

A Prevailing Party Provision Should Define What It Means to Prevail

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A typical prevailing party contract provision allows the prevailing party in litigation or arbitration to recover their attorney's fees from the other party. It is an attractive provision when negotiating a construction contract and its existence often weighs on the decision to pursue litigation or arbitration. However, which party "prevails" is not always easy to determine. What happens if both parties bring claims and both prevail on certain aspects of the underlying case? The Rhode Island Supreme Court recently weighed in on this issue in *Clean Harbors Environmental Services v. 96-108 Pine Street, LLC*, 286 A.3d 838 (R.I. 2023).

The *Clean Harbors* case involved a contract with the following typical prevailing party provision: "If any party to this Contract brings a cause of action against the other party arising from or relating to the Contract, the prevailing party in such proceeding shall be entitled to recover its reasonable attorney fees and court costs." One party brought claims for breach of contract and unjust enrichment and the other party countered with its own breach of contract claim for liquidated damages. The case was tried, and the trial court awarded damages to both parties on their respective claims. Both parties subsequently moved the court for their respective attorney's fees and court costs. Because there was no guiding legal precedent in Rhode Island, the court relied on case law from other jurisdictions, which allow a court considerable discretion on awarding attorney's fees when faced with a split decision and a contractual fee-shifting provision. The trial court determined that since both parties prevailed on their respective claims, neither party prevailed and declined to award attorney's fees to either party. The party awarded the larger judgment appealed this decision seeking its attorney's fees.

The Supreme Court closely examined the prevailing party provision in light of relevant case law in other jurisdictions and decided that a more flexible approach, affording the trial judge greater discretion, was most acceptable to determine the prevailing party where both or neither party may be considered to have prevailed. The Supreme Court vacated the trial court decision seeking a "more comprehensive, fact-intensive and case-specific analysis" from the trial judge. *Id.* at 846. The case was remanded to the Superior Court for a determination of the prevailing party by considering:

(1) the contractual language; (2) the number of claims, counterclaims, cross-claims, etc., brought by the parties; (3) the importance of the claims relative to each other and their significance in the context of the lawsuit considered as a whole; and (4) the dollar amounts attached to and awarded in

connection with the various claims, as well as whether compelling circumstances exist to justify a finding that both parties, or neither party may be considered to have prevailed.

Id. (internal quotations omitted).

The Court's guidance does not appear to make a decision on attorney's fees any easier. Rather than allow a court discretion to analyze and interpret a potentially unclear prevailing party provision, the contract should clearly define what it means to prevail at arbitration or litigation so that the Court only has to enforce it. Such definition should not only cover the situation where both sides prevail but also what it means to prevail in the first instance. For example, in order to prevail, must one recover a minimum percentage, say 80 percent, of the amount of the initial claim asserted to be entitled to recover attorney's fees? Such a requirement would serve the dual purpose of clearly defining a win (which should be simple to enforce) and encouraging realistic initial claims which increase the chance of prevailing under the definition. Take the time to negotiate and agree upon what it means to prevail in litigation or arbitration. The language should be tailored to the particular circumstances of each contract. Otherwise, you run the risk and additional expense, which may not be recoverable, of allowing a decision-maker to interpret a contract provision differently than what the parties intended.

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