

Recovering Attorney Fees in Ohio: When Do We Reach the Twentieth Century?

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Since 1840, bankers (and nonbankers) in Ohio have generally been precluded from recovering their legal costs incurred in collecting defaulted loans even when specific provisions for such costs were made in documents. This result was justified because of a general concern that to permit such recovery would (a) allow avoidance of usury statutes, (b) induce additional litigation, and (c) oppress borrowers. In what the Ohio Supreme Court thought was the first case in the Union to decide the issue,¹ *State ex rel. Fund Commissioners v. Taylor*,² the court concluded that permitting a clause in a warrant of attorney and in a mortgage providing for the payment of five percent as attorney fees to be enforced emasculates statutes regulating interest so that they are “at once virtually repealed.”³

In response to the plaintiff’s claim that the attorney fees sought to be recouped were nothing more than costs incurred, the court stated:

Now, it seems to us to be of little consequence, in this case, what this five per cent may be called, but the inquiry is, what is the thing itself? However it may be disguised, it is very clear to us, it is a mere shift or devise by which 12 per cent is retained, as interest, upon this loan, and in this view of the case cannot be enforced.⁴

It is interesting to note the low regard with which the court held bankers and brokers:

But is it such a contract, as public policy should execute? What may be supposed as the natural result to the community from the execution of this agreement? It would be the condition of future loans, at banks, that the borrower should pay the expenses of collection, and, perhaps, the tax thereon. The brokers in this State would hold a general jubilee; and as their sense of morality and law usually expands with their hopes of gain, in proportion to the borrower’s necessity they would find, probably, additional items of *costs*, as the means of a legalized extortion upon their loans. In our opinion, such agreements are against the public policy of the country, and ought not to be enforced in courts of justice.⁵

This language should be contrasted with the following appearing in an 1884 Oregon case which cited *Fund Commissioners*:

If the effect of enforcing [agreements to pay attorney fees] would be to give the lender a larger compensation for the loan and use of his money than such statute allows, then they should be held usurious and void. But, while the lender has no lawful right to contract with the borrower for a rate of interest exceeding the limit imposed by the statute, he is not

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1. In *Campbell v. Shields*, 33 Va. (6 Leigh) 517 (1835), a note which provided that the principal would be increased by \$48 from a commission to be paid to an agent for collection if the principal was not paid on time was held enforceable. A similar result was reached in *Huling v. Drexell*, 7 Watts 126 (Pa. 1838).

2. 10 Ohio 378 (1841).

3. *Id.* at 380 (emphasis in original).

4. *Id.* at 380–81.

5. *Id.* at 381 (emphasis in original).

debarred from requiring, as a condition of making the loan, that he shall be secured in such a way as will enable him to receive the principal of the loan, and the amount of lawful interest stipulated for, without further loss or expense occasioned by the default of the borrower.⁶

The negative view of attorney fee recovery was fairly entrenched in Ohio jurisprudence for over a century with few exceptions. In 1924 there was a futile attempt by one courageous judge in the Common Pleas Court of Brown County to carve a niche in this veritable commandment:

the rule against the recovery of attorney fees is limited to contracts involving the lending and borrowing of money; in other words, contracts in the nature of a debt, in the narrow sense of the term. The court is unable to find any authority in Ohio holding that attorney fees and expenses may not be recovered, where the contract specifically provides for such recovery, in that class of contracts which do not exist in the form of a debt, evidenced by some form of negotiable paper and where the question of usury is not present. The court is of the opinion that such a contract is governed by the same rules that apply to liquidated damages, and by the common law relating to contracts by which it is permissible to recover attorney fees as special damages incidental to the breach of an agreement which provides for the recovery of such special damages.⁷

Unfortunately, the case was reversed on appeal. The court of appeals concluded that the definition of debt presented by the lower court was too narrow. Since the policy behind prohibiting suits to recover attorney fees was to lessen the inducement toward litigation, the court of appeals was unable to discern a distinction in principle between the case at bar (in which the plaintiff co-op was suing a member for failure to deliver tobacco in breach of a contract) and a suit on a mortgage.⁸

Certain exceptions to the doctrine have come into existence. The earliest one relates to contracts of indemnity. The Ohio courts have long held that in a contract of indemnity where the indemnitor agrees to make the indemnitee whole for losses incurred when the indemnitee is sued, the indemnitee may recover attorney fees incurred in defending a lawsuit which comes within the scope of the indemnity.⁹ In the most recent opportunities to review this exception, the Ohio Supreme Court has strongly asserted its vitality. The first example, *Worth v. Aetna Casualty & Surety Co.*,¹⁰ involved employment contracts entered into by Paul Worth and another individual while they were employees of Union Commerce Corporation at a time when Union was negotiating with Huntington Bancshares, Inc. with respect to the acquisition of Union by Huntington.¹¹ The employment contracts contained "golden parachute" provisions which were triggered if the employees were terminated involuntarily after a change in control, or if within two years after a change in control the employees determined in good faith that their employment status or responsibilities

6. *Peyser v. Cole*, 11 Or. 39, 44, 4 P. 520, 522 (1884).

7. *Burley Tobacco Grower's Coop. Ass'n v. Gardner*, 25 Ohio N.P. (n.s.) 1, 11-12 (C.P., Brown County 1924).

8. *List v. Burley Tobacco Growers' Coop. Ass'n*, 22 Ohio Law Rptr. 455, 469-70 (Ct. App. 1924), *aff'd*, 114 Ohio St. 361, 151 N.E. 471 (1926).

9. *Allen v. Standard Oil Co.*, 2 Ohio St. 3d 122, 443 N.E.2d 497 (1982); *Motorists Mut. Ins. Co. v. Trainor*, 33 Ohio St. 2d 41, 294 N.E.2d 874 (1973) (contract of insurance).

10. 32 Ohio St. 3d 238, 513 N.E.2d 253 (1987).

11. *Id.* at 238, 513 N.E.2d at 254.

had been diminished.¹² To assure that the benefits intended to be provided to the employees would be so provided, the employer was required to post an irrevocable standby letter of credit in the amount of 500,000 dollars to reimburse the employees for qualified legal fees incurred in attempting to enforce the employment contract provisions.¹³ In lieu of posting a letter of credit, the employer obtained a surety bond from Aetna.¹⁴ The employees resigned within two years of the consummation of the acquisition and requested Huntington to honor the "golden parachute" provisions.¹⁵ Huntington declined and then also declined to pay plaintiffs' legal fees incurred in attempting to enforce compliance with the employment contracts.¹⁶ The employees then demanded payment from Aetna, and in the absence of an affirmative response, the employees sued Aetna.¹⁷ The trial court and the appellate court concluded that the plaintiffs were not entitled to judgment on the ground that the provision providing for the payment of attorney fees was void as against public policy.¹⁸

The Ohio Supreme Court found the agreements in question to be ones of indemnity,¹⁹ and that Union (and therefore Huntington as Union's successor) had agreed to hold the employees harmless with respect to qualified legal expenses incurred in seeking to enforce rights granted to the employees, which rights the court went to great lengths to point out were for the joint benefit of Union and the employees.²⁰ The court distinguished the instant case from clauses in agreements requiring the payment of attorney fees upon default of a debt obligation on the following basis:

When a stipulation to pay attorney fees is incorporated into an ordinary contract, lease, note or other debt instrument, it is ordinarily included by the creditor or a similar party to whom the debt is owed and is in the sole interest of such party. In the event of a breach or other default on the underlying obligation, the stipulation to pay attorney fees operates as a penalty to the defaulting party and encourages litigation to establish either a breach of the agreement or a default on the obligation. In those circumstances, the promise to pay counsel fees is not arrived at through free and understanding negotiation.

In contrast, the indemnity agreements at issue in the instant case present a circumstance in which it is in the interest of both the executives and the employer for the executives to enforce the terms of their Employment Agreements. It was in the executives' interest to have the means to enforce their employment contracts. It was in Union Commerce's interest to retain qualified personnel during and following a change of control and to provide its executives with security by giving them the means to vindicate their rights under the contracts. Through free and understanding negotiation, both the executives and the employer were able to protect their respective interests. The fact that this indemnity agreement was assented to in this context distinguishes this case from the ordinary stipulation to pay

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.* at 238-39, 513 N.E.2d at 254.

16. *Id.* at 239, 513 N.E.2d at 254.

17. *Id.*

18. *Id.*

19. *Id.* at 241, 513 N.E.2d at 256.

20. *Id.* at 243, 513 N.E.2d at 258.

attorney fees for breach of a debt obligation. This is not a situation of a one-sided attorney fees provision or one of imbalance, but one of making the indemnified parties whole.²¹

The same facts set the background for a more recent case in this area, *Worth v. Huntington Bancshares, Inc.*,²² where the court found "golden parachute" provisions to be enforceable,²³ but held that the plaintiff did not reasonably exercise his discretion to terminate his employment.²⁴ However, the court still found that the plaintiff had a right to recover his attorney fees, even though he was not successful in attempting to enforce his employment agreement.²⁵

The next exception to the prohibition against recovery of attorney fees arose out of *Sekeres v. Arbaugh*.²⁶ The plaintiff had entered into a commodity futures trading agreement with Merrill, Lynch, Pierce, Fenner & Smith, Inc. which provided for the plaintiff to reimburse the defendant for legal costs incurred in successfully defending itself in a suit brought by the plaintiff with respect to his account.²⁷ The agreement also provided that New York law would govern the agreement.²⁸ The plaintiff sued to recover losses sustained on his account and lost.²⁹ The defendant had counter-claimed for and was awarded attorney fees incurred in defending the suit.³⁰

The Ohio Supreme Court, in a four-to-three decision, determined that New York law would apply if (a) New York had a substantial relationship to the parties or the transaction or that there be some reasonable basis for the parties' choice, and (b) New York law does not violate the fundamental policy of the state which (i) has a greater material interest in the determination of the issue and (ii) is a state whose law would be applied in the absence of a choice by the parties.³¹ The court concluded that although Ohio law would have applied in the absence of choosing New York law, Ohio does not have a *materially greater* interest than New York in the outcome of the case, and consequently there is no need to ascertain if New York law would violate Ohio's public policy. The court applied New York law and affirmed the award of attorney fees since a contractual attorney fees provision is valid in New York. Two of the three dissenting voices based their dissent in part on the presumed power of the defendant to coerce its customers to sign pre-printed forms:

The imbalance is obvious. If Merrill, Lynch can enforce such a provision in its pre-printed, form contract, why not insurance companies, banks, landlords, auto lessors, airline carriers,

21. *Id.* at 242-43, 513 N.E.2d at 257-58.

22. 43 Ohio St. 3d 192, 540 N.E.2d 249 (1989).

23. *Id.* at 196, 540 N.E.2d at 254.

24. *Id.* at 198, 540 N.E.2d at 256.

25. *Id.* at 199-200, 540 N.E.2d at 257. In *Buckeye Fed. Sav. & Loan Ass'n v. Guirlinger*, No. 89CV 04 2866, slip op. (C.P., Franklin County, Feb. 2, 1990), the Franklin County Court of Common Pleas decided that a clause providing for the payment of attorney fees in a guaranty was valid since it was not a simple debt instrument so as to create public policy concerns.

26. 31 Ohio St. 3d 24, 508 N.E.2d 941 (1987).

27. *Id.* at 24, 508 N.E.2d at 941.

28. *Id.*

29. *Id.* at 24, 508 N.E.2d at 942.

30. *Id.*

31. *Id.* at 25, 508 N.E.2d at 942. "In other words, the application of New York law here must not violate the public policy of Ohio, but only if Ohio has a materially greater interest than New York in this matter, and only if Ohio law would have governed the agreement if the parties had not specified otherwise." *Id.*

sporting event promoters (in language printed on the ticket of admission) and anyone else with whom the public does business? The party with the power to include such provisions in a pre-printed contract is afforded a magnificent tool to discourage, if not eliminate, litigation against itself.³²

The last major exception arose out of a case decided in 1987, *Nottingdale Homeowners' Association, Inc. v. Darby*,³³ where a homeowners' association, a not-for-profit corporation, filed a foreclosure action against condominium owners for unpaid assessments.³⁴ At the end of the trial, the association moved for payment of attorney fees based on a provision of the condominium declaration which provided for such payment in the event of successful collection or foreclosure action.³⁵ In another four-to-three decision, the court held that such provisions "are enforceable and not void as against public policy so long as the fees awarded are fair, just and reasonable as determined by the trial court upon full consideration of all of the circumstances of the case."³⁶ The court distinguished prior precedent on attorney fee stipulation principally because the instant case arose in the context of a noncommercial transaction.³⁷ The court concluded with the following ringing terms:

In sum, this court will not interfere with the right of the people of this state to contract freely and without needless limitation. A rule of law which prevents parties from agreeing to pay the other's attorney fees, absent a statute or prior declaration of this court to the contrary, is outmoded, unjustified and paternalistic.³⁸

At least one court of appeals, in an unreported case, has taken the position that the *Nottingdale* case has opened the floodgates for attorney fee recovery in other contexts. In *ATEC v. Columbia Portland Cement Corp.*,³⁹ the plaintiff, who was an assignee of an equipment lease, sued the defendant, who was in effect deemed to be the lessor of the lease, for attorney fees incurred in repossessing the equipment. The court awarded attorney fees on the basis that such fees may be recovered by the winning party when the parties have contracted for such a recovery and the contract is found to be enforceable, citing *Nottingdale*.

It is interesting to note that at this time, every other state in the Union, with the exception of Nebraska and North Dakota (and North Dakota permits stipulations for the payment of attorney fees in documents other than certain debt instruments), permits, either by case law or statute, stipulations in debt instruments providing for the payment of attorney fees.⁴⁰ Pending in the Ohio General Assembly is H. B. 562,

32. *Id.* at 29, 508 N.E.2d at 945 (Brown, J., joined by Wright, J., dissenting).

33. 33 Ohio St. 3d 32, 514 N.E.2d 702 (1987).

34. *Id.* at 33, 514 N.E.2d at 703.

35. *Id.*

36. *Id.* at 37, 514 N.E.2d at 707.

37. *Id.* at 35, 514 N.E.2d at 705 (citing *Miller v. Kyle*, 85 Ohio St. 186, 97 N.E. 372 (1911)). The court described this case as involving "a specific contractual provision that was assented to in a non-commercial setting by competent parties with equal bargaining positions and under neither compulsion nor duress." *Id.*

38. *Id.* at 37, 514 N.E.2d at 706-07 (footnote omitted).

39. No. 88AP-380, 1988 Ohio App. LEXIS 5337 (10th Dist.).

40. *Alabama*: *Wood v. Winship Mach. Co.*, 83 Ala. 424, 3 So. 757 (1888). *Alaska*: ALASKA STAT. § 09.60.010 (1983). *Arizona*: ARIZ. REV. STAT. ANN. § 12-341.01 (1982). *Arkansas*: ARK. STAT. ANN. § 4-56-101 (1987); ARK. STAT. ANN. § 16-22-308 (Supp. 1987). *California*: *Carriere v. Minturn*, 5 Cal. 435 (1855); *Sichel v. Carrillo*, 42 Cal. 493 (1871). *Colorado*: *Byers v. Bellan-Price Inv. Co.*, 10 Colo. App. 74, 50 P. 368 (1897); *Florence Oil & Ref. Co. v.*

which provides for the enforcement of commitments to pay attorney fees in commercial contracts of indebtedness.⁴¹ Such a commitment is enforceable only to the extent that it obligates payment of a reasonable amount; in determining reasonableness, the court must consider all relevant factors, including “the nature of the services rendered, the time expended in rendering the services, the amount of money and the value of the property affected, and the professional skill and expertise of the attorney.”⁴² The proposed statute also sets up amounts which will be deemed reasonable attorney fees in the absence of a preponderance of the evidence to the contrary.⁴³

In light of the commercial realities of today’s marketplace, especially the emergence of lender liability litigation, the prohibition against lenders recovering attorney fees appears as an anachronism. The distinction between an owner of property being

Hiawatha Gas, Oil & Ref. Co., 55 Colo. 378, 135 P. 454 (1913). *Connecticut*: Pacelli Bros. Transp., Inc. v. Pacelli, 189 Conn. 401, 456 A.2d 325 (1983); Nussenfeld v. Smith, 110 Conn. 438, 148 A. 388 (1930). *Delaware*: DEL. CODE ANN. tit. 10, § 3912 (1974). *Florida*: FLA. STAT. ANN. § 687.06 (West Supp. 1989). *Georgia*: GA. CODE ANN. § 13-1-11 (1982). *Hawaii*: HAW. REV. STAT. § 607-14.5 (Supp. 1988); HAW. REV. STAT. § 607-17 (1985). *Idaho*: Rinker v. Lauer, 13 Idaho 163, 88 P. 1057 (1907); Warner v. Bockstahler, 48 Idaho 419, 282 P. 862 (1929). *Illinois*: Barton v. Farmers & Merchants’ Nat’l Bank, 122 Ill. 352, 13 N.E. 503 (1887); Farmers’ Nat’l Bank v. Sutton Mfg. Co., 52 F. 191 (6th Cir. 1892); Geldermann & Co. v. R.A. Hartley & Son, Inc., 543 F. Supp. 1062 (N.D. Ill. 1982). *Indiana*: Billingsley v. Dean, 11 Ind. 331 (1858). *Iowa*: IOWA CODE § 625.22 (Supp. 1989). *Kansas*: KAN. STAT. ANN. § 58-2312 (1983). *Kentucky*: KY. REV. STAT. ANN. § 411.195 (Michie/Bobbs-Merrill Supp. 1988). *Louisiana*: Simon v. Haifleigh, 21 La. Ann. 607 (1869); Blakesley v. Ransonet, 159 La. 310, 105 So. 354 (1925). *Maine*: Pepperell Trust Co. v. Mehlman, 155 Me. 318, 154 A.2d 161 (1959). *Maryland*: Maus v. McKellip, 38 Md. 231 (1873); Bowie v. Hall, 69 Md. 433, 16 A. 64 (1888). *Massachusetts*: Leventhal v. Krinsky, 325 Mass. 336, 90 N.E.2d 545 (1950). *Michigan*: Security Trust Co. v. Solomon, 241 Mich. 32, 216 N.W. 405 (1927); Wilson Leasing Co. v. Seaway Pharmacal Corp., 53 Mich. App. 359, 220 N.W.2d 83 (1974); but see Kittermaster v. Brossard, 105 Mich. 219, 63 N.W. 75 (1895) (fixed sums for attorney fees have no relation to actual services rendered, so thus void as a penalty). *Minnesota*: Johnston Harvester Co. v. Clark, 30 Minn. 308, 15 N.W. 252 (1883). *Mississippi*: Meacham & Co. v. Pinson, 60 Miss. 217 (1882); Chaney v. GMAC, 349 So. 2d 519 (Miss. 1977). *Missouri*: North Atchison Bank v. Gay, 114 Mo. 203, 21 S.W. 479 (1893). *Montana*: Bank of Commerce v. Fuqua, 11 Mont. 285, 28 P. 291 (1891). *Nebraska*: Dow v. Updike Bros., 11 Neb. 95, 7 N.W. 857 (1881) (refusing to enforce attorney fee stipulations). *Nevada*: Cox v. Smith, 1 Nev. 161 (1865). *New Hampshire*: Bryant v. Bowles, 108 N.H. 315, 234 A.2d 534 (1967). *New Jersey*: ALCOA Edgewater No. 1 Fed. Credit Union v. Carroll, 44 N.J. 442, 210 A.2d 68 (1965). *New Mexico*: Exchange Bank v. Tuttle, 5 N.M. 427, 23 P. 241 (1890); Fortier v. Dona Anna Plaza Partners, 747 F.2d 1324 (10th Cir. 1984). *New York*: Commercial Inv. Trust, Inc. v. Eskew, 126 Misc. 114 (N.Y. Sup. Ct., Cattaraugus County 1925). *North Carolina*: N.C. GEN. STAT. § 6-21.2 (1986). *North Dakota*: N.D. CENT. CODE § 28-26-04 (1974); Farmers Union Oil Co. v. Maixner, 376 N.W.2d 43 (N.D. 1985) (will not enforce stipulations in certain debt instruments). *Oklahoma*: Cooper v. Bank of Indian Territory, 4 Okla. 632, 46 P. 475 (1896); Baker Gin Co. v. N.S. Sherman Mach. & Iron Works, 31 Okla. 484, 122 P. 235 (1912). *Oregon*: Gaston v. McLeran, 3 Or. 389 (1872); Wilson Sewing Mach. Co. v. Moreno, 7 F. 806 (D. Or. 1879); Peyser v. Cole, 11 Or. 39, 4 P. 520 (1884); OR. REV. STAT. ANN. § 20.096(1) (Butterworth 1988) (requires courts to apply one-sided contractual attorney fee provisions as if they entitled the prevailing party to such fees). *Pennsylvania*: Huling v. Drexell, 7 Watts 126 (Pa. 1838); Robinson v. Loomis, 51 Pa. 78 (1865); Daly v. Maitland, 88 Pa. 384 (1879). *Rhode Island*: Morris Plan Co. v. Whitman, 51 R.I. 24, 150 A. 610 (1930); Washington Trust Co. v. Fatone, 106 R.I. 168, 256 A.2d 490 (1969). *South Carolina*: Aultman & Taylor Co. v. Gibert, 28 S.C. 303, 5 S.E. 806 (1887); Legare v. Fraser, 34 S.C.L. (3 Strob.) 377 (Ct. App. 1848). *South Dakota*: Farmers’ Nat’l Bank v. Rasmussen, 1 Dakota 60, 46 N.W. 574 (1875); Danforth v. Charles, 1 Dakota 285, 46 N.W. 576 (1875). *Tennessee*: Tyler v. Walker, 101 Tenn. 306, 47 S.W. 424 (1898). *Texas*: Roberts v. Palmore, 41 Tex. 617 (1874); Miner v. Paris Exch. Bank, 53 Tex. 559 (1880). *Utah*: Salisbury v. Stewart, 15 Utah 308, 49 P. 777 (1897). *Vermont*: Darling v. Burlington Drug Co., 101 Vt. 155, 142 A. 75 (1928); Young v. Northern Terminals, Inc., 130 Vt. 258, 290 A.2d 186 (1972). *Virginia*: Campbell v. Shields, 33 Va. (6 Leigh) 517 (1835); Colley v. Summers Parrott Hardware Co., 119 Va. 439, 89 S.E. 906 (1916); Conway v. American Nat’l Bank, 146 Va. 357, 131 S.E. 803 (1926). *Washington*: Cloud v. Rivord, 6 Wash. 555, 34 P. 136 (1893). *West Virginia*: Moore v. Johnson Serv. Co., 158 W. Va. 808, 219 S.E.2d 315 (1975). *Wisconsin*: Tallman v. Truesdell, 3 Wis. 443 (1854); Home Bank v. Becker, 48 Wis. 2d 1, 179 N.W.2d 855 (1970). *Wyoming*: Graves v. Burch, 26 Wyo. 192, 181 P. 354 (1919); Combs v. Walters, 518 P.2d 1254 (Wyo. 1974).

41. H.B. 562, 118th Gen. Assembly, Reg. Sess. (Ohio 1989–90).

42. *Id.*

43. *Id.*

able to negotiate a net lease and a lender being able to negotiate a “net” loan does not appear logical. Adding to this anomaly is the fact that a lender having a home office out of this state may (if its agreements provide for approval and execution outside of this state) in fact be able to enforce a stipulation to pay attorney fees while a domestic lender may not.

