# The Unamerican Rule on Attorneys' Fees

## Our Civil System's Failure

BY SID A. HORWITZ

Our system of jurisprudence is solidly based on the fundamental principle that victims of another's tort or contract breach are to be made whole. The general rule of damages law requires that money be awarded to place the plaintiff in the position he or she would be in if the tort or breach of contract had not occurred. Conversely, there is no reason why defendants who prevail in defeating a plaintiff's claim should not be made whole.

The equitable notion that parties be made whole is significantly undermined by the American Rule, which prohibits the award of attorneys' fees except in limited circumstances. As the American Rule has its genesis in common law, there is no reason why it could not and should not be overruled by judicial fiat.

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## The Harm Caused

Our judicial system fails victims of economic torts and defendants alike by not awarding attorneys' fees to the prevailing party. Unlike breach of contract cases, for which A.R.S. § 12-341.01 allows the prevailing party to recoup his or her reasonable attorneys' fees, parties in economic tort cases have no such right. Unlike personal injury cases, there is no built-in mechanism for claimants to recover their attorneys' fees through "pain and suffering" damages, which are in reality artificial mechanisms to assure payment of attorneys' fees. In fact, the personal injury plaintiff achieves an unfair advantage over the personal injury defendant, who has no opportunity to be made whole under any circumstance. In economic tort cases, neither party has the ability to be made whole.

A major impediment to the fundamental right to be made whole is the American Rule, which denies the prevailing party the right to recover attorneys' fees in many cases. The nonrecoverability of attorneys' fees fosters nuisance litigation and "economically motivated" settlements, which have nothing to do with the merits. The nonrecoverability of attorneys' fees also encourages the stubborn defense of valid cases in order to make the claimant's claim unprosecutable in practice. A plaintiff who must spend $25,000, $50,000 or $100,000 to "prevail" against a defendant at fault for an economic tort is still a loser—and so is the defendant who must spend $25,000, $50,000 or $100,000 to defeat an invalid claim.

## Social Goals Advanced

What harm is there is granting the prevailing party in all cases the right to recover reasonable attorneys' fees and other expenses? What social policy could possibly be advanced for denying prevailing parties the right to be made whole? Could it be to discourage litigation or punish litigants for resorting to civil remedial law?

This hardly seems like a lofty goal. Without the right to redress (and to defend the right to redress), civilized society falls into anarchy, in which the law of the jungle controls. Civil litigation should have the positive attributes of both discouraging bad behavior and reducing the need for governmental regulation and control through taxpayer-funded bureaucracies.

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Of course, if the social policy to be advanced is to discourage litigation, one must ask why that is so, and whether we are accomplishing our goal. It sure doesn't seem that we are; courts are as overloaded as ever with civil cases of all types. If we are going to have a civil case system, the role of judges should be to administer justice. Unfortunately, the American Rule of attorneys' fees hampers judges from doing just that.

## *Barmat* and *Sparks*

The Arizona case of *Barmat v. John and Jane Doe Partners A-D*[1] has illogically turned A.R.S. § 12-341.01 on its head so that professional negligence cases (which directly arise from and could not exist but for a contractual relationship) are not economically viable to sue on or to defend. Cases against attorneys, accountants, architects, engineers, contractors, appraisers, insurance agents and a host of other professionals are discouraged due to economics. The same is true of intentional tort cases, such as interference with contract, trespass and conversion cases. The ethical attorney must advise such claimants that their $25,000, $50,000 or possibly even $100,000 case is not worth pursuing—even where liability is fairly clear. By the same token, regardless of the merits of their defense, defendants are motivated to settle cases for purely economic reasons. This is an abomination of justice in a society that should have the laudatory goal of seeing disputes adjudicated upon their merits.

The *Barmat* decision usurped legislative authority, violated legislative intent, illogically interpreted the law and unjustifiably restricted claimants' access to the courts by diluting their actual net recovery. The real effect of the *Barmat* decision is to chill so-called small claimants from pursuing just claims against professionals who do not properly perform their contractual obligations.

In *Sparks v. Republic National Life Insurance Co.*,[2] the Arizona Supreme Court employed logic that allowed for the recovery of attorneys' fees in bad-faith cases against insurance companies. Although *Barmat* attempted to reconcile its holding with *Sparks*, there is no real distinction between these two cases. There is no express language in the insurance policy which states that an insurer shall act in "good faith." This is a duty that evolved through common law decisions interpreting the relationship between insurers and insureds. In other words, it is implied-in-law, not in-fact. Regardless of the semantics employed, if one employs the true "but for" test that *Barmat* purports to hold as being determinative, the said test is met in a professional negligence context.

The genesis of the relationship between attorneys and other professionals and their

clients is contractual in nature. "But for" the existence of that contract, there would be no relationship, and there could be no claim. Under the *Sparks* test, "as long as the cause of action and tort could not exist but for the breach of contract," attorneys' fees are awardable. In fact, A.R.S. § 12-341.01 does not require there to be a breach of any contractual duty; it merely states that in any contested action *arising out of* an express or implied contract, attorneys' fees are awardable.

## How *Barmat* Falls

The *Barmat* analysis begins by acknowledging that a contract between a lawyer and client implies competent and ethical representation. In truth, all contracts incorporate the law by implication. Under the ethical rules, which are an implied part of the attorney–client contract, "A lawyer shall provide competent representation." (*See* ER 1.1.) Despite its acknowledgment that the professional's contract with his client necessarily incorporates the law, *Barmat* proceeds to circularly evade the logical conclusion of such implication.

First, the Arizona Supreme Court analogized a professional's contractual relationship with an ordinary negligence action by a bus passenger against his carrier or by a tenant against his landlord. But an ordinary negligence action for personal injuries is not equivalent to an action brought primarily for economic damages by a client who enters into a contract with an attorney. Unlike personal injury cases, which allow for the award of pain and suffering damages, there is no such built-in mechanism in economic tort cases.[3]

Second, the Arizona Supreme Court provided no specific authority for its belief that the text of A.R.S. § 12-341 does not require "so broad of an interpretation." The legislative intent of A.R.S. § 12-341.01 could not be more clear: It is to "mitigate the burden of the expense of litigation to establish a just claim or a just defense." A.R.S. § 12-341.01 does not distinguish between implied-in-law and implied-in-fact duties. This is judicial rhetoric, which was employed in *Barmat* to evade the broad intent of the Legislature to allow prevailing parties in claims *arising out of contracts*, express *or implied*, to recover attorneys' fees to mitigate the burden of litigation.

Third, as for the Arizona Supreme Court's citation to the *Wagenseller* case as evidence of legislative intent, that case in fact indicates an intent contrary to the holding in *Barmat*. *Wagenseller* quoted Senator Walsh, who stated that the purpose of A.R.S. § 12-341.01 "would bring Arizona more in line with a portion of the British system where they have less litigation than the United States."[4] Under the "English Rule," attorneys' fees are awarded to all litigants as costs.[5] If the Arizona Supreme Court truly believes the Arizona Legislature intended to bring Arizona more in line with the English Rule, it should broadly interpret A.R.S. § 12-341.01 so as to be consistent therewith.

Fourth, the Arizona Supreme Court's reliance on *Salt River Project Agriculture Improvement and Power District v. Westinghouse Electric Corp.*[6] is misplaced. *Salt River Project* held that where a party's damages were primarily "economic" in nature as opposed to representative of personal injury or property damage, the Court would look to the contract in determining the remedies of the parties. If anything, *Salt River Project* supports the notion that an economically damaged plaintiff has claims that are essentially contractual in nature. Under this logic, attorneys' fees should be recoverable under A.R.S. § 12-341.01.

## Conclusion

Justice Oliver Wendell Holmes, Jr., once wrote that "The life of the law has not been logic: It has been experience." Regardless of whether law should be governed by logic or experience, it is supposed to be about fairness. The effect of the *Barmat* decision is to discourage plaintiffs with just, albeit so-called small, claims from obtaining a fair and full recovery and to discourage defendants from contesting nuisance lawsuits.

The effect of our Rules of Civil Procedure, including pleadings, motions, discovery, disclosure, depositions, pre-trial procedures and trial, has been to cause even the smallest of claims to conservatively result in attorneys' fees of nothing less than $25,000 (based on "reasonable" hourly rates). Does this mean that a person who has a claim for "only" $10,000, $20,000 or $30,000 or even more may as well just "forget about it" because the economics do not justify resort to the court system?

It is high time for the American Rule to disappear into the sunset. Let us adopt a rule whereby all prevailing parties, plaintiffs and defendants alike, may achieve a full and fair recovery and be made whole.

endnotes

1. 747 P.2d 1218 (Ariz. 1987).
2. 647 P.2d 1127 (Ariz. 1982).
3. In furtherance of the goal of limiting recovery so as to discourage litigation, in *Reed v. Mitchell and Timbanard, P.C.*, 903 P.2d 621 (Ariz. Ct. App. 1995), the Arizona Court of Appeals held that emotional distress damages are not recoverable in cases against professionals involving purely economic injury. According to the Arizona Court of Appeals, distress only results from physical injury. As a matter of common sense, everyone knows that economic damage causes stress. A court probably could take judicial notice that economic difficulties cause stress and distress. The *Reed* case simply employs another fiction to limit recoverability in cases involving professionals.
4. *See Wagenseller v. Scottsdale Mem'l Hosp.*, 710 P.2d 1025, 1046 (Ariz. 1985).
5. *See* Rambow, Note, *Statutory Attorneys Fees in Arizona: An Analysis of A.R.S. Section 12-341.01*, 24 Ariz. L. Rev. 659, 661 (1982).
6. 694 P.2d 198 (Ariz. 1984).