

Does Your Contractual Fee-Shifting Provision Maximize Your Recovery of Legal Fees?

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Virtually every contract in the construction industry contains a fee-shifting provision, which is a clause that requires the losing party in litigation to pay the prevailing party's reasonable attorneys' fees. However, despite the fact that alternative fee recovery agreements maximize a party's recovery of legal fees when a fee-shifting provision (or statutory award) is triggered, they are not universally implemented.

What is an Alternative Fee Recovery Agreement?

An alternative fee recovery agreement states that if someone other than the client is to pay attorneys' fees, then the amount of attorneys' fees will be the greater of the amount charged to the client and the amount to be determined by the Court.² The agreement is triggered in the event a party is awarded fees according to a statutory or contractual fee-shifting provision.

The First Baptist Case

In *First Baptist Church of Cape Coral, Florida Inc. v. Compass Const. Inc.*, the Supreme Court of Florida explicitly held that alternative fee recovery agreements are valid.³ In that case, First Baptist and Compass were named as defendants in a lawsuit arising from a construction accident. First Baptist defended the main action and pursued a crossclaim for contractual indemnity against Compass. First Baptist prevailed against the plaintiff in the main action and on its crossclaim for indemnity.

Compass conceded that First Baptist was entitled to attorneys' fees as part of its indemnity claim. However, the parties disagreed about how the attorneys' hourly rate should be calculated. Compass argued for the hourly rate actually charged and billed. First Baptist contended that its attorney was entitled to a fee calculated on the basis of a substantially higher hourly rate pursuant to an alternative fee recovery agreement.

First Baptist had insurance coverage for the claim made against it in the main action. As a result, the insurer assigned an attorney to represent First Baptist and provided a defense to the plaintiff's claims. The attorney assigned to the case had a written fee agreement with

the insurer for the defense of personal injury and wrongful death cases brought against the company's insureds, such as First Baptist. According to the agreement, the attorney billed the insurer for his services at \$170 per hour. The insurer's obligation to pay the agreed hourly rate was not contingent in any respect. It was a traditional hourly fee plan whereby the insurer was obligated to pay the pre-determined hourly rate for time billed on the case.

The written fee agreement also contained an "alternative fee recovery clause" which indicated that "should anyone other than the insurance company be required to pay attorneys' fees ... the hourly rate for attorneys' fees would be \$300 ..., or such amount as is determined by the court, whichever is higher."⁴ After a hearing, the trial court ruled that First Baptist could recover from Compass "a reasonable fee" to be determined by the court "even if that amount is greater than the amount First Baptist's counsel charged First Baptist."⁵ The trial court later determined that First Baptist's attorney expended 115 hours in the defense of the plaintiff, and that a reasonable rate was \$350 per hour - equating to a final judgment awarding First Baptist fees of \$40K.

On appeal, the Second District reversed the award, holding that "the trial court was limited by the non-contingent fee agreement between First Baptist and its attorney in making the award of fees against Compass."⁶ However, the Supreme Court of Florida disagreed and held that the alternative fee recovery clause, which required Compass to pay the fees in an amount greater than First Baptist's insurer owed, was valid and reinstated the judgment awarding \$40K in attorneys' fees.⁷

Application of Alternative Fee Recovery Agreements to Other Fee Plans

The alternative fee recovery agreement approved in *First Baptist* can be utilized in conjunction with virtually all customized fee plans to maximize the recovery of legal fees. In fact, the following cases demonstrate that courts are not only willing to extend the enforcement of alternative fee agreements to other fee plans, including a partial contingency fee plan, but are also willing to enforce oral alternative fee agreements that complement already existing and established fee plans. Even more important from the client's perspective, in each of these examples the client retained the full benefit of the excess fee award that resulted when the court increased the discounted hourly rates charged to and paid by the client to the higher court-determined reasonable hourly rates.

Partial Contingency Fee Plan - The Sewer Pipe Delay Case

In 2010, a Florida state court enforced an alternative fee recovery agreement that was part of a partial contingency fee plan. This case involved the construction of sewer lines, a new pump station and a force main in Ft. Lauderdale for the purpose of alleviating the need for septic tanks. The general contractor⁸ filed a negligence action against a professional engineering firm. Before trial, the general contractor offered to settle for \$800K, which the engineering firm did not accept. After an eight-day trial, the jury returned a verdict for the general contractor for \$1.5M.

After trial, the general contractor moved for an award of attorneys' fees in accordance with its written fee agreement. The fee agreement set forth "discounted hourly rates" and also stated:

In consideration of the discounted hourly rates, (the general contractor's counsel) shall also be entitled to a 20% contingency fee on all amounts recovered in the action. In the event that a court awarded fee is determined, (the general contractor's counsel) shall be entitled to either the court awarded fee or the reduced hourly rate plus the 20% contingency fee, whichever is greater. Nothing herein shall limit any court determined reasonable fee to be paid by the liable person, firm, corporation or party to the above percentages or rates.

The court, relying on the written alternative fee recovery agreement, awarded the general contractor reasonable attorneys' fees that were significantly higher than the previously negotiated "discounted hourly rates."

Traditional Hourly Fee Plan - The Alleged Roof Failure Case

In 2016, a Florida federal court enforced an alternative fee recovery agreement that was part of a traditional hourly rate fee plan. The case involved a contractor responsible for installing a roof. The contractor purchased the roofing materials from a national manufacturer of roofing systems.⁹ After installation, the roof failed, and the contractor sued the manufacturer alleging that one of the roofing components was defective. The manufacturer filed a motion for final summary judgment based on a lack of evidence. The trial court granted the manufacturer's motion and entered final judgement.

Having prevailed, the manufacturer moved for an award of attorneys' fees in accordance with its written alternative

fee recovery agreement, which stated in pertinent part: (The manufacturer) and (its counsel) have agreed that should anyone other than (the manufacturer) be required to pay (its counsel's) attorneys' fees, the hourly rate for (its counsel's) attorneys' fees would be (a) the ... discounted rates (actually paid by the manufacturer), or (b) such reasonable rates as is determined by the court, whichever is higher, and (the manufacturer) would be obligated to then pay (its counsel) that court-awarded reasonable amount.

The court, relying on the written alternative fee recovery agreement, awarded the manufacturer reasonable attorneys' fees that were significantly higher than the previously negotiated "discounted rates."

Oral Alternative Fee Recovery Agreement – The Third-Party Indemnification Action

In 2014, a Florida state court enforced an oral alternative fee recovery agreement that was part of a traditional hourly fee plan. The case involved a third-party action filed by a multinational bank.¹⁰ In the underlying case, the bank was sued in connection with a nighttime armed robbery at one of its drive-thru ATMs that resulted in the death of its customer. The plaintiff alleged that the incident was caused, in part, by nonfunctional lighting at the ATM. The bank's lighting contractor, however, refused to defend the bank. The bank defended and settled the underlying case, and then filed a third-party indemnification action against the lighting contractor.

After a five-day trial on the third-party indemnification action, the jury returned a verdict for the bank of \$912,000. Additionally, the bank was entitled to attorneys' fees pursuant to the indemnification provision. The bank moved for an award of attorneys' fees in accordance with its oral alternative fee agreement:

I represent (the bank) and have represented (the bank) for several years. (The bank) and I have a fee agreement for the defense of personal injury and wrongful death cases brought against (the bank) in which I provide legal services at a discounted hourly rate. (The bank) and I have also agreed that should anyone other than (the bank) be required to pay attorneys' fees, the hourly rate for attorneys' fees would be at a reasonable rate as is determined by the court and (the bank) would be obligated to then pay me that court-awarded reasonable amount.

The court, relying on the oral alternative fee recovery agreement, awarded the bank reasonable attorneys' fees

that were significantly higher than the previously negotiated "discounted hourly rates." The lighting contractor appealed the verdict and the award of attorneys' fees pursuant to the oral alternative fee recovery agreement. However, a settlement was reached by the parties that resulted in the dismissal of the appeal before an opinion was issued by the appellate court.

Best Practice in Drafting Alternative Fee Recovery Agreements and the Extension of the First Baptist Case to Oral Alternative Fee Recovery Agreements

The *First Baptist* case and the aforementioned examples provide guidance to drafting an enforceable alternative fee recovery agreement and, in fact, provide specific, approved language:

(Name of client) and (name of counsel) have a fee agreement in which (name of counsel) provides legal services at a discounted hourly rate. In accordance with that fee agreement, the hourly rate for partners is \$XXX.XX, the hourly rate for senior counsel is \$XXX.XX, the hourly rate for associates is \$XXX.XX, and the hourly rate for paralegals is \$XXX.XX.

(Name of client) and (name of counsel) have also agreed that should anyone other than (the client) be required to pay (its counsel's) attorneys' fees, the hourly rate for (its counsel's) attorneys' fees would be (a) the discounted rates actually paid by the client or (b) such reasonable rates as is determined by the court, whichever is higher, and (the client) would be obligated to then pay (its counsel) that court-awarded reasonable amount.¹¹

Although it appears that the courts will enforce oral alternative fee recovery agreements, best practice would be to enter into a written, executed agreement.

Conclusion

In conclusion, courts continue to enforce alternative fee recovery agreements, whether written or oral. And, when written to include discounted rates for the client, there is simply no downside to entering an alternative fee recovery agreement, as it maximizes the potential recovery for the client and minimizes overall legal fees.

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Fee Plan	Customization	Matter Type	Description
Contingency	Traditional	litigation	The law firm will defer its fees entirely in exchange for receiving an agreed-upon portion of the client's ultimate recovery. Typically, the client pays the expenses of the litigation.
	Partial Contingency	litigation or transactional	The law firm handles a matter at a reduced hourly rate contingency transactional and shares in a favorable recovery or resolution at a smaller percentage. For transactional matters, the firm may conduct the work at reduced hourly rates in exchange for a percentage of the value the client receives upon liquidation or sale.
Alternative Hourly Rate	Blended Hourly Rates	litigation or transactional	A law firm agrees to bill the same rate for all lawyers regardless of each lawyer's level or individual billing rate.
	Volume Discounts	litigation or transactional	A law firm agrees to bill at a discounted hourly rate in return for a client guaranteeing a set volume work.
Fixed or Flat Fees	Straight Fixed or Flat Fees	litigation or transactional	A law firm agrees to work on a particular matter (e.g., one case or transaction) or to complete a particular task (e.g., monthly consulting) for a fixed/flat fee.
	Monthly Access/ Advice Retainers	litigation or transactional	The client pays a fixed fee for access to day-to-day or pre-litigation legal issues.
	Phase-Based Fees	litigation or transactional	A law firm agrees to be compensated once certain case phases are completed or milestones of a deal are achieved.
Risk Sharing	Fee Holdbacks	litigation or transactional	A law firm holds back an agreed-upon percentage from its monthly billings. In return, the law firm has the opportunity to earn the holdback amount based upon the client's assessment of the law firm's performance, which is graded against certain predetermined criteria (e.g., work quality, results, efficiency). The client's holdback determinations can be made annually or when a matter concludes.
	Success Fees	litigation or transactional	A predetermined premium paid by the client in addition to its prior billings. A success fee can be a set fee, a graduated fee according to predetermined schedule, or a percentage of prior billings.
	Broken Deal Discounts	transactional matter	A reduction of fees in the event a transaction did not proceed beyond a certain stage.

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² *Compass Const., Inc. v. First Baptist Church of Cape Coral, Florida, Inc.*, 61 So. 3d 1273, 1274-75 (Fla. 2d DCA 2011).

³ *First Baptist Church of Cape Coral, Florida, Inc. v. Compass Const., Inc.*, 115 So. 3d 978, 980 (Fla. 2013).

⁴ *Id.* at 979-80.

⁵ *Id.* at 980 (emphasis added).

⁶ *Id.*

⁷ *Id.* at 983-84.

⁸ Clyde & Co attorneys, Barry Davis and Daniel Lever, represented the general contractor.

⁹ Clyde & Co attorneys, Fred Fein and Daniel Lever, represented the national manufacturer of roofing systems.

¹⁰ Clyde & Co attorneys, Barry Davis and Daniel Lever, represented the multinational bank.