



Recovering Attorney's Fees in Chancery and When Fees are the “Natural Consequence” of a Breach CLE

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Speakers:

Hon. Robert J. Smith, Judge, Fairfax County Circuit Court

James B. Kinsel, Esq., Protora Law, PLLC

Rebecca B. Kinsel, Esq., Protora Law, PLLC



CLE SEMINAR

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Speakers' Biographies

The Honorable Robert J. Smith

Judge Smith graduated from the University of Illinois at Urbana-Champaign in 1974 with a degree in Social Studies Education, and from The John Marshall Law School, Chicago, Illinois, in 1978.

Judge Smith began practicing law with the United States Army Judge Advocate General's Corps in 1978. Assignments included tours at Fort Stewart, Georgia, Germany, and Fort Belvoir, Virginia, as defense counsel, prosecutor, branch office chief, and instructor. On September 1, 2009, Judge Smith retired as a Colonel from the United States Army Reserve after thirty years of service. At his retirement he was the Chief Trial Judge of the United States Army Reserve.

Judge Smith was the first Senior Assistant Public Defender in Fairfax County from July 1987 until November 1990. Judge Smith represented indigent clients accused of all offenses from minor misdemeanors to major felonies. In this position he also had managerial responsibilities for six assistant public defenders.

Judge Smith was a Judge of the Fairfax County General District Court from November 19, 1987, until February 1, 2008. On February 2, 2008, Judge Smith was sworn in as a Judge of the Fairfax County Circuit Court.

James B. Kinsel, Esq.

James B. Kinsel serves as a Managing Partner at Protora Law and co-chair of the firm's litigation teams. He is a trial attorney who focuses on business litigation, business breakups, disputes over ownership of businesses, and unfair business practice claims. Jim has prosecuted and defended hundreds of business disputes involving breach of contract, trade secret misappropriation and other business tort claims in federal courts, as well as Virginia and Maryland state courts. Jim received his law degree from the University of Virginia School of Law and clerked in the U.S. District Court for the Western District of Virginia for the Honorable Norman K. Moon.

Rebecca Bricken Kinsel, Esq.

Rebecca Bricken Kinsel co-chairs Protora Law's litigation practice team. Becky's practice focuses on domestic relations, disputes within closely held businesses, and business litigation. As a fifth-generation attorney, Becky guides her clients through the litigation process with perseverance and empathy. Always eager to learn new ways to help her clients, Becky has recently expanded her skills into the new collaborative approach to family law. Becky received her law degree from the University of Virginia School of Law. She serves as the Secretary of the Fairfax Law Foundation, is the past president of her Rotary Club, and is an active member in numerous legal associations, including the Fairfax Bar Association and the Virginia Association of Defense Attorneys.

Recovering Attorney's Fees in Chancery and When Fees are the "Natural Consequence" of a Breach *Recent Developments in Virginia Case Law*



James B. Kinsel
Managing Member, Co-Chair Litigation Practice

Judge Robert J. Smith
Fairfax Circuit Court



Rebecca Bricken Kinsel
Member, Co-Chair Litigation Practice

- Virginia follows the "American Rule"
 - Prevailing party cannot generally recover attorney's fees from the losing party absent contractual or statutory liability
 - The rule's purpose is to "avoid stifling legitimate litigation by the threat of the specter of burdensome expenses being imposed on an unsuccessful party." *Bolton v. McKinney*
- The party seeking to recover attorney's fees bears the burden of establishing the reasonableness of the fees and their necessity

- 2021 Decisions – Springboard to What End?
 - *St. John v. Thompson* – Fraud
 - Supreme Court of Virginia, 299 Va. 431 (Feb. 25, 2021)
 - *Bolton v. McKinney* – Covenant Not to Sue
 - When Attorneys’ Fees are Natural and Almost Unavoidable Consequences of Breach
 - Supreme Court of Virginia, 855 S.E.2d 853 (April 1, 2021)

- Three Count Complaint
- Count III – Fraud and Undue Influence
 - Plaintiff had cognitive deficits and limited education, which left him “vulnerable to undue influence or coercion”
 - Neighbor, St. John, induced plaintiff to sign durable power of attorney to obtain plaintiff’s \$100,000 gun collection
 - “St. John did explain what the form was, but never read it to him or explained how it could be used”
 - Plaintiff “signed the document, believing that St. John was acting in [plaintiff’s] best interest”

- Discusses Awarding Fees in Chancery Cases – Equity
- Rejects a requirement that the fraud must be “particularly egregious” in order to award fees

- Awarding Fees in Chancery Cases – Equity
- Historically, recovery of attorney's fees in chancery court differed from recovery of attorney's fees in common law courts. "Early English courts of equity allowed the Chancellor to award attorney's fees to the prevailing party; the Chancellor, however, rarely granted fee awards unless the losing party acted in an abusive manner."
- Law Cases – Fees Not Allowed Ordinarily
- "In contrast, '[a]t common law, fee awards were based solely on statutes."
- Quoting: John F. Vargo, [*The American Rule on Attorney Fee Allocation: The Injured Person's Access to Justice*](#), 42 Am. U. L. Rev. 1567, 1570 (1993).

- Awarding Fees in Chancery Cases – Equity
- The court quoted with approval a 1939 U.S. Supreme Court case that discussed the broad power of equity court to award attorneys' fees: "[p]lainly the foundation for the historic practice of granting reimbursement for the costs of litigation other than the conventional taxable costs is part of the original authority of the chancellor to do equity in a particular situation."
- "[S]uch allowances by equity courts are appropriate only in exceptional cases and for dominating reasons of justice."
- Quoting [*Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161, 166, 59 S.Ct. 777, 779, 83 L.Ed. 1184 \(1939\)](#)

- Awarding Fees in Chancery Cases – Equity
- Awarding fees in fraud cases is “another outgrowth from these ancient equitable roots”
- “[W]hen deciding whether to award attorney’s fees, the chancellor must consider the circumstances surrounding the fraudulent acts and the nature of the relief granted to the defrauded party.”

- Awarding Fees in Chancery Cases – Equity
- Court rejected a “especially egregious fraud” threshold
- “Instead, fees are proper if the trial court, exercising its discretion in a fraud case, awards equitable relief, and further determines that the circumstances surrounding the fraudulent acts and the nature of the relief granted compel an award of attorney’s fees.” (Emphasis Added.)

- Awarding Fees in Chancery Cases – Equity
- Some Questions Coming Out of *St. John*
 - Do All Equitable Claims/Relief Permit a Fee Award?
 - Will the Standard for Awarding Fees Further Develop?

- Do All Equitable Claims/Relief Permit a Fee Award?
 - Permanent and Preliminary Injunctions?
 - Difference when Injunctions Granted in Law versus Equitable Claims?
- Contract Related Relief?
 - Specific Performance?
 - Recission?

- Will the Standard for Awarding Fees Further Develop?
 - Court's have Broad Discretion – Whether *circumstances surrounding the fraudulent acts and the nature of the relief granted* compel an award of attorney's fees.
 - Flexibility for Each Case
 - But Risk Inconsistency from Case to Case

- Will the Standard for Awarding Fees Further Develop?
- Will Certain Equitable Claims/Relief Semi-Automatically Warrant and Not Warrant an Award of Fees?
 - Examples:
 - Granting a preliminary injunction in a law related case?
 - All fraud cases or should it depend on the type of fraud?

Spotlight on Fraud Cases – Should All Fraud Permit a Fee Award?

- *Actual Fraud* – “false representation,” “made intentionally and knowingly,” “with intent to mislead”
- *Constructive Fraud* – “false representation” “made innocently or negligently”
- *Fraud in the Inducement* – “false representation of a material fact, constituting an inducement to the contract”

- If Not All Fraud Cases, Upon Which Factors Should A Fee Award Turn:
 - Vulnerability of Defrauded Party?
 - *St. John* – cognitive deficits and limited education, vulnerable to undue influence or coercion
 - Level of Maliciousness of Deceit?
 - Amount of Harm Caused by Fraud?
 - Other?

Duress as a "Species of Fraud"

- Wife claimed Husband threatened to divorce her if she did not sign a Postnuptial Agreement
 - *Wills v. Wills*, 72 Va.App. 743 (2021)
- "Duress may exist [when] one party to the transaction is prevented from exercising his free will by reason of threats made by the other and that the contract is obtained by reason of such fact." "
- "Authorities are in accord that the threatened act must be wrongful to constitute duress."
- Question: in duress cases, are attorneys' fees awardable always, sometimes, rarely or never?

- What About Claims that Do Not Require Bad Intent/Act?
 - Example – Specific Performance with a Good Faith Argument regarding Contract Construction
 - One Size Fits All?
 - What Factors Should Matter if Case-by-Case Analysis?

- 2021 Decisions – Springboard to What End?
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Attorneys' Fees as Natural and Almost Unavoidable Consequences of a Contract Breach

- Bolton involved a breach of a covenant not to sue, which is “an agreement not to enforce an existing cause of action against another party to the agreement”
- Court Recognized Split Amongst Jurisdictions whether Breach of Covenant Not to Sue Justifies Awarding Attorneys' Fees
- Argument Against Awarding Fees – Onus Should be on the Contract Drafters to Include Prevailing Party Entitled to Fees

Attorneys' Fees as Natural and Almost Unavoidable Consequences

- Court held that attorneys' can be awarded for violating a covenant not to sue
 - "plaintiff's damages for a breach of a covenant not to sue may be the amount of the attorney's fees incurred by the plaintiff in defending actions that breached the agreement
- Court focused on the overall purpose of the remedy for a breach of contract, which:
 - "is intended to put the injured party in the same position in which it would have been had the contract been performed"

Attorneys' Fees as Natural and Almost Unavoidable Consequences

- Court focused on the overall purpose of the remedy for a breach of contract (Cont.)
 - "A breach of a covenant not to sue, therefore, creates a unique situation in which the damages stemming from the breach may be the attorney's fees incurred by the party protected by the covenant"
 - "A defendant in an action brought in violation of a covenant not to sue bargained to receive, and exchanged consideration for, the opposing party's promise that it would forbear from bringing suit. Under these circumstances, the lawsuit itself is the object that the bargain intended to prohibit"

Attorneys' Fees as Natural and Almost Unavoidable Consequences

- Can *Bolton* be Applied More Broadly than Covenant Not to Sue Cases?
 - Other Instances when Fees are a Natural Consequence of the Contract Breach or Other Wrong?
 - More Expansive Reading May Result from this Language in *Bolton* regarding Consequential Damages?
 - “[J]urisdictions that permit the award of attorney’s fees as damages for the violation of a covenant not to sue do so primarily because, unlike in most cases, attorney’s fees are direct or consequential damages of a breach of this type of agreement” (Emphasis Added.)

Attorneys' Fees as Natural and Almost Unavoidable Consequences

- More Expansive Reading May Result from this Language in *Bolton*? (Cont.)

"As the New Hampshire Supreme Court recently observed:

When a party requests attorney's fees and costs in defending the action as consequential damages for breach of a covenant not to sue, this request does not seek an award of attorney's fees within the meaning of the American Rule. Rather, under these circumstances, attorney's fees and costs help to put the non-breaching party in the position it would have been in had the breach not occurred." (Emphasis Added)

Attorneys' Fees as Natural and Almost Unavoidable Consequences

- More Expansive Reading May Result from this Language in *Bolton*? (Cont.)
- Court's use of consequential damages may be more akin to direct damages; however, consequential damages has its own meaning under Virginia law. And consequential damages are broader and often unrecoverable
- *Roanoke Hosp. Ass'n v. Doyle & Russell, Inc.*, 215 Va. 796 (1975)

Attorneys' Fees as Natural and Almost Unavoidable Consequences

- More Expansive Reading May Result from this Language in *Bolton*? (Cont.)
- “Direct damages are those which arise ‘naturally’ or ‘ordinarily’ from a breach of contract; they are damages which, in the ordinary course of human experience, can be expected to result from a breach.”

Attorneys' Fees as Natural and Almost Unavoidable Consequences

- More Expansive Reading May Result from this Language in *Bolton*? (Cont.)
- "Consequential damages are those which arise from the intervention of 'special circumstances' not ordinarily predictable. If damages are determined to be direct, they are compensable. If damages are determined to be consequential, they are compensable only if it is determined that the special circumstances were within the 'contemplation' of both contracting parties."
- "Whether damages are direct or consequential is a question of law. Whether special circumstances were within the contemplation of the parties is a question of fact."
- *Roanoke Hosp. Ass'n v. Doyle & Russell, Inc.*, 215 Va. 796 (1975)

Questions?

Contact Us.

PROTORÆ LAW

James B. Kinsel
Managing Partner
Protoraë Law PLLC
jkinsel@protoraelaw.com
703.749.6023

Rebecca Bricken Kinsel
Member
Protoraë Law PLLC
rkinsel@protoraelaw.com
703.942.6719

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