

Recovering Attorney Fees Incurred in Civil Litigation From The Adverse Party: When and How Much?

Kentucky and Ohio courts follow the “American Rule” under which a prevailing litigant may not recover its attorney fees from the losing party. However, both states recognize two major exceptions. First, a party may recoup its attorney fees if provided for by the terms of the contract or negotiable instrument that is the subject of the lawsuit. Second, numerous federal and state attorney fee-shifting statutes entitle victorious parties to such collection.

An attorney fee-shifting provision contained in a contract may grant either party the right to recovery in the event that the party prevails in litigation. Such a provision may read: “in connection with any litigation arising out of this contract, the prevailing party shall be entitled to recover its reasonable attorney fees.” Alternatively, a clause in a contract or negotiable instrument may only allow for “one-way” recovery of attorney fees. Often such clauses are contained in promissory notes and authorize the creditor’s recovery of fees incurred in collection of the debt from the borrower.

Always consult with an attorney before adding an attorney fee-shifting term to a contract because the law limits, and in some cases prohibits, attorney fee shifting in certain circumstances. For instance, the Ohio Supreme Court has held that a lender may collect its attorney fees from a borrower in connection with the borrower’s reinstatement of a residential mortgage loan in default. But, in Ohio, a lender may not collect its attorney fees from a borrower in connection with the borrower’s payoff of the same loan.

In cases where a right to recover attorney fees is afforded by statute, the purpose is often to further a public interest. Thus both the Ohio Consumer Sales Practices Act and the Kentucky Consumer Protection Act, which are aimed at curbing abusive business practices, allow successful plaintiffs to recover attorney fees. Absent an allowance for such recovery, many consumers would not sue under these Acts as damages resulting from violations are often small. But by allowing consumers to recover attorney fees incurred in pursuing meritorious claims, the law encourages plaintiffs to act as “private attorneys general” to enforce these consumer protections.

In the event that a party is entitled attorney fees, such an award will be limited to those fees that are reasonably incurred. A court will consider the following to determine reasonability: The time the attorney spent on the matter, the complexity of the matter, the fees customarily charged in the locality for the same or similar legal services, the result obtained and the experience, reputation and ability of the attorney performing the legal services.

In addition to the two major exceptions to the American Rule discussed above, there are also judicially created exceptions that allow for a litigant to recover attorney fees in particular circumstances. Such exceptions vary in availability and scope depending on jurisdiction. Accordingly, the issue of whether attorney fees are recoverable from an adverse party should always be a part of the attorney-client dialogue when litigation is being considered.