

A CLIENT'S SOPHISTICATION MATTERS,
Particularly When the Recovery of Attorneys' Fees Are at Stake

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Contracts ranging from simple residential leases to multimillion dollar purchase agreements routinely contain fee-shifting provisions. A standard provision provides that, in the event of a dispute relating to the contract, the non-prevailing party must reimburse the prevailing party for all attorneys' fees expended. This concept makes perfect sense. Legal expenses were only incurred because the winning side had to sue to enforce a contractual obligation; the losing side must bear that cost.

But what happens when the attorneys' fees sought under a fee-shifting clause exceed the actual damages recovered by the plaintiff?

This issue was recently addressed by the Circuit Court for Montgomery County in *White Flint Realty Group Limited Partnership, LLLP v. Bainbridge St. Elmo Bethesda Apartments, LLC, et al.* Following hotly contested litigation, the parties settled on the eve of trial with the defendant (Bainbridge) agreeing to pay the plaintiff (White Flint) \$3.2 million. As part of the settlement, White Flint retained its right to seek legal fees pursuant to the fee-shifting clause in the contract. White Flint's request for fees and expenses, which exceeded the settlement amount, was ultimately deemed reasonable by the court. In reaching this conclusion, the court noted that the degree of plaintiff's success was a factor in the determination, but it was simply one factor of many. The court stressed that a fee-shifting provision is a bargained-for item of contractual damage, especially in contracts between sophisticated parties. In other words, the recovery of attorneys' fees under this bargained-for provision will be respected unless plainly unreasonable.

For any action commenced after January 1, 2014, Maryland Rule 2-705 governs a claim based on a contractual fee-shifting provision. If the claim for an award of attorneys' fees exceeds the lesser of 15% of the principal amount found to be due or \$4,500, a Court will apply the factors set forth in Maryland Rule 2-703(f)(3) to determine the amount of the award: (A) the time and labor required; (B) the novelty and difficulty of the questions; (C) the skill required to perform the legal service properly; (D) whether acceptance of the case precluded other employment by the attorney; (E) the customary fee for similar legal services; (F) whether the fee is fixed or contingent; (G) any time limitations imposed by the client or the circumstances; (H) the amount involved and the results obtained; (I) the experience, reputation, and ability of the attorneys; (J) the undesirability of the case; (K) the nature and length of the professional relationship with the client; and (L) awards in similar cases. A court also has discretion to consider "any other factor reasonably related to the fairness of the award." Md. Rule 2-705(f)(1). Less stringent standards will apply to fees falling below the lesser of 15% of the principal amount due or \$4,500. Md. Rule 2-705(f)(2).

The new rule incorporates many of the same factors applied in *White Flint*. Fundamentally, attorneys' fees may be awarded to the extent they are deemed reasonable in light of the above factors, even if they exceed the amount in controversy.

Sophisticated parties who agree that the non-prevailing party in litigation shall bear all litigation expenses must appreciate the ramifications of their agreement. In *White Flint*, it resulted in the prevailing party recovering nearly all of the fees and expenses it had incurred in enforcing its contractual rights, more than doubling the amount it received in the settlement.

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