

By Jodie Steinberg

Counsel should carefully consider whether an award of attorneys' fees through the "tort of another" doctrine might apply.

# The Beginning of the Demise of the "American Rule"

While attorneys' fees are often awarded as a prevailing party's *costs* in accordance with contract or statute, knowing that your client will not have to pay attorneys' fees as *damages* if that client loses litigation is becoming

a comfort of the past. Notably, one area of the law has expanded and developed since the 1800s and may be leading to the demise of the so-called "American rule": the "tort of another" doctrine.

As litigators in the United States are aware, the United States follows the American Rule, which generally provides that each party involved in litigation is responsible for paying its own attorneys' fees and costs, unless provided otherwise by statute or contract. This rule is universally applied in a generic two-party lawsuit. However, a party can circumvent this rule through what is generally referred to as the "tort of another" doctrine, if the party is forced to file or defend a suit because of a third party's tort, which typically occurs in professional malpractice suits.

This exception to the American rule, relied on by state courts to award attorneys' fees as damages, is referenced in the Restatement (Second) of Torts: "The damages in a tort action do not ordinarily include compensation for attorney fees

or other expenses of the litigation. [But] [o]ne who through the tort of another has been required to act in the protection of his interests by bringing or defending an action against a third person is entitled to recover reasonable compensation for loss of time, attorney fees and other expenditures thereby suffered or incurred in the earlier action." 1979 Restatement (Second) of Torts §914.

Attorneys and clients sometimes do not consider their opponents' attorneys' fees in evaluating cases due to the American rule. However, given the "tort of another" doctrine, counsel and their clients should consider their opponents' attorneys' fees in evaluating the exposure that clients will face in cases.

## The History and Development of the "Tort of Another" Doctrine

Many state courts have been applying the "tort of another" doctrine to circumvent the American rule under a common law indemnity theory since the 1800s, although it may not have been phrased as the "tort of another" doctrine. The rationale was that the attorneys' fees incurred due to the tort of a third party were the natural and proximate consequences of the tort, which should be recoverable by a plaintiff. *See,*



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*e.g., Philpot v. Taylor*, 75 Ill. 309 (1874). A plaintiff usually recovered attorneys' fees in a subsequent lawsuit, during which a court would perform an analysis to determine whether a party was required to bring the original action to protect its interests due to the "tort of another."

To determine whether a party has been required to bring an action to protect its interests as a result of a tort of another, a court evaluates whether the litigation was a "natural and necessary" consequence of the defendant's wrongdoing. Remote, uncertain and contingent consequences do not afford a basis for recovery. *See, e.g., Lovett v. Estate of Lovett*, 250 N.J. Super. 79, 94 (N.J. Ch. 1991) (finding that the decedent's children's chose to bring various claims but that they did not prove that the claims were reasonably necessary to correct defendant's negligence).

Ever since the Restatement of Torts §914 was codified in 1939, many state courts have relied on that section to justify damages awards of attorneys' fees. Over the years, the "tort of another" doctrine has developed and expanded. For example, in *De La Hoya v. Slim's Gun Shop*, 80 Cal. App. 3d Supp. 6 (Cal. App. Dep't Super. Ct. 1978), a California state court expanded the doctrine to breach of contract situations, rather than limiting it to tort cases, as courts had previously. Further, as the law developed, it became generally understood that to recoup attorneys' fees under the "tort of another" doctrine, the doctrine must actually be pled in a complaint or cross-complaint. This was not always the case. *See, e.g., Prentice v. North American Title Guaranty Corp.*, 59 Cal. 2d 618 (Cal. 1963). Moreover, while it is true that in some cases that have discussed this third-party exception to counsel fees, courts have referred to a requirement that the litigation involving the third party take place in a "prior proceeding," and more recently, courts have clarified that it is not necessary for the litigation against the third party to have been separate from the litigation between the plaintiff and the defendant. *See, e.g., Wood v. Old Security Life Insurance Co.*, 643 F.2d 1209, 1218 (5th Cir. 1981). By the time that the third version of the Restatement of Torts §914 is codified, counsel should recognize that this doctrine is here to stay, and it will continue to develop and expand.

Some attorneys may be unaware that their states follow the "tort of another" doctrine because some courts do not phrase the doctrine as "tort of another." Tennessee, for example, calls it the "independent tort theory." Missouri calls it the "collateral litigation" exception, and Florida and Michigan call it the "wrongful acts" doctrine. Regardless of the terminology, most state courts have fashioned some sort of exception to the American rule based on the "tort of another" doctrine.

When applying the doctrine, state courts have not simply awarded attorneys' fees in certain kinds of cases in which circumventing the American rule might make some sense, such as cases involving fraud or egregious conduct. Although some courts have limited awards of attorneys' fees only to cases involving fraud, as in *De Lage Landen Fin. Servs. v. Miramax Film Corp.*, state courts have recognized that no blanket rule exists that limits awards of attorneys' fees only to fraud cases. *De Lage Landen*, 2009 U.S. Dist. LEXIS 20663, n.2 (E.D. Pa. 2009). For example, in *Autrey v. Trkla*, 350 N.W.2d 409, 413 (Minn. Ct. App. 1984), an attorney was ordered to pay for his client's attorneys' fees as damages that had been incurred during litigation caused by the attorney's negligence.

The "tort of another" exception has been widely used by most state courts across the country for decades. Counsel should investigate whether their state follows the "tort of another" doctrine, since an award of attorneys' fees can dramatically influence the ultimate value and exposure of a case.

### **The Difference Between the "Tort of Another" Doctrine and the Doctrine of Implied Equitable Indemnity**

Understanding the difference between the "tort of another" doctrine and equitable indemnity is important because one may apply in situations in which other does not to support an award of attorneys' fees.

The duty to indemnify for attorneys' fees arises from a duty to provide complete indemnity, which includes the duty to provide a defense. However, the obligation to pay attorneys' fees under the "tort of another" doctrine does not arise from a duty to provide a defense. Also, an indemnitee can seek indemnity even if that indemnitee may have been partially and directly negligent.

However, that is not the case with the "tort of another" doctrine, as discussed in more detail later. Moreover, indemnity can apply to a subrogee situation, whereas the "tort of another" doctrine would not apply in such a situation, since the doctrine only applies if the person from whom one seeks fees actually committed the tort. In short, to invoke the "tort of another" doctrine, the attorneys'

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fees as damages must actually arise from a tort committed by the defendant.

Therefore, when pleading the "tort of another" doctrine, identify a clear violation of a traditional tort duty between the tortfeasor, who is required to pay the fees, and the person seeking compensation for those fees.

A perfect example of how the "tort of another" doctrine and equitable indemnity differ is in the case *Wilson v. Cadwell*, 1988 Ohio App. LEXIS 1883 (Ohio Ct. App. 1988). In that case, Wilson and Cadwell were president and vice-president of a securities broker-dealer corporation. The dispute arose from Cadwell's alleged fraudulent conduct in selling unregistered securities in the form of limited partnership interests to the general public. Cadwell's activities on behalf of the corporation prompted an investigation by the National Association of Securities Dealers (NASD), which took disciplinary action against both parties. The corporation also lost a major investment due to Cadwell's activities, which prompted an investigation and the retention of counsel by Wilson.

Wilson subsequently sued Cadwell, seeking indemnity for attorneys' fees that he allegedly expended defending the NASD action. The trial court awarded Wilson his

attorneys' fees from Cadwell. On appeal, both parties cited the "tort of another" doctrine under the Restatement. The court stated that the "tort of another" doctrine was consistent with the general theory of indemnity, which is "the right of a person who is only secondarily liable to recover from the person primarily liable for proper expenditures paid to a third party injured

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through the violation of their common duties." *Wilson v. Cadwell*, 1988 Ohio App. LEXIS 1883, at 7 (citations omitted).

In reversing the award of attorneys' fees, the court noted that Wilson was unable to differentiate between the attorneys' fees spent defending himself during the NASD investigation and the attorneys' fees spent while investigating Cadwell's activities related to the lost investment. The court stated that the lost investment was a harm suffered by the corporation, not by Wilson directly, and therefore, it was an independent claim beyond the scope of indemnification. However, Wilson probably could have obtained his attorneys' fees under the "tort of another" doctrine for the fees incurred in investigating Cadwell, but since Wilson failed to allege the "tort of another" doctrine in his complaint against Cadwell, the court refused to award attorneys' fees.

Therefore, as a practitioner, when seeking attorneys' fees under an indemnification theory, it is always good practice to also allege the right to recover attorneys' fees under the "tort of another" doctrine, in case indemnity does not apply. You must plead the "tort of another" doctrine in a complaint or cross-complaint or a court will not apply the doctrine to award fees. Also, if a party seeks attorneys' fees as damages through the "tort of another" doctrine, the claim must be presented to a trier of fact as part of the case-in-chief, unless it is stipulated to post-judgment consideration by the judge.

### The Safeway and the Peters Rule

In deciding whether to plead the "tort of another" doctrine, counsel should find out whether their state follows the *Safeway* or the *Peters* rule.

In *Safeway Stores, Inc. v. Chamberlain Protective Services, Inc.*, 451 A.2d 66, 70 (D.C. 1982), the court explained in detail whether the "tort of another" doctrine applied in a case in which Safeway was found vicariously liable for the tort of its employee, but successfully defended itself against allegations of its own negligence. The court ultimately held that Safeway was not entitled to attorneys' fees from its employee because the fact that Safeway successfully defended itself from charges of its own negligence was immaterial to its obligation to bear its own attorneys' fees. Since Safeway was obliged to conduct a defense for its own benefit, the court found that the general rationale that would have allowed attorneys' fees recoupment did not apply.

The rule articulated in the *Safeway* case is disturbing because if a plaintiff pleads or alleges that an employer's negligence amounted to more than vicarious liability, even if the employer is ultimately found only vicariously liable, the employer could not recoup attorneys' fees from the employee.

Conversely, an Iowa court in *Peters v. Lyons*, 168 N.W.2d 759 (Iowa 1969), held that the facts as found by the trier of fact, not the allegations in the pleadings, should control the recovery of attorneys' fees. The *Peters* court recognized the problem inherent in the *Safeway* court's determination of the *Safeway* case, stating,

Is the determination of recoverability of attorney fees to be based on the charges made by the injured party or

on the facts as found by the court or jury?... [I]t may be argued the determination is to be made on whether primary acts are alleged. We reject this basis for such determination. First, the indemnitee may wisely settle with a claimant before suit is actually filed, indeed, it may be his duty to do so under certain circumstances, and attorney fees may be incurred in the process. Second, the determination of this matter as between indemnitor and indemnitee should not rest on the presence or absence of such pleading by a third party, who through an overabundance of caution or optimism alleges more (or less) than he can prove. The decision must be made on the facts as found by the trier thereof.

*Peters v. Lyons*, 168 N.W.2d 759, 770 (Iowa 1969).

Surely the *Peters* rule more accurately reflects the concept behind the "tort of another" doctrine, which is to promote fairness and justice when a defendant has been forced into a lawsuit because of the tort of a third party. As mentioned, counsel should determine whether their jurisdiction follows the *Safeway* or the *Peters* approach regarding the "tort of another" doctrine, as this impacts how you will evaluate a case, and how you should draft a pleading.

### Application of the Doctrine in Professional Liability Cases

One area of the law in which attorneys' fees have increasingly been awarded under the "tort of another" doctrine is in professional liability cases. One of the reasons is because in a professional liability case, due to the negligence or fraud of a professional, a plaintiff commonly is forced to sue or defend him- or herself against others. For example, in real estate professional liability cases a buyer or seller of real property is commonly forced to sue to quiet title due to the negligence or fraud of the escrow or title officer. There have been many cases in which the "tort of another" exception has been applied to award attorneys' fees in situations involving an escrow or title agent's negligence. *See, e.g., Prentice v. North American Title Guaranty Corp.*, 59 Cal. 2d 618, 621 (Cal. 1963). In *Prentice*, for instance, a negligent escrow holder made it necessary for the vendor of land to file

a quiet title action against a third person. The attorneys' fees incurred by the vendor in prosecuting the action were recoverable as an item of the vendor's damages in an action against the escrow holder.

It seems easy to understand why professional liability cases would involve a violation of a traditional tort duty between the tortfeasors, who are required to pay the attorneys' fees, and the parties seeking compensation for those fees. Persons generally rely on the skills, education and expertise of professionals in various fields. If those professionals provide faulty advice, act negligently or supply fraudulent work products, courts have shown willingness to award attorneys' fees as damages. For example, in *Myers v. Adler*, 188 Mo. App. 607 (1915), a broker fraudulently represented to his principals that a certain farm was of good quality and worth a certain amount of money, and thereby induced his principals to enter into a contract through which they exchanged their own property for the valueless farm. The principals learned the true situation in time to rescind the contract, but they had to expend a considerable amount of money to defend a suit for specific performance, which they finally won. In an action brought against the broker for damages because of his fraud, the court held that the expenses of the suit had been incurred necessarily, due to the broker's tort, and therefore, had been recoverable as damages.

In *Kadlec Med. Ctr. v. Lakeview Anesthesia Assocs.*, 527 F.3d 412, 426 (5th Cir. 2008), Dr. Berry's treatment, while under the influence of Demerol, led to a patient's near-death, resulting in a lawsuit against Kadlec Medical Center. Kadlec cross-complained against Lakeview Medical and several doctors who worked for Lakeview Medical for failing to disclose to Kadlec that Lakeview Medical had discovered that Dr. Berry was a Demerol addict and that he was subsequently discharged. Kadlec alleged that the tortious activity of Lakeview Medical and several doctors who worked for Lakeview Medical, in particular, writing recommendation letters for Dr. Berry, led to Kadlec hiring Dr. Berry and the resulting millions of dollars that it had to spend settling the patient's lawsuit. The court awarded Kadlec its attorneys' fees.

Many different kinds of professional liability cases would seem to justify attor-

neys' fees awards, for instance cases involving fraud by or negligence of an appraiser, escrow company, title company, doctor, attorney, broker or agent or surveyor. And the list goes on. In fact, in many cases attorneys' fees have been awarded under the "tort of another" doctrine. *Gray v. Don Miller & Associates, Inc.*, 35 Cal. 3d 498 (Cal. 1984) (real estate broker's fraud); *Tarnowski v. Resop*, 236 Minn. 33 (Minn. 1952) (agent's fraud); *Murphy v. Fidelity Abstract & Title Co.*, 114 Wash 77 (Wash. 1920) (escrow holder's negligence); *Prentice v. North Am. Title Guaranty Corp., Alameda Division*, 59 Cal. 2d 618 (Cal. 1963) (abstract company's negligence); *Earven v. Smith*, 127 Ariz. 354 (Ariz. Ct. App. 1980) (escrow holder's negligence); *Auxier v. Kraisel*, 466 A.2d 416 (D.C. 1983) (property assessor's negligence); *Tetherow v. Wolfe*, 223 Neb. 631 (Neb. 1986) (real estate broker's negligence); *Katz v. Schachter*, 251 N.J. Super. 467 (N.J. Super. Ct. App. Div. 1991) (real estate broker's fraud); *Hoage v. Westlund*, 43 Ore. App. 435 (Or. Ct. App. 1979) (title company negligence); *Whitelaw v. Brooks*, 138 S.W.3d 890 (Tenn. Ct. App. 2003) (surveyor negligence); *South Sanpitch Co. v. Pack*, 765 P.2d 1279 (Utah Ct. App. 1988) (title company negligence); *Meas v. Young*, 417 N.W.2d 55 (Wis. Ct. App. 1987) (real-estate broker's negligence); *Highlands Underwriters Insurance Co. v. Elegante Inns, Inc.*, 361 So. 2d 1060 (Ala. 1978) (professional negligence of an insurance broker).

What the professional liability cases cited directly above have in common is that evidence existed of negligence or fraud committed by professionals that caused the plaintiffs to incur substantial attorneys' fees to essentially resolve the mistakes of the professionals. With careful pleading, courts would likely award attorneys' fees granted in all cases in which the professionals' fault caused litigation if the parties seeking the fees have been faultless. However, some states, such as Michigan, still refuse to extend the "tort of another" doctrine to professional negligence cases. See, e.g., *J.M.S. v. Schwartz*, 2000 Mich. App. LEXIS 1541 (Mich. Ct. App. 2000). Nevertheless, considering the nation as a whole, this seems to be the minority view, and counsel should not assume that their state will not extend the doctrine to professional negligence cases. Given the historical pro-

gression and development of the doctrine nationwide, it would be unsurprising if states such as Michigan began to extend the doctrine to professional negligence cases in the future.

Although professionals should be wary because courts seem willing to award attorneys' fees in professional liability cases, there is light at the end of the tunnel. Even

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in cases of evident professional liability, a court will generally not award attorneys' fees under the "tort of another" doctrine if the plaintiff brought the suit in haste. For example, in *Johnson v. Martin*, 423 So. 2d 868 (Ala. Civ. App. 1982), a landowner sued a surveyor, and the landowner wanted to recoup attorneys' fees. The court denied the request because the landowner could have accepted the surveyor's survey as correct, but instead, the landowner proceeded to have the court establish the correct boundary line. The court refused to award attorneys' fees as damages since the fees were not the natural and proximate consequences of the surveyor's wrong, but were incurred because the landowner rashly filed suit.

When recommending whether a client should file suit, keep in mind that to seek attorneys' fees under the "tort of another" doctrine those fees must have been incurred due to underlying professional misconduct. Courts will not award attorneys' fees incurred in filing suits to prevent problems or future litigation.

### Exceptions to the Doctrine's Applicability

You can make very few arguments opposing an award of attorneys' fees through **American Rule**, continued on page 69

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the “tort of another” doctrine if, upon first glance, it seems to apply. However, in some situations you may possibly defeat a claim for attorneys’ fees sought through the “tort of another” doctrine.

For instance, if a case involves multiple, joint tortfeasors, you might enjoy some success. In reversing a judgment for attorneys’ fees against one of three joint tortfeasors in *Vacco Industries, Inc. v. Van Den Berg*, 5 Cal. App. 4th 34, 57, (1992), the court stated:

There is nothing about their relationship or their conduct that justifies singling out Van Den Berg as the one whose conduct caused Vacco to have to prosecute a legal action against the other two.... The rule of *Prentice* was not intended to apply to one of several joint tortfeasors in order to justify additional attorney fee damages. If that were the rule there is no reason why it could not be applied in every multiple tortfeasor case with the plaintiff simply choosing the one with the deepest pocket as the ‘*Prentice* target.’

The *Vacco* rule seems a bit unfair, because it appears to insulate third parties from liability for attorneys’ fees if several tortfeasors harmed a plaintiff or defendant, rather than simply one tortfeasor. The *Vacco* rule will especially bring harsh results when a party is dealing with a conspiracy situation, since in that situation numerous joint tortfeasors are commonplace.

Also, the “tort of another” exception

does not apply if “it appears that a defendant, in part at least, is defending himself against claims of his own wrongdoing.” *Greene v. Emersons Ltd.*, 1985 U.S. Dist. LEXIS 18393 (S.D.N.Y. 1985). See also *Brochner v. Western Insurance Company*, 724 P.2d 1293 (Colo. 1986) (stating that the “tort of another” exception to the general rule prohibiting attorneys’ fees awards applied only if the party seeking such attorneys’ fees was without fault in the underlying action).

If your client bears even one percent of direct liability in a case, a court will probably deny an award of attorneys’ fees, even if the client was forced to defend a suit mainly due to a third party’s tort. Again, counsel should keep this in mind when recommending a course of action to a client. Filing suit may not be the best approach, rather than engaging in alternative dispute resolution, if you believe that the litigation will prove costly and there is a chance that your client will be found liable. This is true especially if one of your client’s goals is to recoup attorneys’ fees from a third-party tortfeasor.

### Conclusion

Since most state courts across the nation have been willing to award attorneys’ fees as damages under the “tort of another” doctrine, counsel should consider pleading the “tort of another” doctrine as a cause of action in their lawsuits.

Especially when dealing with professional liability cases, counsel should carefully

consider whether an award of attorneys’ fees through the “tort of another” doctrine might apply. If you believe that the doctrine might apply, this will greatly impact how you evaluate a case for a client.

Unfortunately, although sometimes a person must bring or defend a lawsuit due to the tortious acts of third parties, if the case involves several joint tortfeasors, a court will not likely award attorneys’ fees. So far, the courts have not extended the “tort of another” doctrine to situations in which numerous joint tortfeasors have caused torts. Yet, given the fairness rationale behind the “tort of another” doctrine, it would be unsurprising if the doctrine was eventually extended to multiple tortfeasor situations, if the courts can devise a way to prevent plaintiffs from simply choosing the “deepest pockets” to go after for attorneys’ fees.

Lastly, give forethought to some other significant implications of pleading the “tort of another” doctrine. First, an insurance company involved in defending a case may not consider attorneys’ fees under the doctrine covered under the terms of the applicable insurance policy. Also, if a party seeks attorneys’ fees in a cause of action through the “tort of another” doctrine, then arguably the attorney’s billing records would become discoverable during the litigation and subject to attack. Counsel should take care in deciding whether to plead the “tort of another” doctrine and may want to agree to stipulate to post-judgment consideration by the judge to protect billing from discovery until after a trial. 