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**Recovery Of Attorney's Fees In Civil Cases In Virginia:  
"The American Rule" And Its Exceptions**

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## I. THE "AMERICAN RULE" DEFINED.

- A. **Federal Case Law:** Generally, "the American Rule" governs the awarding of attorney's fees in federal courts. The "American Rule" provides that each party should bear the cost of its litigation and, ordinarily, the prevailing litigant is not entitled to collect reasonable attorney's fees from the loser. Congressional authorization by statute may except to the American Rule and permit a court to require one party to pay attorney's fees to the other. A court's authority to enforce its own orders by assessing attorney's fees for the willful violation of a court order, and a court's empowerment to award fees against a losing party who has acted in bad faith, vexatiously, wantonly, or for oppressive reasons, are other exceptions to the American Rule. *Cherry v. Arendall*, 247 B.R. 176 (Bankruptcy E.D.Va. 2000).

As recently as August 16, 2000, the Fourth Circuit restated what is generally referred to as the American Rule against the recovery of attorney's fees:

1. **The American Rule Stated:** ". . . In the United States, each party in a lawsuit bears its own attorneys' fees 'unless there is express statutory authorization to the contrary.'" *Kreischer, et al. v. The Kerrison Dry Goods Company*, 229 F.3d 1143 (4th Cir., S.C.)(2000), citing *Hensley v. Eckerhart*, 461 U.S. 424, 429, 76 L. Ed. 2d 40, 103 S. Ct. 1933 (1983).
2. No analysis of the "American Rule" is complete without an understanding of its origins, its rationale, and its exceptions:

Although the traditional American rule ordinarily disfavors the allowance of attorney's fees in the absence of statutory or contractual authorization, federal courts, in the exercise of their equitable powers, may award attorney's fees when the interests of justice so require. Indeed, the power to award such fees "is part of the original authority of the chancellor to do equity in a particular situation," . . . and federal courts do not hesitate to exercise this inherent equitable power whenever "overriding considerations indicate the need for such recovery."

*Hall v. Cole*, 412 U.S. 1, 4-5 (1973).

Instead of limiting the equity court's power to create exceptions, the United States Supreme Court in *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161, 164 (1939) stated that "[a]s in much else that pertains to equitable jurisdiction, individualization in the exercise of a discretionary power will alone retain equity as a living system

and save it from sterility . . . . In any event such allowances are appropriate only in exceptional cases and for dominating reasons of justice." The exceptions to the American rule generally arise: (1) from conduct that is found to be in bad faith, *fraudulent*, wanton, willful, vexatious, harassing or oppressive; or (2) where the legal fees confer a substantial benefit on an ascertainable class of people. "The variety of factual circumstances in which this principle [of judicial exception] has been applied indicates that 'dominating reasons of justice' has been the guide to its application." *Local No. 149 International Union, United Automobile, Aircraft and Agricultural Implement Manufacturers of America v. American Brake Shoe Co.*, 298 F.2d 212, 214 (4th Cir. 1962), *cert. denied*, 369 U.S. 873 (1962).

3. **Recognized Exceptions:** Notwithstanding the American Rule, a federal court may award attorney's fees through inherent power. At least four exceptions have been recognized (three by the United States Supreme Court and one by the Fourth Circuit):
  - (1) **The "Common Fund" Exception:** Where a party's litigation efforts directly benefit others. *Kreischer, et al. v. The Kerrison Dry Goods Company*, 229 F.3d 1143 (4th Cir., S.C.)(2000).
  - (2) **Where a party willfully disobeyed a court order.** *Kreischer, et al. v. The Kerrison Dry Goods Company*, 229 F.3d 1143 (4th Cir., S.C.)(2000).
  - (3) **The "Bad Faith" Exception:** Where a party acts in bad faith, vexatiously, or for oppressive reasons. See *Chambers v. NASCO, Inc.*, 501 U.S. 32, 45-46, 115 L. Ed. 2d 27, 111 S. Ct. 2123 (1991). *Kreischer, et al. v. The Kerrison Dry Goods Company*, 229 F.3d 1143 (4th Cir., S.C.)(2000).
  - (4) **The "Essential to Equity" Exception:** The Fourth Circuit also has recognized an "essential to equity" exception that may apply in exceptional circumstances. See *Rolax v. Atlantic Coast Line R.R. Co.*, 186 F.2d 473 (4th Cir. 1951).
4. **Federal Exceptions:** An exception has been recognized where a party has to defend his title to certain property against baseless and vexatious litigation. See *Guardian Trust Co. v. Kansas City Southern Ry. Co.*, 28 F.2d 233 (8th Cir. 1928), *rev'd on other grounds*, 281 U.S. 1 (1930). Relief may be necessary where an equitable damage award is premised on a finding that "the wrongdoers's actions were unconscionable, fraudulent, willful, in bad faith, vexatious, or exceptional." *Taussing v. Wellington Fund, Inc.*, 187 F.Supp. 179 (D.Del. 1960), *aff'd*, 313 F.2d 472 (3d Cir. 1963). The United States Supreme Court in *Vaughn v. Atkinson*, 369 U.S. 527 (1962) created

an exception where the defendant's consistent refusal to discuss the plaintiff's claim or admit liability forced the plaintiff to hire a lawyer to obtain what was clearly owed to him under laws that were centuries old. In *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 392-94 (1970), the United States Supreme Court held that the common fund doctrine may apply where no class action has been brought and no particular monetary fund is created, as long as the litigation confers a substantial benefit on an ascertainable class. Exceptions have also been applied in the context of litigation involving union members who have sought equitable relief to correct abuses by a solvent union, although not creating a fund or conferring a benefit upon all the members and with little expectation of receiving a substantial monetary award from which to pay attorneys fees since the primary relief is equitable. *Cutler v. American Federation of Musicians*, 231 F.Supp. 845 (S.D.N.Y. 1964), *aff'd*, 366 F.2d 779 (2d Cir. 1966), *cert. denied*, 386 U.S. 993 (1967). See also *Local No. 149 International Union, United Automobile, Aircraft and Agricultural Implement Manufacturers of America v. American Brake Shoe Co.*, 298 F.2d 212, 215 (4th Cir. 1962), *cert. denied*, 369 U.S. 873 (1962) (holding that "[i]n actions for unfair competition attorney's fees are assessed as an element of damages where the wrongdoer's action is unconscionable, fraudulent, willful, in bad faith, vexatious or exceptional.") and cases cited therein; *Carter Products, Inc. v. Colgate-Palmolive Co.*, 214 F.Supp. 383, 414 (D.Md. 1963).

5. Although these exceptions exist, their status as exceptions must not be forgotten. The Supreme Court cautioned that "because of their very potency, inherent powers must be exercised with restraint and discretion." *Chambers*, 501 U.S. at 44.

**B. Virginia Case Law:**

**1. The American Rule in Virginia stated:**

"The general rule in this Commonwealth is that in the absence of a statute or contract to the contrary, a court may not award attorney's fees to the prevailing party." *Prospect Development Co. v. Bershader*, 258 Va. 75, 92, 515 S.E.2d 291, 300 (1999); *Gilmore v. Basic Industries, Inc.*, 233 Va. 485, 490, 357 S.E.2d 514, 517 (1987). The American Rule forbids an award of attorney's fees absent a contractual, statutory, or equitable basis for it:

"We have repeatedly stated that the 'general rule in this Commonwealth is that in the absence of a statute or contract to the contrary, a court may not award attorney's fees to the

prevailing party." *Arthur, et al. v. Warner*, (Va. Cir. 2000), citing *Russell Co. Dept. of Social Services, v. O'Quinn*, 259 Va. 139, 142, 523 S.E.2d 492, 493 (2000), (quoting *Prospect Development Co. v. Bershader*, 258 Va. 75, 92, 515 S.E.2d 291, 300 (1999)); see also *Gilmore v. Basic Industries, Inc.* 233 Va. 485, 490, 357 S.E.2d 514, 517 (1987).

2. **Recognized Exceptions in Virginia to the American Rule:**

- (1) Prevailing party prosecuting a cause of action for malicious prosecution or false imprisonment may recover attorney's fees -- *Burrus v. Hines*, 94 Va. 413, 420, 26 S.E. 875, 878 (1897); *Bolton v. Vellines*, 94 Va. 393, 404, 26 S.E. 847, 850 (1897).
- (2) Where a breach of contract has forced plaintiff to maintain or defend a suit with a third person, he may recover counsel fees incurred by him in the former suit provided they are reasonable in amount and reasonably incurred -- *Owen v. Shelton*, 221 Va. 1051, 1055-56, 277 S.E.2d 189, 192 (1981); *accord Fidelity Nat. Title Ins. Co. v. Southern Heritage Title Ins. Agency, Inc.*, 257 Va. 246, 253-54, 512 S.E.2d 553, 557-58 (1999); *Hiss v. Friedberg*, 201 Va. 572, 577-78, 112 S.E.2d 871, 875-76 (1960).
- (3) A Trustee defending a Trust in good faith may recover attorney's fees from the estate. *Cooper v. Brodie*, 253 Va. 38, 44, 480 S.E.2d 101, 104 (1997).
- (4) Common Fund Exception -- where plaintiff brings a law suit that creates a fund which enures to the common benefit of others. *Norris v. Barbour*, 188 Va. 723, 741-42, 51 S.E.2d 334, 342 (1949).
- (5) Bad Faith Exception -- exception recognized based upon bad faith or vexatious, willful or wanton behavior and to do justice between the parties. The Supreme Court has recognized this exception to the American Rule where injury is wanton or malicious and exemplary damages are recoverable. *Kemp v. Miller*, 166 Va. 661, 680, 186 S.E. 99, 106 (1936).
- (6) Attorney's fees have been upheld in certain cases involving alimony and support disputes even though such awards of attorney's fees were neither authorized by statute nor by contract. See *Carswell v. Masterson*, 224 Va. 329, 331-32, 295

S.E.2d 899, 900-01 (1982); *Alig v. Alig*, 220 Va. 80, 86, 255 S.E. 2d 494, 498 (1979); *McKeel v. McKeel*, 185 Va. 108, 116-17, 37 S.E.2d 746, 750-51 (1946); *McClaugherty v. McClaugherty*, 180 Va. 51, 69, 21 S.E.2d 761, 768 (1942); *Heflin v. Heflin*, 177 Va. 385, 399-400, 14 S.E.2d 317, 322 (1941).

- (7) **Fraud Exception:** In a fraud suit, a chancellor, in the exercise of his discretion, may award attorney's fees to a defrauded party. When deciding whether to award attorney's fees, the chancellor must consider the circumstances surrounding the fraudulent acts and the nature of the relief granted to the defrauded party. *Prospect Development Co. v. Bershader*, 258 Va. 75, 92, 515 S.E.2d 291, 300 (1999).

In an Order rendered December 29, 2000, Judge Arthur Kelsey of the Circuit Court of Isle of Wight County, Virginia observed, . . . the Virginia Supreme Court broke new ground [in *Prospect Development Company, supra*] by holding that "In a fraud suit, a chancellor, in the exercise of his discretion, may award attorney's fees to a defrauded party." *Arthur v. Warner*, 2000 Va. Circuit, LEXIS 197, Circuit Court, Isle of Wight County, Virginia (Opinion and Order, December 29, 2000).\*

### 3. Summary.

The American Rule is not a blanket prohibition against the award of attorneys' fees absent a contractual or statutory provision, it is rather a general rule or guide which must be construed consistently with the court's equitable powers and the rule of complete relief -- *i.e.*, that a plaintiff is entitled to be restored to the position he enjoyed but for defendant's fraud. That is why the "American Rule" is not violated by the recovery of attorneys' fees in a fraud case.\*\*

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\* At least one reported lower court, sitting in equity, has awarded compensatory damages for fraud, including plaintiff's reasonable attorney's fees in order to afford complete relief. "*The Court's equitable powers permit an award of attorney's fees in a fraud case.* 'Equity deals with the substance and not the form, and will grant such relief as far as possible by allowing compensation for the damages sustained by reason of the fraud.' *Miller Co. v. Augusta Corp.*, 140 Va. 409, 421 (1924) (emphasis added)." *Anderson v. Sharma*, 38 Va. Cir. 22 (1995) (Chief Judge Jamborsky, presiding).

\*\* *Prospect Development v. Bershader, supra.* See *Miller Co. v. Augusta Corp.*, 140 Va. 409, 421 (1924); *Anderson v. Sharma*, 38 Va. Cir. 22 (1995).

Courts of equity have the power to devise an unlimited variety of remedies to fit the circumstances of every case and the complex relations of the parties:

In the administration of remedies, an equity court is not bound by the strict rules of the common law, but adapts its relief and molds its decrees to satisfy the requirements of the case. Its purpose is the accomplishment of justice, and it will administer such relief as the exigencies of the case demand. The absence of precedents, or novelty in incident, presents no obstacle to the exercise of its jurisdiction. 19 Am. Jur., Equity, § 123, p. 123; 30 C.J.S., Equity, § 12, p. 331; *Alexander v. Hillman*, 296 U.S. 222, 56 S.Ct. 204, 80 L.ed. 192; *Chapman v. Sheridan-Wyoming Coal Co.*, 338 U.S. 621, 70 S.Ct. 392, 94 L.ed. 393; *Baker Sand & Gravel Co. v. Rogers P. & H. Co.*, 228 Ala. 612, 154 So. 591, 102 A.L.R. 346. "Equitable remedies . . . are distinguished by their flexibility, their unlimited variety, their adaptability to circumstances, and the natural rules which govern their use. There is in fact no limit to their variety and application; the court of equity has the power of devising its remedy and shaping it so as to fit the changing circumstances of every case and the complex relations of all the parties." *Turner v. Citizens Bank*, 111 Va. 184, 192, 68 S.E. 407, 409.

*First Nat. Exchange Bank of Roanoke v. Hughson*, 194 Va. 736, 753-54, 74 S.E.2d 797, 809 (1953) (Buchanan, J., and Hudgins, C.J., concurring).

C. **Other Recent 4th Circuit and Virginia Cases Citing the American Rule.**

*Gail Stepp, et al. v. James A. Foster, et al.*, Va. Sup. Ct., Record No. 990404 (2000)

*Christy Brzonkala v. Virginia Polytechnic Institute & State University*, 2000 U.S. Dist., LEXIS 14747 (July 21, 2000)

*Christy Brzonkala v. Virginia Polytechnic Institute & State University*, 115 F.Supp 2d 677 (2000)

*Golden Rule Insurance Co. v. Karen L. Jarvis, et al.*, 2000 Va. Circuit, LEXIS 185 (October 23, 2000)

*Arthur v. Warner*, 2000 Va. Circuit, LEXIS 197 (Cir. Ct. Isle of Wight County)

*Cherry v. Arendall*, 24 B.R. 176 (Bankruptcy E.D. Va. 2000)

## II. SELECTED VIRGINIA STATUTORY AUTHORITY FOR RECOVERY OF ATTORNEY'S FEES.

While the exceptions recognized in Virginia and federal case law have certainly not "swallowed" the American Rule, the proliferation of statutory provisions which allow for the recovery of attorney's fees lend weight to the argument that the historical factors giving rise to the American Rule are becoming less important, and that the Rule itself has taken a back seat to other legal doctrines of equal, or arguably greater dignity (*e.g.*, the authority of a chancellor in equity to grant complete relief; or putting parties in the position they would have been in but for the fraud as the full and proper measure of damages in cases of actual fraud).

A word search done in the Virginia Code on the subject of "attorney's fees" revealed the following statutes which currently allow for their recovery:

§ 2.1-346. Proceedings for enforcement of chapter  
For violation of the Freedom of Information Act, a complainant may recover attorney's fees.

§ 2.1-725. Causes of action not created  
Virginia Human Rights Acts  
Employees suing employer for violations of the Virginia Human Rights Act may recover attorney's fees from the recovery.

§ 4.1-410  
TITLE 4.1. ALCOHOLIC BEVERAGE CONTROL ACT  
CHAPTER 4. WINE FRANCHISE ACT  
Attorney's fees may be awarded if the Board pursues a violation of the Wine Franchise Act.

§ 4.1-509  
TITLE 4.1. ALCOHOLIC BEVERAGE CONTROL ACT  
CHAPTER 5. BEER FRANCHISE ACT

Attorney's fees may be awarded if the Board pursues a violation of the Beer Franchise Act.

TITLE 6.1. BANKING AND FINANCE  
CHAPTER 1.1. WET SETTLEMENT ACT

§ 6.1-2.15. Penalty.

Any person suffering losses due to the failure of the lender or the settlement agent to cause disbursement as required by this chapter, shall be entitled to recover, in addition to other actual damages, double the amount of any interest collected in violation of § 6.1-2.12 of this chapter plus reasonable attorney's fees incurred in the collection thereof.

§ 6.1-14. How subscriptions to stock to be paid; bank not to begin business until amounts specified in certificate of authority received; disposition of money received before bank opens; stock option plans.

Attorney's fees may be refunded if a bank fails to obtain a certificate of authority after accepting deposits.

§ 6.1-194.113. Par value of shares; payment of shares; requisition of shares or acceptance thereof as security; how subscriptions to stock to be paid; disposition of money received before institution opens; stock option plans.

Attorney's fees may be awarded if a savings bank fails to obtain a certificate of authority after accepting deposits.

§ 6.1-309. Penalty for violation of chapter, regulation or order of Commission by licensee.

Attorney's fees may be awarded for violation of the Consumer Finance Act.

6.1-273. Consumer Finance Act

If lenders charge in excess of what is allowed by the Consumer Finance Act, then the borrower may recover attorney's fees if he sues.

6.1-330.57. Usury

If a lender charges more than the interest rate allowed by law, borrower may recover attorney's fees if he sues to recover.

6.1-440. Check Cashier Act.

§ 8.01-40.2. Unsolicited transmission of advertising materials by facsimile machine.

You may recover attorney's fees if you sue to prevent someone from sending unsolicited ads to your fax machine.

§ 8.01-42.1. Civil action for racial, religious, or ethnic harassment, violence or vandalism.

It is within discretion of the court to award attorney's fees in civil cases for racial, religious, or ethnic harassment, violence or vandalism.

§ 8.01-44.4. Action for shoplifting and employee theft.

Shopowners may recover attorney's fees up to \$150 to recover from a shoplifter.

§ 8.01-66.1. Remedy for arbitrary refusal of motor vehicle insurance claim.

Insurance owner may recover attorney's fees if insurance carrier arbitrarily refuses to pay claim.

§ 8.01-413. Certain copies of health care provider's records or papers of patient admissible; right of patient or his attorney to copies of such records or papers; subpoena, damages, costs and attorney's fees.

The court may award damages for all expenses incurred by the patient to obtain such copies, including court costs and reasonable attorney's fees.

§ 8.01-662. Judgment of court or judge trying it; payment of costs and expenses when petition denied.

If a writ of *habeas corpus* is denied, the Commonwealth can collect attorney's fees from the petitioner.

8.5A-111. UCC Letters of Credit.

If you must sue to enforce claim, then you can claim attorney's fees.

CHAPTER 1.1:1. ADMINISTRATIVE PROCESS ACT

ARTICLE 6. COSTS AND ATTORNEY'S FEES.

§ 9-6.14:21. Recovery of costs and attorney's fees from agency.

If an agency position is not substantially justified, then you can recover attorney's fees out of the operating expenses of the agency.

10.1-1418. Improper Disposal of Solid Waste.

TITLE 16.1. COURTS NOT OF RECORD

CHAPTER 11. JUVENILE AND DOMESTIC RELATIONS DISTRICT COURTS

ARTICLE 9. DISPOSITION § 16.1-278.19. Attorney's Fees.

In any matter properly before the court, the court may award attorney's fees and costs on behalf of any party as the court deems appropriate, based on the relative financial ability of the parties.

§ 19.2-152.10. Protective order in cases of stalking.

The court can assess attorney's fees against either party when a protective order for stalking is before the court.

§ 20.71.1. Attorney's fees in proceedings under § 20-71.

In an action for child support or spousal support, the court may award reasonable attorney's fees.

20.138. Uniform Child Custody Jurisdiction Act.  
For filing to enforce a custody decree of another state.

32.1-36.1. Violation of HIV test confidentiality.

§ 46.2-112. Tampering with odometer; penalty; civil liability.  
If a dealer knowingly defrauds a customer by tampering with the odometer, then he will be liable for customer's attorney's fees.

55.248-11. Virginia Residential Landlord and Tenant Act.  
For violation of security deposit rules.

CHAPTER 21. THE VIRGINIA REAL ESTATE TIME-SHARE ACT  
ARTICLE 3. PROTECTION OF PURCHASERS

§ 55-382. Effect of violations on rights of action; attorney's fees.  
May recover attorney's fees for violation of the Virginia Real Estate Time-Share Act.

CHAPTER 17.

§ 59.1-206. Virginia Consumer Protection Act.

CHAPTER 26. UNIFORM TRADE SECRETS ACT

§ 59.1-338.1. Attorney's fees.  
Attorney's fees for willful violation of Trade Secrets Act

65.2-308 Worker's Compensation.  
Discharge of employee for exercising rights.

10.1-1455  
The Board may recover attorney's fees if it substantially prevails on the merits of a case regarding knowingly disposing, transporting, or storing hazardous waste without a permit, or in violation of a permit.

13.1-522. Attorney's fees for selling securities in violation of 13.1-502, 504A, 507, or 510.

15.2-2245. Attorney's fees against government for failing to release performance bonds.

62.1-269. Attorney's fees can be awarded for violations regarding groundwater.

801-40.2. Attorney's fees awarded for violation of rule preventing advertising materials being sent to fax machine in an unsolicited manner.

55-248. Attorney's fees for failure to heat, water, hot water, or other essential services.

59.1-68.3. Consumer Protection Act.

59.1-207. Violations of Lemon Laws.

A word search of the United States Code similarly revealed no fewer than 150 statutory sections scattered throughout the Code that provide for an award of attorney's fees in various circumstances.