

# Statutory Attorney's Fees In Arizona: An Analysis of A.R.S. Section 12-341.01

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In the United States, the successful litigant is usually not entitled to recover attorney's fees from his opponent.<sup>1</sup> Thus, the prevailing party must bear the burden of litigation himself unless recovery is authorized by statute or by an express agreement between the parties.<sup>2</sup> This so-called "American Rule"<sup>3</sup> is a well-settled doctrine in Arizona.<sup>4</sup>

Although the American Rule is followed by most jurisdictions in the United States,<sup>5</sup> it has become the subject of heavy criticism.<sup>6</sup> A frequently suggested alternative is the "English Rule," which generally awards attor-

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1. *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 247 (1975); *Hall v. Cole*, 412 U.S. 1, 4 (1973); *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 717 (1967); *Oelrichs v. Spain*, 82 U.S. (15 Wall.) 211, 230 (1872); *Aracabel v. Wiseman*, 3 U.S. (3 Dal.) 306, 306 (1796).

2. See cases cited *supra* note 1.

3. See *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 247 (1975); *Hall v. Cole*, 412 U.S. 1, 4 (1973); *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 717-18 (1967); Berger, *Court Awarded Attorney's Fees: What Is "Reasonable"?*, 126 U. PA. L. REV. 281, 281 (1977); Talmadge, *The Award of Attorneys' Fees In Civil Litigation In Washington*, 16 GONZAGA L. REV. 57, 58 (1980).

4. See *Sellinger v. Freeway Mobile Home Sales, Inc.*, 110 Ariz. 573, 577, 521 P.2d 1119, 1123 (1974); *State v. Mahoney*, 103 Ariz. 308, 310, 441 P.2d 68, 70 (1968); *Commercial Standard Ins. Co. v. Cleveland*, 86 Ariz. 288, 294, 345 P.2d 210, 215 (1959); *O.S. Stapley Co. v. Rogers*, 25 Ariz. 308, 314, 216 P. 1072, 1074 (1923). While these cases do not expressly refer to the "American Rule," the language used fits within such a label.

5. No jurisdiction in the United States awards attorney's fees as costs in all civil cases. Although the American Rule is the general rule in the United States, statutory exceptions have substantially eroded its applicability. For instance, both Alaska and Idaho have statutes which authorize attorney's fees in any civil action at the court's discretion. ALASKA STAT. § 09.60.010 (1973) ("the supreme court shall determine by rule or order what costs, if any, including attorney fees, shall be allowed the prevailing party in any case"); ALASKA R. CIV. P. 82 (1968) (supreme court rule which makes an award of attorney's fees discretionary on the part of the trial court and provides a fee schedule for guidance); IDAHO CODE § 12-121 (1979) ("in any civil action, the judge may award reasonable attorneys' fees to the prevailing party" as long as no other statute is applicable); IDAHO R. CIV. P. 54(e)(1) (1980) (limits the awards under § 12-121 to litigation that is determined to be frivolous, unreasonable, or without foundation).

6. The validity of the American Rule is beyond the scope of this Note. For a critical examination of the American Rule, see Goodhart, *Costs*, 38 YALE L.J. 849 (1929); Kuenzel, *The Attorney's Fee: Why Not a Cost of Litigation?*, 49 IOWA L. REV. 75 (1963); Mayer & Stix, *The Prevailing Party Should Recover Counsel Fees*, 8 AKRON L. REV. 426 (1975); Stoebe, *Counsel Fees Included In Costs: A Logical Development*, 38 U. COLO. L. REV. 202 (1966); Taylor, *It's Time To Allow Recovery of Attorney's Fees to the Prevailing Party In Any Civil Case*, 2 ORANGE COUNTY B.J. 645 (1975).

ney's fees as costs to the successful litigant.<sup>7</sup> This alternative, however, has not yet been adopted by any jurisdiction in the United States.<sup>8</sup>

The most common method of dealing with perceived inadequacies of the American Rule has been to enact statutes awarding attorney's fees in narrowly defined situations to affect public policy.<sup>9</sup> Arizona has adopted this approach.<sup>10</sup> Section 12-341.01 of the Arizona Revised Statutes authorizes a court to award reasonable attorney's fees in any contested action arising out of contract or in any contested action in which a claim or defense is found to be harassment, groundless and not made in good faith.<sup>11</sup>

This Note will examine four areas concerning attorney's fees awarded pursuant to section 12-341.01. First, the permissive and mandatory nature of awards under section 12-341.01 will be examined. Second, this Note will evaluate the award of attorney's fees in actions arising out of contract. Third, this Note will focus on the award of attorney's fees when a claim or

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7. Kuenzel, *supra* note 6, at 80-81; Talmadge, *supra* note 3, at 57. Several commentators have suggested the English Rule as an alternative to the American Rule. Kuenzel, *supra* note 6, at 80-81; Mattis, *Attorney's Fees as Costs in Illinois: 1607 and All That*, 1979 So. ILL. U.L.J. 249, 269; McCormick, *Counsel Fees and Other Expenses of Litigation as an Element of Damages*, 15 MINN. L. REV. 619, 643 (1931). The English Rule includes attorney's fees as costs with all costs being awarded at the discretion of the judge. For a historical synopsis of the development of the English Rule, see generally *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 717 (1967); 6 J. MOORE, W. TAGGART, & J. WICKES, *MOORE'S FEDERAL PRACTICE* ¶ 54.77(2) (2d ed. 1982); Goodhart, *supra* note 6, at 851-72; Mattis, *supra*, at 252-56; Mayer & Stix, *supra* note 6, at 429-31; Stoebe, *supra* note 6, at 204-07.

8. Although no American jurisdiction has adopted the English Rule, some statutes have gone a long way in eroding the American Rule. See *supra* note 5.

9. This approach has been liberally used in Arizona. Presently, Arizona has 61 statutes that authorize the award of attorney's fees in varying situations. See, e.g., ARIZ. REV. STAT. ANN. § 2-567(I) (1982) (in a medical malpractice action, if the medical liability review panel finds for the defendant and the plaintiff proceeds with litigation and does not prevail at trial, then the defendant may recover attorney's fees actually incurred subject to a bond limitation); ARIZ. REV. STAT. ANN. § 23-327 (Supp. 1981) (in an action by a minor-employee to recover the minimum fair wage to which he is entitled, the successful employee is entitled to reasonable attorney's fees based on the time and effort expended by his counsel); ARIZ. REV. STAT. ANN. § 25-332(C) (1976) (attorney's fees assessed against party who seeks child custody modification if such an attempt was vexatious or constituted harassment). Arizona is not the only jurisdiction to have numerous statutory provisions awarding attorney's fees. The federal government has been quite prolific as well. Berger, *supra* note 3, at 303 n.104.

10. See *supra* note 9.

11. ARIZ. REV. STAT. ANN. § 12-341.01 (1982) provides:

A. In any contested action arising out of contract, express or implied, the court may award the successful party reasonable attorney's fees. This section shall in no manner be construed as altering, prohibiting or restricting present or future contracts or statutes that may provide for attorney's fees.

B. The award of reasonable attorney's fees awarded pursuant to subsection A should be made to mitigate the burden of the expense of litigation to establish a just claim or just defense. It need not equal or relate to the attorney's fees actually paid or contracted, but such an award may not exceed the amount paid or agreed to be paid.

C. Reasonable attorney's fees shall be awarded by the court in any contested action upon clear and convincing evidence that the claim or defense constitutes harassment, is groundless and not made in good faith. In making such award, the court may consider such evidence as it deems appropriate and shall receive this evidence during the trial on the merits of the cause or separately, regarding the amount of such fees as it deems in the best interest of the litigating parties.

D. Reasonable attorney's fees awarded under the provisions of this section shall be awarded by the court and not by a jury.

defense constitutes harassment, is groundless and not made in good faith.<sup>12</sup> Finally, the meaning of "reasonable attorney's fees" will be discussed.

## I. PERMISSIVE AND MANDATORY AWARDS UNDER SECTION 12-341.01

Section 12-341.01 provides two grounds upon which a court may award attorney's fees.<sup>13</sup> First, the court may award reasonable attorney's fees to the successful party in any contested action arising out of contract.<sup>14</sup> Subsection A of section 12-341.01 was designed to discourage unmeritorious litigation and to reduce the caseload of the trial courts.<sup>15</sup> Second, under subsection C of section 12-341.01, courts are required to award reasonable attorney's fees to a party where there is clear and convincing evidence of vexatious litigation.<sup>16</sup> These two grounds of awards are not mutually exclusive because an award may be made for vexatious litigation in an action arising out of contract.<sup>17</sup>

Under subsection A, an award of attorney's fees by the trial court is permissive.<sup>18</sup> Thus, an appellate court will not readily set aside an award absent a clear abuse of discretion.<sup>19</sup> The Arizona Court of Appeals has held that a trial court abuses its discretion in the award of attorney's fees only when a reasonable man would not have made the award.<sup>20</sup> An award

12. For purposes of this Note, vexatious litigation refers to acts that constitute harassment, are groundless, and not made in good faith.

13. ARIZ. REV. STAT. ANN. § 12-341.01 (1982). For text of this section, see *supra* note 11.

14. ARIZ. REV. STAT. ANN. § 12-341.01(A) (1982).

15. Fleming, *Debtors'-Creditors' Rights Committee*, 11 ARIZ. B.J. 19, 20 (Spring 1976).

16. ARIZ. REV. STAT. ANN. § 12-341.01(C) (1982).

17. If an action does not arise out of contract, then subsection C can still be the basis of an award. See *Sparks v. Republic Nat'l Life Ins. Co.*, 132 Ariz. 529, 544 n.5, 647 P.2d 1127, 1142 n.5 (1982) (suggests that attorney's fees could have been awarded under paragraph C even though the action arose out of contract and fees were awarded pursuant to paragraph A); *Noble v. National Am. Life Ins. Co.*, 128 Ariz. 188, 193, 624 P.2d 866, 871 (1981) (Struckmeyer, C.J., dissenting) (bad faith motives in breach of contract would be covered by paragraph C); *Nationwide Resources Corp. v. Ngai*, 129 Ariz. 226, 231, 630 P.2d 49, 54 (Ct. App. 1981) (while no award could be made under subsection A, an award under subsection C might be appropriate).

18. ARIZ. REV. STAT. ANN. § 12-341.01(A) (1982); *Autenreith v. Norville*, 127 Ariz. 442, 444, 622 P.2d 1, 3 (1980); *Title Ins. Co. v. Acumen Trading Co.*, 121 Ariz. 525, 526, 591 P.2d 1302, 1303 (1979); *Earven v. Smith*, 127 Ariz. 354, 358, 621 P.2d 41, 45 (Ct. App. 1980); *ARC Electric Co., Inc. v. Esslinger-Lefler, Inc.*, 121 Ariz. 501, 505, 591 P.2d 989, 993 (Ct. App. 1979); *Circle K Corp. v. Rosenthal*, 118 Ariz. 63, 69, 574 P.2d 856, 862 (Ct. App. 1977).

19. See *Catalina Foothills Ass'n, Inc. v. White*, 132 Ariz. 427, 428, 646 P.2d 312, 313 (Ct. App. 1982) (the court said that the weight to be given to a particular factor is wholly within the trial court's discretion); *Earven v. Smith*, 127 Ariz. 354, 358, 621 P.2d 41, 45 (Ct. App. 1980) (court refused to interfere with the trial court's award of attorney's fees because several factors were present that could justify the award); *Lamb v. Arizona Country Club*, 124 Ariz. 32, 34, 601 P.2d 1068, 1070 (Ct. App. 1979) (an award of attorney's fees under subsection A was discretionary and appropriate in the case); *Altfillisch Constr. Co. v. Torgerson Constr. Corp.*, 120 Ariz. 438, 440, 586 P.2d 999, 1001 (Ct. App. 1978) (no abuse as the award was within the sound discretion of the trial judge). But see *Scafid v. Puckett*, 118 Ariz. 589, 590-91, 578 P.2d 1018, 1019-21 (Ct. App. 1978) (Hathaway, J., dissenting) (Justice Hathaway said that the trial court's failure to make an award lacked a sound basis because appellant's position was so groundless that the appellee should not bear the total burden of his attorney's fees). For a more detailed discussion on the trial court's discretion in setting the amount of reasonable attorney's fees, see *infra* notes 224-62 and accompanying text.

20. *Moser v. Moser*, 117 Ariz. 312, 315, 572 P.2d 446, 449 (Ct. App. 1977). The *Moser* decision dealt with § 25-324 of the Arizona Revised Statutes, which provides that a court may award reasonable attorney's fees to either party in a marriage dissolution action. ARIZ. REV. STAT. ANN. § 25-324 (1976). Section 25-324 resembles subsection A because it is a permissive award and calls

under subsection A has never been reversed or modified as an abuse of discretion, however.<sup>21</sup>

Subsection C, which provides for attorney's fees in cases of vexatious litigation, states that attorney's fees *shall* be awarded when the litigation is in bad faith.<sup>22</sup> Recently, the Arizona Supreme Court held that an award under this subsection is mandatory when a trial court finds clear and convincing evidence of vexatious litigation.<sup>23</sup>

Although subsection C is mandatory, the trial court has substantial latitude in determining the meaning of vexatious litigation.<sup>24</sup> The court's latitude will be discussed further in connection with the discussion of vexatious litigation<sup>25</sup> and reasonable attorney's fees.<sup>26</sup>

## II. ATTORNEY'S FEES IN ACTIONS "ARISING OUT OF CONTRACT"

Before a trial court may exercise its discretion and award reasonable attorney's fees under subsection A, the party seeking attorney's fees must satisfy several threshold requirements. The action must arise out of contract, it must be contested, and the party seeking the attorney's fees must have prevailed in the action. A discussion of each of these requirements follows.

### A. "Arising Out Of Contract"

There are two important issues to consider when determining whether an action "arises out of contract" within the meaning of subsection A. First, whether an action arises out of contract depends on the theories advanced by the parties. Second, an action alleging both contract and tort theories may affect the amount of the award under subsection A. As will be discussed below, resolution of the first issue will not necessarily decide the second.

Subsection A applies whether the action is based on an express or implied contract.<sup>27</sup> Arizona courts have given an expansive meaning to the phrase "contested action arising out of contract, express or implied."<sup>28</sup>

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for reasonable attorney's fees. *Id.*; Luna v. Luna, 125 Ariz. 120, 126, 608 P.2d 57, 63 (Ct. App. 1979); *In re Marriage of Fong*, 121 Ariz. 298, 306, 589 P.2d 1330, 1338 (Ct. App. 1978); Nelson v. Nelson, 114 Ariz. 369, 373, 560 P.2d 1276, 1280 (Ct. App. 1977).

21. The only cases considering whether a trial court's award was an abuse of discretion upheld the awards. See cases cited *supra* note 19.

22. ARIZ. REV. STAT. ANN. § 12-341.01(C) (1982).

23. White v. Kaufman, No. 15655, slip op. at 4 (Ariz. Sept. 14, 1982); Berry v. Arizona State Land Dep't, No. 15658, slip op. at 6 (Ariz. Sept. 9, 1982).

24. See *infra* notes 146-60 and accompanying text.

25. *Id.*

26. See *infra* notes 245-62 and accompanying text.

27. ARIZ. REV. STAT. ANN. § 12-341.01(A) (1982).

28. *Id.*; Nationwide Mut. Ins. Co. v. Granillo, 117 Ariz. 389, 394, 573 P.2d 80, 85 (Ct. App. 1977). In *Nationwide* the court stated that a party seeking declaratory relief was entitled to attorney's fees because the action arose out of contract, even though the contract provision in question concerned insurance coverage in a forthcoming personal injury suit. In *Lamb v. Arizona Country Club*, 124 Ariz. 32, 34, 601 P.2d 1068, 1070 (Ct. App. 1979), the court reasoned that a negotiated settlement incorporated in a stipulated judgment arises out of a contract within § 12-341.01. Thus, a challenge to such a judgment made paragraph A applicable. *Id.*

In *Shirley v. Hartford Accident & Indemnity Co.*,<sup>29</sup> for example, the defendant defeated a contract action by proving that no contract existed.<sup>30</sup> Even though the existence of a contract had been defeated, the court awarded the defendant attorney's fees under subsection A.<sup>31</sup> The court held that because the plaintiff could have recovered if the court had found a contract, the defendant could likewise recover if the existence of a contract was successfully defeated.<sup>32</sup>

Another example of the expansive interpretation of subsection A can be found in *Ruck Corp. v. Woudenberg*,<sup>33</sup> where the court upheld an award of attorney's fees under subsection A even though the express contract failed because of an unlawful condition precedent.<sup>34</sup> When the contract claim failed, the plaintiff sued instead in *quantum meruit* for the reasonable value of expended services and materials.<sup>35</sup> The trial court awarded the plaintiff, as the prevailing party, attorney's fees.<sup>36</sup>

The largest expansion of the phrase "arising out of contract" has occurred in cases involving both contract and tort theories. In applying subsection A, the Arizona courts have focused on the basis of the prevailing party's legal arguments.<sup>37</sup> Difficulty arises, however, where the plaintiff alleges both contract and tort claims.<sup>38</sup> In *Amphitheater Public Schools v. Eastman*,<sup>39</sup> the court of appeals said that it is not the label which a party puts on a claim, but rather the substance of the claim that determines whether the claim arises out of contract.<sup>40</sup> The court held that a breach of a duty created by a bailment contract sounded in tort rather than contract.<sup>41</sup> Consequently, no award under subsection A was permitted.<sup>42</sup> The approach used in *Eastman* has been both criticized and rejected in subsequent decisions.<sup>43</sup>

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29. 125 Ariz. 70, 607 P.2d 389 (Ct. App. 1979).

30. *Id.* at 71, 607 P.2d at 390.

31. *Id.*

32. *Id.* The same reasoning prevailed in a case where the parties attempted to change deed restrictions. *Catalina Foothills Ass'n, Inc. v. White*, 132 Ariz. 427, 428, 646 P.2d 312, 313 (Ct. App. 1982). There was no valid contract because the deed did not authorize changes via declarations, and therefore, defendant/appellee prevailed on a finding of no contract and was awarded attorney's fees. *Id.*

33. 125 Ariz. 519, 611 P.2d 106 (Ct. App. 1980).

34. *Id.* at 522, 611 P.2d at 109.

35. *Id.* at 521, 611 P.2d at 108.

36. *Id.* at 522, 611 P.2d at 109.

37. *Sparks v. Republic Nat'l Life Ins. Co.*, 132 Ariz. 529, 542-43, 647 P.2d 1127, 1140-41 (1982); *Wenk v. Horizon Moving & Storage Co.*, 131 Ariz. 131, 132, 639 P.2d 321 (1982); *Amphitheater Public Schools v. Eastman*, 117 Ariz. 559, 560, 574 P.2d 47, 48 (Ct. App. 1977).

38. *Sparks v. Republic Nat'l Life Ins. Co.*, 132 Ariz. 529, 534, 647 P.2d 1127, 1132 (1982); *Wenk v. Horizon Moving & Storage Co.*, 131 Ariz. 131, 132, 639 P.2d 321, 322 (1982); *Circle K Corp. v. Rosenthal*, 118 Ariz. 63, 69, 574 P.2d 856, 862 (Ct. App. 1977); *Amphitheater Public Schools v. Eastman*, 117 Ariz. 559, 560, 574 P.2d 47, 48 (Ct. App. 1977).

39. 117 Ariz. 559, 574 P.2d 47 (Ct. App. 1977).

40. *Id.* at 560, 574 P.2d at 48. *See also Earven v. Smith*, 127 Ariz. 354, 358, 621 P.2d 41, 45 (Ct. App. 1980) (action against escrow agent sounded in negligence despite being labeled breach of contract and negligence).

41. 117 Ariz. at 560, 574 P.2d at 48.

42. *Id.*

43. *Sparks v. Republic Nat'l Life Ins. Co.*, 132 Ariz. 529, 542-43, 647 P.2d 1127, 1140-41 (1982); *Wenk v. Horizon Moving & Storage Co.*, 131 Ariz. 131, 132, 639 P.2d 321, 322 (1982).

In *Wenk v. Horizon Moving & Storage Co.*,<sup>44</sup> the plaintiff, under an express bailment contract, hired a storage company to store certain possessions.<sup>45</sup> Later, the company was called to redeliver the items to the plaintiff, at which time the plaintiff requested that the company place four items back into storage.<sup>46</sup> No express contract was executed for the items restored, which were subsequently lost.<sup>47</sup> The court said these facts supported an implied bailment contract which included a duty of the company to take reasonable care of the items while in their possession.<sup>48</sup>

To determine whether attorney's fees should be awarded under subsection A, the *Wenk* court had to decide whether a breach of duty under an implied bailment contract was a breach of contract claim or a negligence claim.<sup>49</sup> The plaintiff had alleged both theories in his complaint.<sup>50</sup> The court announced that there is a presumption that an action is for breach of contract when the complaint can be construed as alleging either a breach of contract or a tort.<sup>51</sup> Based on this presumption, the court held that the evidence supported recovery for breach of contract of an implied bailment contract.<sup>52</sup> The court remanded the case for the trial court to determine which theory the plaintiff prevailed under.<sup>53</sup> The court concluded that if the trial court found the prevailing theory to be in contract, then the court should consider whether to award attorney's fees.<sup>54</sup> The court, however, expressly refused to consider whether attorney's fees could be awarded if the trial court found the prevailing theory to be in tort.<sup>55</sup>

The Arizona Supreme Court, in *Sparks v. Republic National Life Insurance Co.*,<sup>56</sup> recently decided whether a party prevailing in tort could recover attorney's fees under subsection A. In *Sparks*, the plaintiff brought suit against the defendant alleging breach of contract, bad faith, and misrepresentation.<sup>57</sup> While the latter two claims were in tort,<sup>58</sup> the court found that the duty of an insurance company to act in good faith toward an insured arises out of the insurance contract.<sup>59</sup> This good faith duty, the court explained, is implicit in all insurance contracts.<sup>60</sup> A breach of this duty, therefore, could not have arisen but for the underlying insurance contract.<sup>61</sup> The court held that such a claim arose out of contract for purposes of subsection A and awarded the prevailing plaintiff attorney's

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44. 131 Ariz. 131, 639 P.2d 321 (1982).

45. *Id.* at 132, 639 P.2d at 322.

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.* at 132-33, 639 P.2d at 322-23.

54. *Id.*

55. *Id.*

56. 132 Ariz. 529, 647 P.2d 1127 (1982).

57. *Id.* at 534, 647 P.2d at 1132.

58. *Id.* at 542, 647 P.2d at 1140.

59. *Id.* at 544, 647 P.2d at 1142.

60. *Id.* at 543-44, 647 P.2d at 1141-42, citing *Noble v. National Am. Life Ins. Co.*, 128 Ariz. 188, 190, 624 P.2d 866, 868 (1981).

61. 132 Ariz. at 544, 647 P.2d at 1142.

fees.<sup>62</sup>

Although the full effect of *Sparks* has yet to be felt, some observations can be made. First, a party's claim or defense does not have to be based in contract so long as it could not have been brought but for an underlying contract.<sup>63</sup> Second, the contract provision that creates the duty does not have to be an express provision<sup>64</sup> and it may be implied.<sup>65</sup>

The result of *Sparks* is to expand the scope of subsection A beyond recovery in contract. The *Sparks* decision will encourage the practitioner to establish a causal link between his client's claim and a contract.<sup>66</sup> If the "but for" language in *Sparks* is treated as causation in fact, recovery under subsection A will be greatly expanded because tort claims may support an award.<sup>67</sup> It must be noted, however, that *Sparks* may be limited to its facts. Instead of creating a "but for" test, the court may have only held that a breach of a duty created by a contract is an action that arises out of contract.<sup>68</sup>

Once a court has determined that an action arises out of contract, the court must consider what effect a tort/contract overlap has on determining the amount of an award. Where a tort claim is not dependent on the underlying contract for its existence, recovery on both the contract and tort claims requires the trial court to consider allocating fees between the two theories when making an award under subsection A.<sup>69</sup> This allocation is especially difficult when the theories arise out of the same transaction.<sup>70</sup>

In *Circle K Corp. v. Rosenthal*,<sup>71</sup> the defendant successfully defended against an oral contract claim and a negligence claim, but was denied attorney's fees because there was no evidence on the record distinguishing the fees expended in defense of each claim.<sup>72</sup> The defendant moved for a rehearing and presented evidence that twenty percent of his briefs were for

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62. *Id.* at 543, 544, 647 P.2d at 1141, 1142.

63. *Id.* at 544, 647 P.2d 1142.

64. *Id.* at 543-44, 647 P.2d at 1141-42.

65. *Id.*; *Noble v. National Am. Life Ins. Co.*, 128 Ariz. 188, 190, 624 P.2d 866, 868 (1981).

66. For instance, if *A* and *B* entered into a sales contract and *B* is to deliver a thousand items to *A* using *A*'s truck, *B*'s negligence in driving the truck might support a tort action that "arose out of contract" within the meaning of subsection A. That is, but for the contract which established the relationship between *A* and *B*, there would be no tort action.

67. Although it is unclear on which theory the jury found for the plaintiff, there is no doubt that the *Sparks* court held that the bad faith tort claim supported attorney's fees under subsection A and that the misrepresentation tort did not support an award under subsection A. 132 Ariz. at 544, 647 P.2d at 1142.

68. This is true if *Sparks* is limited to its facts. The "but for" language, however, is used rather broadly in the *Sparks* opinion and the court may be establishing a test for future cases. See *Trebilcox v. Brown & Bain, P.A.*, 1CA-CIV 5394 (Ariz. App. Oct. 5, 1982), where the court held that a tort for breach of a fiduciary relationship arising out of an attorney-client contract could not exist "but for" the breach of contract, and therefore attorney's fees were available under section 12-341.01. Slip op. at 7.

69. See *Sparks* 132 Ariz. at 544, 647 P.2d at 1142 (1982); *Circle K Corp. v. Rosenthal*, 118 Ariz. 63, 69, 574 P.2d 856, 862 (Ct. App. 1978).

70. When a party brings an action under two different theories relating to the same event, much of the time and work expended by an attorney is relevant to both theories. This makes it difficult to allocate attorney's fees between theories.

71. 118 Ariz. 63, 574 P.2d 856 (Ct. App. 1978).

72. *Id.* at 69, 574 P.2d at 862.

defense of the contract claim.<sup>73</sup> The Arizona Court of Appeals, however, declined to award attorney's fees.<sup>74</sup> The court stated that the contract and tort theories overlapped sufficiently to make a quantitative allocation impossible.<sup>75</sup>

The *Sparks* decision offers no new guidance in solving the allocation problem. There, the court held that attorney's fees were recoverable for a bad faith tort action arising out of a breach of a duty created by an insurance contract.<sup>76</sup> Attorney's fees, however, were not recoverable for the tort of misrepresentation under the Insurance Code.<sup>77</sup> The question before the court was whether the award made by the trial court covered only the fees allocable to the bad faith tort claim.<sup>78</sup> The trial court awarded \$80,000 in attorney's fees.<sup>79</sup> Testimony was introduced, however, that reasonable attorney's fees in litigating the case would be somewhere between \$62,000 and \$225,000.<sup>80</sup> Because the amount actually awarded by the trial court was near the lower end of the range attributable to litigating all the claims, the supreme court found the award to be within the sound discretion of the trial court and did not discuss allocation between the theories.<sup>81</sup> As a result, the Arizona courts have yet to develop an approach to allocate attorney's fees where a party is successful on multiple theories, of which only one may support an award under subsection A.

While the lack of any allocation approach may be symptomatic of the discretionary aspect of the awards under subsection A,<sup>82</sup> there is still a need to set guidelines for determining the maximum award allowable in any given case.<sup>83</sup> If the claims arise out of the same transaction or fact pattern, much of the attorney's fees would be attributable to both claims.<sup>84</sup> A possible allocation model to determine the maximum amount of attorney's fees awardable under subsection A might be derived. The court could hear evidence on the attorney's fees which would be incurred if each claim had been litigated separately. The court could add these two figures together to form a denominator and use the estimated amount attributable to the action arising out of contract as the numerator. Finally, this proportion would then be multiplied against the total fees actually incurred to

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73. *Id.*

74. *Id.*

75. *Id.*

76. 132 Ariz. at 544, 647 P.2d at 1142.

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.* After discussing the evidence introduced at the trial level concerning the range of attorney's fees that might be incurred in a case such as the one before the court, the supreme court held that the award was in the sound discretion of the trial judge because it was substantially lower than the upper end of the estimates. *Id.* The court seemed to be satisfied as long as the award did not exceed the actual amount of fees incurred. *Id.* at 544-45, 647 P.2d at 1142-43.

82. See cases *supra* note 18. The court's refusal in *Circle K Corp.* to consider evidence of allocation between theories of recovery is especially illustrative of this point. 118 Ariz. 63, 69, 574 P.2d 856, 862 (Ct. App. 1977).

83. ARIZ. REV. STAT. ANN. § 12-341.01(B) (1982); *Sparks*, 132 Ariz. at 544-45, 647 P.2d at 1142-43.

84. See *Circle K Corp. v. Rosenthal*, 118 Ariz. 63, 69, 574 P.2d 856, 862 (Ct. App. 1977) (court refused to allocate fees even though prevailing party introduced evidence that 20% of his brief covered the action arising out of contract).



arrive at a maximum limit for an award under subsection A.<sup>85</sup> This allocation approach would provide an easy way to establish a maximum and provide the appellate courts with a record by which to evaluate the trial court's exercise of discretion.

Also, this allocation approach would also avoid the necessity of disclosing the underlying attorney-client fee arrangements.<sup>86</sup> Subsection B, however, expressly states that the award may not exceed the actual amount incurred in an action arising out of contract.<sup>87</sup> This suggests that a losing party should be able to examine and question the fee arrangement and itemized statement of attorney's fees.<sup>88</sup> The Arizona Supreme Court in *Sparks*, however, seemed to think that an *in camera* inspection of the fee arrangement between the prevailing party and his attorney was all that was necessary under subsection B.<sup>89</sup> Because the fees awarded did not approach the outside range attributable to an action arising out of contract and did not exceed the amount actually incurred under the fee arrangement, the award of attorney's fees was held appropriate under subsections A and B.<sup>90</sup>

### B. Contested Contract Actions

In addition to the "arise out of contract" requirement, subsection A requires the action to be "contested."<sup>91</sup> The Arizona Supreme Court has interpreted "contested" as requiring a lawsuit.<sup>92</sup> A party, therefore, is not entitled to attorney's fees when the issue is settled out of court.<sup>93</sup> Presumably, the same result would follow if a lawsuit was filed, but settled before trial.<sup>94</sup>

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85. For example, assume it would cost \$100 to litigate a contract action separately from a negligence action. Also, assume it would cost \$50 to litigate a negligence action separately from a contract action. Litigated together, the prevailing party would actually pay \$90. Using the suggested allocation approach, the prevailing party could recover a maximum of \$60 computed as follows:  $(100/(100 + 50)) \times 90 = \$60$ .

86. On appeal, the defendant in *Sparks* argued due process had been denied because it was not able to discover the fee arrangement between the plaintiff and the plaintiff's attorney. *Id.* at 544-45, 647 P.2d at 1142-43. The court said that there was a full hearing on attorney's fees and because the defendant had an opportunity to cross-examine plaintiff's witnesses and to present evidence in rebuttal, there was no due process violation. *Id.*

87. ARIZ. REV. STAT. ANN. § 12-341.01(B) (1982). See *supra* note 11 for the text of this subsection.

88. Although the court has great discretion in making awards under subsection A, a losing party may question an award because it exceeds what that party believes is the maximum attributable to an action arising out of contract. An examination of the fee arrangement and statement of fees might prove the party right.

89. 132 Ariz. at 544-45, 647 P.2d at 1142-43.

90. *Id.* The *Sparks* approach would not work in a situation where the trial court intended to award the maximum under subsection A, because the losing party has not had a chance to prove that the amount awarded was not attributable to an action arising out of contract with an examination of the fee arrangement and statement of fees.

91. ARIZ. REV. STAT. ANN. § 12-341.01(A) (1982).

92. *McEldowney v. Osborn School Dist.*, 123 Ariz. 416, 418, 600 P.2d 29, 31 (1979). See also *Lamb v. Arizona Country Club*, 124 Ariz. 32, 601 P.2d 1068 (Ct. App. 1979), where the court held that a motion for relief from judgment was a contested action because the motion would have achieved the same result as filing an independent action for relief from a prior judgment. *Id.* at 34, 601 P.2d at 1070.

93. See *McEldowney v. Osborn School Dist.*, 123 Ariz. 416, 418, 600 P.2d 29, 31 (court said the § 12-341.01 award must be predicated on a lawsuit).

94. Without a judgment entered against a party, it is difficult to imagine that there is a pre-

The Arizona Supreme Court has also held that the parties must be adverse to meet the "contested action" requirement.<sup>95</sup> Adversity is not determined solely from the parties' alignment in the pleadings,<sup>96</sup> but must be ascertained from the opposing positions or interests of the parties.<sup>97</sup> For example, in *Nationwide Resources Corp. v. Ngai*,<sup>98</sup> the plaintiff sued the defendants for its brokerage commission.<sup>99</sup> The defendants filed a counterclaim against the plaintiff alleging misrepresentation as to the size of a lot purchased in an unrelated transaction.<sup>100</sup> The plaintiff then filed a third-party complaint against other brokers.<sup>101</sup> The plaintiff alleged that if it was held liable on the counterclaim, then the third-party defendants would be liable for the entire award of damages to the defendant.<sup>102</sup> The third-party defendants, therefore, had every incentive to assert any defenses available to the plaintiff.<sup>103</sup> The court concluded that the third-party defendants were adverse to the defendant.<sup>104</sup>

### C. Successful Party

The last requirement of subsection A is that the party seeking the attorney's fees award must have prevailed in the action.<sup>105</sup> A plaintiff or defendant who is awarded a monetary judgment<sup>106</sup> or a defendant who successfully defends an action for damages<sup>107</sup> in a contract action qualifies as a "successful party." The result is less clear when damages are not sought<sup>108</sup> or when there are multiple claims involved.<sup>109</sup>

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vailing party within the meaning of § 12-341.01. *But see* Johnston v. Jago, 51 U.S.L.W. 2272 (6th Cir. 1982) (party in 42 U.S.C. § 1983 action may be prevailing even if case results in a settlement). Also, such an award would discourage settlements, and thus, hinder the stated goal of discouraging unmeritorious litigation. The Arizona courts, however, have yet to hear such a case. In *Lamb v. Arizona Country Club*, 124 Ariz. 32, 34, 601 P.2d 1068, 1070 (Ct. App. 1979), the court held that a negotiated settlement reduced to a judgment was a contract within the meaning of subsection A and that a motion to invalidate the agreement was an action arising out of contract. Therefore, if the parties reduce their settlement to a judgment, they might have a better argument for attorney's fees pursuant to subsection A. It's likely that the parties would include a provision in their settlement regarding attorney's fees one way or the other, however, and such a provision would take the action out of subsection A's applicability. ARIZ. REV. STAT. ANN. § 12-341.01(A) (1982).

95. *Nationwide Resources Corp. v. Ngai*, 129 Ariz. 226, 232, 630 P.2d 49, 55 (Ct. App. 1981) (court analogized § 12-341.01 to § 12-341 and held that the parties must be adverse in order to recover attorney's fees under § 12-341.01).

96. *Id.*

97. *Id.*

98. 129 Ariz. 226, 630 P.2d 49 (Ct. App. 1981).

99. *Id.* at 227, 630 P.2d at 50.

100. *Id.* at 230, 630 P.2d at 53.

101. *Id.*

102. *Id.*

103. *Id.* at 232, 630 P.2d at 55.

104. *Id.*

105. ARIZ. REV. STAT. ANN. § 12-341.01(A) (1982).

106. *But see* Altfillisch Constr. Co. v. Torgerson Constr. Corp., 120 Ariz. 438, 440, 586 P.2d 999, 1001 (Ct. App. 1978) (a successful party under § 12-341 does not necessarily win a monetary judgment).

107. Subsection A applies to "claims" as well as "defenses." ARIZ. REV. STAT. ANN. § 12-341.01(A) (1982).

108. *But see* Altfillisch Constr. Co. v. Torgerson Constr. Corp., 120 Ariz. 438, 440, 586 P.2d 999, 1001 (Ct. App. 1978) (declaratory judgment action); *Nationwide Mut. Ins. Co. v. Granillo*, 117 Ariz. 389, 394-95, 573 P.2d 80, 85-86 (Ct. App. 1977) (claim for possession of property).

109. *See, e.g.,* Nataros v. Fine Arts Gallery, 126 Ariz. 44, 49, 612 P.2d 500, 505 (Ct. App. 1980)

In *Nationwide Mutual Insurance Co. v. Granillo*,<sup>110</sup> an action for declaratory judgment resulted in summary judgment for the defendant.<sup>111</sup> The court considered the defendant to be the "successful party" for purposes of awarding attorney's fees.<sup>112</sup> Also, in *Altfillisch Construction Co. v. Torgerson Construction Corp.*,<sup>113</sup> the plaintiff, who prevailed on a claim for possession of property, was considered the "successful party."<sup>114</sup> These cases indicate that one need not seek monetary relief to be a successful party. Any time affirmative relief is sought, the party in whose favor the court rules may be awarded attorney's fees as the successful party under subsection A.<sup>115</sup>

When a party's judgment is reversed on appeal, however, he is no longer a successful party and any awards previously granted under subsection A are vacated.<sup>116</sup> It is unclear whether the reversal automatically makes the opposing party the successful party within the terms of subsection A, thus allowing him to recover attorney's fees incurred at the trial level. In *Wenk v. Horizon Storage & Moving Co.*,<sup>117</sup> however, the Arizona Supreme Court held that section 12-341.01 applies to appeals as well as trials.<sup>118</sup> In *Wenk*, the plaintiff prevailed at the trial level, but appealed an order denying the award of attorney's fees.<sup>119</sup> The court remanded the

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(implication that apportionment might be appropriate where both parties successful on claims against each other); *Watson Constr. Co. v. Amfac Mortg. Corp.*, 124 Ariz. 570, 584-85, 606 P.2d 421, 435-36 (Ct. App. 1979) (each party was successful, one on a complaint and the other on a counterclaim); *General Cable Corp. v. Citizens Utils. Co.*, 27 Ariz. App. 381, 385, 555 P.2d 350, 354 (1976) (one party sought greater relief than the other, but both lost so neither party considered successful); *Trollope v. Koerner*, 21 Ariz. App. 43, 47, 515 P.2d 340, 344 (1973) (both parties recovered different monetary amounts).

110. 117 Ariz. 389, 573 P.2d 80 (Ct. App. 1977).

111. *Id.* at 394-95, 573 P.2d at 85-86.

112. *Id.* The defendant in *Granillo* was not a party to the contract, but rather a potential tort claimant against the plaintiff's policy holder. *Id.* at 394, 573 P.2d at 85. The court said that the "successful party" under § 12-341.01 does not have to be a party to the contract which is the subject of the suit. *Id.* at 394-95, 573 P.2d at 85-86.

113. 120 Ariz. 438, 586 P.2d 999 (Ct. App. 1978).

114. *Id.* at 440, 586 P.2d at 1001.

115. ARIZ. REV. STAT. ANN. § 12-341.01(A) (1982). Besides seeking restitution, damages, declaratory relief or specific performance, a party might seek rescission of the contract or possibly injunctive relief, such as enjoining a party from breaching a negative promise. 12 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 1454A (3d ed. 1970).

116. *Correa v. Pecos Valley Dev. Corp.*, 126 Ariz. 601, 607, 617 P.2d 767, 773 (Ct. App. 1980) (because the court reversed the trial court on the contract count, the party who recovered at the trial level was no longer a successful party and the award of attorney's fees was therefore reversed too); *Esmark, Inc. v. McKee*, 118 Ariz. 511, 514, 578 P.2d 190, 193 (Ct. App. 1978) (when summary judgment is reversed on appeal and remanded for further proceedings, a successful party has not yet been determined).

117. 131 Ariz. 131, 639 P.2d 321 (1982).

118. *Id.* at 133, 639 P.2d at 323. See also *Fousel v. Ted Walker Mobile Homes, Inc.*, 124 Ariz. 126, 130, 602 P.2d 507, 511 (Ct. App. 1979); *Lamb v. Arizona Country Club*, 124 Ariz. 32, 33, 601 P.2d 1068, 1069 (Ct. App. 1979) (Div. 1); *Gann v. Morris*, 122 Ariz. 517, 519, 596 P.2d 43, 45 (Ct. App. 1979) (Div. 2); *Gressley v. Patterson Tillage & Leveling, Inc.*, 119 Ariz. 154, 156, 579 P.2d 1124, 1126 (Ct. App. 1978). Cf. *Amos Flight Operations, Inc. v. Thunderbird Bank*, 112 Ariz. 263, 268, 540 P.2d 1244, 1247 (1975) (attorney's fees "are also allowed on appeal from suits on contracts which allow attorney's fees"); *Lawrence v. Valley Nat'l Bank*, 106 Ariz. 455, 457, 478 P.2d 79, 81 (1970).

119. 131 Ariz. at 131, 639 P.2d at 321.

case to the trial court because the record did not adequately state why no attorney's fees had been awarded to the plaintiff at the trial level.<sup>120</sup> The court also held that a successful party is not ultimately determined until the appeal process has run its course and that attorney's fees may be awarded to the successful party on appeal.<sup>121</sup> Although the *Wenk* court awarded attorney's fees incurred on appeal to the successful party,<sup>122</sup> the case did not address the question of whether a party successful on appeal is entitled to attorney's fees incurred at the trial level.<sup>123</sup>

Given the appropriate fact situation, the Arizona appellate courts might consider awarding the successful party on appeal all attorney's fees incurred, including those at the trial level.<sup>124</sup> The appellate courts, however, rather than substituting their decision as to the amount, could simply remand the case to the trial court to determine the award. This would be appropriate where the trial court had to affirmatively act upon remand of the case by the appellate court. Where the action is not remanded for further proceedings, however, the appellate court should handle the award because the court can award attorney's fees incurred on appeal.<sup>125</sup>

Although appeals make the determination of the successful party more difficult, the complexity of multiple claim litigation poses the greatest problem in determining the successful party. The Arizona courts have not directly examined this problem in terms of subsection A of section 12-341.01,<sup>126</sup> but have done so in relation to section 12-341 of the Arizona Revised Statutes.<sup>127</sup> It is, therefore, appropriate to determine what a suc-

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120. *Id.* at 133, 639 P.2d at 323.

121. *Id.*

122. *Id.* But see ARIZ. R. CIV. APP. P. 21 (C) (1981) which provides:

When attorneys' fees are recoverable by statute or contract, the claim for such fees in connection with the prosecution or defense of an appeal may be included in the statement of costs prescribed by Rule 21(a). *The claim for attorneys' fees for the prosecution or defense of the case in superior court may also be included, provided that the superior court has not previously awarded such fees.*

(Emphasis added).

123. 131 Ariz. at 132-33, 639 P.2d at 322-23.

124. See *supra* note 122.

125. 131 Ariz. at 133, 639 P.2d at 323.

126. But see *supra* notes 71-81 and accompanying text.

127. *Ocean West Contractors v. Halec Constr. Co.*, 123 Ariz. 470, 473, 600 P.2d 1102, 1105 (1979); *Nataros v. Fine Arts Gallery*, 126 Ariz. 44, 49, 612 P.2d 500, 505 (Ct. App. 1980); *Waqui v. Tanner Bros. Contracting Co., Inc.*, 121 Ariz. 323, 327, 589 P.2d 1355, 1359 (Ct. App. 1979); *General Cable Corp. v. Citizens Utils. Co.*, 27 Ariz. App. 381, 385, 555 P.2d 350, 354 (1976); *Trollope v. Koerner*, 21 Ariz. App. 43, 47, 515 P.2d 340, 344 (1973).

ARIZ. REV. STAT. ANN. § 12-341 (1982) provides: The successful party to a civil action shall recover from his adversary all costs expended or incurred therein unless otherwise provided by law. A strong analogy can be drawn between § 12-341 and § 12-341.01 because both provisions allow recovery of litigation expenses on the part of the "successful party." In *Nationwide Resources corp. v. Ngai*, 129 Ariz. 226, 630 P.2d 49 (Ct. App. 1981), the court of appeals analogized § 12-341.01 to § 12-341 and held that successful parties under § 12-341.01 must be adverse to the other party, just as required in § 12-341. *Id.* at 232, 630 P.2d at 55. See also *Ocean West Contractors v. Halec Constr. Co.*, 123 Ariz. 470, 473-74, 600 P.2d 1102, 1105-06 (1979) (court applied *Trollope's* "net judgment" rule to a contract provision awarding attorney's fees to the prevailing party and said that the contract controlled over § 12-341.01, but that the result would have been the same); *Altfillisch Constr. Co. v. Torgerson Constr. Corp.*, 120 Ariz. 438, 440, 586 P.2d 999, 1001 (Ct. App. 1978) (court distinguished *Trollope* on the ground that the parties in *Trollope* had sought monetary relief and not specific performance). Further support of the analogy between § 12-341.01 and § 12-341 is in their purpose. Section 12-341 is designed to "idemnify a party against

cessful party is under section 12-341.

Section 12-341 requires awards of statutorily defined "costs" to successful parties in all civil actions.<sup>128</sup> In *Trollope v. Koerner*,<sup>129</sup> both the plaintiff and the defendant were awarded monetary judgments.<sup>130</sup> To determine who the successful party was for purposes of section 12-341, the court used a "net judgment" approach and awarded costs to the plaintiff on a winner-take-all basis.<sup>131</sup> The court considered the plaintiff the successful party because he received a greater monetary judgment than the defendant.<sup>132</sup>

The net judgment method has been criticized because of its winner-take-all approach.<sup>133</sup> Alternatively, an apportionment scheme has been suggested.<sup>134</sup> Instead of awarding costs only to the party receiving the greater monetary judgment, the costs of litigation would be apportioned between each claim. The costs would be offset against each other with a net amount being paid to the party incurring the greatest costs. If an apportionment scheme is used under subsection A, the apportionment of attorney's fees between respective judgments poses the same difficulties as apportioning attorney's fees when a prevailing party alleges both a contract and a tort claim which arises out of the same transactions.<sup>135</sup>

A question remains as to who the successful party is if neither party prevails on their claim<sup>136</sup> or if there is an exact monetary offset.<sup>137</sup> In *Nataros v. Fine Arts Gallery*,<sup>138</sup> the Arizona Court of Appeals said that it is in the discretion of the trial court to determine who is the successful party under section 12-341.<sup>139</sup> The trial court in *Nataros* found the defendant in

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the expense of successfully asserting his rights in court." *Watson Constr. Co. v. Amfac Mortg. Corp.*, 124 Ariz. 570, 585, 606 P.2d 421, 436 (Ct. App. 1979); *In re Estate of Stavro*, 17 Ariz. App. 257, 262, 497 P.2d 77, 82 (1972). Subsection A of § 12-341.01 is designed to discourage unmeritorious litigation by mitigating the burden of the expense of litigation. See ARIZ. REV. STAT. ANN. § 12-341.01(B) (1982); Fleming, *supra* note 15.

128. ARIZ. REV. STAT. ANN. § 12-341 (1982). See *supra* note 127.

129. 21 Ariz. App. 43, 515 P.2d 340 (1973).

130. *Id.* at 47, 515 P.2d at 344.

131. *Id.*

132. *Id.*

133. *Nataros v. Fine Arts Gallery*, 126 Ariz. 44, 49, 612 P.2d 500, 505 (Ct. App. 1980); *Watson Constr. Co. v. Amfac Mortg. Corp.*, 124 Ariz. 570, 585, 606 P.2d 421, 436 (Ct. App. 1979); *Moran v. Lewis*, 131 Conn. 680, 681-82, 41 A.2d 905, 905 (1945). If the "net judgment" approach of *Trollope* is used to award attorney's fees, it will be difficult to decide whether a party who recovers for breach of contract or the opposing party who gains possession of property is the prevailing party. Cf. *Altfillisch Constr. Co. v. Torgerson Constr. Corp.*, 120 Ariz. 438, 440, 586 P.2d 999, 1001 (Ct. App. 1978). In such a case, apportionment may be similarly unmanageable either because the different legal theories used to obtain relief may not be separable or because the legal work done may have applied to both claims. Cf. *supra* notes 37-68 and accompanying text.

134. See *supra* note 133.

135. See *supra* notes 37-68 and accompanying text.

136. *General Cable Corp. v. Citizens Utils. Co.*, 27 Ariz. App. 381, 385, 555 P.2d 350, 354 (1976) (court found neither party to be the successful party where two monetary claims in differing amounts were denied).

137. *Tank v. Clark*, 179 Minn. 587, 588, 229 N.W. 579, 580 (1930) (defendant entitled to costs as prevailing party for fending off the plaintiff's attack despite exact offset); *Ennis v. Ring*, 56 Wash. 2d 465, 473, 353 P.2d 950, 954 (1960) (neither party was held to be the prevailing party due to an exact offset).

138. 126 Ariz. 44, 612 P.2d 500 (Ct. App. 1980).

139. *Id.* at 49, 612 P.2d at 505. Cf. *General Cable Corp. v. Citizens Utils. Co.*, 27 Ariz. App. 381, 385, 555 P.2d 350, 354 (1976).

a negligent misrepresentation action to be the successful party even though his counterclaim for slander had failed.<sup>140</sup> Because awards under subsection A of section 12-341.01 are discretionary and not mandatory as under section 12-341,<sup>141</sup> trial courts are more likely to let both parties bear the burden of their own attorney's fees if both prevail on various claims in a multiple claim situation.<sup>142</sup> The case law under section 12-341, however, remains useful as an analogy for determining a successful party under subsection A.<sup>143</sup>

Once a successful party has been determined in a contested action arising out of contract, the threshold requirements of subsection A have been met and the party may be awarded reasonable attorney's fees.<sup>144</sup> If a party cannot meet the requirements of subsection A, he may still be able to recover under subsection C of section 12-341.01 regarding vexatious litigation.<sup>145</sup>

### III. VEXATIOUS LITIGATION: A SEARCH FOR STANDARDS

To award attorney's fees under subsection C, the court must find clear and convincing evidence that an opponent's claim or defense constitutes harassment, is groundless and lacks good faith.<sup>146</sup> Because the court may consider evidence as it deems appropriate,<sup>147</sup> it has substantial latitude in determining what constitutes vexatious litigation.

The fact that awards under subsection C are mandatory evidences a legislative intent to compensate the victim and punish the offender in cases of vexatious litigation.<sup>148</sup> When a court considers whether an action is vexatious, it should weigh these considerations against the general rule in Arizona that each party must bear the cost of his own counsel.<sup>149</sup>

To date, there have been only three appellate reviews of awards of attorney's fees under subsection C.<sup>150</sup> In *Nationwide Resources Corp. v. Ngai*,<sup>151</sup> the evidence presented in the plaintiff's motion for summary judgment showed that the defendant's counterclaim was without basis.<sup>152</sup> By the defendant's own admission, the counterclaim was without legal ba-

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140. 126 Ariz. at 49, 612 P.2d at 505.

141. See *supra* notes 18-19 and accompanying text.

142. *Id.*

143. See *supra* note 127.

144. See *infra* notes 222-33 and accompanying text.

145. For example, see *Nationwide Resources Corp. v. Ngai*, 129 Ariz. 226, 231, 630 P.2d 49, 54 (Ct. App. 1981).

146. ARIZ. REV. STAT. ANN. § 12-341.01(C) (1982). See *supra* note 11 for text of this statute.

147. ARIZ. REV. STAT. ANN. § 12-341.01(C) (1982).

148. See *supra* notes 22-23 and accompanying text. See also *White v. Kaufman*, No. 15655 (Ariz. Sept. 14, 1982) (court declined to determine precise purpose of subsection C but said legislature could allow recovery as a purely punitive measure).

149. *Wichita v. Pima County*, 131 Ariz. 576, 577-78, 643 P.2d 21, 22-23 (Ct. App. 1982).

150. *Auman v. Auman*, No. 15845 (Ariz. Oct. 22, 1982); *White v. Kaufman*, No. 15655 (Ariz. Sept. 14, 1982); *Nationwide Resources Corp. v. Ngai*, 129 Ariz. 226, 630 P.2d 49 (Ct. App. 1981).

151. 129 Ariz. 226, 630 P.2d 49 (Ct. App. 1981).

152. *Id.* at 230, 630 P.2d at 53. As the appellate court noted, the amount of damages claimed coincided with Nationwide's commission, which is what Nationwide was trying to recover from the defendants. *Id.* at 231 n.3, 630 P.2d at 54 n.3.

sis and made to harass the plaintiff for bringing the suit.<sup>153</sup> The court concluded that there was sufficient evidence to support an award of attorney's fees under subsection C.<sup>154</sup> The *Nationwide* decision indicates that a total lack of legal merit coupled with a confessed subjective bad faith motive warrants an award under subsection C. *Nationwide*, however, presents an extreme fact situation which provides little guidance.

Similarly, *White v. Kaufman*,<sup>155</sup> provides the practicing attorney with little guidance as to what constitutes vexatious litigation. In *White*, the plaintiff brought an action for conversion and judgment was entered in his favor.<sup>156</sup> The plaintiff, in a post-trial motion requested attorney's fees under subsection C.<sup>157</sup> The trial court, following a hearing, awarded the fees.<sup>158</sup> On appeal, the Arizona Supreme Court held that the evidence was sufficient to support a finding of vexatious litigation.<sup>159</sup> The court did not discuss the facts which supported such a finding because the defendant failed to bring the full record on appeal, and therefore, the award was presumed to be supported by the underlying facts.<sup>160</sup> Because the facts which supported the award for vexatious litigation were never discussed, the holding offers little guidance.

The most recent case to consider an award under subsection C is *Auman v. Auman*<sup>161</sup> in which the Arizona Supreme Court upheld the trial court's award of attorney's fees.<sup>162</sup> The plaintiff and defendant were divorced in 1973<sup>163</sup> and since that time the plaintiff unsuccessfully tried four times to have the dissolution decree modified.<sup>164</sup> The defendant was awarded attorney's fees under subsection C because of the plaintiff's last effort.<sup>165</sup> The trial court expressly found that the plaintiff lacked probable cause to bring the suit and brought the suit with the malicious intent of injuring and harassing the defendant.<sup>166</sup> The Arizona Supreme Court held that all the elements of subsection C were present, and therefore, the award was appropriate.<sup>167</sup> The court noted that "this case does not involve the situation where an attorney incorrectly advised his client that an action is meritorious" nor does it involve a situation where the action was "brought partially for the purpose of harassment but supported with probable cause." Instead, the court stressed that this case involved a situation where the plaintiff's attorney advised him that the suit "lacked probable

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153. *Id.* at 231, 630 P.2d at 54.

154. *Id.*

155. No. 15655 (Ariz. Sept. 14, 1982).

156. Slip op. at 3.

157. *Id.* at 4.

158. *Id.*

159. *Id.* at 5.

160. *Id.*; see *Floral Lakes, Inc. v. Patton*, 20 Ariz. App. 303, 513 P.2d 672 (1973) (court must presume that evidence is sufficient to support an award where full record not brought up on appeal by appellant).

161. No. 15845 (Ariz. Oct. 22, 1982).

162. Slip. op. at 8.

163. *Id.* at 2.

164. *Id.* at 3.

165. *Id.* at 4.

166. *Id.* at 7-8.

167. *Id.* at 8, n.1.

cause of being terminated successfully."<sup>168</sup> Thus, it is clear that harassment alone is insufficient to support an award under subsection C; rather the party must have also known or should have known that the suit was groundless.<sup>169</sup>

Because there is little case law interpreting subsection C, this Note will examine other areas where conduct analogous to vexatious litigation permits an award of damages. Section 12-2106 of the Arizona Revised Statutes, permits appellate courts to make limited monetary awards, as damages or a penalty, for frivolous appeals taken for the purpose of delay.<sup>170</sup> Because the statute is not intended to give full compensation, the standards for determining frivolity might not be as strict as those contemplated under subsection C for vexatious litigation.<sup>171</sup> Nevertheless, an examination of the standards under section 12-2106 will be helpful.

For an appeal to be considered frivolous under section 12-2106, two criteria must be met.<sup>172</sup> First, there must be insufficient grounds for the appeal.<sup>173</sup> This requirement is analogous to the groundlessness requirement of subsection C. Second, the appeal must have been taken for purposes of delay.<sup>174</sup> This requirement is analogous to the harassment and bad faith requirements of subsection C. *Mosher v. Young*,<sup>175</sup> provides a detailed example of such dilatory action.<sup>176</sup> Throughout the entire legal process, the defendant in *Mosher* resisted paying the damages sought by the plaintiff even though the defendant had no legal defenses.<sup>177</sup> The defendant introduced no evidence at trial<sup>178</sup> or on appeal.<sup>179</sup> The court, therefore, found that the defendant's sole purpose for appealing was to delay the plaintiff's recovery and awarded damages against the defendant.<sup>180</sup>

To recover under section 12-2106, delay must be the sole motive for

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168. *Id.*

169. *Id.* The court apparently centers on the advice given to a party by its attorney. If the attorney says there is probable cause for success, then there cannot be a finding of vexatious litigation. *Id.* Furthermore, if an attorney incorrectly advises the party as to probability of success, then there cannot be a finding of vexatious litigation. *Id.* Only where a party disregards his attorney's conclusion that the suit lacks probable cause for successful termination is a finding of vexatious litigation possible. *Id.*

170. ARIZ. REV. STAT. ANN. § 12-2106 (1982) provides:

When the supreme court is of the opinion that an appeal has been taken for delay, and that there was not sufficient grounds for taking an appeal, it may include in its judgment an additional amount, not exceeding ten percent of the judgment appealed from, if the judgment is for the recovery of money, and not exceeding five hundred dollars in other cases, as damages for a frivolous appeal.

171. *Gangadean v. Byrne*, 16 Ariz. App. 112, 114-15, 491 P.2d 501, 503-05 (1971).

172. See *supra* note 162.

173. ARIZ. REV. STAT. ANN. § 12-2106 (1982). This determination is based upon whether there are questions on which reasonable persons and attorneys could differ. *Barnett v. Melton*, 112 Ariz. 605, 608, 545 P.2d 421, 424 (1976); see also *Compass Realty & Inv. Corp. v. A A Refrig. & Hearing, Inc.*, 21 Ariz. App. 214, 217, 517 P.2d 1107, 1110 (1974) (defendant-appellant's defense never had the semblance of a meritorious defense).

174. See *supra* note 170 for text of ARIZ. REV. STAT. ANN. § 12-2106 (1982).

175. 50 Ariz. 389, 72 P.2d 682 (1937).

176. *Id.* at 392-93, 72 P.2d at 683-84.

177. *Id.* at 393, 72 P.2d at 684.

178. *Id.* at 392, 72 P.2d at 683.

179. *Id.* at 393, 72 P.2d at 684.

180. *Id.*



the appeal.<sup>181</sup> Section 12-2106 is limited to appeals, and bad faith in that context is narrowly focused on dilatory concerns. Section 12-341.01, however, applies to appeals as well as trials;<sup>182</sup> therefore the victims of frivolous appeals may now recover attorney's fees incurred in defending against the appeals.<sup>183</sup>

Other judicial exceptions to the American Rule that the prevailing litigant is not entitled to recover attorney's fees are provided for in Arizona. For example, a judge may award, as damages, attorney's fees incurred in litigation wrongfully caused by the conduct of a nonparty.<sup>184</sup> The party who is forced to litigate due to the nonparty's wrongful conduct can bring a separate action against the nonparty to recover attorney's fees incurred in the first action.<sup>185</sup>

In *Taylor v. Southern Pacific Transportation Co.*,<sup>186</sup> the Arizona Supreme Court stated that there must be more than a mere lack of good faith on the part of a defendant, before a court can award attorney's fees incurred by the plaintiff in another action.<sup>187</sup> In addition, the court, adopting language from the United States Supreme Court,<sup>188</sup> said that the defendant must have acted "vexatiously, wantonly, or for oppressive reasons."<sup>189</sup> The court further held that repeated disregard of a court order without reasonable justification could support an exception to the general rule concerning attorney's fees.<sup>190</sup> Although the Arizona court was dealing with the collateral litigation exception to the general rule, it adopted language from the United States Supreme Court dealing with the federal bad faith exception to the American Rule.<sup>191</sup>

Examination of the federal bad faith exception may help determine what qualifies as vexatious litigation under subsection C.<sup>192</sup> The federal courts have inherent equitable powers to award attorney's fees to a suc-

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181. See *J.W. Hancock Ent., Inc. v. Registrar of Contractors*, 126 Ariz. 511, 515, 617 P.2d 19, 23 (1980); *Mosher v. Young*, 50 Ariz. 389, 392-93, 72 P.2d 682, 683-84 (1937); *Morley v. Dula*, 31 Ariz. 386, 388, 253 P. 899, 900 (1927); cf. *DGP Trucking Co. v. Fopa Trucking Co.*, 26 Ariz. App. 195, 197, 547 P.2d 47, 49 (1976) (appeal was prosecuted primarily for purpose of delay, not solely for delay).

182. See *supra* notes 117-23 and accompanying text.

183. Section 12-2106 provides for 10% of a monetary judgment or \$500 in other cases as a penalty or damages for frivolous appeals. ARIZ. REV. STAT. ANN. § 12-2106 (1982). This certainly would not fully compensate a victim of vexatious litigation.

184. *United States Fidelity & Guaranty Co. v. Frohmiller*, 71 Ariz. 377, 380, 227 P.2d 1007, 1009 (1951), quoting 15 AM. JUR. DAMAGES § 144 (1938).

185. *Id.*

186. 130 Ariz. 516, 637 P.2d 726 (1981).

187. *Id.* at 523, 637 P.2d at 733.

188. *Hall v. Cole*, 412 U.S. 1, 6 (1973), citing 6 J. MOORE, W. TAGGART & J. WICKER, *supra* note 7, at ¶ 54.77(2).

189. 130 Ariz. at 523, 637 P.2d at 733.

190. *Id.*

191. *Id.*; see *supra* note 188 and accompanying text.

192. Because the purpose behind the federal bad faith exception and subsection C are to both punish the offender and compensate the victim in vexatious litigation situations, it will be helpful to look at federal standards in ascertaining standards under subsection C. For the purpose behind the federal bad faith exception, see *Copeland v. Martinez*, 603 F.2d 981, 985 (D.C. Cir. 1979), cert. denied, 444 U.S. 1044 (1980); *Republic of Cape Verde v. A & A Partners*, 89 F.R.D. 14, 21 (S.D.N.Y. 1980).

cessful party when the opponent has acted in bad faith.<sup>193</sup> The mere fact that a party's claim or defense is meritless is not sufficient alone to justify an award of attorney's fees.<sup>194</sup> Bad faith must be found either in the instigation of the litigation<sup>195</sup> or during the course of the litigation.<sup>196</sup> To qualify as bad faith, the claim or defense must totally lack any legal merits and have been made for improper purposes.<sup>197</sup> A claim or defense is meritless if the party knew or should have known that the claim or defense was untenable, yet the party continued the litigation for reasons of harassment and delay.<sup>198</sup> In addition, the litigation must be oppressive.<sup>199</sup> Because the awards under the federal bad faith exception are based on the court's inherent equitable powers,<sup>200</sup> they may be more restrictive than those under subsection C.

Arizona is one of many states that award attorney's fees by statute in cases of vexatious litigation.<sup>201</sup> Massachusetts, for example, has a statutory provision similar to Arizona's subsection C.<sup>202</sup> Under section 6F of chapter 231 of the Massachusetts General Laws,<sup>203</sup> any claim or defense found to be insubstantial, frivolous and not made in good faith is grounds for an award of reasonable attorney's fees.<sup>204</sup> The statute also requires the court to give specific facts and reasons for such a finding,<sup>205</sup> requiring the

193. *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 258 (1975); *Hall v. Cole*, 412 U.S. 1, 6 (1973); *Vaughan v. Atkinson*, 369 U.S. 527, 530, *reh'g denied*, 370 U.S. 965 (1962).

194. *Runyan v. McCrary*, 427 U.S. 160, 183-84 (1976); *Miracle Mile Ass'n v. City of Rochester*, 617 F.2d 18, 21 (2d Cir. 1980); *Anthony v. Marion County Gen. Hosp.*, 617 F.2d 1164, 1170 (5th Cir. 1980).

195. *Hall v. Cole*, 412 U.S. 1, 15 (1973); Note, *Attorney's Fees and the Federal Bad Faith Exception*, 29 HASTINGS L.J. 319, 324-27 (1978) [hereinafter cited as *Attorney's Fees*]; Note, *Recovery of Attorney Fees In Kansas*, 18 WASHBURN L.J. 535, 540 (1979).

196. See Notes, *supra* note 186.

197. *Numeroff v. Abelson*, 620 F.2d 339, 348 (2d Cir. 1980); *Republic of Cape Verde v. A & A Partners*, 89 F.R.D. 14, 22 (S.D.N.Y. 1980). The focus is on whether the party reasonably believed under the circumstances that it could support the claim. 620 F.2d at 348.

198. See *Hall v. Cole*, 412 U.S. 1, 15 (1973) (dilatory tactics); *Kinnear-Weed Corp. v. Humble Oil & Refining Co.*, 441 F.2d 631, 637 (5th Cir.), *cert. denied*, 404 U.S. 941 (1971) (repeated attempts to relitigate the issues); *Republic of Cape Verde v. A & A Partners*, 89 F.R.D. 14, 22 (S.D.N.Y. 1980) (defendants failed to advance any defense to the motion for summary judgment in addition to there being no colorable defense available).

199. See cases *supra* note 185. Only in exceptional cases may the federal courts exercise their inherent equitable power to award attorney's fees in bad faith litigation. See cases *infra* note 191; 6 J. MOORE, W. TAGGART & J. WICKER, *supra* note 7, at ¶ 54.77(2).

200. See *Christianburg Garment Co. v. E.E.O.C.*, 434 U.S. 412, 417 (1978); *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 258-59 (1975); *Newman v. Piggie Park Enter.*, 390 U.S. 400, 401 n. 4 (1968).

201. A survey of state statutes reveals ten states with similar provisions. COLO. REV. STAT. § 13-17-101 (Supp. 1980) (frivolous or groundless standard); FLA. STAT. ANN. § 57.105 (Supp. 1981) (complete absence of a justiciable issue of law or fact as the standard); GA. CODE ANN. § 20-1404 (1965) (bad faith, stubbornly litigious or caused unnecessary trouble or expense as the standards); HAWAII REV. STAT. § 607-14.5 (Supp. 1981) (completely frivolous standard); ILL. ANN. STAT. ch. 110, § 41 (Smith-Hurd Supp. 1981-82) (untrue allegations and denials in pleadings made without reasonable cause as the standard); MD. R. CIV. P. 604 (1977) (bad faith, without substantial justification or for delay as the standards); MASS. GEN. LAWS ANN. ch. 231, § 6F (Supp. 1981) (wholly insubstantial, frivolous and not advanced in good faith as the standards); MINN. STAT. ANN. § 549.21 (Supp. 1981) (bad faith standard); N.D. CENT. CODE § 28-26-01 (1974) (frivolous standard); WIS. STAT. ANN. § 814.025 (Supp. 1981-82) (frivolous standard).

202. MASS. GEN. LAWS ANN. ch. 231, § 6F (Supp. 1981).

203. *Id.*

204. *Id.*

205. *Id.* In *Katz v. Savitsky*, 413 N.E.2d 354 (Mass. App. 1980), the court found the plaintiff's

court to state its basis for an award provides a clear record for review. Also, this requirement encourages consistent awards, and gives future litigants the ability to predict with some certainty or accuracy their chances of recovering attorney's fees.

The statutory scheme in Wisconsin explicitly provides what a court must find before it can award reasonable attorney's fees for vexatious litigation.<sup>206</sup> Under section 814.025 of the Wisconsin Statutes,<sup>207</sup> the court must find that the claim was either brought solely for harassment purposes or that the claim was objectively groundless.<sup>208</sup> Thus, both subjective and objective standards are used. The harassment requirement depends on the subjective intent of the opposing party and the lack of legal merit depends on a reasonable person standard.

In *Sommer v. Carr*,<sup>209</sup> the Wisconsin Supreme Court applied the objective test to determine whether a claim was groundless.<sup>210</sup> The court said it is not the party's chance of prevailing that is controlling.<sup>211</sup> The important factor is whether the party's position is so indefensible that he or his attorney should have known that it was frivolous.<sup>212</sup> This objective approach provides a sound standard for the determination of groundlessness which could be applied under subsection C.

These areas, which are analogous to the vexatious requirement of section 12-341.01, suggest two important improvements to subsection C. First, Arizona courts should be required to provide the basis and rationale for awarding or denying attorney's fees under subsection C. This requirement would yield a sound record for review<sup>213</sup> and add a measure of con-

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action to be wholly groundless and brought in bad faith because the plaintiff could or would not give a coherent explanation of its complaint, which on its face had no factual support whatsoever. *Id.* at 357.

206. WIS. STAT. ANN. § 814.025(3) (Supp. 1981-82) provides:

In order to find an action, special proceeding, counterclaim, defense or cross complaint to be frivolous under sub.(1), the court must find one or more of the following:

(a) The action, special proceeding, counterclaim, defense or cross complaint was commenced, used or continued in bad faith, solely for purposes of harassing or maliciously injuring another.

(b) The party or the party's attorney knew, or should have known, that the action, special proceeding, counterclaim, defense or cross complaint was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law.

207. *Id.*

208. *Id.* But see *Auman v. Auman*, No. 15845, slip op. 8 n.1 (Ariz. Oct. 22, 1982) (both objective and subjective tests used together).

209. 99 Wis. 2d 789, 299 N.W.2d 856 (1981).

210. *Id.* at 799, 299 N.W.2d at 860.

211. *Id.* at 797, 299 N.W.2d at 859.

212. *Id.*; see *Auman v. Auman*, No. 15845, slip op. 8 n.1 (Ariz. Oct. 22, 1982) (vexatious litigation if party continues litigation after attorney advises him that suit lacks probable cause to terminate successfully; however, no such finding if attorney erroneously states that suit is meritorious).

213. See *infra* notes 254-58 and accompanying text. Also, in *Wenk v. Horizon Moving & Storage*, 131 Ariz. 131, 639 P.2d 321 (Ct. App. 1982), the court of appeals remanded to the trial court with instructions to clarify the basis for the denial of an award of attorney's fees under subsection A. *Id.* at 133, 639 P.2d at 323. The appellate court was unable to determine whether the trial court refused to award fees under its discretionary power or whether the trial court determined that the plaintiff had recovered in tort so as to make subsection A inapplicable. *Id.* at 132-33, 639 P.2d at 322-23. This shows the importance of trial courts giving reasons for their actions concerning awards of attorney's fees and could be a foreshadowing of future disclosure requirements.

sistency for future awards under subsection C.<sup>214</sup> Not only would this requirement promote fairness, it would give future litigants guidelines for determining whether they are entitled to attorney's fees.

Second, Arizona courts should define vexatious litigation in terms of the reasons for granting attorney's fees so that the statutory exception does not become the general rule.<sup>215</sup> The purpose for awarding attorney's fees in vexatious litigation is to punish the offending party<sup>216</sup> and to relieve the victim of the oppressive burden of litigation.<sup>217</sup> Rarely will there be cases where litigants openly admit or give evidence that their motives are for oppressive reasons;<sup>218</sup> therefore, the litigant's actions must be viewed in light of the legal sufficiency of the claim.<sup>219</sup> Naturally, the allegedly offending party should be given the opportunity to explain his conduct.<sup>220</sup> Finally, areas of the law which are presently the center of change and vigorous litigation are less likely to support a finding of vexatious litigation.<sup>221</sup>

#### IV. REASONABLE ATTORNEY'S FEES

Once the court decides to award attorney's fees under section 12-341.01, the amount to be awarded must be determined. The only statutory requirements are that the attorney's fees awarded be "reasonable"<sup>222</sup> and that they be made by the court and not the jury.<sup>223</sup> The procedures the court must follow, however, when awarding reasonable attorney's fees are not the same for actions arising out of contract as they are for vexatious litigation.

Section 12-341.01(B) explains the purpose and limits of amounts available in actions arising out of contract.<sup>224</sup> According to subsection B, the award is to mitigate the burden of the expense of litigation.<sup>225</sup> Mitigation does not, however, require full compensation.<sup>226</sup> Therefore, the award of reasonable attorney's fees is not based on the amount actually incurred. The actual fees incurred merely establish the maximum amount of the

214. One of the greatest criticisms by practicing attorneys is that awards under § 12-341.01 vary considerably from judge to judge, and although discretion is an essential element to this statutory scheme, some degree of consistency is desirable.

215. If vexatious litigation were equated with only failure on the merits, for example, there would not be much left of the general rule that each party must bear the costs of his attorney.

216. See *supra* notes 22-23 & 148 and accompanying text.

217. *Id.*

218. See *supra* notes 51-54 and accompanying text.

219. A Florida appellate court emphasized this point in *Chiles v. Beaudin*, 384 So.2d 175, 178 (Fla. App. 1980).

220. Subsection C allows the court to hear evidence as it deems appropriate, so the court has control over what it will consider. ARIZ. REV. STAT. ANN. § 12-341.01(C) (1982).

221. WIS. STAT. ANN. § 814.025(3)(b) (Supp. 1981-82); Note, *Attorney's Fees*, *supra* note 186, at 330.

222. ARIZ. REV. STAT. ANN. § 12-341.01 (1982).

223. ARIZ. REV. STAT. ANN. § 12-341.01(D) (1982). For the text of this section, see *supra* note 11.

224. ARIZ. REV. STAT. ANN. § 12-341.01(B) (1982). For the text of this section, see *supra* note 11.

225. ARIZ. REV. STAT. ANN. § 12-341.01(A) (1982).

226. *Id.*; see also *Cummings v. Aviation Specialties Trade*, 120 Ariz. 536, 540, 587 P.2d 255, 259 (Ct. App. 1978) (trial court emphasized mitigation role versus full compensation of the party).

award.<sup>227</sup> Instead, the amount awarded is determined by the respective merits and financial positions of the parties involved in the litigation.<sup>228</sup> The trial court may feel that both parties have legitimate legal positions and that under such circumstances, an award would not be appropriate because it would penalize a party for litigating a just claim or defense. The position of one party may be superior to the other and an award based on the relative merits of each side would ease the burden of a successful party with lesser resources,<sup>229</sup> while at the same time discouraging only unmeritorious litigation. If the trial court considers the relative merits and financial positions of the parties, awards under subsection A will act as deterrents to marginal claims and defenses because potential liability becomes a factor in whether a party pursues a claim or defense. The trial court, therefore, is in the best position to award attorney's fees that will mitigate the burden of establishing a just claim or defense.<sup>230</sup>

The Arizona appellate courts have given great deference to a trial court award made pursuant to subsection A.<sup>231</sup> In fact, the court in *Scafidì v. Puckett*,<sup>232</sup> found no abuse of discretion in the trial court's decision that both parties ought to bear the expense of their own attorney's fees.<sup>233</sup> The dispute in that case concerned the interpretation of a contract.<sup>234</sup> Because the dispute presented a valid controversy over the meaning of the contract, the court concluded that an award of attorney's fees would have discouraged meritorious, rather than unmeritorious, litigation.<sup>235</sup> Also, in *Altphilisch Construction Co. v. Torgerson Construction Corp.*,<sup>236</sup> the court upheld an award of attorney's fees where a buyer had to resort to legal process to gain possession of goods wrongfully withheld by the seller.<sup>237</sup> In this case, the defendant/seller had no legal grounds to defend his action; therefore, an award was held appropriate in light of the purpose of subsection A.<sup>238</sup> The legal sufficiency of a party's position, therefore, is central in determining what amount, if any, is reasonable to mitigate the burdens of litigation.<sup>239</sup>

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227. ARIZ. REV. STAT. ANN. § 12-341.01(B) (1982).

228. See *infra* notes 231-43 and accompanying text.

229. Catalina Foothills Ass'n, Inc. v. White, 132 Ariz. 427, 428, 646 P.2d 312, 313 (Ct. App. 1982).

230. See *supra* note 220. Because the trial court has heard arguments on the merits of the case, it can best assess the merits of each party's position. This view was stressed in Catalina Foothills Ass'n, Inc. v. White, 132 Ariz. 427, 428, 646 P.2d 312, 313 (Ct. App. 1982).

231. See *supra* notes 21-24 and accompanying text.

232. 118 Ariz. 589, 578 P.2d 1018 (Ct. App. 1978).

233. *Id.* at 590, 578 P.2d at 1019.

234. *Id.* at 589-90, 578 P.2d at 1018-19.

235. The Arizona courts have recognized this notion under § 12-2106 of the Arizona Revised Statutes which awards up to 10% of a monetary judgment or \$500 in other cases as a penalty for bringing a frivolous appeal. ARIZ. REV. STAT. ANN. § 12-2106 (1982). Where questions are raised that reasonable people could differ on, the award is inappropriate. Barrett v. Melton, 112 Ariz. 605, 608, 545 P.2d 421, 424 (1976). Also, an award is appropriate where the defense lacked any semblance of merit because it subjected the appellee to needless expense and delay. Compass Realty & Inv. Corp. v. A A Refrig. & Heating, Inc., 21 Ariz. App. 214, 217, 517 P.2d 1107, 1110 (1979).

236. 120 Ariz. 438, 586 P.2d 999 (Ct. App. 1978).

237. *Id.* at 440, 586 P.2d at 1001.

238. *Id.*

239. See *supra* note 235.

Recently, the Arizona Court of Appeals in *Catalina Foothills Association, Inc. v. White*,<sup>240</sup> recognized several factors a trial court might consider when awarding attorney's fees under subsection A. The court said that the trial court could consider whether the losing party would ultimately bear the burden of litigation or whether another, such as an insurance company, would bear the cost.<sup>241</sup> The court also said that the trial court could consider the financial position of the parties and the nature of the parties.<sup>242</sup> None of these factors, however, is dispositive and the trial court's decision should not be readily overruled on appeal.<sup>243</sup>

The award under subsection C is mandatory, and unlike the award under subsection A, the award in vexatious litigation situations is not limited by subsection B.<sup>244</sup> A strong argument, therefore, can be made that if a trial court finds a claim or defense to constitute vexatious litigation, an award of the actual amount of attorney's fees incurred should be made so long as the amount is reasonable in light of the prevailing community standards.

Determining the reasonableness of the attorney's fees actually incurred is left to the discretion of the trial court.<sup>245</sup> The reasonableness of the fees awarded under subsection C depends on the actual amount of the fees incurred and not a determination of what award might be reasonable given the litigating positions of the parties.<sup>246</sup> There are many alternatives for arriving at reasonable attorney's fees, and Arizona courts should adopt a framework for such a determination.<sup>247</sup>

The importance of guidelines in the determination of reasonable attorney's fees centers on consistency of awards and creating a sufficient record for appellate review of the awards.<sup>248</sup> Although subsection C provides no guidelines to the trial court, statutes which provide for the awards of attorney's fees in other situations do. Several Arizona statutes provide for the award of attorney's fees based upon the time and effort expended by

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240. 132 Ariz. 427, 646 P.2d 312 (Ct. App. 1982).

241. *Id.* at 428-29, 646 P.2d at 313-14.

242. *Id.*

243. *See id.*

244. *See supra* notes 22-23 and accompanying text. Subsection C gives the trial court discretion as to when it will hear evidence that it deems appropriate concerning the award of reasonable attorney's fees. ARIZ. REV. STAT. ANN. § 12-341.01(C) (1982). The evidence may be heard during the trial on the merits or separately, whichever the trial court finds is in the best interests of the litigating parties. *Id.* There is no expressed limitation on what may be considered reasonable attorney's fees.

245. *See supra* note 223.

246. *See supra* notes 240-43 and accompanying text.

247. *See Copper Liquor, Inc. v. Adolph Coors Co.*, 624 F.2d 575, 581 (5th Cir. 1980) (the court adopted 12 factors that the district court is to consider in awarding reasonable attorney's fees in anti-trust cases); *Lindy Bros. Bldrs., Inc. v. American R & S Sanitary Corp.*, 487 F.2d 161, 166-69 (3d Cir. 1973) (the court adopted a two-step process in awarding reasonable attorney's fees; ascertaining the services rendered and then valuing them), *modified*, 540 F.2d 102 (1976); ARIZ. REV. STAT. ANN. § 12-568 (1982) (eight factors for trial judge to consider in awarding reasonable attorney's fees in medical malpractice cases); ARIZ. REV. STAT. ANN. § 12-671 (1982) (reasonable attorney's fees awarded in actions to recover on bad checks are to be based on the time and effort expended by plaintiff's counsel); *Stoebeuck*, *supra* note 6, at 211-14. For a discussion on the award of reasonable attorney's fees under federal statutes, see generally Berger, *supra* note 3.

248. *See Copper Liquor, Inc. v. Adolph Coors Co.*, 624 F.2d 575, 581 (5th Cir. 1980); Berger, *supra* note 3, at 286.

counsel.<sup>249</sup> Also, detailed guidelines for the consideration of reasonable attorney's fees can be found in section 12-568 of the Arizona Revised Statutes<sup>250</sup> which awards reasonable attorney's fees in medical malpractice litigation. These guidelines, however, are just a verbatim recitation of factors that an attorney must consider in setting his fees under Disciplinary Rule 2-106 of the Model Code of Professional Responsibility.<sup>251</sup> There is a potential danger that such an array of factors would be mechanically applied.<sup>252</sup>

Numerous federal statutes also provide for the award of reasonable attorney's fees.<sup>253</sup> In general, two methods of determining reasonable attorney's fees have emerged from the federal courts. First, there are several factors which a district court must consider when determining reasonable attorney's fees.<sup>254</sup> These factors are much like those found in section 12-568.<sup>255</sup> The district court, however, must explain its findings and reasons for making an award.<sup>256</sup> This gives the appellate court a sufficient record for review.<sup>257</sup>

The second method considers a list of factors, but only after arriving at the "lodestar" figure.<sup>258</sup> The lodestar figure is the number of hours expended multiplied by the normal hourly rate charged by counsel.<sup>259</sup> Once this figure is determined, it is adjusted based on factors as complexity of

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249. ARIZ. REV. STAT. ANN. § 12-671 (1982) (awards attorney's fees to plaintiffs in action to recover on bad checks); ARIZ. REV. STAT. ANN. § 23-327 (Supp. 1981-82) (awards reasonable attorney's fees to minor-employee in minimum wage/unfair labor practice actions).

250. ARIZ. REV. STAT. ANN. § 12-568 (1982). See *infra* note 251 for the factors found in § 12-568 as adopted from DR 2-106 of the Model Code of Professional Responsibility.

251. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-106 (1981) provides in part: Factors to be considered as guides in determining the reasonableness of a fee include the following:

- (1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal services properly.
- (2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.
- (3) The fee customarily charged in the locality for similar legal services.
- (4) The amount involved and the results obtained.
- (5) The time limitations imposed by the client or by the circumstances.
- (6) The nature and length of the professional relationship with the client.
- (7) The experience, reputation, and ability of the lawyer or lawyers performing the services.
- (8) Whether the fee is fixed or contingent.

252. *Copper Liquor, Inc. v. Adolph Coors Co.*, 624 F.2d 575, 581 (5th Cir. 1980); *Berger, supra* note 3, at 286.

253. *Berger, supra* note 3, at 303 n. 104.

254. *Copper Liquor, Inc. v. Adolph Coors Co.*, 624 F.2d 575, 581 (5th Cir. 1980); *Waters v. Wisconsin Steel Works of Int'l Harvester Co.*, 502 F.2d 1309, 1322 (7th Cir. 1974) *cert. denied*, 425 U.S. 997 (1976); *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974); *Williams v. McKleithen*, 495 F. Supp. 707, 708 (M.D. La. 1980).

255. ARIZ. REV. STAT. ANN. § 12-568 (1982).

256. See *supra* note 225. See also IDAHO R. CIV. P. RULE 54(e)(2) (1980) (court must make a written finding as to basis and reasons for awards under Idaho Code § 12-121).

257. See *supra* notes 213-15 and accompanying text.

258. *Illinois v. Sangamo Constr. Co.*, 657 F.2d 855, 862 n. 6 (7th Cir. 1981); *Lindy Bros. Bldrs., Inc. v. American R & S Sanitary Corp.*, 487 F.2d 161, 166-69 (3d Cir. 1973), *modified*, 540 F.2d 102 (1976); *Stenson v. Blum*, 512 F.Supp. 680, 682-85 (S.D.N.Y. 1981).

259. *Stenson v. Blum*, 512 F.Supp. 680, 682 (S.D.N.Y. 1981), *aff'd*, 671 F.2d 496 (2d Cir. 1981).

litigation, quality of representation, and risk of nonrecovery.<sup>260</sup>

Both federal methods provide a basis for appellate review and more importantly, provide consistency in awards. Although the trial court is in the best position to assess the reasonableness of the attorney's fees,<sup>261</sup> such discretion should not be unlimited. Subsection C provides the trial court with unlimited discretion and there is little chance that an award will constitute an abuse of discretion.<sup>262</sup> The lack of any requirement of detailed findings as to the reasonableness of attorney's fees awarded under subsection C also makes appellate review more difficult. For subsection C to be effective and reliable in the prevention of vexatious litigation and the compensation of the victim, it must produce predictable results.

### CONCLUSION

The general rule in Arizona is that each party must bear the burden of attorney's fees in the absence of a contractual agreement or a statutory provision. Section 12-341.01 of the Arizona Revised Statutes authorizes the award of attorney's fees to successful parties in actions arising out of contract and to the victims of vexatious litigation. The Arizona courts have been quite active in awarding fees in actions arising out of contract. Much of the appellate examination of such awards has centered on what "arising out of contract" means when an action is based on both contract claims and tort claims. The general approach has been to examine the essence of the claim or defense instead of the labels the parties attach. In addition, the Arizona Supreme Court in *Sparks v. Republic National Life Insurance Co.*, adopted a "but for" test to determine whether an action arose out of contract. Simply stated, if the action could not have arisen but for the contract, then the action arises out of contract within the meaning of subsection A even though the claim is one in tort.

Determining the successful party can also present difficulties. Successful parties are not limited to those who receive a net monetary judgment, but rather are those who successfully obtain or avoid the relief being sought. A party who does not recover under subsection A, however, may still do so under subsection C.

The awards in actions arising out of contract are permissive, while those in vexatious litigation are mandatory. There are no specific guidelines for the court to follow in determining vexatious litigation and there has been little case law in Arizona concerning the issue. The greatest deficiency in the statutory scheme is that it does not require the court to give its reasons and the factual background upon which it makes or denies the award. This inhibits review of such awards. Vexatious litigation, however, should be given a restrictive meaning so as not to discourage meritorious litigation. Also, the more expansive the meaning given, the greater the encroachment on the general rule.

Finally, both subsections A and C call for reasonable attorney's fees.

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260. *Illinois v. Sangamo Constr. Co.*, 657 F.2d 855, 862 (7th Cir. 1981).

261. See *supra* note 232.

262. See *supra* notes 18-26 and accompanying text.



In actions arising out of contract, the court may award fees to mitigate the burden of litigation. The award is to be reasonable in light of the litigants' positions both legally and financially. The award, however, may not exceed the actual amount of fees incurred. Reasonableness in regards to vexatious litigation refers to the actual amount of fees incurred. As long as the actual fees are reasonable in light of community standards, the nature of the case, and the market value of the services, then the full amount should be awarded to the victim because the award is designed to punish and compensate.

Although section 12-341.01 leaves much discretion in the trial courts, this is desirable because the trial courts are in the best position to weigh the need for fee shifting in any particular case. This discretion, however, should not be unlimited, and therefore, the statutory scheme should require a trial court to make detailed findings regarding its award or denial of fees and provide comprehensive standards regarding what constitutes vexatious litigation. These requirements would provide a clear record for review, encourage consistent awards, and provide the litigants with some degree of certainty about whether they are entitled to attorney's fees.

