



By Terese A. West



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## EVERYBODY PAYS: ATTORNEY FEES AND THE AMERICAN RULE

In business litigation, clients frequently ask whether there is any prospect of recovering their attorney fees from the opposing party. In most cases, the answer disappoints, but not without good reason.

In the United States, win or lose, a party to a lawsuit pays its own attorney fees unless otherwise allocated under contract or by statute. For more than 200 years, courts in this country have based their consideration of attorney fee awards on this so-called American rule. In this, we stand remarkably alone.

The loser-pays rule, known as the English rule, is the default rule in England and throughout most of the rest of the Western world. At first blush, the loser-pays rule seems so very right (particularly to those who cannot conceive of losing). So why, in America, do we adhere to the general rule that, regardless of the outcome, everybody pays his or her own way? The answer lies in the notions of freedom and equal access to justice.

The Supreme Court of the United States first acknowledged the American rule in 1796 in a case involving maritime law entitled *Arcambel v. Wiseman*. In that case, the Circuit Court of Rhode Island had awarded damages and a charge of \$1,600 in attorney fees against the losing party. On appeal, the Court succinctly rejected the charge:

We do not think that the charge ought to be allowed. The general practice of the United States is in opposition to it; and even if that practice were not strictly correct in principle, it is entitled to the respect of the court, till it is changed, or modified, by statute.

The general practice referred to by the Court, and to which we adhere today, springs from the American colonists' desire for freedom from religious persecution, poverty, and oppression. In 1776, in declaring their independence from British

rule, the colonists "submitted to a candid world" a list of "abuses and usurpations" in support of their cause. These included, among other things, King George III's refusal to consent to laws for the public good, to establish judicial powers, and to allow the colonists to legislate for themselves. By 1783, the colonists had secured their independence, and they depended on equal access to the courts to vindicate the rights accruing from self governance.

As the Court expounded in later cases, because "litigation is at best uncertain[,] one should not be penalized for merely defending or prosecuting a lawsuit." Without the American rule, "the poor might be unjustly discouraged from instituting actions to vindicate their rights if the penalty for losing included the fees of their opponents' counsel." In this respect, the Court views the parties to be on equal footing:

There is no fixed standard by which [attorney fees] can be measured. Some counsel demand much more than others. Some clients are willing to pay more than others. More counsel may be employed than are necessary. When both client and counsel know that the fees are to be paid by the other party there is danger of abuse. We think the principle of disallowance rests on a solid foundation . . . and sound public policy.

Of course, parties to a lawsuit have some measure of control over their own attorney fees. Each case involves a continual assessment of cost versus benefit, risk versus reward. Each party has the right to choose its own legal counsel. An individual may choose to represent himself or herself. A party may choose to accept the consequences of its actions, forgo certain discovery, buy peace, prosecute an unremarkable case beyond all appearance of reason to protect a business model, or pursue a claim or defense based on a novel legal theory that may make new law. These decisions drive the fees.

Certainly there should be, and are, exceptions to the American rule. For example, the parties to a contract may agree to shift fees amongst themselves under certain circumstances. This may occur pre-dispute or post-dispute by allocating the risk of incurring fees in the event of a dispute or by shifting incurred fees in an out-of-court settlement.

Federal and state statutes also provide for exceptions to the American rule to advance the public interest. The statutes may provide for fee awards, for example, to discourage deceptive trade practices, to encourage shareholders to take action to right corporate wrongs, or to encourage the private enforcement of civil rights.

Federal and state courts recognize exceptions to the American rule where necessary to ensure a just result. For example, the common fund exception relieves a plaintiff who creates or preserves a common fund for the benefit of others from the burden of attorney fees. The exception is based on the theory that it is unjust for the plaintiff to bear the entire cost of litigation for the greater good. In class actions, the exception provides for attorney fees to be paid out of any fund recovered for the class.

Where a defendant's wrongful act forces a plaintiff into litigation with a third party, the plaintiff may be permitted to recover from the defendant its attorney fees incurred in the third-party litigation as special damages. This exception applies most often in cases involving professional malpractice or, for example, where a third party's tortious interference with a non-compete agreement compels an employer to sue to enforce it. In that case, the employer may be entitled to recover its attorney fees.

In addition, courts have the discretion to award attorney fees against a party who disobeys court orders, refuses to cooperate in discovery, acts in bad faith by pursuing a baseless claim or defense to harass or delay, or engages in other misconduct. Not coincidentally, the exceptions to the American rule are founded on familiar themes: the freedom of contract, the public interest, and the interests of justice.

In the final analysis, the American rule rejects the notion that the losing party had a meritless claim or defense. One party to a lawsuit is likely to be as convinced of the correctness of his position as the other. In short, the American rule presumes the existence of legitimate disputes and ensures that neither party need fear an undue financial burden for turning to an impartial forum for resolution.

