



Defending the Frivolous Lawsuit: Can You Recover Your Legal Fees?

By Ryan M. McLane
rmclane@dbllaw.com

As a member of [DBL's Civil Litigation Practice Group](#), I frequently defend small and medium-sized businesses against all sorts of lawsuits. While being sued is not a regular occurrence for most such companies, it remains a cost of doing business that many must suffer at some point. A recent case I read reminded me of a frequent question these clients ask at the outset: "can I recover my legal fees if I win." Unfortunately, my response to this question often begins with "probably not."

The so-called "American Rule" dictates this answer. The American Rule provides that attorney fees are not recoverable by the successful party in a lawsuit unless a statute or contract expressly allows for their recovery. Such statutes are few and far between. The greatest hope for the recovery of attorney fees is usually the case involving a contract stating that the prevailing party in a dispute may recover its litigation costs.

Frequently, neither of the American Rule exceptions apply. In that case, one other hope may remain. This chance arises when someone files a frivolous lawsuit against another. A party that successfully defends such a suit can then file a claim for wrongful use of civil proceedings against the frivolous litigant and its attorney. If the plaintiff succeeds in the wrongful use of civil proceedings action, then it may recover the cost of defending the frivolous lawsuit (potentially along with other damages including emotional distress, damage to reputation, and punitive damages).

Actions for wrongful use of civil proceedings, however, present several serious challenges. First and foremost, the party must win the underlying frivolous suit. Second, the party must then file and prosecute a separate and subsequent suit. This may dramatically extend the length of the overall litigation and will require additional litigation costs.

Finally, the underlying suit must truly be frivolous in the *legal* sense. Many businesses and persons that have been sued believe the suit to be frivolous, and many are "frivolous" in the common sense of the word. From a legal perspective, however, the offender must have filed the frivolous lawsuit: (a) without probable cause, and (b) primarily for an ulterior motive. Those elements can be difficult to prove.

Despite these challenges, the claim of wrongful use of civil proceedings remains available to businesses and individuals suffering the expense of

defending a frivolous lawsuit. If faced with the unpleasant prospect of defending such a suit, you and your lawyer should discuss the practicality of a claim for wrongful use of civil proceedings at the outset. Planning ahead and preparing to pursue this claim early can greatly increase the chance of success later.

For a more detailed legal analysis of the recent Kentucky case on wrongful use of civil proceedings, please visit my colleague David V. Kramer's civil procedure blog at <http://civilprocedure.dblaw.com/2012/08/coaky-distinguishes-wrongful-use-of-civil-proceeding-from-malicious-prosecution/>.

If you would like to know more about these issues, please contact Ryan McLane, [a Northern Kentucky associate](#) in the [Medical Malpractice](#), [Construction](#), and [Civil Litigation](#) Practice Groups at [Dressman Benzinger LaVelle psc](#). Ryan can be reached at (859) 426-2143 or via email at rmclane@dblawn.com.