



Can I Get My Attorney's Fees Back?

By Ron Tracy

One of the major impediments to the legal system is cost. Almost everyone is typically concerned about the expense of hiring an attorney to pursue their cause or defense, even wealthier individual clients and corporations. One frequently encountered question is, "Can I get my attorney's fees back?" Generally, under the current law the answer is "No." Even if the case is one in which the prevailing party is entitled to recover fees, the best answer is often "Maybe."

Generally speaking, Oklahoma follows the so-called "American Rule" for recovery of attorney fees. Under this rule, "[c]ourts are without authority to award attorney fees in the absence of a specific statute or a contractual provision allowing the recovery of such fees, with certain exceptions. *Barnes v. Oklahoma Farm Bureau Mutual Ins. Co.*, 2000 OK 55, ¶46, 11 P.3d 162. The rationale is that "liberality of attorney's fees awards has a chilling effect on open access to the courts." *Eagle Bluff, LLC v. Taylor*, 210 OK 47, §16, 237 P.3d 73. However, case law and statutes provide a rather extensive list of exceptions to the American Rule. My review of Oklahoma law (which is not necessarily exhaustive), uncovered the following:

- 12 O.S. § 936(A) (civil action to recover for labor or services rendered, or on open account, a statement of account, account stated, note, bill, negotiable instrument, or contract relating to purchase or sale of goods, wares or merchandise);
- 12 O.S. § 936(B) (actions to recover debts owed to the State);
- 12 O.S. § 939 (breach of express warranty);
- 12 O.S. § 940 (negligent or willful injury to property);
- 12 O.S. § 1141 (written correction of title defect refused without reasonable cause);
- 12 O.S. § 1101.1 (offer of judgment in actions for personal injury, wrongful death, and certain specified actions);
- 12 O.S. § 1190(B)(1)(recovery by creditor upon trial of more than garnishee admitted in answer);

- 12 O.S. § 2004.1(C)(1) (undue burden of expense on person subject to subpoena);
- 12 O.S. § 2011 and *City Nat. Bank & Trust Co. v. Owens*, 1977 OK 86, ¶12, 565 P.2d 4 (bad faith litigation);
- 15 O.S. § 761.1 (violations of Oklahoma’s Consumer Protection Act);
- 23 O.S. § 103 (bad faith litigation involving claim or defense for personal injury, except death/damages to personal rights);
- 36 O.S. § 1219 (attorney fees allowed in certain claims upon “accident and health” policies);
- 42 O.S. § 176 (actions involving liens);
- 43 O.S. § 112 (D)(2), §§ 111.1(C)(3) and 111.3(E) (actions contrary to child’s best interests, and violations of child support or visitation orders);
- 51 O.S. § 24(A) (civil suit for declarative or injunctive relief to enforce Open Records Act);
- 52 O.S. § 318.5 (Surface Damages);
- 60 O.S. § 175.57(D) (actions involving trusts);
- 60 O.S. § 856 (enforcement of real property covenants or restrictions); and
- State ex rel. Burk v. City of Oklahoma City, Okl.*, 1979 OK 115, § 598 P.2d 659 (successful litigant confers substantial benefit upon a class).

Obviously, there are a lot of exceptions to the American Rule. But, even if a successful litigant is entitled to recover attorney’s fees, recovery is often limited by a “reasonable” requirement and the standards set forth in *State ex rel. Burk v. City of Oklahoma City, Okl.*, above. These include: 1) time and labor required; 2) novelty and difficulty of the questions; 3) skill required to perform the legal service properly; 4) preclusion of other employment due to acceptance of the case; 5) customary fee; 6) whether fee is fixed or contingent; 7) time limitations imposed by client or the circumstances; 8) amount involved and results obtained; 9) experience, reputation and ability of the attorneys; 10) the undesirability of the case; 11) the nature and length of the professional relationship with the client; and 12) awards in similar cases. A determination of a fee award will be upheld absent abuse of discretion. *Spencer v. Oklahoma Gas & Electric Company*, 2007 OK 76, 171 P.3d 890.

So, if you have been sued or have a potential lawsuit and are interested in knowing if you can recover attorney’s fees, do yourself a favor and determine early on if the action falls within one of the exceptions to the American Rule. If it does, and you win, keep in mind that does not

necessarily mean recovery of all your attorney's fees at the end of the day. Conversely, be aware of the "chilling effect" of paying someone else's attorney's fees, in addition to your own, should the other side ultimately prevail.