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Picking Up the Tab: Recent Trends in the Recovery of Attorneys' Fees

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Given the growing number of judicial and statutory vehicles for the recovery of attorneys' fees, there are more and more opportunities for litigants to pursue such an award. While the increasing availability of fee awards makes litigation more expensive for businesses, a recent federal case suggests that courts are adopting a more reasonable approach to calculating fee awards, making the risk of litigation somewhat more palatable. This article reviews the availability of fee awards in New Hampshire and describes how recent trends may affect the size of such an award.

I. Attorneys' Fees in New Hampshire

In most lawsuits, each party is responsible for paying its own attorneys' fees and costs. That general rule, however, is subject to a number of statutory and judicial exceptions under which a "prevailing party" can recover the legal fees it incurs. Where a party prevails on some, but not all of the issues at trial, that party cannot recover attorneys' fees for issues on which it was unsuccessful. Moreover, courts will not award attorneys' fees to *pro se* litigants who, as a result of their self-representation, do not pay for the services of an attorney.

A. Statutorily Authorized Attorneys' Fees

There are dozens of statutes in New Hampshire that allow for the recovery of attorneys' fees. Most allow a plaintiff to recover the attorneys' fees expended in bringing a claim pursuant to a particular statute, reflecting the Legislature's desire to advance the public interests protected by such statutes. Attorneys' fees are recoverable in a wide variety of disputes, including those involving unfair debt collection practices, wage claims, shareholder derivative actions, workers' compensation appeals, trade secrets, and the right-to-know law. Other more general statutes allow the prevailing party, defendant or plaintiff, to recover attorneys' fees where the opposing party acted improperly.

B. Judicially Authorized Attorneys' Fees

Even where no statute authorizes an award of attorneys' fees, such relief may be granted when the court decides that the litigation was "instituted or unnecessarily prolonged through a party's oppressive, vexatious, arbitrary, capricious or bad faith conduct." Such conduct has been defined as any act or omission making judicial intervention necessary to obtain the benefit of a clearly defined and established right, including those situations where a party is forced to litigate in order to enjoy what a court has already decreed. For example, one New Hampshire court found a party's request for a hearing on issues that had already been resolved against that party at an earlier date to be unreasonable conduct warranting an award of

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attorneys' fees.

II. Recent Trends: A More Realistic Approach to Awarding Attorneys' Fees

While Legislatures have been more willing to award attorneys' fees, there is a countervailing trend in the courts. In recent years, courts have moved towards a more realistic approach to calculating an award of attorneys' fees. For example, in New Hampshire, a fee award must be based on the time spent by the attorney and a reasonable hourly rate. In making this determination, the court considers the amount of fees involved, the nature, novelty and difficulty of the litigation, the attorney's standing and the skill employed by that attorney, and the overall benefit conferred on the client. Consequently, a fee arrangement entered into by the prevailing party and its attorney is only one of many factors that a court may consider in determining what is a reasonable award, and the court is not bound to grant the fees set forth in such an agreement.

For businesses involved in litigation outside of New Hampshire, there is now a trend outside of the state to ensure that fee awards are both reasonable and realistic. In *Arbor Hill Concerned Citizens Neighborhood Ass'n v. County of Albany*, 484 F.3d 162 (2d Cir. 2007), the federal Court of Appeals for the Second Circuit, based in New York, abandoned the traditional "lodestar" method, pursuant to which courts calculated fee awards by determining the number of hours expended on litigation, multiplying that figure by the attorney's normal hourly rate, and adjusting the resulting fee according to case-specific considerations. In its place, the Second Circuit instructed that courts should focus on setting a "reasonable hourly rate," as New Hampshire courts do, rather than calculating a fee based on the attorney's normal hourly rate. Notably, the *Arbor Hill* court directed that the "reasonable hourly rate is the rate a paying client *would be willing to pay*," and not the attorney's actual rate. In determining the "reasonable hourly rate," the Second Circuit noted that courts should consider that "a reasonable, paying client wishes to spend the minimum necessary to litigate the case effectively," and that the client "might be able to negotiate with his or her attorneys" to reduce the hourly rate. According to the Second Circuit, courts should rely on the above-described "reasonable hourly rate" to calculate the overall reasonable fee, and not the attorney's standard billing rate.

III. Conclusion

Although there are more and more opportunities for litigants to pursue an attorneys' fee award, *Arbor Hill* demonstrates a movement towards tempering the amount of fees awarded. The *Arbor Hill* decision sets forth a more realistic approach to calculating fee awards so that businesses involved in litigation both within and outside New Hampshire face less exposure than they otherwise would from the increasing frequency of fee awards.

This article is intended to serve as a summary of the issues outlined herein. While it may include some general guidance, it is not intended as, nor is it a substitute for, legal advice. Your receipt of Good Company or any of its individual articles does not create an attorney-client relationship between you and Sheehan Phinney Bass + Green or the Sheehan Phinney Capitol Group. The opinions expressed in Good Company are those of the authors of the specific articles.

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