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Equitable Attorney Fees

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I. Equitable Award of Attorney's Fees

The “American Rule” on attorney fees, which has stood for over 200 years in the United States, is one in which each party must compensate its own attorney for the costs of litigation, regardless of the outcome of the case.¹ The American Rule can be directly contrasted to its predecessor, the “English Rule.” The English Rule, often referred to as the “loser-pays” rule, is one in which the losing party pays the costs of litigation to both its own and the opposing party’s attorneys.² Like its name suggests, the English Rule is well established in the United Kingdom, and its origins can be traced back to the thirteenth century.³ In fact, most Western legal systems, besides the United States, follow some form of the English Rule.⁴

In 1796, the Supreme Court of the United States set the standard in *Arcambel v. Wiseman* by determining that the award of attorney fees was improper.⁵ The Court explained that the damages charge of \$1,600 for counsel’s fees ought not 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.”⁶

* Professor Spitz’s Equity students, Spring 2012.

¹ David A. Root, *Attorney Fee-Shifting in America: Comparing, Contrasting, and Combining the “American Rule” and “English Rule,”* 15 *Ind. Int’l & Comp. L. Rev.* 583, 584 (2005).

² Geoffrey Woodroffe, *Loser Pays and Conditional Fees - an English Solution?*, 37 *Washburn L.J.* 345 (1998).

³ *Id.*

⁴ Thomas D. Rowe, Jr., *Shift Happens: Pressure on Foreign Attorney-Fee Paradigms from Class Actions*, 13 *Duke J. Comp. & Int’l L.* 125, 128 (2003) *citing* Thomas D. Rowe, Jr., *The Legal Theory of Attorney Fee Shifting: A Critical Overview*, 1982 *Duke L.J.* 651, 651 (1982).

⁵ *Arcambel v. Wiseman*, 3 U.S. 306, (1796).

⁶ *Id.*

Starting around the turn of the twentieth century, several exceptions to the American Rule began to emerge.⁷ There are six general categories of exceptions to the American Rule: 1) Contracts; 2) Fee-shifting statutes; 3) Contempt; 4) Common Fund; 5) Substantial Benefit; and 6) Bad Faith.⁸ 1) Contracts: Courts recognize that a contract may provide for attorney fee-shifting should litigation arise from a dispute over it.⁹ 2) Fee-shifting statutes: There are over 200 federal statutes and almost 2000 state statutes that allow for attorney fee-shifting as an exception to the American Rule.¹⁰ 3) Contempt: In *Toledo Scale Co. v. Computing Scale Co.*, the U.S. Supreme Court held that a party who seeks to enforce a final judgment through contempt proceedings may recover attorney's fees for enforcement of the contempt order.¹¹ 4) Common Fund: As an equitable exception, the common fund doctrine compensates parties who create or preserve a common fund for the benefit of others.¹² 5) Substantial Benefit Doctrine: This exception is very similar to the common fund doctrine, except it typically applies to nonpecuniary benefits.¹³ 6) Bad Faith: In *Chambers v. NASCO, Inc.*, the Supreme Court held that a court's inherent power allowed it to use its equitable discretion to assess attorney's fees for bad faith behavior.¹⁴ This paper will focus on the Common

⁷ Robin Stanley, *Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources: To the Prevailing Party (Fn2) Goes the Spoils . . . and the Attorney's Fees!*, 36 Akron L. Rev. 363, 367 (2003).

⁸ Root, *supra* note 1, at 585.

⁹ John F. Vargo, *The American Rule on Attorney Fee Allocation: The Injured Person's Access to Justice*, 42 Am. U. L. Rev. 1567, 1578 (1993).

¹⁰ *Id.*

¹¹ *Id.* at 1583 citing *Toledo Scale Co. v. Computing Scale Co.*, 261 U.S. 399, 427-28 (1923).

¹² *Id.* at 1579.

¹³ *Id.* at 1581.

¹⁴ *Id.* at 1587 citing *Chambers v. NASCO, Inc.*, 501 U.S. 32, 58 (1991).

Fund and Bad Faith equitable exceptions to the American Rule by reviewing relevant South Carolina cases.

The general rule in South Carolina is that attorney's fees are not recoverable unless authorized by contract or statute.¹⁵ If attorney's fees are authorized—either by contract, by statute, or in equity—then there are six factors to consider in determining an award of attorney's fees. Those factors are: 1) nature, extent, and difficulty of the legal services rendered; 2) time and labor devoted to the case; 3) professional standing of counsel; 4) contingency of compensation; 5) fee customarily charged in the locality for similar services; and 6) beneficial results obtained.¹⁶

II. Exception to the American Rule: Common Fund Doctrine

In addition to the statutory exceptions to the American Rule, the courts have recognized equitable exceptions in certain circumstances. One such exception, the Common Fund Doctrine, refers to the “principle that a litigant who creates, discovers, increases, or preserves a fund to which others also have a claim is entitled to recover litigation costs and attorney's fees from that fund.”¹⁷ Statutory schemes are usually fee shifting, where the losing party pays. Under the Common Fund Doctrine, attorney fees are paid by the members of the class for which the fund is created. The doctrine is equitable in that it is designed to prevent unjust enrichment. The rule of the common fund doctrine thus invoked, rests in equity and not in contract in charging a common fund with expenses, including attorneys' fees.

¹⁵ *Blumberg v. Nealco*, 427 S.E.2d 659, 660 (S.C. 1993); *Collins v. Collins*, 122 S.E.2d 1 (S.C. 1961).

¹⁶ *Blumberg* at 660.

¹⁷ *Petition of Crum*, 196 S.C. 528, 531 (1941).

The equitable objective is that of distributing the burden of such expenses among those who share in an accomplished benefit. When a member of a class of plaintiffs creates and maintains a fund to litigate and obtains a favorable result that will benefit the class, the member equitably deserves to recover fees. The rule has been recognized with approval in South Carolina and elsewhere, particularly in federal jurisdictions. The rule is founded upon the principle that one who preserves or protects a common fund works for others as well as for himself, and the others so benefited should bear their just share of the expenses, including a reasonable attorney's fee; and that the most equitable way of securing such contribution is to make such expenses a charge on the fund so protected or recovered. Attorney's fees are paid by members of the plaintiff class who share the burden of paying their own counsel out of the common fund. A class member may be exempted from this by participating in the litigation and hiring their own personal representation and not relying on the efforts of another class member.

The Common Fund Doctrine was first applied in South Carolina in Nimmons v. Stewart in 1880.¹⁸ In affirming an award for reasonable attorney fees from a common fund created in a partition action the court stated:

In equity, costs, as between "party and party," are entirely within the discretion of the court, and as to fees between "solicitor and client," there are cases in which, from the character of the parties or the nature of the proceeding, the court will make provision for the payment of proper charges for professional services rendered...where the parties are numerous and have an interest in common, for the benefit of which professional services are rendered...In such cases as this, the court

¹⁸ 13 S.C. 445 (S.C. 1880).

generally deems it just and equitable that services rendered for the benefit of the common interest should, as upon a quantum meruit, be paid for out of the common fund.¹⁹

This old case, following English law, is still good law today.²⁰ The equitable proceeding for partition of land now has the Doctrine codified at Rule 71(d)(3), South Carolina Rules of Civil Procedure with authority for the court in equity to grant fees pursuant to S.C. Code Ann. § 15-61-110 (2011).

The court has stated that an award of attorney fees is a measure capable of extreme abuse and there are certain requirements that must be met in order to recover fees from a common fund. First, the attorney must have participated properly establishing and maintaining the common fund. This can be accomplished by creating a fund from class members at the outset or be from an award to the class. In an equity action to sell land, the court found where property was converted to personally for the exclusive benefit of a single life tenant, the attorneys had not created a common fund under the rule.²¹ However, in Petition of Crum, where Crum was an attorney representing a class of heirs in a will contest, he was awarded fees from the funds distributed under the will.²² Although Crum did not create a separate fund for litigation expenses, his success yielded an award that would not have existed but for his diligent efforts. The award itself made up the common fund.

¹⁹ *Nimmons*, 13 S.C. at 447 (citing 2 Daniell's Ch. Pl. & Pr.; *Minuse v. Cox*, 5 Johns. Ch. 451).

²⁰ See *Shillito v. Spartanburg*, 214 S.C. 11 (S.C. 1949) (Taxpayer who filed action on behalf of all taxpayers was entitled to attorney fees from taxes that were unlawfully collected under unconstitutional tax.); *Petition of Crum*, 196 S.C. 528 (1941) (When an attorney representing one group of heirs established that his group and two others were entitled to take under a will, it was equitable that the attorney should be allowed a fee out of the funds distributable to all three groups of heirs.).

²¹ *Caughman v. Caughman*, 247 S.C. 104 (1965).

²² 14 S.E.2d 21 (S.C. 1941).

Second, there must be a contract for employment of counsel with the common fund used to pay costs to litigate. As stated in Crum, "before one may be allowed compensation out of a common fund belonging to others for services rendered on behalf of the common interest 'there must be a contract of employment, either expressly made or superinduced by the law upon the facts.'"²³ The court has held that when an attorney gets a result benefiting another person, the attorney is not eligible for fees without a contract between those parties. Merely providing beneficial service is not sufficient for an award of fees. The contract for employment is essential, otherwise the attorney has generously donated his or her time and services. As stated by the court in Blake, "No one can legally claim compensation for voluntary services to another, however beneficial they may be, nor for incidental benefits and advantages to one, flowing to him on account of services rendered to another, by whom he may have been employed."²⁴ It is this requirement that precludes recovery of fees from a class member who retained their own separate counsel.

Finally, the award must benefit the whole class. One who preserves or protects a common fund works for others as well as for himself, and the others so benefited should bear their just share of the expenses, including a reasonable attorney's fee. But if the benefit is not realized then there is nothing to recover. The attorneys were denied payment of fees from a common fund because their services in creating, preserving, or protecting the fund and proved fruitful only the interests of their respective clients. Caughman, 247 S.C. 104 (1965). Here, equity rewards the crusader.

Modern cases have given guidance to the apportionment of reasonable fees and management of the common fund. Apportionment of fees is a function of recovery. In fee

²³ *Id.* at 23.

²⁴ *Blake v. Cannon*, 312 S.C. 135, 139 (S.C. Ct. App. 1993).

shifting statutes a "lodestar" approach reflecting the amount of attorney time reasonably expended on the litigation results in a reasonable fee. In Layman, when awarding fees to be paid from a common fund, the court used the common fund itself as a measure of the litigation's success.²⁵ This bases an award of attorneys' fees on a percentage of the common fund created, known as the "percentage-of-the-recovery" approach. Therefore success is a dollar amount.

III. Bad Faith Exception to the American Rule

As previously stated, the American Rule generally prohibits American federal district courts from awarding attorney fees to the prevailing party in the absence of a statute, court rule, or contract that provides for such award.²⁶ Despite the general rigidity of the American Rule, in exceptional cases, a court may exercise its inherent powers²⁷ to impose attorney fees as a sanction if a party has acted in bad faith, "vexatiously, wantonly, or for oppressive reasons."²⁸ In such cases, the court's sanction may be equated to an exercise of its inherent contempt authority since the sanctioned party's conduct is outside acceptable litigation decorum.²⁹

Actions involving bad faith conduct that have been adjudicated as giving rise to an award of attorney fees are: oppressive, discriminatory, or unlawful contracts; violations of confidential relationships; harassing or dilatory tactics in the conduct of litigation;

²⁵ *Layman v. State*, 376 S.C. 434, 453 (S.C. 2008).

²⁶ *Duke Power Co. v. South Carolina Public Service Commission*, 284 S.C. 81 (1985). See also, *Allie v. Whole Foods Market Group, Inc.*, 746 F.Supp.2d 773 (E.D. Va. 2010).

²⁷ *Chambers v. NASCO, Inc.*, 501 U.S. 32 (1991) ("[F]ederal district court . . . may properly use its inherent power to assess attorney fees as sanction for [a party's] fraud on the court and bad-faith conduct during litigation.").

²⁸ *Balcar v. Bell & Associates, LLC*, 295 F.Supp.2d 635 (N.D.W. Va. 2003), *aff'd*, 83 Fed.Appx. 519 (4th Cir. 2003).

²⁹ *Brandt v. Gooding*, 368 S.C. 618, 628 (2006) ("[C]ourts have the inherent power to punish for offenses that are calculated to obstruct, degrade, and undermine the administration of justice." (citing *State ex rel. McLeod v. Hite*, 272 S.C. 303, 305, 251 S.E.2d 746, 747 (1979)).

vexatious or unfounded actions, proceedings, allegations, or motions; a bad faith defense; general bad faith or obduracy.³⁰ To warrant a grant of counsel fees to an opponent, a court must find extraordinary or exceptional circumstances.³¹

The essential element in triggering an award of counsel fees on the basis of an adversary's vexatious, wanton, or oppressive conduct is the existence of bad faith on the part of the unsuccessful litigation.³² Courts typically apply "necessarily stringent" standards in analyzing a party's alleged bad faith when determining whether an award of attorney fees to the prevailing party is proper.³³

Appropriately, the right to an award of attorney fees based on the losing party's bad faith can be nullified by improper acts on the part of the prevailing party. To make an equitable award on the basis of one party's bad faith in the face of the opposing party's improper conduct would violate the equitable maxim that one who comes to equity must do so with clean hands.

A prevailing party's dilatory conduct may also prevent an equitable award of attorney fees under the maxim that equity will not award one who sleeps on his rights.³⁴

Awards of attorney fees must be limited to an amount covering only the necessary efforts shown to have been occasioned by the bad faith, oppressive, or obstinate conduct of the opposing party.³⁵

³⁰ See William A. Harrington, Annotation, *Award of Counsel Fees to Prevailing Party Based on Adversary's Bad Faith, Obduracy, or Other Misconduct*, 31 A.L.R. Fed. 833 (1977).

³¹ See e.g., *Diamond Shamrock Corp. v. Lumbermens Mut. Casualty Co.*, 466 F.2d 722 (7th Cir. 1972).

³² *Hall v. Cole*, 412 U.S. 1 (1973).

³³ See e.g., *Satoskar v. Indiana Real Estate Commission*, 517 F.2d 696 (7th Cir. 1975), *cert. den.*, 423 U.S. 928.

³⁴ See e.g., *In re Kaid*, 347 F.Supp. 540 (E.D. Va. 1972) (The district court denied an award of attorney fees to the prevailing party because due to his own delay, he and his counsel were deemed to be primarily responsible for the aggravated costs and fees.)

³⁵ See e.g., *Wright v. Jackson*, 522 F.2d 955 (Va. 1975) (holding that an award for obstinacy must be computed as to any unnecessary effort occasioned by the obstinacy rather than for all efforts taken in the suit by the prevailing party's attorneys).

Notable, of course, is that despite the general national recognition of the bad faith exception to the American Rule, South Carolina has yet failed to adopt it. In Weeks v. McMillan,³⁶ the Master-in-Equity ordered: (1) the dissolution of the partnership at issue, (2) an accounting of the dissolving partner's interest in the partnership, and (3) that the dissolving partner was entitled to attorney fees due to the bad faith conduct of the other partners. The Court of Appeals affirmed the dissolution and accounting but denied the award of attorney fees, holding explicitly that South Carolina does not recognize the bad faith exception to the American Rule.³⁷

Nonetheless, on February 1st of this year, the South Carolina Court of Appeals held that "special damages recoverable in a slander of title action are the pecuniary losses that result directly and immediately from the effect of the conduct of third persons, including impairment of vendibility or value caused by disparagement, and the expense of measures reasonably necessary to counteract the publication, including litigation."³⁸ So despite rejecting awards of attorney fees for the bad faith acts of a losing party on equitable grounds (e.g., where there is no adequate remedy at law), a court will award litigation costs and attorney fees where a defendant's tortious action necessitates litigation (e.g., there is no remedy for the acts except through litigation).

³⁶ 291 S.C. 287 (1987).

³⁷ *Id.* (emphasis added).

³⁸ *Solley v. Navy Federal Credit Union*, 2012 WL 288501, at *5 (S.C. Ct. App. Feb. 1, 2012) (emphasis added).