**ATTORNEY FEES NOT ALWAYS RECOVERABLE**

**BY: WILLIAM G. MORRIS, ESQ.**

A lot of people think if they win a lawsuit, they also get their attorney fees paid by the loser. They think they should recover their damages plus all the costs of having to go to court to get a judgment. Many are surprised to find that attorney fees are generally not recoverable unless a statute or a contract specifically authorizes recovery.

Even when fees are recoverable, they are limited by judges to “reasonable” attorney fees. Some argue all attorney fees are unreasonable, but that argument does not make it to court. The determination of what is reasonable is a legal issue for determination by the judge and not a jury.

Winners ask the judge to award all of their attorney fees. Losers argue the winner paid too much. The judge considers evidence and even a mini trial may be required before the judge determines what is reasonable. Points of contention include amount of time, efficiency or lack thereof, difficulty or novelty of legal issues, whether time is for attorney, paralegal or secretarial services and hourly rate.

Florida judges tend to award the requesting party the hourly rate of the attorneys and paralegals employed to attain victory but scale back the amount of time, often ruling that some time is duplicative, other secretarial and some excessive. When this writer practiced in Virginia, the judges generally awarded all of the requested time but cut back the hourly rate. In both states, it is rare for a prevailing party to be awarded 100% of that party’s attorney fees.

There are a lot of statutes that provide for attorney fees to the prevailing party in a lawsuit, but they do not cover everything. Representative cases in which statutes provide for attorney fees to the winner include Florida’s Landlord and Tenant Act, Florida’s Deceptive and Unfair Trade Practices Act, lawsuits against insurance companies, and actions to collect bad checks. Statutes governing actions by contractors to enforce liens against real property and actions by condominium associations to enforce liens also provide for attorney fees.

Attorney fees are recoverable in family law cases, but award of fees in those cases is not based on winning and losing. It is based instead upon the need of one party and ability to pay of the other.

Parties to a contract can agree that attorney fees may be recoverable in the event action is taken to enforce the contract. Wording of a contract provision for the award of fees is important. Unless clearly within the contract language, courts will not award attorney fees proving the amount of fees that should be awarded (as opposed to proving entitlement).

A lot of contracts provide attorney fees can only be recovered by the party who wrote the contract. Florida’s legislature recognized one-sided attorney fees clauses in contracts written by the favored party may not be fair and adopted a statute that makes one-sided fees provisions bilateral. If a contract in Florida provides for attorney fees to one party, a statute changes that clause to provide for recovery by either party.

It can be difficult to determine who is the winner in complicated cases. Each party may win on some claims and lose on others and the judge must decide who is the “prevailing party” entitled to attorney fees. The judge’s decision focuses largely on who won on the biggest issues. That does not end the argument over fees, as the loser will also argue that a lot of the fees were not related to the claim or claims on which winner won. If the fees did not relate to those claims, the winner may not be entitled to recover them as the prevailing party. That is a particular problem in lawsuits where some claims have entitlement to fees and others do not.

When there is no statute or contract providing a route to recover attorney fees, all is not lost. Statute and court rules authorize a party to make a proposal for settlement to the other party after a lawsuit is filed. A proposal for settlement cannot be served during the first 90 days after a lawsuit is filed, which is intended to give the parties time to gather information and assess liability in the lawsuit. The recipient has 30 days to accept the proposal. If the proposal is not accepted, it sets the table for attorney fees.

If a defendant does not accept the plaintiff’s proposal for settlement and the plaintiff obtains a judgment at least 25 % greater than the proposal, the plaintiff is entitled to attorney fees. If a plaintiff does not accept a defendant’s proposal and obtains judgment 25% less than the proposal, the plaintiff is subject to an award of fees.

There is also a statute under which attorney fees can be awarded when a claim or defense is not supported by necessary material facts or then-existing law. A party subject to such claim is required to serve notice of intent to seek fees under the statute after which the recipient has 21 days to withdraw or correct the claim or defense. If the claim or defense is not withdrawn or corrected and the court later agrees it was unsupported by material facts or then-existing law, the judge awards attorney fees to the party who served the proposal. The award can be from the losing party, the losing party’s attorney or both.

Litigation attorney fees are expensive. When thinking about a lawsuit, the potential attorney fees should always be included as an important consideration.

***William G. Morris is the principal of William G. Morris, P.A. William G. Morris and his firm have represented clients in Collier County for over 30 years. His practice includes litigation and divorce, business law, estate planning, associations and real estate. The information in this column is general in nature and not intended as legal advice.***