



Rolling the Dice

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To which triers of fact are indemnitors entitled to present these issues?

Jury Trials— Reasonable Attorney Fees and Expenses

In a recent indemnity case, a federal district court awarded summary judgment to the surety, finding that the indemnitors had breached the terms of the Indemnity Agreement between them and the surety. Under the

terms of the Indemnity Agreement, the indemnitors agreed to indemnify the surety: from and against any and all liability, loss, costs, damages, attorney's fees, and expenses of whatever kind or nature which the Company may sustain or incur by reason or in consequence of executing any such bond or bonds as surety or co-surety or procuring, upon its full indemnity, the execution thereof as aforesaid, and which it may sustain or incur in making any investigation on account of any such bond or bonds, in defending or prosecuting any action, suit or other proceeding which may be brought in connection therewith, in obtaining or attempting to obtain a release from liability under any such bond or bonds, . . . and to indemnify the Company to the full amount of liability, loss, costs, damages, attorney's fees and expenses as aforesaid, regardless of any reinsurance or insurance that may be carried against any part of, or liability under such bond or bonds. . . .

As requested by the court, the surety filed a Motion for Final Judgment, claiming that it was entitled to recover the following damages: 1) the amount of the bond payment; 2) attorneys' fees and costs for the investigation and prosecution of claim against the indemnitors; and 3) prejudgment interest. The indemnitors objected to various items of attorneys' fees and expenses, and in a status conference, the court indicated that it intended to submit these issues to a jury for determination. The surety argued that the determination of reasonable attorneys' fees and costs under an indemnity agreement was a matter for the court. But, is an indemnitor entitled to have a jury determine the reasonableness of the attorneys' fees, costs and expenses incurred by the surety to investigate and prosecute an action against an indemnitor under the terms of an indemnity agreement?

The starting point for discussion of this issue is *Budinich v. Becton Dickinson Co.*, 486 U.S. 196, 108 S. Ct. 1717, 100 L. Ed. 2d



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178 (1988), a case cited in several attorneys' fees decisions for the general rule that it is indisputable that a claim for attorney's fees is not part of the merits of the action for which the fees pertain. Such an award does not remedy the injury giving rise to the action, and indeed is often available to the party defending the action.

Id. at 200.

The *Budinich* case was cited in the penultimate case on the issue of whether a party in a contract dispute is entitled to have a jury determine the reasonableness of attorneys' fees and costs when the contract allows such a recovery: *McGuire, et al. v. Russell Miller, Inc., et al.*, 1 F.3d 1306 (2d Cir. 1993). The *McGuire* case involved a lawsuit between parties to a merger agreement. When the merger collapsed, the participants filed a lawsuit and a jury awarded \$313,000.00 to the defendants. The merger agreement contained an indemnity provision under which the defendants claimed they were entitled to all costs, assessments, judgments, demands, and reasonable attorneys' fees arising out of any claim made with respect to the merger agreement. The trial court refused to award attorneys' fees to the prevailing defendants, contending that the defendants did not submit proper proof at trial of the amount of the attorneys' fees and costs. The defendants argued that once the jury determined that the other party had breached the contract and was, therefore, liable to the defendants for their attorneys' fees, the amount and reasonableness of such fees was a question for the judge, not the jury. The defendants also contended that because they continued to accrue recoverable attorneys' fees even during the trial, it would have been impossible for them to continuously prove the amount of attorney's fees to which they would have been entitled under the terms of the indemnity clause.

In considering this issue of first impression, the appellate court engaged in a detailed discussion of the necessary procedure to follow in deciding a contractual claim for attorneys' fees.

Counsel for both sides agreed at oral argument that the common practice in the district courts of this Circuit is for the judge to determine the amount of attorneys' fees owed pursuant to an indemnification agreement after the liability for such fees is decided at a trial,

whether bench or jury. *See, e.g., Diamond D Enterprises USA, Inc. v. Steinsvaag*, 979 F.2d 14, 18 (2d Cir. 1992), cert. denied, 124 L. Ed. 2d 660, 113 S. Ct. 2442, 1993 U.S. LEXIS 3761 (1993) (citing cases). Following common practice, today we make law out of what was previously common sense: when a contract provides for an award of attorneys' fees, the jury is to decide at trial whether a party may recover such fees; if the jury decides that a party may recover attorneys' fees, then the judge is to determine a reasonable amount of fees. For reasons discussed below, this rule would not apply to a contract for legal services between a client and a lawyer.

Id. at 1313.

The court recognized that this rule was in keeping with the Seventh Amendment's provision that in suits at common law, the right of trial by jury shall be preserved, and the right to a jury trial in federal court is a matter of federal law, citing *Cutlass Productions, Inc. v. Bregman*, 682 F.2d 323, 325 n.5 (2d Cir. 1982). Whether a party has a right to a jury determination regarding the amount of attorneys' fees owed to the prevailing party depends on whether an action to recover attorneys' fees is legal or equitable. In *Resolution Trust Corp. v. Marshall*, 939 F.2d 274, 279 (5th Cir. 1991), a case involving a contractual provision for payment of reasonable attorneys' fees, the Fifth Circuit held that since there is no common law right to recover attorneys' fees, the Seventh Amendment does not guarantee a trial by jury to determine the amount of reasonable attorneys' fees.

The *McGuire* court agreed with the outcome of *Resolution Trust Corp.*, *supra*, but it did not believe that the Seventh Amendment precluded all rights at common law to recover attorneys' fees pursuant to a contract. The *McGuire* court found that an action to recover attorneys' fees pursuant to a contract presents traditional common law contract issues that should be submitted to a jury, including whether a party is entitled to attorneys' fees, but that the subsequent determination of the amount of attorneys' fees owed is an equitable accounting issue that does not engage the Seventh Amendment right to a jury trial. As the court explained; [P]laintiff agreed to indemnify defendant for "reasonable attorneys' fees... arising

out of any claim, or the defense, settlement or compromise thereof, made with respect to" misrepresentations by plaintiff in connection with the merger agreement. Accordingly, defendants' counterclaim for attorneys' fees was a claim for a contractual "legal right," and plaintiff had the right to have a jury decide whether defendants should recover attorneys' fees under the agreement. However, the subsequent action in this case to determine a reasonable amount of attorneys' fees owed was not an action to enforce "legal rights" pursuant to a contract; rather, such an action was equitable in nature. That action did not involve "a suit to determine the amount of fees owing to a lawyer by a client under a contingent fee retainer contract."

McGuire, 1 F.3d at 1315.

The *McGuire* court felt that the calculation of a reasonable amount of attorneys' fees in a particular case necessitated an assessment of 1) the time and labor reasonably required by the case; 2) the skill demanded by the novelty or complexity of the issues; 3) the burdensomeness of the fees; and 4) the incentive effects on future cases and the fairness to the parties. Because this calculation is not simply a multiplication of the hours spent on the case by the hourly rate, "although plaintiff had the right to a jury decision on whether defendants should recover attorneys' fees, plaintiff did not have the right to a jury decision on a reasonable amount of attorneys' fees." *Id.*

The *McGuire* court considered the application of this rule fair to all parties because 1) the merger agreement containing the indemnification clause was admitted into evidence, the jury was properly instructed on the award of attorneys' fees, and based on this instruction the jury found that defendants should receive attorneys' fees; 2) judges routinely compute the amount of attorneys' fees owed after trial and they are better equipped than juries to make computations based on details about billing practices, including rates and hours charged on a particular case, and the judge can distill the proof necessary to prove the amount of attorneys' fees by waiting until after a verdict when only prevailing parties will submit proof of the amount of attorneys' fees and costs; and 3) the presiding judge can as-

sess the amount of attorneys' fees and costs after a trial with "perfect hindsight."

In *The Scotts Company v. Central Garden & Pet Co.*, 256 F. Supp. 2d 734 (S.D. Ohio 2003), citing *McGuire*, *supra*, the court stated:

The Sixth Circuit has not decided whether a fee provision in a contract is a matter for the judge or the jury to decide. The Court has recognized, however that

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there is a split of authority on the issue. (citations omitted.) In *McGuire v. Russell Miller, Inc.*, 1 F.3d 1306 (2nd Cir. 1993), the Second Circuit held that the jury is to decide whether a party is entitled to recover attorneys' fees pursuant to a contract because the issue is one of common law contract. According to the Second Circuit, the subsequent calculation of amount is an equitable issue for the court to determine. In contrast, federal courts in the Northern District of Illinois hold that the Seventh Amendment does not require that claims for attorneys' fees pursuant to a contract be presented to the jury because the nature of the claim is more equitable than legal. (citations omitted.) This Court is persuaded by the latter analysis. Attorneys' fees and costs are matters traditionally reserved for court determination. In this Court's view, a contractual fee-shifting provision for reimbursement to a successful party does not change the equitable nature of the relief sought...

Id. at 748.

Other courts have independently come to the conclusion that the allowance and amount of attorneys' fees is not a jury question, but within the auspices of the trial court. In *Hatrock, et al. v. Edward E. Jones*

& Co., et al., 750 F.2d 767 (9th Cir. 1984), the court stated:

Dowardy contends that the court should have submitted the attorneys' fee question to the jury because the Hatrocks brought their claim for attorneys' fees at law. Dowardy's reasoning, however, is flawed. The mere inclusion of a reasonable attorneys' fee in Section 30-1446 as an item of recovery does not mean that the subject of attorneys' fees should have been submitted to the jury as a question at law. The allowance and amount of attorneys' fees is not a jury question, but is within the sound discretion of the trial judge.

(citations omitted.) *Id.* at 776.

The same conclusion was reached by state courts in *Paramount Communications, Inc. v. Horsehead Industries, Inc.*, 287 A.D.2d 345 (N.Y. 2001), and *Thomas C. Murphy, et al. v. Stowe Club Highlands, et al.*, 761 A.2d 688 (Vt. 2000). In *Paramount*, the court stated that:

...insofar as it holds that when a contract provides for an award of attorneys' fees, there is no right to a jury trial on the issue of the reasonable value of such fees. The amount of, if not the right to, attorneys' fees raises post-judgment issues collateral to the merits in the nature of an accounting that are essentially equitable in nature.

Similarly in *Murphy*, the court stated:

"The United States Court of Appeals for the Second Circuit has held that the jury must decide whether a party is entitled to attorneys' fees pursuant to a contractual provision, but the amount of fees awarded is determined post-trial by the judge. *McGuire v. Russell Miller, Inc.*, 1 F.3d 1306, 1315 (2d Cir. 1993)..."

In the absence of a contractual requirement to the contrary, we adopt the Second Circuit approach for the many practical reasons described in *McGuire*. The judge is better equipped than the jury to determine the appropriate rate of compensation and determine whether the time claimed is reasonable. (citation omitted.) Determining the amount of fees necessarily involves the fact-finder in the details of how the case was prepared and tried, including the tactical choices of the lawyer.

Allowing the jury to "look behind the curtain of a case" may improperly affect

their deliberation on the merits unless the trial is bifurcated. (citation omitted.) Deciding the amount of fees post-trial is more efficient because the evidence need be presented only if the party seeking the award prevailed on the merits. (citations omitted.) Finally, post-trial adjudication is the only way to account fully for the legal services provided.

Although the judge can compute the amount of attorneys' fees after a trial with perfect hindsight, the jury would have to keep a running total of fees as they accrued through summations and then predict future fees from post-trial proceedings and motions. The prospect of such a trial evokes images of an attorney struggling to prove the amount of fees to which he is entitled, but never being able to do so because he must prove the value of his last words even as he speaks them, and also the value of words yet unuttered and unwritten.

Murphy, 761 A.2d at 701.

These same principles have also been applied to lawsuits by a surety against an indemnitor. In *United States Fidelity & Guaranty, Co. v. Neri Const., LLC, et al.*, 2006 U.S. Dist. Lexis 70210 (D.C. CT. 2006), a case involving the surety's attempt to recover attorneys' fees and costs based on an indemnity agreement, the court stated:

Section V(C) of the Master Surety Agreement provides that USF&G is entitled to recover from the defendants reasonable attorneys' fees and expenses for the Enforcement Action. "[W]hen a contract provides for an award of attorneys' fees, the jury is to decide at trial whether a party may recover such fees; if the jury decides that a party may recover attorneys' fees, then the judge is to determine a reasonable amount of fees."

Ideal Electronic Security Co., Inc., et al. v. International Fidelity Ins. Co., 327 U.S. App. D.C. 60 (D.C. 1997), was also an action in which the surety brought a claim against indemnitors under general indemnity agreement. In that case the court stated:

The District Court of Columbia Court of Appeals has long held, and this court has acknowledged, that once a contractual entitlement to attorney's fees has been ascertained, the determination of a reasonable fee award is for the trial court

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in light of the relevant circumstances. Where a claim for attorney's fees arises from a private contract provision, such a claim does not embody a right to a trial by jury. Rather, the reasonableness of an attorney's fees award is within the sound discretion of the trial court and is reviewed only for abuse of discretion. (citations omitted.)

In *Atlantic Contracting & Material Company Inc. v. Ulico Casualty Co.*, 844 A.2d 460 (Md. App. 2004), the Maryland Court of Appeals affirmed a decision in favor of the surety's recovery under an indemnity agreement, and then remanded the action back to the trial court to reconsider its award of attorneys' fees to the surety on the grounds that since the surety prevailed on the indemnitors' claim that the payment was made in bad faith, the surety was entitled to recover a larger proportion of its attorneys' fees and costs. In discussing the award the court stated:

Where an award of attorneys' fees is called for by the contract in question, the trial court will examine the fee request for reasonableness, even in the absence of a contractual term specifying that the fees be reasonable. The reasonableness of attorneys' fees is generally a factual determination within the "sound discretion of the trial judge and will not be overturned unless clearly erroneous."

In the present case, the trial court properly concluded that, under the terms of the indemnity agreement, Atlantic was obligated by contract to pay Ulico the sums it incurred to enforce the agreement, which included its attorneys' fees, costs, and expenses. Indemnity agreements of this kind are interpreted generally to entitle the surety to recover fees, costs, and expenses incurred in enforcing them. (citations omitted.)

Atlantic Contracting, 844 A.2d at 478.

The question presents itself as to whether a surety has to obtain a specific jury instruction at trial, or a specific finding by a trial court on a motion for summary judgment, that the surety is entitled to recover attorneys' fees and costs under the indemnity agreement, as opposed to a more straightforward finding that the surety is entitled to fees and costs simply by virtue of the indemnitors' breach of the indemnity agreement. In *Warranty Corp., Inc., et al. v. Hans*, 2000 U.S. Dist. Lexis 3017 (S.D. AL. 2000), the court stated with respect to the award of attorneys' fees under a contractual provision:

The defendant argues that plaintiffs 'waived' any right to attorneys' fees by failing to prove up their entitlement at trial and by failing to have the jury make a finding as to entitlement.... *In this case, the only predicate for entitlement to attorneys' fees is to prevail on a breach*

of contract claim. Warranty Corporation did so prevail. Therefore, Warranty Corporation is entitled to an award of attorneys' fees. Warranty Corporation's entitlement to attorneys' fees is governed by a syllogism. The major and minor premises having been established at trial (which is not disputed by the defendant), the conclusion necessarily follows, and it cannot make any difference whether the jury explicitly stated the conclusion. Certainly it cannot form a basis to deny attorneys' fees. (emphasis added)

This holding indicates that once the court or a jury explicitly finds that the indemnitors breached the appropriate terms and provisions of the General Indemnity Agreement, under the syllogism in *Warranty Corp., Inc.*, the surety would be entitled to attorneys' fees without a specific determination of such an entitlement under the General Indemnity Agreement.

Conclusion

Although entitlement to attorneys' fees may be a jury issue, most courts considering the right to a jury determination on the amount of attorneys' fees pursuant to a contract have found the issue to be one traditionally viewed as equitable in nature and particularly appropriate for determination by the court. Sureties pursuing their indemnity rights should be prepared to address this issue early in the litigation. 