

## **Revisiting the Standard Attorney's Fee and Cost Provision**

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### **Introduction**

The conventional wisdom among litigators in Florida is that a prevailing party in a contract dispute is unlikely to recover all of its attorney's fees and costs in litigation, even though the operative agreement contains a prevailing party fee and cost provision. Although fee and cost reductions by courts are sometimes the result of perceived overbilling, overstaffing, or excessive rates, incomplete recoveries are more often a function of Florida substantive law and the limitations of the "standard" attorney's fee and cost provision contained in the vast majority of contracts.

Generally, fee and cost provisions drafted in Florida and elsewhere contain some variation on the following language: "In the event of a dispute between the parties regarding the terms or enforcement of this contract, the prevailing party in any such action shall recover its reasonable attorney's fees and costs from the non-prevailing party." As will be discussed in more detail below, Florida courts will not permit the recovery of fees expended in litigating or quantifying the amount of recoverable fees ("fees for fees") or award non-taxable costs when a fee and cost provision is drafted in this manner. In many commercial disputes, claims for fees and costs may approach or even exceed the value of the primary claim, meaning that the amounts left unrecoverable under the "standard" fee provision can be quite significant.

This article recognizes that the "standard" fee and cost provision inadequately protects parties to contracts who desire the broadest possible ability to recover legal expenses in the event of a dispute. Accordingly, this article proposes that fee and cost provisions in contracts governed by Florida law be redrafted to expressly permit the recovery of fees for fees and costs not taxable

under the Statewide Uniform Guidelines for Taxation of Costs (the "Uniform Guidelines")<sup>2</sup> when broad fee and cost recovery is desirable. The authors conclude by providing two sample fee and cost provisions that have been drafted based on the proposals contained in this article.

## **Principles Governing the Recovery of Attorney's Fees and Costs in Florida**

### *Fees for Fees*

Florida courts follow the "American Rule" that attorney's fees may be recovered by a successful litigant only when authorized by contract, statute, or court rule.<sup>3</sup> However, when a contract between the parties contains a provision entitling the prevailing party to recover its attorney's fees, courts are required to enforce the attorney's fee provision like any other valid contractual provision.<sup>4</sup> Accordingly, "[w]hen the parties by contract determine that the prevailing party in any litigation shall be entitled to attorney's fees, the question before the court is not whether fees should be awarded; the issue is which is the prevailing party."<sup>5</sup>

Before the Florida Supreme Court's decision in *State Farm Fire & Casualty Co. v. Palma*, the District Courts of Appeal were split as to whether a prevailing party's entitlement to attorney's fees should include the ability to recover fees incurred in litigating or quantifying the amount of recoverable fees.<sup>6</sup> In *Palma*, a majority of the Florida Supreme Court held that fees incurred in determining the prevailing party's *entitlement* to fees are properly recoverable, but that fees incurred in litigating or quantifying the *amount* of fees due to the prevailing party are not recoverable.<sup>7</sup> The *Palma* majority based its holding on a narrow interpretation of the language of section 627.428, *Florida Statutes*, which permits a prevailing insured to recover reasonable attorneys' fees and costs from the insurer in a dispute arising under an insurance contract, but does not specifically permit an award of fees for fees.<sup>8</sup> Consistent with the "American Rule," the *Palma* majority emphasized that "[i]f the scope of section 627.428 is to be

expanded to include fees for time spent litigating the amount of attorney's fees, then the Legislature, rather than this Court, is the proper party to do so."<sup>9</sup> The three dissenting justices argued that the majority's holding was premised on an unduly narrow reading of the language of section 627.428, *Florida Statutes*, and conflicts with the position taken by the federal courts, which generally permit the recovery of fees for fees.<sup>10</sup>

Appellate courts have routinely followed *Palma* in holding that fees incurred in litigating the amount of awardable fees generally are not recoverable in Florida.<sup>11</sup> However, a number of post-*Palma* decisions have held that fees for fees may be awarded in appropriate circumstances. For example, the Third and Fourth Districts have held that fees for fees are recoverable when attorney's fees are awarded as a sanction,<sup>12</sup> and the Second and Fourth Districts have held that non-moneyed spouses may recover fees for fees in marital dissolution cases.<sup>13</sup>

#### ***Non-Taxable Costs***

Court costs are generally recoverable by the prevailing party in litigation pursuant to Section 57.041, *Florida Statutes*. In addition, the majority of contracts with attorney's fees provisions also make reference to the recovery of court costs. In Florida, awards of costs are guided by the Uniform Guidelines, which divide costs into three categories: (1) litigation costs that *should* be taxed, (2) litigation costs that *may* be taxed, and (3) litigation costs that *should not* be taxed.<sup>14</sup> A number of significant costs are not included in either the "should be taxed" or "may be taxed" categories, including (1) electronic research charges, (2) copying costs for documents that are not filed with the court or obtained in discovery, (3) expert witness fees for services other than testimony or preparation of a court-ordered report, (4) court reporter fees for non-evidentiary hearings, and (5) attorney and expert travel expenses.<sup>15</sup> Awards of other substantial costs, such as mediator fees, are made discretionary by the Uniform Guidelines.<sup>16</sup>

The Uniform Guidelines expressly state that they are "advisory" and that "taxation of costs in any particular proceeding is within the broad discretion of the trial court."<sup>17</sup> Furthermore, the Uniform Guidelines make clear that they are "not intended to limit the amount of costs recoverable under a contract or statute."<sup>18</sup> Despite these caveats, appellate decisions have made it clear that the Uniform Guidelines generally set the benchmark by which trial courts are to award costs in Florida.<sup>19</sup> Even when contractual fee and cost provisions were at issue, the Second and Fourth Districts held in *Midway Services, Inc. v. Custom Manufacturing & Engineering, Inc.*, and *Wood v. Panton & Co. Realty, Inc.*, respectively, that contracts providing for the recovery of "all costs" or "all costs and expenses" by the prevailing party should be construed as extending to only those costs that are taxable pursuant to the Uniform Guidelines.<sup>20</sup> However, *Midway* and *Wood* are equally clear that cost items that are not taxable pursuant to the Uniform Guidelines are nevertheless awardable where the operative contract *specifically* identifies those costs as being recoverable by the prevailing party.<sup>21</sup>

It is not clear under *Midway* and *Wood* whether Florida courts will permit the recovery of non-taxable costs pursuant to the Uniform Guidelines where the operative contract contains language generally providing for an award of taxable and non-taxable costs (as defined by the Uniform Guidelines) without specifying particular non-taxable costs as being recoverable. However, federal courts have upheld generic language of this sort,<sup>22</sup> and enforcement would be consistent with the Uniform Guidelines' deference to contractual cost provisions.

### **Recommended Revisions to the "Standard" Fee and Cost Provision in Florida**

As noted above, Florida substantive law leaves a significant amount of fees and costs arguably unrecoverable pursuant to a "standard" fee and cost provision. In a commercial dispute of any size, the attorney's fees expended in litigating the amount of fees, conducting associated

discovery, and redacting billing narratives, together with non-taxable expert witness fees, copying costs, and the like, can easily reach six figures. Although litigators might be able to present arguments as to why fees for fees and non-taxable costs should be recovered in particular cases, the more effective approach going forward would seem to be for transactional attorneys to include express language within fee and cost provisions entitling the prevailing party to recover fees for fees and specified costs that would otherwise not be taxable. *Midway* and *Wood* speak directly to this issue and hold that non-taxable costs may be recovered when specifically enumerated in the contract. Although there appears to be no Florida decision addressing whether courts will enforce express fees for fees language in contracts, the rationale of *Palma* and the general principles governing the enforcement of attorney's fee provisions in Florida strongly suggest that fees for fees provisions are binding on the parties as long as the language is clear.

There is little justification for maintaining the "standard" fee and cost language in contracts governed by Florida law—except perhaps in the unusual transaction in which the parties desire a prevailing party provision, but for some reason do not wish to provide for the broadest possible recovery of litigation expenses. Indeed, the prevalence of the "standard" provision following cases such as *Palma*, *Midway*, and *Wood* appears to have resulted less from a conscious choice on the part of parties to transactions and more from a breakdown in communication between litigators and transactional attorneys as to the narrow manner in which appellate courts have construed generic language permitting the recovery of "reasonable attorney's fees and costs" or from the unwillingness of transactional attorneys to draft a longer form provision that might be deemed offensive to the contracting parties.

The model fee and cost provisions set forth below are provided as alternatives to language that simply provides for the recovery of "reasonable attorney's fees and costs" by the

prevailing party. Both the "long form" and "short form" alternatives expressly provide for the recovery of fees for fees and non-taxable costs by the prevailing party. The authors believe that the "long form" alternative is generally preferable when the potential amounts at issue in fee and cost disputes justify detailed and precise language to protect the interests of the parties to the transaction. It is sometimes the case, however, that a particular client requires a shorter fee and cost provision due to space limitations (*e.g.*, on a single-page front and back form contract presented to all customers). Accordingly, a "short form" alternative is presented with less detailed language, particularly in the itemized list of recoverable costs. Although the language of the "short form" alternative is less precise than the "long form" alternative, the authors nevertheless believe that it represents a substantial improvement upon the "standard" fee and cost provision currently prevalent in contracts governed by Florida law.

Initially, some attorneys might be concerned about the breadth of the proposed form language and the potential for their clients to be assessed with large fee and costs awards in the event that they do not ultimately prevail in any dispute under the contract. However, the "standard" fee and cost provision, either by its terms or by operation of Section 57.105(7), *Florida Statutes*, also provides for reciprocal recovery.<sup>23</sup> If the transaction is such that the parties desire the ability to recover litigation expenses, there are exceedingly few transactions in which, using hypothetical numbers, 75% recovery under the "standard" fee and cost provision would be desirable, but 95% recovery under the proposed forms set forth below would not. A related concern is that a broader fee and cost provision could provide an incentive for excessive or bad faith litigation practices that might unduly increase the fee and cost award. This issue is, however, at least partially addressed by the "reasonableness" restriction in the proposed forms set forth below. Although excessive litigation is not an unwarranted concern, Florida courts

routinely scrutinize legal bills and cost invoices for reasonableness, and there is no reason to believe that they will not continue to do so in interpreting expanded fee and cost language.

### ***Alternative 1 – Long Form***

Attorney's Fees and Costs. In the event of a legal action or other proceeding arising under this Agreement or a dispute regarding any alleged breach, default, claim, or misrepresentation arising out of this Agreement, whether or not a lawsuit or other proceeding is filed, the prevailing party shall be entitled to recover its reasonable attorney's fees and costs, whether incurred before suit, during suit, or at the appellate level. The prevailing party shall also be entitled to recover any attorney's fees and costs incurred in litigating the entitlement to attorney's fees and costs, as well as in determining or quantifying the amount of attorney's fees and costs due to it.

Recoverable Costs. The reasonable costs that the prevailing party shall be entitled to recover pursuant to Paragraph [#] of this Agreement shall include any costs that are taxable pursuant to any applicable statute, rule, or guideline (including, but not limited to, the Statewide Uniform Guidelines for Taxation of Costs), as well as costs not taxable thereunder. Such recoverable costs shall specifically include, but not be limited to, (1) costs of investigation; (2) costs of copying documents and other materials, whether for discovery, filing with the court, internal review, or any other purpose; (3) costs for electronic discovery; (4) Westlaw, Lexis Nexis, or other electronic research service charges; (5) telephone charges; (6) mailing, commercial delivery service, and courier charges; (7) travel expenses, whether for investigation, depositions, hearings, trial, or any other purpose; (8) information technology support charges; (9) any and all consultant or expert witness fees, whether or not such fees are incurred in connection with a court-ordered report or testimony at a deposition, hearing, or trial; (10) court reporter and transcript fees, whether for deposition, trial, or an evidentiary or non-evidentiary hearing; (11) mediator fees; and (12) any other reasonable cost incurred by the prevailing party in connection with the dispute.

### ***Alternative 2 – Short Form***

Attorney's Fees and Costs. In the event of a dispute arising under this Agreement, whether or not a lawsuit or other proceeding is filed, the prevailing party shall be entitled to recover its reasonable attorney's fees and costs, including attorney's fees and costs incurred in litigating entitlement to attorney's fees and costs, as well as in determining or quantifying the amount of recoverable attorney's fees and costs. The reasonable costs to which the prevailing party is entitled shall include costs that are taxable under any applicable statute, rule, or guideline, as well as non-taxable costs, including, but not limited to, costs of investigation, copying costs, electronic discovery costs, telephone charges, mailing and delivery

charges, information technology support charges, consultant and expert witness fees, travel expenses, court reporter fees, and mediator fees, regardless of whether such costs are otherwise taxable.<sup>24</sup>

### Conclusion

The "standard" fee and cost provision has proven woefully inadequate in protecting clients' ability to recover the expenses of litigation in contractual disputes governed by Florida substantive law. The authors believe that the sums often at issue in fee and cost disputes warrant a rewriting of prevailing party provisions to, at the very least, provide for the recovery of fees incurred in litigating the amount of recoverable fees and for an award of costs that otherwise would not be taxable under the Uniform Guidelines. Although a prevailing party's ability to obtain the broadest possible recovery of the actual costs and fees incurred in any dispute will depend on how the underlying agreement is drafted, the authors hope that these suggestions will provide the impetus for transactional attorneys to reconsider the "standard" language.

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<sup>2</sup> *In re Amendments to Uniform Guidelines for Taxation of Costs*, 915 So. 2d 612, 616-17 (Fla. 2005).

<sup>3</sup> See, e.g., *State Firm Fire & Cas. Co. v. Palma*, 629 So. 2d 830, 832 (Fla. 1993); *Moakley v. Smallwood*, 826 So. 2d 221, 223-24 (Fla. 2002).

<sup>4</sup> *Sybert v. Combs*, 555 So. 2d 1313, 1314 (Fla. 5th DCA 1990); see also *Himebaugh v. Weber Inv. Corp.*, 700 So. 2d 19, 21 (Fla. 5th DCA 1997).

<sup>5</sup> *Himebaugh v. Weber Inv. Corp.*, 700 So. 2d 19, 21 (Fla. 5th DCA 1997).

<sup>6</sup> See *Palma*, 629 So. 2d at 831-32 (discussing split in authority).

<sup>7</sup> *Id.* at 833.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*; see also *Whitten v. Progressive Cas. Ins. Co.*, 410 So. 2d 501, 505 (Fla. 1982) (recognizing that "[s]tatutes authorizing an award of attorneys fees are in derogation of the common law" and, "[t]herefore, such statutes must be strictly construed").

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<sup>10</sup> *Palma*, 629 So. 2d at 834. As noted in *Palma*, federal courts typically award fees for fees. See *Sheet Metal Workers' Int'l Ass'n, Local 15, AFL-CIO v. Law Fabrication, LLC*, 237 Fed. App'x 543 (11th Cir. 2007) (recognizing difference between federal and Florida law on fees for fees).

<sup>11</sup> See, e.g., *Wight v. Wight*, 880 So. 2d 692, 695 (Fla. 2d DCA 2004); *Oruga Corp. v. AT & T Wireless of Fla., Inc.*, 712 So. 2d 1141, 1145 (Fla. 3d DCA 1998); see generally JAMES C. HAUSER, ATTORNEY'S FEES IN FLORIDA § 7.11 (2d ed. 1977 & Supp. 2010)

<sup>12</sup> See *Condren v. Bell*, 853 So. 2d 609 (Fla. 4th DCA 2003); *Bates v. Islamorada*, 939 So. 2d 171 (Fla. 3d DCA 2006); *Bennett v. Berges*, 50 So. 3d 1154, 1161 (Fla. 4th DCA 2010). However, other cases have held that fees for fees are not awardable pursuant to Section 57.105(1), *Florida Statutes*. See *Pierpont v. Pierpont*, 578 So. 2d 780 (Fla. 2d DCA 1991); *Yakovonis v. Dolphin Petroleum, Inc.*, 934 So. 2d 615 (Fla. 4th DCA 2006). The apparent conflict might be explained on the basis that the sanctions awards in *Bates* and *Bennett* were based on the court's inherent authority to sanction litigants for bad faith conduct and non-compliance with court orders. In *Pierpont* and *Yakovonis*, by contrast, the fee award was based upon statutory language that did not specifically provide for the recovery of fees for fees. In *Condren*, the fee award was based upon both Section 57.105(1), *Florida Statutes*, and Florida Rule of Civil Procedure 1.730(c). See *Condren v. Bell*, Case No. No. CL 98-4393 AE, 2004 WL 5338608, at \*1-\*2 (Fla. 15th Cir. Dec. 6, 2007). The *Condren* trial court mentioned Section 57.105(1), only in passing and relied primary upon Rule 1.730(c), which permits an award of attorneys' fees and costs and "other appropriate remedies" for a party's failure to comply with a mediation agreement. See *id.*, at \*2. Although the Fourth District's opinion in *Condren* provides some authority for the proposition that fees for fees are available under Section 57.105(1) the more recent *Yakovonis* decision from the same court squarely holds that an award of fees for fees is not available under Section 57.105(1), suggesting that *Condren's* holding was premised on the more expansive language of Rule 1.730(c).

<sup>13</sup> See *Baker v. Baker*, 35 So. 3d 76 (Fla. 2d DCA 2010); *Schneider v. Scheider*, 32 So. 3d 151 (Fla. 4th DCA 2010). However, the ability to recover such fees is more circumscribed in the Second District than the Fourth District. Compare *Schneider*, 32 So. 3d 151 (holding that fees for fees are recoverable for temporary fee awards to non-moneyed spouse), with *Wight v. Wight*, 880 So. 2d 692 (Fla. 2d DCA 2004) (holding that fees for litigating amount of fees incurred in obtaining final judgment in dissolution cases are not recoverable).

<sup>14</sup> *Uniform Guidelines*, 915 So. 2d at 616-17.

<sup>15</sup> See *id.*, §§ I(B), I(C), I(E); see also *Wood v. Panton & Co. Realty, Inc.*, 950 So. 2d 534, 535 (Fla. 4th DCA 2007) (holding that electronic research charges are not recoverable under Uniform Guidelines).

<sup>16</sup> See *Uniform Guidelines*, 915 So. 2d at 616-17, § III(A).

<sup>17</sup> *Id.* at 614; see also *Midway Servs., Inc. v. Custom Mfg. & Eng'g, Inc.*, 974 So. 2d 427, 430 (Fla. 2d DCA 2007) (noting that the Uniform Guidelines are "advisory guidelines that were created to help courts assess costs").

<sup>18</sup> *Uniform Guidelines*, 915 So. 2d at 614.

<sup>19</sup> See, e.g., *Midway*, 974 So. 2d at 430; *Wood*, 950 So. 2d at 525; *Seminole County v. Koziara*, 881 So. 2d 83, 85 (Fla. 5th DCA 2004).

<sup>20</sup> See *Midway*, 974 So. 2d at 430; *Wood*, 950 So. 2d at 525.

<sup>21</sup> See *Midway*, 974 So. 2d at 430 ("[I]f the contract specifically provides for certain costs that are not recoverable under the uniform guidelines, the contract controls."); *Wood*, 950 So. 2d at 525

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(distinguishing cases in which a "contractual provision define[s] the scope of 'costs' to be awarded to a prevailing party" from those in which the contract simply provides for the recovery of "all costs").

<sup>22</sup> See, e.g., *Columbia Data Products, Inc. v. Symantec Corp.*, Case No. No. 6:06-cv-66-Orl-28KRS, 2008 WL 4365925, at \*3 (M.D. Fla. Sept. 23, 2008) (enforcing contract provision stating that "costs (taxable or otherwise)" were recoverable on basis that such language "clearly sets forth the parties' intent that the prevailing party could recover litigation expenses in addition to taxable costs").

<sup>23</sup> Section 57.105(7), *Florida Statutes*, provides that, "[i]f 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 that party prevails in any action, whether as plaintiff or defendant with respect to the contract."

<sup>24</sup> The authors do not suggest that these model fee and costs provisions are ideally suited to every transaction. Instead, these alternatives are proposed merely as improvements upon the narrow fee and cost provisions currently prevalent in contracts, assuming that the parties desire a broader ability to recover attorney's fees and costs under Florida substantive law than "standard" fee and cost provisions currently allow. If either alternative is used, its language should be modified as appropriate based on the nature of the transaction and the goals of the client.