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It's Time to Revise Your Contracts and Agreements for "Actual" Attorneys' Fees and Costs

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More and more contracts today contain what we call a "shifting attorney fee" provision meaning that the winning party is entitled to collect its out-of-pocket attorney fees and costs as additional damages if the contract is breached. However, most "shifting attorney fee" provisions provide that the winner is entitled to recover its "reasonable" attorney fees, as opposed to its "actual" attorneys' fees. The difference could mean the expenditure of thousands, if not hundreds of thousands of dollars. If your contract contains an attorney fee provision, you may want to have your lawyer review it and possibly change it to clarify that any recovery of attorneys' fees should be "actual" and not merely "reasonable."

When you go to the grocery store or restaurant or any other retail outlet, you're expected to pay the price stated for the item. You don't typically haggle at the cash register offering to pay a "reasonable" price. The same is true when you hire a lawyer. Most attorney fee agreements provide for hourly rates with the contractual expectation that the invoice will be paid as stated. While most lawyers are reasonable, clients are expected to pay the invoice as billed.

If a contract provides that the prevailing party is entitled to the recovery of "actual" attorney fees, why would a court impose its own thoughts on what the fees should be? One would think that the prevailing party could simply submit the invoice to the court and receive an award.

But until recently, courts in general would not award the "actual" amount of fees the prevailing party paid to its attorney. Instead, courts would hold a fairly sophisticated, expensive, and time-consuming "evidentiary hearing" to arrive at a "reasonable" attorney fee amount. And in most cases, the attorney fee awarded would be less than the actual amount charged. Sometimes, and albeit rare, courts would also award attorneys'

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fees higher than what was actually charged.

For contracts not providing for “actual” attorneys’ fees, the court would determine a “reasonable” fee by assessing multiple factors including whether the hourly rate was reasonable for the community, whether the hours charged were reasonable, whether the attorney was experienced or a novice, whether the case was easy or difficult, whether the attorney had to turn away other work, etc. While the court could consider the “actual” attorneys’ fees charged, it was not required to “rubber stamp” the invoices. Again, this is a laborious process, which can be easily avoided by making some slight changes to contractual attorney fee recovery provisions.

Indeed, a recent court decision from the Oakland County Business Court held that the stringent “reasonableness” analysis does not apply when a contract awards the prevailing party “actual attorney fees.” See e.g., *Northridge Livonia, LLC v Burn Fitness-3, LLC*, Oakland County Business Court, Judge Michael Warren presiding, decided April 15, 2021, Case No. 2020-181630-CB. In this case, the parties’ commercial lease agreement provided that the prevailing party would be entitled to recover “actual attorneys’ fees.”

Judge Warren further explained that where “the contract language plainly and unambiguously provides for the recovery of ‘actual attorneys fees,’ we must simply enforce the contract language as written.” As such, the prevailing party simply submitted its attorney fee invoices as part of its damages claim. Judge Warren considered the invoice as part of the prevailing party’s damage claim and added the amount accordingly. There was no need whatsoever to engage in a time-consuming “reasonableness” analysis to determine an appropriate attorney fee. Judge Warren’s reasoning was straight forward—parties are free to contract with each other and are thus free to contract for the recovery for “actual” attorney fees. If the court imposed a “reasonableness” analysis, it would engage in an improper exercise of re-writing the parties’ contract. Granted, Judge Warren’s opinion has not yet been tested by the Michigan Court of Appeals, but his reasoning is solid under basic contract law principles.

As such, it makes sense to take the time to review your agreements and perhaps modify them to provide for the recovery of “actual” attorneys’ fees and costs. Failing to do so could cost thousands of dollars. Our attorneys are best suited to reviewing your agreements and will do so for a fee that you will find to be most “reasonable.”

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