

August 14, 2019

BUSINESS LAW

## Consider Potential Litigation Fees, Costs When Drafting Business Contracts

Commentary by  
Noah B. Tennyson



Tennyson

Before you sue someone, it may be prudent to consider potential litigation fees and costs. This is because, unless your claim arises from a Florida statute or contract that entitles you to recoup attorney fees, each side will bear their own regardless of who prevails. Thus, you may find that prevailing in court results in the type of victory lamented by Plutarch during the Pyrrhic war: “if we are victorious in one more battle with the Romans, we shall be utterly ruined.”

Ask yourself this question: If I wound up in a lawsuit, would I want there to be a basis for legal fees to be awarded to the prevailing party? Of course, if you expect to prevail in future lawsuits, then the answer is easy. But, few truly know what tomorrow brings and simply hoping that your side will prevail in future lawsuits is likely just wishful thinking. So, to help mitigate the risk of an uncertain future, it may be helpful to consider various legal fee language to insert into some of your business’ most important documents—its contracts.

As a starting place, look at the agreements that you executed with your landlord, vendors, bank, and other parties in order to run your business. What does the legal fee language say? Does it provide that any party that prevails in any dispute arising from the contract can recoup its legal fees? If not, to what extent did your counterpart create an attorney fees clause which favors its side? Finally, which state laws are to be applied to the contract if there is a lawsuit?

You may have chafed at these terms but signed anyway, perhaps because you saw signing as but one more requirement to get your business up and running. Whether you signed or not, in your future contract negotiations, consider using legal fee language which may favor your business as opposed to your counterpart’s. Aside from your own scruples, the limit to how unfair you can be is the reasonable likelihood that a judge will enforce your contract as you intended.

To determine whether a judge will enforce your legal fee language, it can be helpful to look at what Florida courts have decided in the past. For instance, let’s say your new business is a franchise. As noted in prior Florida cases, Subway Restaurants (Subway) has written into its contracts that its franchisee “agrees to pay the cost of collection and reasonable attorney fees on any part of its rental that may be collected by suit or by attorney, after the same is past due.” In other words, Subway, and only Subway, can recoup its legal fees if they arise from the franchisee failing to pay rent.

This provision appears to be an illicit one-way fee clause which Florida courts have ruled permits either side

to seek a fee award, so long as that side prevails in the lawsuit. Thus, in a dispute between Subway and one of its franchisee Florida stores, the franchisee sought attorney fees from Subway after prevailing in its claim for wrongful eviction. However, the Florida court ruled that the franchisee’s lawsuit never triggered an entitlement to attorney fees because the legal fee language limited awards to matters involving the collection of rental payments. Put another way, even if this fee clause were a two-way street, the lanes would still be confined to matters involving the collection of the franchisee’s rent. Therefore, the franchisee was not entitled to recoup its legal fees even though it won its case.

As seen above, a careful examination of contract language can uncover provisions that might go unnoticed by most, but are duly noted by those seasoned in business disputes. As another example, contracts made in Florida can be written to have the laws of other states, such as New York or Virginia, be used to resolve disputes. This might seem innocuous, but the impact can be severe because the treatment of one-way attorney fees clauses varies from state-to-state.

In one Florida case, stockbrokers put into their brokerage agreement that New York law would govern the agreement’s terms. The agreement also stated that stock purchasers who signed it in order to purchase stock would reimburse the brokers for any debts owed, which included related attorney fees.

When a stock trading error cost a group of purchasers more than \$70,000, the purchasers sued the brokers and won damages totaling \$81,500. Yet, the Florida court refused to award the purchasers their attorney fees even though the agreement’s legal fee clause applied to their lawsuit, and even though Florida law requires a two-way street for such fee clauses.

The Florida court’s reasoning was simple: New York law does not require that one-way fee clauses be made into two-way clauses. Because New York—and not Florida—law applied, the Florida court had no authority to grant a fee award to the stock purchasers.

You should examine proposed contracts with care because established corporations have legal teams crafting contracts which benefit them. Bear that in mind if you consider signing. Conversely, when drafting your own contracts, heed your lawyer’s advice. Otherwise, you, too, may fall victim to unintended consequences.

**Noah B. Tennyson is an associate at Nason Yeager in Palm Beach Gardens. His practice focuses on commercial and business litigation matters, including commercial foreclosures, business disputes, contract litigation, condominium and homeowners’ association issues, construction defect litigation and employment issues. He can be reached at 561-686-3307 or via email at [ntennyson@nasonyeager.com](mailto:ntennyson@nasonyeager.com).**

BOARD OF  
CONTRIBUTORS