tort claims."\textsuperscript{182} As set forth previously,\textsuperscript{183} courts do sometimes rely on the contractual language to require a prevailing party to segregate its fees by claim into those that are recoverable and those that are not.

The parties may also wish to define the term "prevail." In doing so, they could select one of the specific approaches discussed above, like determining which party has the net judgment or who came closest to the optimal outcome, or even choose a more generic definition such as the party that "substantially obtains or defeats the relief sought."\textsuperscript{184} They may also wish to consider specifying whether a party must "prevail" by obtaining a judgment, or whether it may do so "by compromise, settlement . . . or the abandonment of the other Party . . . of its claim or defense."\textsuperscript{185} Or the parties could come up with their own unique method of determining prevailing party status. For example, they could avoid general terms like "prevailing party" or "successful party" in favor of a detailed explanation of when fees should be shifted and when they should not. Generally, so long as the parties' contract is not unconscionable and does not violate public policy, it will be enforced.\textsuperscript{186}

The specific language to be included will obviously depend on the objectives of the contracting parties but reaching consensus at the time the contract is drafted will make sure those objectives are expressed and, hopefully, will be implemented by a court rather than superseded by general principles of law.

\textbf{B. Careful Construction}

In determining whether to award fee shifting under a contract, courts should, as with any contractual issue, first work to discern the intent of the contracting parties.\textsuperscript{187} If the plain meaning of the contract as to the fees issue is clear and unambiguous, a court need not consult any other sources.\textsuperscript{188} Of course, as set forth above, some states have

\begin{itemize}
  \item \textsuperscript{182} Santisas v. Goodin, 951 P.2d 399, 405 (Cal. 1998). The court found that a fee-shifting clause applying to all actions "arising out of the execution of the agreement or the sale" was broad enough to include tort as well as contract claims. \textit{Id}.
  \item \textsuperscript{183} \textit{See} discussion supra Section II.D.
  \item \textsuperscript{186} LK Operating, LLC v. Collection Grp., LLC, 331 P.3d 1147, 1170 (Wash. 2014) (Madsen, J., dissenting); Holcomb Condo. Homeowners' Ass'n, Inc. v. Stewart Venture, LLC, 300 P.3d 124, 128-29 (Nev. 2013).
  \item \textsuperscript{187} Castleberry v. Phelan, 101 P.3d 460, 463 (Wy. 2004).
  \item \textsuperscript{188} \textit{Id}.
\end{itemize}
statutes that apply to contractual fee shifting. These statutes appear to have been primarily designed to ensure that both parties have an equal opportunity to obtain fee shifting should they prevail, without having to alter the parties' private agreements. Accordingly, these statutes should not be used to prevent courts from effectuating the parties' intent as to fee shifting, unless that intent was "oppressive" and "one-sided." If the parties intended to mutually broaden or narrow the definition of what it means to prevail, then courts should permit them to do so.

The courts should also not attempt to graft fee shifting standards developed in the context of civil rights and other statutory lawsuits onto private contractual disputes. Those standards were developed with different goals in mind, namely to "ensure equal access to the justice system" and "encourage compliance with and enforcement of" statutes that vindicate the public interest. Indeed, statutory fee shifting has often been enacted with the intent to motivate civically-minded lawsuits by "private attorneys general." Contractual fee shifting clauses, however, can be drafted with an eye towards discouraging litigation and encouraging settlement. Frequently, contractual fee-shifting clauses concern disputes between two private parties where there is no public interest at stake. Thus, broadly construing what it means for a plaintiff to prevail—such as by including any material alteration of the relationship between the parties that benefits the plaintiff—may not make sense in the contractual fee shifting context. Similarly, some of the factors courts consider in assessing reasonableness in the statutory context seem inapposite to the contractual fee shifting context. For example, courts assessing stat-
utory fee shifting consider how time consuming and difficult the case was, and how much it displaced other work for the attorneys involved.\textsuperscript{198} While these factors make perfect sense in the civil rights context, where attracting and properly compensating skillful counsel is a major objective, they seem less appropriate in a "dispute between two similarly situated businesses," both of whom are likely to retain and pay attorneys on a regular basis.\textsuperscript{199} Again, the focus should be on the intent of the parties, not on any abstract policy concern to which they may or may not have subscribed.

It should also be remembered that fee shifting pursuant to a contract should not be equated with fee shifting based on bad faith. The latter essentially sanctions a party for maintaining frivolous claims or engaging in vexatious conduct that delays and increases the cost of the litigation.\textsuperscript{200} While contractual disputes are certainly not immune to contumacious conduct by the parties, that conduct generally should not be considered in determining who the prevailing party was under a fee shifting clause.\textsuperscript{201} After all, the parties in their contract agreed that the winning party would obtain fees, not the party that litigated most ethically and graciously. On the other hand, such inappropriate litigation conduct may be considered in setting the amount of fees that a prevailing party may reasonably be granted; to the extent it creates unnecessary delay and expense it may justify a reduction.\textsuperscript{202} The parties to a fee shifting agreement would clearly not have intended fees resulting from obstreperous conduct to be considered reasonable.

\begin{C. Holistic, Equitable Analysis}

Even with the parties' agreement as a guiding star, courts will often have considerable leeway to determine which party prevailed in the litigation. In doing so, they would be wise to employ a flexible approach that does not rely solely on mechanical calculations but rather

\begin{footnotes}
\textsuperscript{198} Paschal v. Flagstar Bank, 297 F.3d 431, 435 (6th Cir. 2002).
\textsuperscript{199} Elec. Wholesalers, 33 A.3d at 832 ("The present case involves a contract dispute between two similarly situated businesses, not an action brought pursuant to a statute specifically enacted to assist private litigants who might otherwise be unable to enforce their rights.").
\textsuperscript{202} EnPalm, LLC v. Teitler Family Tr., 75 Cal. Rptr. 3d 902, 907 (Ct. App. 2008).
\end{footnotes}
considers all the facts and circumstances of the litigation. Although the net judgment rule can provide a useful starting point, it ignores other factors that undoubtedly would have been relevant to the parties at the time they signed their contract, including most notably how the parties' litigation outcomes compared to their objectives. The net judgment rule places a premium on recovering a monetary judgment and assigns no value to defeating even the highest-dollar-value claims. This rewards bringing a lawsuit, even where the success in doing so is minimal. But fee shifting clauses are often included in contracts with the objective of avoiding litigation. Accordingly, determining the prevailing party under such a clause should involve a consideration of how the plaintiff (or counterplaintiff) may have overreached and how the defendant (or counterdefendant) may have prevailed by avoiding claimed liability.

In this respect, the approach espoused by Utah courts is attractive. Among other things, those courts determine the delta between the best possible financial outcome for the plaintiff and the best possible outcome for the defendant and divide that in half. If the plaintiff recovered less than half of that delta, then the defendant succeeded in defeating more liability than it incurred, and could be considered to have prevailed. If the plaintiff recovered more than half, than it accomplished more than the defendant in the litigation and is potentially entitled to fee shifting. This approach credits both offensive and defensive success in a lawsuit and thereby seems to comport with the likely intentions of the parties to a fee shifting clause. At the same time, it encourages efficient litigation and discourages overreaching, such as by claiming millions of dollars in damages (perhaps to stake a settlement position) in a case one knows is really worth only thousands. Of course, this mathematical exercise should not be (and is not, in Utah) a court's sole consideration in determining the prevailing

206. Vargas v. City of Salinas, 134 Cal. Rptr. 3d 244, 256 ( Ct. App. 2011).
207. Olsen, 246 P.3d at 523.
208. Id.
209. Id.
party. For instance, the relative importance of the various issues may play a role; if a party has succeeded on the most hotly-contested issue in the case, the issue that consumed the bulk of the parties' time and effort, then it might be considered the prevailing party even if the raw numbers suggest another result. The point is for the court to undertake a holistic, equitable analysis that considers what the parties intended when they signed the contract, what they hoped for at the outset of the litigation, how the focus of that litigation developed, and what the ultimate results were.

That holistic, equitable analysis should not end once the court has determined which party prevailed. Courts should not simply hand prevailing parties a blank check for their fees, but carefully adjust the amount to be awarded based on reasonableness. Even if the parties' contract does not specifically mention reasonableness, "the notion of proportionality is integral to contract fee-shifting to meet the reasonable expectation of the parties." In other words, no rational party would agree to shift fees that are unreasonable or bear no relationship to the claims on which litigation success was actually achieved. Accordingly, courts enforcing fee shifting clauses should require careful reporting of which portions of the fees relate to what claims and what tasks in the litigation. They should then award only those fees that are reasonable and relate to those claims on which the prevailing party actually succeeded. And they can also consider whether the prevailing party engaged in overreaching or obstructive conduct that unnecessarily increased the cost of the litigation. By carefully considering the equities of the situation and making a fee award that is proportionate to the success achieved in the litigation, courts can avoid turning any close case on the merits into a bloodbath on the fees issue.


212. Litton Indus., Inc. v. IMO Indus., Inc., 982 A.2d 420, 430 (N.J. 2009).

213. See, e.g., Weichert Co. of Md., Inc. v. Faust, 989 A.2d 1227, 1238 (Md. Ct. Spec. App. 2010) (prevailing party provided "a good deal of evidence, including her actual bills and their corresponding descriptions of services, as well as a lengthy exhibit of itemized fees. . . [and] 'breakdowns' of time by category and month, with summaries of events during those time frames.").


Although fee shifting has long been viewed as disfavored under U.S. law, it is actually not uncommon, given the number of statutes and private contracts that authorize it. In the context of statutory fee shifting, courts have developed a large body of law that takes a broad view of when fees should be shifted to plaintiffs so that they will be encouraged to bring lawsuits that are viewed as furthering a public interest. Those cases also assess the reasonableness of the fee award using a variety of factors aimed at avoiding waste but ensuring that qualified counsel will be incentivized to handle these matters. With regard to contractual fee shifting, however, the interests involved are different and the court decisions less numerous and more contradictory. While courts agree that a party need not achieve complete success to prevail and receive contractual fee shifting, they disagree as to the degree of success that is required and how success should be gauged in a case of multiple claims and counterclaims. Some courts have found that both parties (or neither party) can be the prevailing party, either granting or denying fees to both parties as a result. And courts that have insisted on a single prevailing party have taken a variety of approaches to determining which party it is, from simply calculating which party received the net judgment to looking at which party won on the main issue to deciding which party achieved more of its litigation objectives in pursuing or defeating claims. Meanwhile, courts have different tests of what constitutes a reasonable fee award in the contractual context, with some courts borrowing the statutory reasonableness factors while others focus more on the fee's proportionality to the results obtained in the case. To help remove the uncertainty as to when fees will be awarded under a fee shifting clause, parties to contracts containing such clauses should carefully spell out their own wishes in this regard. Courts should then begin their fee shifting analyses by attempting to effectuate the parties' intent, rather than turning to other statutes, case law, or legal dictionaries. And where the parties' intent is less than clear, courts should engage in a holistic, equitable analysis of what it means to prevail, keeping in mind that fee shifting clauses are often designed to discourage litigation while statutory fee shifting seeks to encourage it. This analysis should include a comparison of the results sought by each party to the results obtained and extend to a determination of what fee is reasonable. Though it may require more time and attention that some current approaches to contractual fee shifting, it will be
only a fraction of the effort devoted to the merits of most cases and will reduce the potential for a disproportionate fee award that could render those merits almost a footnote.