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The Slow Death of Statutory Prevailing Party Fees in Florida and the Resurgence of the American Rule

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Attorney's Fees and Costs:

Prevailing Party vs American Rule

In 2021 the Florida Supreme Court and the Florida Legislature, separately, limited the circumstances under which prevailing parties in litigation may recover their attorney's fees and costs from the other side. Is it a trend? Probably, yes.

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Florida Supreme Court Limits Prevailing Party Fees

In October, 2021, the Florida Supreme Court in ***Levy v. Levy*** considered whether Florida Statutes Section 57.105(7) made reciprocal the prevailing party fees provision in the parties' settlement agreement. The high court found that it did not.

As a result, the Former Wife, who successfully defended against meritless post-judgment litigation brought by her ex-husband, is not entitled to prevailing party attorney's fees and costs. Had the Former Husband, won, however, he would be entitled to prevailing party fees.

Florida Legislature Limits Prevailing Party Fees

Meanwhile, the Florida Legislature in its 2021 session passed a radical overhaul of the prevailing party fees provision applicable to property insurance claims. It is now possible for an insured to prevail in litigation against an insurance company but not receive prevailing party attorney's fees and costs—modifying law that has been on the books since 1893.

Type of Fee Awards

Florida adheres to the "**American Rule**" on attorney's fees: Attorney's Fees are not recoverable from the other party unless permitted by contract or statute.

But:

Most contracts contain prevailing party attorney's fees and costs provisions.

Numerous Florida statutes also provide for prevailing party attorney's fees and costs.

Unilateral vs. Bilateral Prevailing Party Fees Provision

A significant number of contracts contain unilateral prevailing party attorney's fees and costs provisions. For example, credit card contracts allow for a credit card company to collect attorney's fees and costs if it sues a cardholder for non-payment, and wins. There is no similar provision if the card holder prevails.

Reciprocal Prevailing Party Fees by Statute

The Florida Legislature attempted to make all prevailing party fees provisions reciprocal through Florida Statues Section 57.105(7). That statute states:

> If a contract contains a provision allowing attorney's fees to a party when he or she is required to take any action to enforce the contract, the court may also allow reasonable attorney's fees to the other party when the party prevails in any action, whether as plaintiff or defendant, with respect to the contract. This subsection applies to any

contract entered into on or after October 1, 1998.

Basis for Entitlement Under Section 57.105(7)

To be entitled to attorney's fees under Section 57.105(7), the moving party must prove:

1. There is a contract which provides for prevailing party attorney's fees

2. Both the moving party and the party against whom fees are sought are both parties to the contract

3. The moving party prevailed

Harris v. Bank of N.Y. Mellon (Fla. 2nd DCA 2018)

The Contractual Prevailing Party Fees Provision in *Levy*

Levy is **NOT** a typical family law case. It is a contract case, as the parties had reached a settlement agreement that was adopted by a final judgment. The litigation involved an alleged breach of that contract by the Former Wife.

Attorney's fees and costs in family law litigation is addressed in Florida Statutes Section 61.16, which employs a need and ability to pay standard.

The ***Levy*** settlement agreement stated:

> ENFORCEMENT: In the event that either party should take legal action against the other by reason of the other's failure to abide by this Agreement, **the party who is found to be in violation of this Agreement shall pay to the other party who prevails in said action, the prevailing party's reasonable expenses** incurred in the enforcement of this Agreement, said expenses to include, but not limited to, reasonable attorney's fees, courts costs, filing fees, court reporter appearance fees, copying costs, travel costs, and transcription fees.

The Former Husband filed a multi-count Motion to Compel Compliance with the Settlement Agreement, in which he asked for prevailing party attorney's fees and costs. The trial before a General Magistrate took eight days, spread over three years. Every single claim, he lost.

However, the General Magistrate found that although the Former Husband had not prevailed, the Former Wife was not entitled to prevailing party fees. Prevailing party fees were limited to only the party who both brought the action and prevailed in that action.

Florida Third District Court of Appeal Opinion

The Florida Third District Court of Appeal reversed, finding that the Former Wife had entitlement to prevailing party attorney's fees and costs under Florida Statute Section 57.105(7). In reversing, the Third District reasoned:

> Section 57.105(7) amends by statute all contracts with prevailing party fee provisions to make them reciprocal. Thus, it also applies to those parties, like the former wife in this case, who successfully defend against a breach of contract action. The statute applies if the contract contains a prevailing party provision, and the litigant seeking fees is a party to the

contract … which is exactly the set of facts before the Court in this case. Thus, we would not be rewriting the parties' contract if the former wife is awarded prevailing party attorneys' fees because section 57.105(7) amends the prevailing party attorneys' fee provision by operation of law. The award is mandatory, once the lower court determines a party has prevailed.

Florida Supreme Court

The Florida Supreme Court accepted jurisdiction in February, 2021, based upon express and direct conflict with a Fourth District case. Significantly, the Florida Supreme Court just six weeks before issued two opinions that also addressed Section 57.105(7):

--***Page v Deutsche Bank Tr. Co. Americas*****,** 308 So. 3d 593 (Fla. 2020)

--***Ham v Portfolio Recovery Assets, LLC***, 308 So. 3d 942 (Fla. 2020)

The Basis for Denying Fees in *Levy*

The Florida Supreme Court held that when

> a unilateral provision is involved, [Section 57.105(7)] transforms the one-sided provision into a reciprocal provision. In this way, the statute fulfills its purpose, which, we have explained, is "to help level the playing field when a contract contains a unilateral attorney's fee provision.

The *Levy* prevailing party fees provision, however, was not unilateral because "the provision does not confer the right

to fees on one **identifiable contracting party** to the exclusion of the other party". It allows either party to file suit if there is a breach of the settlement agreement, and either party can recover prevailing party attorney's fees and costs if they win.

> …To find that section 57.105(7) applies here would be to confer a right on the former wife that neither party had under the contract, namely the right to fees absent proof of a violation of the PSA. Section 57.105(7) simply does not go that far: it levels the playing field, but does not expand it.

My former associate, Stephanie Koutsodendris, who now works at Bilzin Sumberg, explained the ruling in a blog post:

> In other words, if a contract states that Party A can recover its attorney's fees as a prevailing party, then the statute will automatically allow Party B to recover its fees as a prevailing party, too. However, in the contract at issue, either party theoretically could have been the plaintiff seeking to enforce the contract. Therefore, the statute did not apply to confer fee-award rights on

whichever party happened to be the defendant.

Bottom line: You only get prevailing party fees if you are the one suing.

I have already changed my standard contract language on prevailing party attorney's fees and costs in order to make sure that either party, either as plaintiff or defendant, is entitled to prevailing party fees in any contract dispute.

Practical Effects

Justice Grosshans at Oral Argument questioned if a financially superior party could avoid the reciprocity provision of Section 57.105(7) by simply "writing around" it by requiring a party to both sue, and win, in order to recover prevailing party fees.

The answer is, yes.

Attorney James Walson, who practices landlord/tenant law at Lowndes, wrote the following blog post on November 1:

> [The opinion] presents an interesting drafting issue for Florida landlords. The overwhelming

majority of landlord / tenant litigation is initiated by a landlord as a result of an alleged tenant default under the lease. As a result, Florida landlords could include a similar provision to Levy in their leases on the theory that they are likely to be the only party alleging a breach. If the landlord prevails on its theory of breach, it would be entitled to attorneys' fees. **If the landlord does not prevail and tenant does not establish that landlord was in default, only that tenant was not in default, no attorneys' fees would be awarded. The practical effect shifts the attorney fee risk away from the**

landlord and onto the tenant in most cases.

Note: The Supreme Court in reversing ***Levy*** also quashed:

Holiday Square Owners Ass'n v. Tsetsenis, 820 So. 2d 450 (Fla. 5th DCA 2002), and

CalAtlantic Group., Inc. v. Dau, 268 So. 3d 265 (Fla. 5th DCA 2019).

Supremacy of the Text

The Florida Supreme Court in *Levy* held that it reached an admittedly unjust result because it was required to do so by the text of the statute. This "Supremacy of the Text" doctrine has taken over Florida jurisprudence.

Before 2020, the phrase "Supremacy of the Text" had never been used in written opinions in Florida.

But the Florida Supreme Court in 2020 issued four opinions utilizing the "Supremacy of the Text" analysis, and another two in 2021.

The Florida First District Court of Appeal issued two opinions in 2020 and another two in 2021 utilizing the Supremacy of the Text analysis, including in one criminal case.

The Florida Fourth District Court of Appeal cited to Supremacy of the Text in one 2020 opinion, while the

Florida Second and Third District Courts of Appeal each issued an opinion in 2021 using the analysis.

What is "Supremacy of the Text"?

"Supremacy of the Text" is statutory interpretation on steroids.

In a "Supremacy of the Text" analysis, the Court determines only the "objective meaning of the text". The intent behind the statute is meaningless.

The Florida Supreme Court laid out its new approach to the law in ***In Re: Implementation of Amendment 4, the Voting Restoration Amendment***, 288 So. 3d 1070 (Fla. 2020). In that case, the Governor asked for an advisory opinion about the implementation of Amendment 4, a 2018 constitutional amendment that restores the voting

rights of convicted felons "upon completion of all terms of sentence including parole or probation". The Florida Supreme Court held that "all terms of sentence" included fines, restitution, costs and fees ordered by the sentencing court. Therefore, for example, a felon who has served his sentence, but still owes restitution, will not have his or her voting rights restored.

In explaining its ruling, the Florida Supreme Court noted that its previous opinions suggest that "the first step in construing a constitutional provision may involve something other than determining the objective meaning of the text". Such statements might be "misleading" because "they may be understood to shift the focus of

interpretation from the text and its context to **extraneous considerations**".

Never again will there be such a misimpression.

As the Florida Supreme Court held:

> We therefore adhere to the "supremacy-of-text principle": "The words of a governing text are of paramount concern, and what they convey, in their context, is what the text means." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 56 (2012).

We also adhere to the view expressed long ago by Justice Joseph Story concerning the interpretation of constitutional texts (a view equally applicable to other texts): "[E]very word employed in the constitution is to be expounded in its plain, obvious, and common sense, unless the context furnishes some ground to control, qualify, or enlarge it." Joseph Story, *Commentaries on the Constitution of the United States* 157-58 (1833), *quoted in* Scalia & Garner, *Reading Law* at 69.

There is merit to the argument that a Court should look at intent when interpreting a Constitutional provision or statute. As the Florida Third DCA found, the Florida Legislature intended to help those, like the former wife in *Levy*, who prevailed in a contract dispute that included a prevailing party fees provision.

But there is a new day in Florida, and with it comes the "Supremacy of the Text" doctrine where only words matter. Intent is superfluous.

A court just calls balls and strikes.

Florida Legislature Guts Prevailing Party Fees in Insurance Dispute Cases

For 128 years, an insured in Florida was entitled to prevailing party attorney's fees and costs if he or she successfully sued their insurance company for denying a claim.

No longer.

Insurance companies had long argued that the prevailing party fees provision "encouraged" meritless litigation because it was used by plaintiffs as a bargaining tool to

negotiate a settlement. Insurance companies argued they paid meritless claims because it was cheaper than going to trial. In 2021, the Florida Legislature agreed, and created an unusual three tier prevailing party attorney's fees provision. Under this approach, depending upon the amount recovered by the insured, the Court can order:

1. Each side to pays its own fees (the "American Rule")
2. Insurance company pays part of the insured's fees
3. Insurance company pays all of the insured's fees

A claimant is now required to file a written notice of intent to litigate at least ten days before filing a claim and *after* the insurance company has determined coverage. The notice is

on a form provided by the Department of Financial Services and must itemize the claimant's damages, including attorney's fees. The amount claimed on the pre-suit demand versus actual amount of recovery now determines entitlement to prevailing party fees under Florida Statutes Section 627.70152

> (8) ATTORNEY FEES.—
> (a) In a suit arising under a residential or commercial property insurance policy not brought by an assignee, the amount of reasonable attorney fees and costs under s. 626.9373(1) or s. 627.428(1) shall be calculated and awarded as follows:

1. If the difference between the amount obtained by the claimant and the presuit settlement offer, excluding reasonable attorney fees and costs, **is less than 20 percent of the disputed amount, each party pays its own attorney fees and costs** and a claimant may not be awarded attorney fees …

2. If the difference between the amount obtained by the claimant and the presuit settlement offer, excluding reasonable attorney fees and costs, **is at least 20 percent but less than 50 percent of the disputed amount, the insurer pays the claimant's**

attorney fees and costs … equal to the percentage of the disputed amount obtained times the total attorney fees and costs.

3. If the difference between the amount obtained by the claimant and the presuit settlement offer, excluding reasonable attorney fees and costs**, is at least 50 percent of the disputed amount, the insurer pays the claimant's full attorney fees and costs**…

Note that a Court does not have discretion in whether it awards fees or not.

Conclusion

The Florida Supreme Court took the *Levy* case not because of its facts, nor because of a "conflict" with a decision from another DCA. It took the case because it wanted to emphasize its new "Supremacy of the Text" doctrine, and because it fit the legal trend away from prevailing party fees to the "American Rule" of paying your own fees. The *Levy* opinion seems a precursor of things to come.

Stay tuned.