



BACKGROUND

Often referred to as a “Loser Pays” provision, a Prevailing Party Attorneys’ Fees clause provides that the prevailing party in a dispute is entitled to recover his or her legal expenses from the loser. Proponents of this type of provision maintain that its inclusion in contracts tend to reduce the filing of frivolous claims lawsuits, although this benefit is often outweighed by its lack of insurability as well as the impracticality of recouping legal fees from parties that may be otherwise judgment-proof.

Determining exactly who the “prevailing party” is, and therefore who is entitled to benefit from such a provision, can be difficult to establish. Furthermore, in the event that a judge, jury or arbitrator uses the prevailing party contract clause as the basis for the payment of attorneys’ fees and not the consultant’s negligence, the awarded attorneys’ fees and litigation costs may not be insured.

Even when a litigant is a prevailing party in a lawsuit and is entitled to repayment of its attorneys’ fees and costs, it must still spend additional time and money to collect its award. Unfortunately, successful litigants are not always entitled to those returned fees and costs: their insurance carriers are. Depending on the jurisdiction, the insured party may receive its deductible back as the first monies are received, but not always. On the other hand, it is not uncommon for the insurer to walk away from a collections dispute since these can be costly and they are not always successful.

For these reasons, we recommend omitting Prevailing Party Attorneys’ Fees clauses whenever possible. In its place, we recommend the sample provision below.

SAMPLE CONTRACT CLAUSE

In the event of any legal action, arbitration or claim with respect to any dispute under this Agreement, the parties to this Agreement shall each bear and be responsible for their own attorneys’ fees and litigation costs.

At your request and as a courtesy to you, Dealey, Renton & Associates (DRA) provides the above to assist you in reviewing and negotiating proposed contractual provisions specific to the insurance issues in design contracts. It is not to be regarded as opinion or advice for any specific contracts. If legal advice or expert assistance is required, the services of a competent professional should be sought. You should develop your own language based on your firm’s procedures and experience in reviewing and approving contracts written by other parties