

Include "Loser Pays" Provision in Business Contracts to Recover Attorneys Fees

You entered a contract with a customer to supply computer equipment to the customer's branch office. You performed your obligations under the contract, but the customer didn't pay you, and you sued. It was clearly a case of the customer having breached his contract with you, and the judge agreed with you at trial. You won the lawsuit, hands down. But when your lawyer asked for the court to award you attorneys' fees, the judge refused. You ended up spending nearly as much on legal fees as you recovered from the customer.

Is that fair? It doesn't seem to be. But in most cases judges abide by what is known as the "American Rule," which provides that each party pays his own legal fees, even if the party wins at trial. In some cases where one party has significantly more resources than the other, the larger party can prolong litigation to the point where the smaller party simply cannot afford to continue and is forced to abandon a meritorious claim. A white paper recently published by the American Subcontractors Association emphasizes the dilemma faced by parties who were "stiffed." The paper, "Dispute Resolution: The Cost," explains that "subcontractors often find that the cost of collecting overdue payments from customers, including particularly the cost to employ a lawyer, renders pursuit of unpaid accounts economically unattractive, or even foolish."

Fortunately, business organizations that routinely enter contracts with other business entities have a way to protect themselves: Include a provision in your contracts that obligates the losing party to pay the prevailing party's legal fees in the event of a lawsuit over the terms of the contract. Just the existence of such a provision may lead to an early settlement of a dispute since the litigants would be assuming the risk of having to pay legal fees for both sides. Furthermore, the onus of paying legal fees for the opposing party may ferret out questionable claims.

The inclusion of a "loser pays" provision in your business contracts is a simple step that may save money for your business by upping the ante for a breaching party. Always consult your lawyer to ensure that you are in compliance with the laws of your particular state or business.