



If You Want Your Attorney's Fees and Costs of Litigation, Make Sure Your Contract Clearly Calls for It

Earlier this year, the Massachusetts Superior Court held that the mere existence of an indemnification provision in a contract does not authorize the court to award attorney's fees to the party that prevails in litigation. Instead, a clear and unambiguous "fee shifting provision" must be included in the contract before a court can require the losing party to pay the prevailing party's fees.

In *Harris v. Imaging Advantage LLC*, a doctor and physician's organization/medical group brought suit in Suffolk County Superior Court against an imaging company, alleging breach of contract. The doctor and the medical group had separate but similar contracts with an imaging company which, among other things, allowed the imaging company to use the doctor's and the

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medical group's intellectual property in exchange for royalties. The contract further provided that the imaging company would pay "exit royalties" to the doctor and the medical group if certain termination events occurred.

Three years later, the medical group terminated the contract and demanded that the imaging company cease any further use of its intellectual property. Despite the demand, the imaging company refused to pay the exit royalties

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Firm News



Darshana Indira

A warm welcome to Darshana Indira who joins the firm as a senior associate focusing in employment and business law.



Mark Smith

Mark Smith moderated the Boston Bar Association's recent DA Candidates Forum.



Marc Laredo

Marc Laredo and Matt Kane co-authored a recent *Boston Bar Journal* article, "The Business Litigation Session Orders the Return of an Inadvertently Disclosed Draft Letter".



Matthew Kane



Payal Salsburg

Payal Salsburg co-authored a *Boston Bar Journal* article, "Reflections on Efforts at Promoting Diversity, Equity, and Inclusion in the Profession".

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and continued to use the plaintiff's marks, logos, and name. Both the doctor and the medical practice brought a lawsuit against the imaging company seeking an injunction and money damages.

After exchanging discovery, the doctor and medical practice moved for summary judgment and prevailed on their arguments before the judge. The judge entered judgment in favor of the doctor and medical practice on the breach of contract claims in the amount of \$5.75 million plus interest. With the win in hand, the doctor and medical practice sought their attorney's fees and costs of litigation from the imaging company, arguing that the indemnification provision in the contract that held each party against "any liability, damage, loss or expense, including reasonable attorney's fees and expenses at litigation" was effectively a fee-shifting provision.

The Superior Court disagreed with the argument for fee-shifting, stating that Massachusetts follows the American Rule that holds each party responsible for its own attorney's fees. A court may not require losing party to pay the attorney's fees of the prevailing party unless there is a contract or a statute that allows such "fee shifting." The parties agreed that there was no applicable fee shifting provision, however they disagreed on the interpretation of the indemnification clause of the contracts.

In analyzing the indemnification provision, the court observed that the language obligating each party to protect the other from "any liability, damage, loss or expense, including reasonable attorney's fees and expenses at litigation" was ambiguous. Specifically, the language did

not contain any requirement for fee-shifting in favor of a prevailing party at litigation, and did not specify whether the litigation must concern the services provided under the contract. The court noted that Massachusetts case law made clear that indemnification provisions typically protect the signatories from claims brought against the signatories by third parties rather than act as a fee shifting provision between the contracting parties themselves. This principle in Massachusetts law is consistent with the law in other states. Without a clear and unambiguous fee shifting provision in a contract, a court has no choice but to deny a motion seeking attorney's fees and costs of litigation.



This court order emphasizes the importance of ensuring that contracts between parties clearly and unambiguously spell out the parties' intent in entering into a contractual relationship. If the parties agree that the non-breaching party will be entitled to its attorney's fees and costs of enforcing the contract terms against the breaching party, the fee shifting language in the contract must be clear and concise. Any language that leaves room for interpretation will likely be seen as ambiguous.