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“... and Attorney Fees to the Prevailing Party”: Recovering Attorney Fees under Montana Statutory Law

Dirk A. Williams

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"... AND ATTORNEY FEES TO THE PREVAILING PARTY": RECOVERING ATTORNEY FEES UNDER MONTANA STATUTORY LAW

Dirk A. Williams

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I. INTRODUCTION

The Montana Supreme Court long ago adopted the general rule that, absent a contrary contractual agreement or statutory provision, the prevailing party in a civil action is not entitled to recover attorney fees.  Although the court periodically has created narrow exceptions to the pay-your-own-way doctrine, the general

2. See Comment, Attorney Fees: Slipping From the American Rule Straight Jacket, 40 MONT. L. REV. 308 (1979), for an indepth discussion of various judicially-created exceptions to the general rule.

The most notable judicially-created exception to the general rule in Montana is that a court, on a case-by-case basis, may exercise its equity power to grant complete relief to the prevailing party, including an award of attorney fees. Foy v. Anderson, 176 Mont. 507, 511, 580 P.2d 114, 116 (1978). The supreme court has approved the application of the Foy doctrine only in the following limited situations: (1) where a party, through no fault of its own, is forced to defend a frivolous action, Holmstrom Land Co. v. Hunter, 182 Mont. 43, 48-49, 595 P.2d 360, 363 (1979); Stickney v. State, ___ Mont. ___, 636 P.2d 860, 862 (1981); (2) where one finds "it necessary to intervene in a frivolous action, although not technically forced to become [a party]," State ex rel. Wilson v. Dep't of Nat. Resources and Conserv., ___ Mont. ___, 648 P.2d 766, 770 (1982) (attorney fees ultimately were denied because the action was not frivolous, id. at ___, 648 P.2d at 722); or (3) where the jury, in its special verdict, grants attorney fees as a measure of consequential damages, Cate v. Hargrave, ___ Mont. ___, 680 P.2d 952, 957 (1984).

Cate is an anomaly which could haunt the courts for many years. There was neither statutory nor contractual basis for awarding attorney fees in Cate, a water rights action with a counterclaim sounding in trespass and conversion. The district court instructed the jury that any damage award should be specified in dollars and cents. The district court nevertheless approved the jury's determination that the sole measure of damages for the defendants, who prevailed on their counterclaim, should be court costs and reasonable attorney fees, as determined by the district court. The supreme court held that the defendants' injuries, suffered as a result of some coplaintiffs' "reprehensible form of self-help" (interfering with an irrigation headgate) id., were compensable. Although the supreme court did not condone the jury's method of calculating the defendants' damages, it refused to disturb the general award of costs and attorney fees merely because it was technically flawed. Id.

Although Cate invoked the rarely-used theory that the prevailing party's consequential damages include reasonable attorney fees, the supreme court appeared to follow the logic implicit in Board of Trustees v. Eaton, 185 Mont. 453, 458, 605 P.2d 1083, 1086 (1979). In Eaton, the supreme court reversed the district court's decision, held that the school board had improperly dismissed Eaton, a high school principal, and awarded Eaton attorney fees, even though no statutory or contractual authority existed for such an award of attorney fees. Indeed, Eaton apparently never even prayed for the attorney fees that he ultimately was awarded: in his appellate brief Eaton asked merely for "reinstatement . . . together

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rule usually is strictly enforced. This comment discusses and analyzes the numerous Montana statutory provisions that permit a prevailing party in certain civil actions to recover attorney fees. Because the degree of discretion available to the district court in awarding attorney fees varies between statutes, this comment discusses those variations where appropriate. This comment also discusses case law as it relates to the various attorney fee statutes. Space limitations preclude discussing the recovery of attorney fees under a contractual agreement and recovery under the judicially-created exceptions to the general rule.

The purpose of this comment is to provide an overview of the prevailing party's right to recover attorney fees under Montana statutes. This comment is divided into specific areas of law in order to provide an efficient reference source.

II. Preliminary Notes

A court cannot award attorney fees until it can determine which party is the prevailing party. A party is the prevailing party only if the court has rendered affirmative judgment in that party's favor at the conclusion of the entire case. An award of attorney fees, like any other award, must be based on competent evidence. In determining what constitutes reasonable attorney fees, the court should consider:

- the amount and character of the services rendered, the labor, time and trouble involved, the character and importance of the litigation in which the services were rendered, the amount of money or the value of property to be affected, the professional

with his back pay and benefits." Appellant's Brief at 19, Eaton. Notwithstanding a dissent by Justice Shea, the Eaton court awarded attorney fees without ever addressing the issue of the propriety of the award. Due to this absence of analysis, one can only speculate as to the court's reasons for its award of attorney fees to Eaton.

Until the supreme court makes a definitive and unequivocal statement regarding the Foy doctrine and its progeny, attorneys will continue to be confused regarding the prevailing party's ability to recover attorney fees without the aid of a statute or a contract provision.

3. See, e.g., Thompkins v. Fuller, Mont. , 667 P.2d 944, 954 (1983). In Thompkins the court stated that the Foy doctrine (see discussion supra, note 2) applies only "where the prevailing party has been forced into an action that is frivolous and utterly without merit." Id.

4. See Mont. Code Ann. § 28-3-704 (1983), and the cases annotated thereunder, for discussion of the issue of recovering attorney fees under a contractual provision.


6. Id.

skill and experience called for, [and] the character and standing in their profession of the attorneys.8

The court may also consider other factors, including the result secured through the attorney’s services9 and the contemporary market value of the attorney’s services rendered.10 Although the contract between the attorney and his client generally is the “measure and mode” of determining attorney fees,11 certain statutory and judicial rules have substituted other standards for determining the amount to which the prevailing party is entitled as reasonable attorney fees. Where appropriate, this comment discusses those rules.

Some of the statutes discussed in this comment allow for an award of attorney fees to either party that prevails, while others permit only a prevailing plaintiff to recover attorney fees. Although some statutes permitting only the prevailing plaintiff to recover attorney fees have been challenged successfully on equal protection grounds,12 recent case law suggests that the Montana Supreme Court likely will not declare such “plaintiffs only” statutes to be violative of the equal protection doctrine.13

9. Id.
13. See, e.g., McMillen v. Arthur G. McKee and Co., 166 Mont. 400, 408, 533 P.2d 1095, 1099 (1975), in which the Montana Supreme Court upheld the constitutionality of MONT. CODE ANN. § 39-71-611 (1983), which allows workers' compensation claimants to recover attorney fees from the insurer in certain situations, but does not permit the insurer to recover attorney fees from the claimant in any situation. See infra, section XI, subsection E, this comment, for further discussion of attorney fees in workers' compensation cases.

The McMillen court cited Missouri, Kansas & Texas Ry. Co. v. Cade, 233 U.S. 642 (1914), which upheld the validity of a Texas statute permitting plaintiffs to recover attorney fees if they prevailed in a wage claim action, but denying prevailing defendants a reciprocal right to recover attorney fees. In Cade, the Supreme Court stated as follows:

If the classification is otherwise reasonable, the mere fact that attorney's fees are allowed to successful plaintiffs only, and not to successful defendants, does not render the statute repugnant to the “equal protection” clause. This is not discrimination between different citizens or classes of citizens, since members of any and every class may either sue or be sued . . . .

Even were the statute to be considered as imposing a penalty upon unsuccessful defendants in cases within its sweep, such penalty is obviously imposed as an incentive to prompt settlement of small but well-founded claims, and as a deterrent of groundless defenses, which are the more impressive where the amount is small . . . .
The statutes that allow a prevailing party to recovery attorney fees inconsistently classify recoverable attorney fees as "costs," "damages," or neither specifically. This inconsistency appears to be of only minor significance, for the district court judge, and not the jury, generally has sole authority to set reasonable attorney fees, regardless of the technical classification of such fees.\(^\text{14}\)

While reading this comment, one should be aware that even if a party is awarded attorney fees by the court, the time spent by its attorney in securing the court-ordered payment of attorney fees is not to be considered in computing the award.\(^\text{15}\) The supreme court has rejected "the notion that the court may require one party to pay opposing counsel for his time spent in seeking justification of the fee he desires."\(^\text{16}\)

### III. NON-UCC COMMERCIAL AND CONSUMER LAW

The consumer movement of the late 1960's and 1970's brought about many legislative acts designed to protect individuals, and sometimes small businesses, from overbearing practices of businesses whose trade does not depend on the satisfaction of a handful of customers. Because most consumer purchases are relatively inexpensive, the cost of litigation in consumer law usually would surpass the amount of the recovery if no steps were taken to mitigate or redistribute the litigation expenses. Hence, many of the consumer protection acts include provisions that allow the prevailing party to recover attorney fees, thereby encouraging persons with strong cases to pursue their claims in court.


The Legislature provided a broad avenue for the recovery of

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The outlay for an attorney's fee is a necessary consequence of the litigation, and since it must fall upon one party or the other, it is reasonable to impose it upon the party whose refusal to pay a just claim renders the litigation necessary. The allowance of ordinary costs of suit to the prevailing party rests upon the same principle. Cade, 233 U.S. at 650-52. The Montana Supreme Court also held that the "plaintiffs only" provision for attorney fees in MONT. CODE ANN. § 39-71-611 did not violate the equal protection clause of the Montana Constitution, MONT. CONST. art. II, § 4. McMillen, 166 Mont. at 408, 533 P.2d at 1099. See also In re Montana Pacific Oil and Gas Co., ___ Mont. ___, 614 P.2d 1045, 1047 (1980) (discussed infra note 163, this comment).


16. Id.
attorney fees when it adopted the Montana Unfair Trade Practices and Consumer Protection Act of 1973 (the Act).17 Section 30-14-133 of the Montana Code Annotated permits a court to award reasonable attorney fees to a single purchaser of consumer goods who proves that he has suffered a loss as a result of the seller's use or employment of "[u]nfair methods of competition [or] deceptive acts or practices in the conduct of any trade or commerce." 18

The potential broad avenue for recovery of attorney fees lies in the Legislature's failure to define specifically the terms "unfair methods of competition" and "deceptive acts or practices in the conduct of any trade or commerce." The term "unfair methods of competition," although not defined specifically by statute, apparently includes the following: price fixing, illegal production restrictions, bid rigging, bid kickbacks, and illegal monopolies;19 price discrimination by a distributor for the purpose of injuring a dealer of a commodity;20 unfair purchasing competition;21 sales at less than cost for the purpose of injuring competitors;22 pooling or competition fixing by neighboring grain warehouses;23 destroying food that is fit for sale and consumption;24 altering invoices for the purpose of injuring a competitor;25 bidding, inviting to bid, or otherwise negotiating for or entering into an agreement for a license to show a motion picture without first showing the motion picture to any motion picture theater operators in the market area who wish to pre-screen the motion picture;26 and selling imitation Indian crafts or articles.27

The term "deceptive practices," defined in the criminal code,28 includes, generally, obtaining property under false pretenses, conducting confidence games, selling property without consent of the owner, and using credit cards fraudulently or without authorization. The Legislature adopted the deceptive practices statutes to proscribe misleading activities which otherwise might not fall under section 45-3-301 of the Montana Code Annotated, the crimi-

nal theft statute. Section 30-14-103 of Montana Code Annotated does not state whether the criminal code definition of deceptive practices is exclusive, partial, or even applicable to the Act. Deceptive practices, for purposes of recovering attorney fees under Section 30-14-133 of Montana Code Annotated, conceivably could include such criminal acts as chain distributor schemes, forgery, and issuing bad checks. The statutory law is unclear whether these provisions come under the umbrella of deceptive practices, and the supreme court has not been faced with the issue.

A successful party in a civil action arising out of a deceptive business practice may also recover attorney fees, at the discretion of the court. Deceptive business practices, also defined in the criminal code, include falsifying weights and measures, shorting the quantity on a sale, taking without authority an extra quantity on a purchase, adulterating or mislabeling commodities, and false advertising.

A consumer who purchases consumer goods as a result of door-to-door, telephone, or other seller-initiated solicitation, at a place other than the seller’s place of business, is entitled to cancel such purchase, return the goods in substantially the same condition as they were received, and receive a full refund, provided the consumer makes such cancellation within three business days of the original sale. If the seller refuses within ten days of the consumer’s timely cancellation to refund the amount the consumer paid for the goods, the consumer may bring an action for the amount paid, $100 in damages, and costs; and if the consumer prevails in the action, the court shall award him reasonable attorney fees. If the consumer fails to prevail in such an action, the seller apparently is not afforded the reciprocal right to recover attorney fees.

B. Debt Collection and Credit Reporting

Retail installment sales contracts typically include a provi-
sion that, should the buyer become delinquent in his payments and the seller find it necessary to turn the account over to an attorney for collection, the seller is entitled to recover reasonable attorney fees. Section 31-1-235 of the Montana Code Annotated statutorily limits attorney fees in such collection actions to 15% of the amount due and payable under the contract. In addition, the statute permits the creditor to recover court costs and "reasonable out-of-pocket expenses incurred in connection with such delinquency." Although this statute was enacted in 1959, no cases have arisen under it, and "reasonable out-of-pocket expenses" remains officially undefined.

A consumer credit reporting agency, or any user of its information, which willfully violates the consumer credit reporting laws with respect to any particular consumer is liable to that consumer for his actual damages, punitive damages, costs, and reasonable attorney fees. The awarding of attorney fees appears to be mandatory if the consumer prevails in such action. A prevailing credit reporting agency, however, apparently is not given a reciprocal statutory right to attorney fees.

C. Sales of Fraudulent, Misrepresented, or Unregistered Securities, and Fraudulent Sales of Out-of-State Subdivision Tracts to Montanans

A person who buys an unregistered security which is not exempted from registration, or a person who purchases a security as the result of fraud or misrepresentation by the seller, may sue the seller to recover the consideration paid for the security, plus annual interest of 10% of the price paid, plus costs and reasonable attorney fees, less the income the buyer received from the secur-

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Major real estate developers who intend to sell undeveloped subdivision tracts located outside of Montana to persons in Montana are required by the Foreign Land Sales Practices Act to register with the Montana Board of Realty Regulation and to deliver a public offering statement to the purchaser for his review. If the seller fails to register with the Board, fails to deliver the public offering statement to the purchaser, or omits a material fact or makes an untrue statement of material fact in disposing of the subdivided land, the purchaser may bring an action against the seller. Unless the seller proves either that the purchaser knew of the untruth or admission, that the seller reasonably could not have known of the untruth or omission, or that the purchaser did not rely on the untruth or omission in making his purchase, the purchaser is entitled to recover the amount paid for the property, plus interest of 6% per annum from the date of payment, property taxes paid, costs, and reasonable attorney fees, less income the purchaser derived from the subdivision tract.

D. Common Carriers and Railroads

Each common carrier that carries property for hire within Montana is liable to its customers for loss, damage, or injury to property incurred during the shipping of goods with the particular common carrier. If the customer files a claim of loss, damage, or injury with the carrier, the carrier must either pay or deny the claim within 120 days of its receipt, or else face legal action. If the customer brings an action for the amount of the claim, and if the customer has inquired as to the delay with the carrier in writing within the 120 day period, then the trial court has discretionary authority to award reasonable attorney fees, not exceeding $500, to the prevailing party. If the lost, damaged, or injured property was carried by more than one common carrier, the carrier against whom the customer brought the claim is entitled to full indemnification, including damages and litigation expenses, from the carrier.

44. MONT. CODE ANN. Title 76, ch. 4, part 12 (1983).
45. MONT. CODE ANN. § 76-4-1226 (1983).
46. MONT. CODE ANN. § 76-4-1247 (1983).
on whose line the loss, damage, or injury occurred. 49

If a court or jury finds that a motor carrier 50 or a railroad 51 willfully charged rates or fares in excess of those established by the Public Service Commission for the services performed, the customer is entitled to recover treble damages for the overcharged amount, costs, litigation expenses, and reasonable attorney fees. The award of attorney fees in such situations appears to be mandatory, although a motor carrier or railroad which prevails does not enjoy a reciprocal right to attorney fees.

If a livestock owner brings an action against a railroad company for negligently killing the owner's livestock, the prevailing party is entitled to recover reasonable attorney fees. 52 If the livestock owner prevails in court, but the railroad company has submitted a written settlement offer to the livestock owner at least forty days prior to the filing of the complaint, and if such settlement offer exceeded or equalled the amount recovered by the livestock owner in court, then the livestock owner is not entitled to attorney fees. 53

E. Protection of Private Franchise Holders

If a Montana farm implement, industrial equipment, or automobile dealer enters into a written dealership contract evidenced by a franchise agreement, sales agreement, or security agreement, and if the franchisor or the dealer cancels the contract, the franchisor must refund to the dealer 100% of the wholesale value of all new inventory and 85% of the wholesale value for all repair parts then in the dealer's inventory. 54 If the franchisor fails or refuses to repurchase the dealer's inventory, the franchisor is liable for 100% of the wholesale value of the dealer's inventory, plus freight charges paid by the dealer, in addition to court costs and the dealer's attorney fees. 55 The awarding of attorney fees to the dealer is mandatory. If the franchisor prevails, however, it is not entitled to recover attorney fees.

If a new automobile dealer suffers pecuniary loss due to the franchisor’s improper or unfair termination or cancellation of the

53. Id. at § 69-14-709(2).
dealer's franchise or the franchisor's coercion of the dealer to accept products not ordered by the dealer, the dealer may bring an action to recover damages. If he prevails, the dealer is entitled to treble damages plus costs, and attorney fees. The right to receive attorney fees apparently is not reciprocated to the prevailing franchisor.

If an automobile franchisor wrongfully denies family members of a deceased or incapacitated automobile dealer from succeeding the dealer in the ownership or operation of the dealership, the wrongfully denied family members may bring an action to recover any pecuniary loss resulting from the wrongful denial. If the family members prevail in such an action, they are entitled to treble damages, costs, and reasonable attorney fees. The family's right to recover attorney fees appears to be mandatory, and the right apparently does not extend reciprocally to prevailing franchisors.

IV. FORECLOSING LIENS AND OTHER SECURITY INTERESTS

Although the agreement which sets the foundation for a security interest often will include a clause granting attorney fees to the prevailing party in any action brought under the agreement, the Legislature has provided a statutory right to recover attorney fees in certain situations involving foreclosures of secured interests in property.

A. Uniform Commercial Code Foreclosures

1. Non-Judicial Foreclosures

After default by the debtor on a security interest governed by the Uniform Commercial Code, and after non-judicial foreclosure of the security interest, the secured party may dispose of the collateral in any commercially reasonable manner. The secured party receives first priority to the proceeds from the disposition of the collateral for the purpose of recovering reasonable costs of repossession and disposition of the collateral. The reasonable costs of repossession and disposition include, to the extent provided in the security agreement and not prohibited by law, the secured party's

reasonable legal expenses and attorney fees. If the secured party obtains a deficiency judgment against the debtor, the reasonable costs of obtaining the deficiency judgment, including reasonable attorney fees, generally are recoverable by the secured party under the terms of the security agreement. If, on the other hand, the debtor successfully contests the non-judicial foreclosure, or if he ultimately prevails in an action against the creditor for tortious conversion of the repossessed collateral or for recovery of surplus resulting from the creditor's disposition of the collateral, then the creditor is reciprocally liable for the debtor's reasonable attorney fees.

The parties are free to define reasonable attorney fees in the underlying security agreement. Unlike some states, Montana has not statutorily limited the amount of attorney fees recoverable in non-judicial foreclosures of security interests in personal property. Preprinted security agreement forms, however, typically set the attorney fee in the event of such foreclosure at 15% of the unpaid balance due under the security agreement.

2. Judicial Foreclosures

Section 30-9-511 of the Montana Code Annotated provides that in any judicial action to foreclose a security interest in personal property, the court must award reasonable attorney fees to the prevailing party, "notwithstanding any stipulation in the instrument or any agreement between the parties to the contrary." The right to recover attorney fees in a judicial foreclosure of a security interest in personal property is reciprocal; a party forced to defend an unsuccessful judicial foreclosure action is entitled to reasonable attorney fees upon dismissal of the action.

Determination of reasonable attorney fees in a judicial personal property foreclosure action is left to the sound discretion of the trial court. Even if the court receives expert testimony re-
garding the reasonableness of the fees sought, the court may ignore such evidence in fixing the attorney fees. 70

Section 30-9-511 limits the recovery of attorney fees in personal property judicial foreclosure actions to the foreclosure proceeding itself, regardless of contrary provisions in the security agreement. The statute does not allow recovery of attorney fees in ancillary causes of action such as one for the tortious conversion of the secured property by a third party, 71 one brought on the underlying promissory note after the security interest in the personal property has been exhausted through a prior foreclosure, 72 or one upon a guaranty where the guarantor promised to pay, among other things, the secured party's attorney fees in the event of a foreclosure of the security interest. 73

B. Statutory Lien Foreclosures

Each party that establishes a salary and wage lien, 74 a farm laborers' lien, 75 a mechanics' lien, 76 a loggers' lien, 77 a thrashers' lien, 78 or an oil and gas wells or pipelines laborers' and materialmen's lien 79 is entitled to reasonable attorney fees incurred in an action to foreclose on the lien, plus the costs of filing and recording the lien. 80 Reciprocally, the successful defendant is entitled to attorney fees incurred in defending against the lien. 81 In either case, the ultimately successful party is entitled to reasonable attorney fees incurred in both district court and on appeal. 82 The award of

70. Id.
73. First Nat'l Park Bank v. Johnson, 553 F.2d 599, 603 (9th Cir. 1977) (applying Montana law).
74. MONT. CODE ANN. Title 71, ch. 3, part 3 (1983) provides for salary and wage liens. The supreme court has held that, in actions arising out of part 3, attorney fees are recoverable only by an employee making a claim against an employer who has made an assignment for the benefit of creditors. McBride v. School District No. 2, 88 Mont. 110, 117, 290 P. 252, 255 (1930). Although McBride appears correct with regard to §§ 71-3-301 through -307, employees with wage claims against solvent employers have statutory recourse to recover attorney fees under MONT. CODE ANN. § 39-3-214(1) (1983). See infra section X, subsection D, for further discussion of an employee's right to recover attorney fees in a wage claim action.
75. MONT. CODE ANN. Title 71, ch. 3, part 4 (1983) provides for farm laborers' liens.
77. MONT. CODE ANN. Title 71, ch. 3, part 6 (1983) provides for loggers' liens.
78. MONT. CODE ANN. Title 71, ch. 3, part 8 (1983) provides for threshers' liens.
79. MONT. CODE ANN. Title 71, ch. 3, part 10 (1983) provides for laborers' and materialmen's liens.
82. MONT. CODE ANN. § 71-3-124 (1983). Where the district court's ruling on attorney
attorney fees to the prevailing party in actions arising out of any of the above-enumerated liens is mandatory, not discretionary.\textsuperscript{83}

In \textit{Western Plumbing of Bozeman v. Garrison},\textsuperscript{84} the defendant homeowners, prior to trial, paid the amount of the mechanics’ liens, plus interest. The supreme court held that the lienholder had filed the liens prematurely;\textsuperscript{85} therefore, the lienholder had no right to recover attorney fees in an action arising out of invalid liens.\textsuperscript{86} Rather, the court awarded attorney fees to the homeowners for successfully defending against the liens.\textsuperscript{87}

The amount of reasonable attorney fees awarded is determined within the discretion of the trial court.\textsuperscript{88} In \textit{Carkeek v. Ayer},\textsuperscript{89} the property owner successfully defended against a foreclosure of a $6,200 mechanics’ lien and was awarded $3,311.50 on a counterclaim for defective workmanship. Partly due to the behavior of Carkeek’s first attorney, Ayer’s attorney fees amounted to $5,773.20 for 144.33 hours of service. The trial court determined that Ayer’s attorney had performed the services stated and had charged a reasonable fee, but it awarded only $3,000 in attorney fees. The supreme court affirmed, reasoning in part that no statutory provision exists for recovering attorney fees on a counterclaim such as Ayer’s.\textsuperscript{90} The court stated that a reasonable attorney fee in a given case does not necessarily result from simple multiplication of the hours spent times a fixed hourly rate. To award an attorneys fee [sic] of $5,773.20 in defending against a $6,200 claim would appear most unreasonable regardless of the time spent, the skill involved in the work, the experience of the attorney and similar considerations. The defense is simply not worth a fee approaching 100% of the amount of the lien.\textsuperscript{91}

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\textsuperscript{84} 171 Mont. 85, 556 P.2d 520 (1976).
\textsuperscript{85} “In Montana the general rule is that the lien arises only upon completion of the contracted work.” \textit{Id.} at 88, 556 P.2d at 522.
\textsuperscript{86} \textit{Id.} at 88, 556 P.2d at 523. \textit{See also} Monarch Lumber Co. v. Wallace, 132 Mont. 163, 314 P.2d 884 (1957).
\textsuperscript{87} 171 Mont. at 88, 556 P.2d at 523.
\textsuperscript{88} Carkeek v. Ayer, \textit{Mont.} \textit{Mont.}, 613 P.2d 1013, 1015 (1980).
\textsuperscript{89} \textit{Id.}
\textsuperscript{90} \textit{Id.}
\textsuperscript{91} \textit{Id.} at \textit{Mont.}, 613 P.2d at 1015-16. See also Simkins-Hallin Lumber Co. v. Simonson, \textit{Mont.}, 692 P.2d 424, 427 (1984), where the plaintiff succeeded in an action to foreclose a mechanics’ lien in the amount of $888.36. Although the plaintiff claimed $2,648.75 as attorney fees, the district court awarded only $500 for attorney fees. The Montana Supreme Court affirmed, holding that the district court had not abused its discretion. The supreme court implied that district courts are justified in limiting attorney fees in

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Recently the supreme court held that contingency fee arrangements between the lienholder and its attorney may be considered in determining reasonable attorney fees in mechanics' lien foreclosure actions. As in all mechanics' lien foreclosure actions, if the contingency fee arrangement is found to be a reasonable means of computing the prevailing party's attorney fees, the prevailing party is entitled to court-determined reasonable attorney fees in addition to any amount due on the lien.

C. Real Property Mortgage Foreclosures

A court must award reasonable attorney fees to the prevailing party in an action to foreclose a mortgage on real property. The statute is reciprocal, thereby allowing a defendant to recover attorney fees if successful. In determining reasonable attorney fees in a real property mortgage foreclosure, the court may consider the testimony of expert witnesses or its own knowledge, as well as the amount of property involved and the complexity of the case.

An intervenor in the foreclosure action may not recover attorney fees if the intervening action could be maintained independently of the foreclosure proceeding. A prevailing party cannot recover attorney fees under the statute in an in personam action on an underlying promissory note if the security in the real property was exhausted in a prior foreclosure action. To recover attorney fees if the security has been exhausted, the prevailing party must rely on a contractual clause in the promissory note which grants attorney fees to the prevailing party in any action brought under the note.

Section 6323(b)(8) of the Internal Revenue Code provides that an attorney's lien on property takes priority over a federal tax
RECOVERING ATTORNEY FEES

If the attorney's lien attaches prior to the federal tax lien. The Federal District Court for Montana once ruled that attorney fees were part of the mortgage debt and a necessary expense of enforcing the mortgage lien, and that attorney fees incurred in a mortgage foreclosure take priority over federal tax liens. The same court reversed itself three years later when, following an intervening United States Supreme Court case, it ruled that the attorney's lien took priority over the federal tax lien only if the attorney's lien was certain in amount, due, and payable at the time the federal tax lien attached. Because the attorney fees provided for by statute in mortgage foreclosures are not due and payable until the foreclosure sale, a federal tax lien which attaches prior to the sale takes priority over the attorney's statutory right to his fee.

D. Trust Indenture Foreclosures

Under the Montana Small Tract Financing Act the costs and expenses of foreclosing on a trust indenture in real property, including trustee fees and attorney fees, are given payment priority out of the foreclosure proceeds. Because of the similarities between trust indentures and real property mortgages, an attorney fees lien in a trust indenture foreclosure likely would be subordinate to any intervening federal tax liens. Also, a prevailing party in an in personam action on the underlying promissory note could probably not recover attorney fees if the security of the trust indenture had been exhausted in a previous foreclosure proceeding.

Section 71-1-320 of the Montana Code Annotated limits attorney fees in trust indenture foreclosure proceedings. If the property is disposed of at a trustee's sale, the maximum allowable combined trustee and attorney fees are 5% of the aggregate principal and interest then due on the obligation. If the buyer reinstates his interest by making current his payments prior to the trustee's sale, the attorney fees are limited to the lesser of $1,000 or 1% of the

105. Id. at 752.
106. MONT. CODE ANN. Title 71, ch. 1, part 3 (1983).
108. See supra text accompanying note 104 for discussion of First Nat'l Bank of Lewistown v. Tilzey.
aggregate principal and interest which was due on the day of default. 110

E. Defending Against Writs of Attachment

Section 27-18-204 of the Montana Code Annotated requires a plaintiff seeking a prejudgment writ of attachment on property to post a bond before the writ is issued. "If the defendant recovers judgment or if the court finally decides that the plaintiff was not entitled to an attachment," the plaintiff must use the posted bond to pay the costs and damages, 111 including reasonable attorney fees, 112 incurred by the defendant in successfully defending against the attachment. The statute does not afford the plaintiff a reciprocal right to attorney fees if it prevails.

V. Non-Secured Real Estate Transactions

A. Actions to Partition Real Property

Because an action to partition real property is brought for the benefit of all the joint tenants or tenants in common, 113 the costs of the partition action, including reasonable attorney fees, are to be paid by the persons receiving property under the partition judgment on a basis prorated to the respective interests in the original estate. 114 This distribution of liability for attorney fees places the parties upon relatively equal footing as to the necessary expenses in effecting the partition of jointly- or commonly-held property for the good of all the parties. 115 If litigation arises between only some of the joint or cotenants, the district court in its discretion can distribute the payment of attorney fees on other than a pro rata basis, such as ordering the parties to pay their own attorney fees or ordering one party to pay all the attorney fees. 116 If the plaintiff brings a partition action, but the final judgment involves issues only ancillary to the partition action, the plaintiff may not recover attorney fees under the partition statute. 117

115. Murray, 19 Mont. at 392, 48 P. at 744.
B. Landlord-Tenant Actions

The prevailing party in actions brought under a residential property rental agreement or under the Montana Residential Landlord and Tenant Act of 1977\(^\text{118}\) may be awarded attorney fees by the trial court, notwithstanding an agreement between the parties to the contrary.\(^\text{119}\) If the landlord wrongfully withholds the tenant's security deposit, the tenant may recover attorney fees in addition to double damages.\(^\text{120}\) In all landlord-tenant disputes, the court's award of attorney fees is discretionary, not mandatory.

VI. EMINENT DOMAIN, INVERSE CONDEMNATION, AND SECONDARY EASEMENTS

A. Eminent Domain

In any eminent domain\(^\text{121}\) action the government\(^\text{122}\) must first prove that the public interest requires the taking of private property for public use.\(^\text{123}\) If the government fails to prove that the condemnation is necessary for the public interest, or if the eminent domain proceeding is dismissed or abandoned, and if federal assistance was available for the proposed project out of which the eminent domain action arose, the entity which sought the condemnation order must pay the property owner's attorney, appraisal, and engineering fees.\(^\text{124}\)

The adoption of the 1972 Montana Constitution effected a significant change in Montana's eminent domain laws. The new constitution provides that a property owner who prevails in court and is awarded compensation greater than the government's final pre-trial compensation offer is entitled to recover the "necessary expenses of litigation."\(^\text{125}\) In addition to codifying the constitutional provision,\(^\text{126}\) the Legislature has defined the necessary expenses of litigation to include the "reasonable and necessary attorney fees,

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\(^{118}\) The Montana Residential Landlord and Tenant Act of 1977 is found at MONT. CODE ANN. Title 70, ch. 24 (1983).
\(^{119}\) MONT. CODE ANN. § 70-24-442 (1983).
\(^{120}\) MONT. CODE ANN. § 70-25-204 (1983).
\(^{121}\) "Eminent domain is the right of the state to take private property for public use." MONT. CODE ANN. § 60-30-101 (1983).
\(^{122}\) As used in this discussion of eminent domain and inverse condemnation, the term "government" refers to any entity, whether public or private, which enjoys the power of eminent domain, as described in MONT. CODE ANN. § 70-30-102 (1983).
\(^{123}\) MONT. CODE ANN. § 70-30-111 (1983).
\(^{124}\) MONT. CODE ANN. § 70-30-304 (1983).
\(^{125}\) MONT. CONST. art. II, § 29.
\(^{126}\) Codified at MONT. CODE ANN. § 70-30-305(2) (1983).
expert witness fees, exhibit costs, and court costs." The Montana Supreme Court has interpreted the legislative definition of "necessary expenses of litigation" to include the expense of an appraiser who was employed by the condemnee but never called at trial, the cost of counsel's time spent with consultants examining scientific information, and the costs for other experts consulted but never called at trial.

Following State Department of Highways v. Rogers, in which the supreme court ordered the government to pay the prevailing condemnee's significant contingent attorney fees, the Legislature defined reasonable attorney fees for eminent domain proceedings as "the customary hourly rates for an attorney's services in the county in which the trial is held." Such fees are not computed with regard to any previously-established contingency fee arrangement.

Although the government's offer of compensation conceivably could include an amount for the condemnee's attorney fees, the Montana Supreme Court has ruled that the statutory right to recover the necessary expenses of litigation does not vest upon the filing of the condemnation action. Rather, the right to recover necessary costs of litigation accrues only after the condemnee has obtained a court award in excess of the government's final pre-trial offer.

B. Inverse Condemnation

In 1971 the Legislature gave property owners who prevail in inverse condemnation proceedings the right to recover attorney

130. Id.
133. Id.
134. See State Dep't of Highways v. Helehan, 186 Mont. 286, 289, 607 P.2d 537, 538 (1980). The Helehan court held that a condemnee's paying attorney fees, all of which were incurred without going to trial, was not a "necessary expense of litigation," and therefore should be borne by the condemnee. The court apparently left the door open for the government voluntarily paying the condemnee's pre-trial legal expenses as part of a settlement offer.
136. Id. See also State Dep't of Highways v. Burlingame, 185 Mont. 183, 186, 605 P.2d 176, 177 (1980); Helehan, 186 Mont. at 289, 607 P.2d at 538.
137. "Inverse condemnation" is an action or eminent domain proceeding brought by the property owner rather than by the condemnor, and is available where private property
fees and other necessary costs incurred in bringing the action.\textsuperscript{138} The right to recover attorney fees in inverse condemnation proceedings is limited to those projects which received federal assistance.\textsuperscript{139} Unlike eminent domain actions, the right to attorney fees under the inverse condemnation statute appears to vest in the property owner immediately upon the recovery of any judgment from the government. A unique characteristic of this statute is that the "reasonable attorney fees" may be determined by either the court rendering the judgment or by the attorney for the agency which effects a settlement of the inverse condemnation action.\textsuperscript{140}

VII. WATER RIGHTS

A. Appeal of Department Ruling

If a person appeals to the district court a final decision of the Department of Natural Resources and Conservation regarding an application for a water rights appropriation permit, the district court must award reasonable attorney fees to the prevailing party on appeal.\textsuperscript{141} Before the right to attorney fees vests, however, the department first must hold a hearing and make a decision on the permit application, and then the party seeking attorney fees must prevail on the appeal to district court.\textsuperscript{142}

B. Secondary Easements

A party with a canal or ditch easement also possesses a secondary easement to enter, inspect, repair, and maintain the canal or ditch.\textsuperscript{143} In an action to enforce the rights under such a second-
VIII. MINERAL RIGHTS AND MINERAL EXTRACTION

A. Rights-of-Way

An owner of a mining claim may bring an action to establish a right-of-way across land owned by others for a road or waterway which is necessary to conduct mining operations upon the mining claim. In any action to establish such right-of-way, the party seeking the right-of-way must pay all costs and expenses, regardless of the outcome of the action. If the court denies the request for a right-of-way, it has discretionary authority to award attorney fees to the landowner upon whose real property the right-of-way was sought.

B. Strip and Underground Mine Reclamation

Under the Montana Strip and Underground Mine Reclamation Act, if a person obtains a court or administrative order of noncompliance and suspension of operating permit on grounds of environmental endangerment, against the operator of a coal or uranium mine, then the person bringing the action may recover attorney fees from the mine operator. The award of attorney fees in such actions is left to the discretion of the court if the order is issued through the judicial process, and to the Department of State Lands if the order is issued as a result of administrative proceedings. The statute also makes the possibility of receiving attorney fees reciprocal to a mine operator who prevails in any such action.

146. MONT. CODE ANN. § 82-2-211 (1983).
147. Id. Although not specifically stated in the statutes, it appears that the law of rights-of-way for mineral rights owners includes owners of oil and gas rights. The 1981 Montana Legislature enacted MONT. CODE ANN. Title 82, ch. 10, part 5 (1983), regarding surface owner damage and disruption compensation. MONT. CODE ANN. § 82-10-508 (1983) permits a surface owner to bring suit if the oil company's offer of compensation for surface disruption is unacceptable. The Legislature could provide a major incentive for oil companies to make reasonable offers by amending § 82-10-508 to allow for an award of attorney fees to surface owners who prevail in litigation.
148. MONT. CODE ANN. Title 82, ch. 4, part 2 (1983).
149. See generally MONT. CODE ANN. § 82-4-251 (1983).
150. MONT. CODE ANN. § 82-4-251(7) (1983).
151. Id.
In addition to bringing an action against the mine operator, a private party may bring a mandamus action against a public official to enforce the provisions of the Montana Strip and Underground Mine Reclamation Act.\textsuperscript{152} As in other mandamus actions,\textsuperscript{153} the moving party may recover attorney fees as part of the damages.\textsuperscript{154}

C. Accounting for Mineral Royalties

Whenever a mineral rights lessor brings an action to compel an accounting by the lessee for all minerals produced under the lessor’s mineral rights, the district court must award reasonable attorney fees to the prevailing party.\textsuperscript{155} Although the statute providing for attorney fees in mineral rights accounting actions was adopted in 1943, no cases have arisen under the attorney fees portion of the statute.

D. Cancellation of Mineral Leases

A mineral rights lessee whose leasehold interest is cancelled or forfeited is required to record a release of his interest, within sixty days of the cancellation or forfeiture, with the clerk and recorder of the county wherein the mineral rights lie.\textsuperscript{156} If the lessee fails to record the release, the lessor first must make demand upon the lessee to record the release within twenty days.\textsuperscript{157} If the lessee then refuses the lessor’s demand, the lessor may bring an action both to compel the release and for damages.\textsuperscript{158} In any such action, the court must award reasonable attorney fees to the prevailing party.\textsuperscript{159}

In determining the amount of attorney fees to be awarded, the court may act upon its own knowledge regarding the value of the

\begin{footnotesize}
\textsuperscript{152} MONT. CODE ANN. § 82-4-252 (1983).
\textsuperscript{153} See infra section XIV, subsection A for discussion of recovering attorney fees in mandamus actions.
\textsuperscript{154} MONT. CODE ANN. § 82-4-252(5) (1983).
\textsuperscript{155} MONT. CODE ANN. § 82-10-101(2), (4) (1983).
\textsuperscript{156} MONT. CODE ANN. § 82-1-201 (1983).
\textsuperscript{157} MONT. CODE ANN. § 82-1-203 (1983).
\textsuperscript{158} MONT. CODE ANN. § 82-1-202(1) (1983).
\textsuperscript{159} Id. As originally enacted, only the plaintiff/lessor could recover attorney fees if successful. The nonreciprocal attorney fee provision was held to be an unconstitutional violation of the fourteenth amendment in Solberg v. Sunburst Oil & Gas Co., 73 Mont. 94, 109, 235 P. 761, 765 (1925). The supreme court reasoned that the nonreciprocal provision was not a legitimate state police power, but “merely a remedy afforded for the enforcement of private contracts.” Id. Cf., supra text accompanying notes 12 and 13 (trend is towards accepting “plaintiffs only” attorney fees statutes as not being violative of equal protection doctrine).
\end{footnotesize}
attorney’s services, notwithstanding the statutory provision that “[i]ssues in regard to such fees shall be determined in the same manner as other issues in such actions.” Where the lessor and lessee each recover a portion of the relief for which they prayed, the supreme court has ruled that neither party is required to pay the other’s attorney fees.

E. Mineral Rights of Unlocatable Persons

The 1979 Montana Legislature enacted legislation permitting persons, holding an interest in the mineral rights of particular property, to petition the district court for the creation of a trust, the purpose of which is to hold the proceeds from the mineral rights belonging to any other unlocatable person holding a mineral interest in the same property. If such trust is created and a party other than the trustee holds such proceeds in excess of six months, the holder is liable to the trust for all costs and attorney fees incurred in recovering such proceeds for the trust.

F. Hard-Rock Mining Local Government Impact

The 1981 Montana Legislature enacted legislation designed to assist local governments in mitigating the initial financial impact of large hard-rock mining projects. Included in the legislation was a requirement that any potential hard-rock mining developer whose project would employ 100 or more persons or cause a 15% increase in the local population must submit to the Hard-Rock Mining Impact Board an impact plan describing the economic impact the proposed mining development would have on the af-
fected local government units.\textsuperscript{167} If the affected local government units formally object to the developer's impact plan as submitted, and if the Hard-Rock Mining Impact Board or a court promulgates a remedial order as a result of the objections, then the objecting local government unit is entitled to attorney fees from the developer for "any administrative or judicial appeals" relating to the impact plan.\textsuperscript{168}

\textbf{IX. PROBATE AND RELATED PROCEEDINGS}

The Montana version of the Uniform Probate Code\textsuperscript{169} is unique in that it statutorily establishes the amount which constitutes reasonable attorney fees for most probate proceedings. If more than one attorney works on a particular probate project, only one compensation, as fixed by the code, is allowed.\textsuperscript{170} If the attorney working on a probate finds it necessary to charge additional fees for non-traditional services performed in connection with the probate, the fees must be fixed by the court after notice, hearing, and a showing of good cause.\textsuperscript{171}

In order to hasten closing of the probate, the Montana Uniform Probate Code provides that if an estate has not been closed within two years of the date of death, and if good cause for such failure cannot be shown, then the personal representative and his attorney may be ordered to forfeit all their rights to compensation.\textsuperscript{172}

\textbf{A. General Probate}

Generally, an attorney may charge fees not to exceed 4 1/2\% of the first $40,000 of the gross probate estate value, as reported for federal estate tax or state inheritance tax purposes, and 3\% of the value of the estate in excess of $40,000.\textsuperscript{173} If the value of the estate for federal estate tax purposes differs from the value for state inheritance tax purposes, the larger value is used to compute the maximum attorney fees.\textsuperscript{174}

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{167} MONT. CODE ANN. § 90-6-307(1) (1983).
\item \textsuperscript{168} MONT. CODE ANN. § 90-6-307(11) (1983). The wording of the statute is ambiguous and should be amended to reflect legislative intent. It is not clear whether the objecting local government unit is entitled to attorney fees in an original proceeding before the Hard-Rock Mining Impact Board.
\item \textsuperscript{169} MONT. CODE ANN. Title 72, chs. 1 through 5 (1983).
\item \textsuperscript{170} MONT. CODE ANN. § 72-3-633(4) (1983).
\item \textsuperscript{171} Id. at § 72-3-633(5).
\item \textsuperscript{172} MONT. CODE ANN. § 72-3-1015 (1983). This section is not part of the Uniform Act.
\item \textsuperscript{173} MONT. CODE ANN. §§ 72-3-633(1), 72-3-631(1) (1983).
\item \textsuperscript{174} Id. If no federal estate tax form is required to be filed because of the lack of
\end{enumerate}
\end{footnotesize}
Where an attorney who has completed part of the probate is relieved of his duties by the personal representative, and the parties had an enforceable employment contract, the attorney is entitled to fees proportionate to the amount of work completed.\(^{176}\) If there was a valid employment contract with the fee based on a percentage of the estate, quantum meruit is not an appropriate measure of the attorney fees in a probate situation.\(^{176}\)

**B. Termination of Joint Tenancies**

An attorney who provides services in connection with the termination of the decedent's joint tenancy interests is entitled to fees not to exceed 3% of the value of the interest passing, provided the surviving joint tenant is not also the surviving spouse.\(^{177}\) If the surviving joint tenant is the decedent's surviving spouse, the attorney fees for services rendered in terminating the joint tenancy are limited to 2% of the interest passing to the surviving spouse.\(^{178}\)

**C. Termination of Life Estates**

An attorney who renders services which terminate a life estate is entitled to fees not to exceed 3% of the value of the life estate in connection with a probate or joint tenancy termination.\(^{179}\) If, however, the life estate is terminated separately from a probate or joint tenancy termination, the attorney rendering services is entitled to fees equal to 3% of the value of the life estate or $100, whichever is greater.\(^{180}\)

\(^{175}\) In re Estate of Magelssen, 182 Mont. 372, 382, 597 P.2d 90, 95 (1979). The district court determined that the estate's original attorney had agreed to probate the estate for 3% of the value for estate tax purposes. Because the contract provided for a fee within the statutory limits, and because the district court had found the original attorney to have completed 95% of the probate, the original attorney was awarded a fee equal to 95% of the contracted fee.

\(^{176}\) Id. at 380, 597 P.2d at 95.

\(^{177}\) MONT. CODE ANN. § 72-3-633(2) (1983).

\(^{178}\) MONT. CODE ANN. § 72-16-505(2) (1983). This section is not part of the Uniform Probate Code.

\(^{179}\) MONT. CODE ANN. § 72-3-633(3) (1983). It is not clear what the “value of a life estate” is if the life tenant is dead. This statute probably should be amended to refer to “3% of the value of the property subject to the life estate . . . .” Remarks of Professor E. Edwin Eck, March 4, 1985.

\(^{180}\) MONT. CODE ANN. § 72-3-633(3) (1983).
D. Guardianships and Conservatorships

Any visitor, physician, conservator, or attorney appointed by the court in any guardianship or conservatorship proceeding, if not otherwise compensated for services rendered, is entitled to reasonable compensation out of the assets of the estate.\textsuperscript{181}

X. Internal Affairs of Corporations and Limited Partnerships

A. Denial of Shareholder Inspection Rights

A person who has been a corporate shareholder for at least six months and who owns at least 5\% of the corporate stock is entitled, upon reasonable notice, to examine the corporate books, records, and minutes, provided that he is attempting to obtain the information for a proper purpose.\textsuperscript{182} If the shareholder brings an inspection rights action, and if the court finds that the corporate officers wrongfully had refused a good faith request to inspect, the corporation is liable to the shareholder for damages or other legal remedies awarded by the court, plus costs and attorney fees.\textsuperscript{183} The statutory provision for awarding attorney fees appears mandatory, and the corporation does not have a reciprocal right to recover attorney fees if it prevails.

B. Determination of Fair Value of Dissenters' Shares

If a dissenting shareholder exercises his right to demand a corporate buyout of his shares, and the dissenting shareholder formally demands more than the price offered by the corporation for those shares, the corporation must file a petition in the district court asking for a judicial determination of the fair value of the shares.\textsuperscript{184} If the corporation substantially failed to comply with the statutory procedures\textsuperscript{185} for exercising dissenters' rights, the court may award the dissenting shareholder such attorney and expert witness fees and expenses as the court deems equitable.\textsuperscript{186} Even if the corporation substantially complied with the statutory requirements, the court is required to award attorney and expert witness fees if it determines that the party against whom the fees and ex-

\textsuperscript{183} Id. at § 35-1-513(3).
\textsuperscript{185} See id. at § 35-1-812(1) to (7).
penses are awarded acted arbitrarily, vexatiously, and in bad faith with respect to the dissenters’ rights.\textsuperscript{187}

C. \textit{Indemnification of Corporate Directors and Officers for Legal Expenses}

Prior to 1981, Montana law essentially permitted corporations to indemnify corporate directors and officers for legal expenses, including judgments, incurred in their capacities as directors and officers, but only if the director or officer was not determined by the court to have been liable for negligence or misconduct.\textsuperscript{188} Although alternative indemnification provisions could be provided in the articles of incorporation or the bylaws,\textsuperscript{189} the pre-1981 provision was too inflexible in light of the modern reality of lawsuits arising out of conduct which formerly was accepted without question.\textsuperscript{190} The 1981 Montana Legislature adopted a more flexible, albeit more complex, means for determining when indemnification is mandated, permitted, or prohibited.

If a corporate director, by reason of his status as a director, is made a party to any legal action, and if he conducted himself in good faith, reasonably believed that his conduct was in the best interests of the corporation, and, in the case of a criminal proceeding, had no reasonable cause to believe that his conduct was criminal, then the director may be indemnified as follows:

1) If the director is wholly successful in the action, the corporation is required to indemnify the director for his reasonable expenses in defending the action,\textsuperscript{191} including attorney fees,\textsuperscript{192} unless the articles of incorporation provide otherwise. If the corporation refuses to indemnify the director, and the director prevails in an action to compel indemnification, the corporation must pay the director’s reasonable expenses of securing the indemnification, in addition to the indemnification;\textsuperscript{193}

2) If the director does not prevail in a derivative action, the corporation may voluntarily indemnify the director for his expenses, including attorney fees, but not for any judgments, penalties, fines, or settlements for which the director is liable;\textsuperscript{194} and

\begin{itemize}
  \item \textsuperscript{187} \textit{Id.}
  \item \textsuperscript{188} \textit{See} \textit{Mont. Code Ann.} § 35-1-108(15) (1979).
  \item \textsuperscript{189} \textit{Id.}
  \item \textsuperscript{190} \textit{See} \textit{Mont. Code Ann.} § 35-1-414 annot. (1984).
  \item \textsuperscript{192} \textit{Mont. Code Ann.} § 35-1-414(1)(c) (1983) defines expenses to include attorney fees.
  \item \textsuperscript{194} \textit{Id. at} § 35-1-414(2)(b).
\end{itemize}
3) If the director does not prevail in an action brought by a third party, the corporation may voluntarily indemnify him against judgments, penalties, fines, settlements, and expenses, including attorney fees.\textsuperscript{195}

Additionally, a director who did not prevail in an original action may petition the court for an order compelling the corporation to indemnify.\textsuperscript{196} If the court determines that the director fairly and reasonably is entitled to indemnification, the court may order indemnification, but in derivative actions indemnification is limited to the indemnified director's litigation expenses.\textsuperscript{197} Indemnification of corporate officers is governed by the same rules that govern indemnification of directors.\textsuperscript{198}

D. Derivative Actions Involving Limited Partnerships

If a limited partner succeeds, in whole or in part, in a derivative action against the limited partnership, the court may award, in addition to any damages or order of accounting, reasonable expenses, including attorney fees.\textsuperscript{199} The provision allowing for attorney fees is discretionary, not mandatory, and apparently does not allow a reciprocal right of attorney fees to limited partnerships which prevail in such actions.

XI. Work-Related Actions

A. Indemnification of Private Employees

An employer generally must indemnify his employee for all of the direct consequential expenses or losses incurred by the employee in discharging his employment duties.\textsuperscript{200} Although the issue never has faced the Montana Supreme Court, general principles of agency law entitle the employee to indemnification from the employer for reasonable attorney fees and other necessary expenses incurred in litigating third-party claims arising out of the employee's good faith performance of his employment duties.\textsuperscript{201}

Because the plaintiff in a claim against an employee usually names the employer as a party defendant, the employer generally

\begin{thebibliography}{99}
\bibitem{195} Id.
\bibitem{196} Id. at § 35-1-414(4)(a)(ii)(B).
\bibitem{197} Id.
\bibitem{198} Id. at § 35-1-414(9).
\bibitem{199} MONT. CODE ANN. § 35-12-1404 (1983).
\bibitem{201} 3 C.J.S. Agency § 322 (1973).
\end{thebibliography}
hires the attorney who represents both employer and employee. An employee who hires his own counsel when his employer already has hired competent counsel to defend both employer and employee is not entitled to indemnification for such unnecessary expense. The employee generally is forced to seek indemnification only where he has notified the employer of the pending action, but the employer has refused to defend. If the employee failed to give notice of the pending action to the employer, in order to be indemnified the employee must prove that he maintained a reasonable defense.

Although the right to indemnification for attorney fees and litigation expenses in third-party actions vests regardless of the case outcome, the right does not extend to actions brought by the employer against the employee for nonfeasance or malfeasance of employment duties.

B. Indemnification of Government Employees

A governmental employee is entitled to indemnification from his employer for money judgments and legal expenses incurred in defending a noncriminal action arising out of the employment, including attorney fees either charged to the employee or awarded to the opposing party. The government employee, however, is not entitled to indemnification if his conduct constituted oppression, fraud, malice, or criminal activity, or if he was acting outside the scope of his employment, or if he unreasonably failed to cooperate in the defense of the case, or if he settled the case without the consent of the government employer.

202. Id.
203. Id.
207. Id. at § 2-9-305(6). This subsection apparently was adopted in response to Dvorak v. Huntley Project Irrigation Dist., Mont. 639 P.2d 62 (1981), in which the supreme court ruled that the government agency was responsible for punitive damages awarded against two employees who intentionally denied irrigation water to a farmer. The denial of water occurred after the adoption of the 1972 Montana Constitution, which abolished sovereign immunity except where specifically provided by the Legislature, MONT. CONST. art. II, § 18, but before the adoption in 1977 of MONT. CODE ANN. § 2-9-105 (1983), which makes government entities immune from punitive damages.

Prior to the adoption of MONT. CODE ANN. § 2-9-305(6) (1983), the government employee was entitled to indemnification unless the claim was based on an intentional tort or a felonious act.
C. Wage Claims

If an employee brings an action to recover wages due, the court must award attorney fees to the prevailing party, even if no specific prayer for attorney fees was made in the pleadings. In order to recover attorney fees, however, formal legal action to recover wages must be taken; attorney fees are not available to an employee who prevails on a mere administrative wage claim.

The right to recover attorney fees runs with the wage claim, therefore an assignment of a wage claim carries with it the right to recover attorney fees. If, however, various assigned wage claims are consolidated in a single action, reasonable attorney fees are those necessary to prosecute or defend the consolidated action, and not the total of attorney fees which would have been incurred if the wage claims had been tried independently. The right to recover attorney fees in wage claim actions extends to actions in quantum meruit for reasonable value of services and to wage claim actions based on implied employment contracts. The right does not extend, however, to claims for reimbursement of out-of-pocket expenses.

D. Deceptive Employment Practices

Employers in Montana may not influence workers to change from one place of employment to another by means of deception regarding work character or working conditions. The definition of deception regarding working conditions includes the failure to state in employment advertisements or contracts the fact that the employer currently is involved in a labor dispute at the proposed place of employment.

Any worker hired as a result of such deceptive employment practices is entitled to recover reasonable attorney fees, in addition to all damages sustained as a consequence of such deceptive hiring practices. Apparently, the statute is mandatory, and the em-

212. Id.
217. Id.
218. Id. at § 39-2-303(2).
ployer is not afforded a reciprocal right to attorney fees if he prevails in the action.

E. Workers’ Compensation Benefits

If a claimant applies for workers’ compensation benefits and the insurer219 denies liability for the claim or terminates compensation benefits, and the workers’ compensation judge or the supreme court subsequently finds the claim compensable, the insurer is required to pay the claimant’s reasonable costs and attorney fees.220 The claimant’s right to recover attorney fees under this rule extends not merely to total denials of claims, but also to successful claims for total disability benefits when the insurer only offered partial disability benefits;221 to successful claims where the insurer initially paid claimant’s temporary benefits from the date of accident until his return to work, but wrongfully denied the claimant benefits when his condition deteriorated over time and he sought permanent total disability benefits two years following his initial compensable accident;222 to successful claims where the insurer initially offered minor compensation to settle the claim on a disputed liability basis, but the Workers’ Compensation Court found the claim to be fully compensable, and the insurer appealed to the supreme court, but subsequently dismissed its appeal;223 and to claims where the insurer initially paid benefits to the claimant, but subsequently wrongfully suspended the claimant’s benefits.224

The purpose of the statute allowing for an award of attorney fees in workers’ compensation cases is two-fold. First, it preserves intact an award of compensation recovered by the claimant for his injury, thereby fully protecting an injured worker against disability from a work-related injury and placing total economic responsibility, including the expense of obtaining compensation, upon the industry employing the injured worker.225 Second, it penalizes an insurer that cavalierly denies a legitimate claim or terminates a

219. “Insurer,” as used in this subsection, refers to every insurer under MONT. CODE ANN. Title 39, ch. 71, part 21 (self-insured employers), part 22 (private insurance companies representing employers), and part 23 (the state insurance fund). See McMillen v. Arthur G. McKee & Co., 166 Mont. 400, 408-09, 533 P.2d 1095, 1099 (1975).


claimant’s benefits. The Workers’ Compensation Court must award the claimant attorney fees when the insurer wrongfully denies or terminates benefits, but the insurer has no reciprocal right to attorney fees.

Where the basic controversy between the insurer and the claimant relates to the amount of compensation due, rather than to the claimant’s right to compensation, and the amount awarded by the Workers’ Compensation Court or the Workers’ Compensation Division exceeds the amount paid or offered by the insurer, then the court or division may award reasonable attorney fees to the claimant. The awarding of any such fees is discretionary, and must be based solely upon the difference between the amount ultimately recovered by the claimant and the amount offered by the insurer.

Three somewhat conflicting statutes grant authority to determine what constitutes reasonable attorney fees in workers’ compensation cases. Section 39-7-611 of the Montana Code Annotated gives such authority to the workers’ compensation judge, alone, in cases where the insurer has wrongfully denied a claim or terminated benefits. Section 39-71-612 of the Montana Code Annotated grants authority alternately to the workers’ compensation judge and to the Workers’ Compensation Division to determine reasonable attorney fees in disputes over the amount of compensation when the insurer has admitted to some liability on the claim, but disputes the amount of compensation requested by the claimant. Section 39-71-613(2) of the Montana Code Annotated grants the administrator of the Workers’ Compensation Division discretionary authority to “regulate the amount of the attorney’s fees in any workers’ compensation case.”

The Montana Supreme Court implicitly adopted the latter statute as controlling in its second review of Wight v. Hughes Livestock Co. (hereinafter Wight II) when it reversed the Workers’ Compensation Court’s determination of “reasonable” attorney fees and remanded the case for a redetermination of attorney fees.

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227. The Montana Supreme Court has held that the provision of MONT. CODE ANN. § 39-71-611 (1983) which permits a prevailing claimant to recover attorney fees, while denying a prevailing insurer the same privilege, is not a violation of the equal protection clause of either the fourteenth amendment of the United States Constitution or MONT. CONST. art. II, § 4. See supra text accompanying notes 13 and 14.
229. Id.
Wight and his attorney originally entered a contingent fee arrangement whereby the attorney would receive 25% of any benefits recovered by Wight. The Workers’ Compensation Court originally ruled that, contrary to the insurer’s contentions, Wight’s claim was compensable, that he was entitled to lifetime benefits of approximately $89,791.85, and that he was entitled to reasonable attorney fees. The insurer unsuccessfully appealed to the supreme court in the first *Wight v. Hughes Livestock Co.* (hereinafter *Wight I*). After the *Wight I* decision, Wight and his attorney renegotiated the contingency fee arrangement to allow the attorney fees equal to 40% of Wight’s recovery. On remand for purposes of determining attorney fees, the Workers’ Compensation Court awarded Wight $8,500 in attorney fees, even though the original contingency fee contract would have allowed Wight’s attorney fees of $22,447.96 and the renegotiated contingency contract would have allowed Wight’s attorney fees of $35,916.74.

In ruling that the Workers’ Compensation Court had abused its discretion in awarding Wight only $8,500 in attorney fees, the supreme court in *Wight II* addressed Montana’s “net recovery concept” of awarding attorney fees, over and above any benefits awarded, to prevailing claimants in disputed workers’ compensation cases. The supreme court recognized the conflict between section 39-71-611 of the Montana Code Annotated, which allows the Workers’ Compensation Court to establish “reasonable” attorney fees if the insurer has wrongfully denied a claim, and section 39-71-613(2) of the Montana Code Annotated, which authorizes the Workers’ Compensation Division to establish “reasonable” attorney fees “in any workers’ compensation case.” The supreme court noted, however, that section 611 originally gave the Workers’ Compensation Division authority to establish “reasonable” attorney fees “in any workers’ compensation case.” The supreme court noted, however, that section 611 originally gave the Workers’ Compensation Division authority to establish “reasonable” attorney fees “in any workers’ compensation case.” The supreme court noted, however, that section 611 originally gave the Workers’ Compensation Division authority to establish “reasonable” attorney fees “in any workers’ compensation case.” The supreme court 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231. *Wight II* Appellant’s Brief, p. 5.
233. *Wight II*, **Mont.** at __, 664 P.2d at 305.
234. *Id.* at ____, 664 P.2d at 306-09.
235. *Id.* at ____, 664 P.2d at 311.
court determined that the division's administrative rules should be used as a guideline by the Workers' Compensation Court in determining reasonable attorney fees for Wight's attorney.\(^{237}\)

The Workers' Compensation Division rules limit contingency fees to 25% of the amount of the benefits if the case never goes to a hearing before the workers' compensation judge, 33% of the amount of the benefits if the claimant is forced to litigate his claim before the workers' compensation judge, and 40% of the amount of the benefits if the case is appealed and the supreme court finds that the claimant is entitled to benefits. In addition to the contingency fee schedule, the Wight II court recited various other factors to be considered by the Workers' Compensation Court in determining "reasonable" attorney fees.\(^{238}\) The supreme court implied, however, that those other factors should be secondary to the factor of "the market value of the lawyer's services at the time and place involved."\(^{239}\)

Because the Workers' Compensation Division obviously had considered its contingency fee limits to represent reasonable contingency fee rates,\(^{240}\) and because the contract between Wight and his attorney fell within those limits, the supreme court stated that such a contingency fee agreement should enjoy a strong presumption that it represents "reasonable" attorney fees in a workers' compensation case.\(^{241}\) The court further stated that if the workers' compensation judge does not set attorney fees in accordance with a contingency fee contract adopted in harmony with the Workers' Compensation Division rules, then the workers' compensation judge "shall state with particularity his reasons in writing, based upon strong countervailing evidence, why the contingent fee contract is not followed by him, and precisely what weight he accorded

\(^{237}\) *Wight II*, Mont. at __, 664 P.2d at 311-12.

\(^{238}\) Those factors are as follows:

"(1) The anticipated time and labor required to perform the legal service properly.

"(2) The novelty and difficulty of legal issues involved in the matter.

"(3) The fees customarily charged for similar legal services.

"(4) The possible total recovery if successful.

"(5) The time limitations imposed by the client or circumstances of the case.

"(6) The nature and length of the attorney-client relationship.

"(7) The experience, skill and reputation of the attorney.

"(8) The ability of the client to pay for the legal services rendered.

"(9) The risk of no recovery."

*Wight II*, Mont. at __, 664 P.2d at 312 (quoting Clark v. Sage, 102 Idaho 261, 265, 629 P.2d 657, 661 (1981)).

\(^{239}\) *Wight II*, Mont. at __, 664 P.2d at 311-12.

\(^{240}\) *Id.* at __, 664 P.2d at 311.

\(^{241}\) *Id.* at __, 664 P.2d at 312.
to the contingent fee contract.”\textsuperscript{242}

Although the supreme court effectively ruled that contingency fee agreements between the workers’ compensation claimant and his attorney are binding upon the insurer which is later found liable for attorney fees, the court did not allow Wight’s attorney to recover on the renegotiated contingency fee contract. The court reasoned that the confidential relationship between the attorney and the claimant prohibited the attorney from using, or giving the appearance of using, his position to influence the renegotiation of the contingency fee arrangement.\textsuperscript{243} Because the insurer subrogates to the duties of the claimant with respect to contingent attorney fees, the insurer may also exercise the rights of the claimant with regard to the contingency fee arrangement.

It should be noted that section 39-71-613(1) of the Montana Code Annotated requires an attorney representing a workers’ compensation claimant to file a copy of the employment contract with the Workers’ Compensation Division. Failure to file as required results in the attorney’s automatic forfeiture of his right to recover attorney fees in that particular workers’ compensation action.\textsuperscript{244} By properly filing a copy of the employment contract with the Workers’ Compensation Division, however, the attorney acquires a lien for payment of fees which attaches in advance upon the claimant’s benefits.\textsuperscript{245} Neither the Legislature, nor the Workers’ Compensation Court, nor the Workers’ Compensation Division has adopted a deadline for filing a copy of the employment contract. In at least one instance the supreme court has indicated that the absence of such a rule makes enforcement of the forfeiture provision difficult.\textsuperscript{246} Nevertheless, an attorney representing workers’ compensation claimants should always file a copy of the employment contract with the Workers’ Compensation Division as soon as the contract is entered.

\textsuperscript{242} Id.

\textsuperscript{243} Id.

\textsuperscript{244} Mont. Code Ann. § 39-71-613(3) (1983). The Wight II court urged the Workers’ Compensation Division to promulgate rules requiring copies of such contracts to be filed with the insurer or employer, and to establish a procedure for the insurer to contest the reasonableness of the contingency fee arrangement. Wight II, --- Mont. at ---, 664 P.2d at 313. As of the date of this writing, the Workers’ Compensation Division has not promulgated any such rules.


If an injured worker brings an action against a third party for injuries suffered in the employment context, the workers' compensation insurer is entitled to subrogation for all compensation and benefits it either has paid or eventually will pay. If the worker notifies the insurer of his intent to bring an action against a third party, and if the worker requests the insurer's proportionate contribution towards prosecuting the action against the third party, the insurer must pay a proportionate share of the costs and attorney fees necessary in prosecuting the action. If the insurer refuses to pay a proportionate share of the costs and attorney fees, then it is entitled only to 50% subrogation.

In order to preserve its right to 100% subrogation, the insurer's response to the worker's request for proportionate financial assistance in bringing the claim "should be explicit, immediate and without reservation." Such unequivocal response allows the worker's attorney to properly evaluate the claim for his client. It also assures the worker that the costs will be shared if the action against the third party is unsuccessful.

It should be noted that while the insurer has subrogation rights in a survival action, it does not have subrogation rights in a wrongful death action. The key distinctions are that a survival action is personal to the decedent, accrues during the decedent's lifetime, is subject to decedent's creditors' claims, and may be prosecuted after decedent's death only by his personal representative; but a wrongful death action is personal to the decedent's survivors (usually spouse and children), vests only upon the decedent's death, and is not subject to claims against the decedent or his estate.

Regardless of whether the insurer agrees to proportionate indemnification for the worker's attorney fees, the worker is entitled to at least one-third of the judgment against the third party, minus a proportionate amount for the worker's attorney fees, if the judgment against the third party is insufficient to provide the worker with that amount after payment of the insurer's subrogation claim.
G. Occupational Disease Benefits

The Montana Occupation Disease Act\textsuperscript{254} allows for compensation of workers who contract work-related diseases, or who have inert work-related diseases, even though no injury, as defined by the workers' compensation laws,\textsuperscript{255} has occurred.\textsuperscript{256} The Occupational Disease Act incorporates a net-recovery doctrine similar to that found in the Workers' Compensation Act. If an insurer denies an occupational disease claim and requests that the Workers' Compensation Division hold a hearing, and if the claim is determined compensable by the division, then the insurer must pay the claimant's reasonable attorney fees, as determined by the Workers' Compensation Division.\textsuperscript{257} If the insurer appeals the decision of the Workers' Compensation Division to the workers' compensation judge or the supreme court, and the claim is ultimately determined compensable, the insurer must pay the claimant's reasonable attorney fees, in addition to costs and any benefits awarded.\textsuperscript{258}

If the insurer is found liable for the claimant's occupational disease claim, and is required to pay the claimant's attorney fees, then section 39-72-712 of the Montana Code Annotated sets forth a payment schedule for those fees. It permits the insurer to pay the claimant's attorney fees in reasonable weekly installments, in the same manner as it pays the claimant's benefits.\textsuperscript{259}

XII. Automobile Liability Claims and Other Insurance Matters

The general rule in Montana is that an insurance policy beneficiary who successfully maintains an action against the insurer to recover amounts due under the insurance policy is not entitled to attorney fees, unless there is a statutory or contractual provision to the contrary.\textsuperscript{260}

\textsuperscript{254} MONT. CODE ANN. Title 39, ch. 72 (1983).
\textsuperscript{255} "Injury" is defined under the Workers' Compensation Act generally as "a tangible happening of a traumatic nature from an unexpected cause or unusual strain resulting in either external or internal physical harm," MONT. CODE ANN. § 39-71-119(1) (1983), and generally does not include work-related diseases. The mere fact that a worker has a compensable claim under the Occupational Disease Act, however, does not necessarily preclude his recovery under the Workers' Compensation Act. Ridenour v. Equity Supply Co., Mont. \textemdash, 665 P.2d 1099, 1104 (1983).
\textsuperscript{257} MONT. CODE ANN. § 39-72-613(1) (1983).
\textsuperscript{258} Id. at § 39-72-613(2).
\textsuperscript{259} MONT. CODE ANN. § 39-72-712 (1983) is noteworthy mainly for its inherent lack of clarity. No cases have been decided under this statute.
A. Automobile Liability Claims

The 1981 Montana Legislature amended the general rule for purposes of some automobile liability claims. Section 25-10-303 of the Montana Code Annotated provides that, if a plaintiff obtains a judgment equal to or greater than the amount of property damage claimed by him in his last written offer to the defendant or defendant’s agent prior to the filing of the action, the plaintiff is entitled to recover attorney fees from the defendant. If the defendant or his agent fails to respond to the plaintiff’s written offer within fifteen days of the response date requested by the plaintiff, the plaintiff may consider such failure to respond a total rejection of the offer and bring an action.\(^\text{261}\) If the plaintiff is successful in his action, he is entitled to recover attorney fees from the defendant.\(^\text{262}\)

It should be noted that this exception to the general rule applies only to actions solely involving damages to property arising out of the ownership, use, or maintenance of an automobile.\(^\text{263}\)

B. Unfair Trade Practices by Insurance Companies

Plaintiffs prevailing in bad faith actions against insurance companies might be entitled to recover attorney fees in addition to other damages awarded by the jury. Section 33-18-201 of the Montana Code Annotated gives rise to the tort of bad faith on the part of insurance companies in Montana.\(^\text{264}\) That section is part of Title 33, chapter 16 of the Montana Code Annotated, the purpose of which “is to regulate trade practices in the business of insurance . . . by defining or providing for determination of all such practices in this state which constitute unfair methods of competition or unfair or deceptive acts or practices . . . .”\(^\text{265}\) Section 33-18-201(1) of the Montana Code Annotated prohibits unfair insurance trade practices, independent of the general prohibition of unfair trade practices under section 30-14-103 of the Montana Code Annotated.\(^\text{266}\) However, neither section 30-14-103 of the Montana Code Annotated, which outlaws unfair trade practices, nor sections 30-14-104 and -105 of the Montana Code Annotated, which limit the scope of section 30-14-103, exempt insurance companies from


\(^{262}\) Id.

\(^{263}\) Id.


section 30-14-103 and other related provisions of the Montana Unfair Trade Practices and Consumer Protection Act of 1973. If indeed insurance companies are subject to the Montana Trade Practices and Consumer Protection Act of 1973, then an insurer that engages in any of the acts prohibited by section 33-18-201 of the Montana Code Annotated could be held liable under section 30-14-133 of the Montana Code Annotated for the reasonable attorney fees of one who prevails in a bad faith action against his insurance company. The Montana Supreme Court has not yet addressed this precise issue.

C. Unauthorized Insurance Companies

In an action to recover amounts due under an insurance policy, brought against an insurance company that is doing business in Montana without first having been issued a subsisting certificate of authority by the commissioner of insurance, the court may allow reasonable attorney fees to the prevailing plaintiff if the unauthorized insurer’s refusal to make payment was vexatious and without reasonable cause. This discretionary power to award attorney fees does not permit the court to award attorney fees to the prevailing unauthorized insurer.

XIII. Family Law

In any proceeding arising under the Montana Uniform Marriage and Divorce Act (hereinafter UMDA), the district court, after considering the financial resources of both parties, may order one party to pay the other party’s reasonable attorney fees.

A. The Dissolution Decree

Although the attorney fees provision of the UMDA applies to several issues, most of the cases arising under that provision relate to the awarding of attorney fees as part of the final dissolution decree. Prior to the adoption of the UMDA, Montana statutory law provided that the court, in its discretion, could require the husband to pay the wife’s attorney fees in divorce actions. Although the former provision, on its face, was partial towards the wife, the courts consistently required a showing of necessity before

268. The Montana version of the Uniform Marriage and Divorce Act is found at MONT. CODE ANN. Title 40, chs. 1 and 4 (1983).
270. REV. CODE MONT. § 21-137 (1947).
awarding attorney fees.\footnote{271}{See, e.g., Whitman v. Whitman, 164 Mont. 124, 132, 519 P.2d 966, 969 (1974); Bordeaux v. Bordeaux, 29 Mont. 478, 482, 75 P. 359, 361 (1904).} Under the UMDA, a showing of necessity also is prerequisite to the awarding of attorney fees.\footnote{272}{In re Marriage of Brown, 179 Mont. 417, 427, 587 P.2d 361, 367 (1978).} Although the Montana Supreme Court has held that an "award of attorney fees must be based on a hearing allowing for oral testimony, the introduction of exhibits, and an opportunity to cross-examine in which the reasonableness of the attorney fees claim is demonstrated,"\footnote{273}{In re Marriage of Aanenson, 183 Mont. 229, 236, 598 P.2d 1120, 1124 (1979).} the court occasionally has upheld an award of "nominal" attorney fees, made without a hearing to determine the reasonableness of the award.\footnote{274}{See, e.g., Bailey v. Bailey, 184 Mont. 418, 422, 603 P.2d 259, 261 (1979); Solie v. Solie, 172 Mont. 132, 137-38, 561 P.2d 443, 447 (1977).} As evidenced by various supreme court cases, determination of "nominal" attorney fees is an inexact science. In \textit{Bailey v. Bailey},\footnote{275}{184 Mont. at 422, 603 P.2d at 261.} the supreme court upheld the district court's award, without a hearing, of $350 to the wife for attorney fees in a dissolution action where the two major issues were relatively simple. The \textit{Bailey} court reasoned that the fee was "nominal" and that the trial court was aware of the parties' relative financial status.\footnote{276}{Id.} Four weeks later, in \textit{Phennicie v. Phennicie},\footnote{277}{185 Mont. 120, 128, 604 P.2d 787, 791 (1979).} the court overturned the district court's award, without a hearing, of $500 to the wife for attorney fees in a dissolution action where the major issues were quite complex in comparison to the issues in \textit{Bailey}. The \textit{Phennicie} court made no mention of whether the attorney fees awarded by the district court were nominal; rather, the court stated that the wife's inability to pay her attorney fees was insufficient evidence to substantiate the $500 award.\footnote{278}{Ironically, the district court judge whose ruling was affirmed in \textit{Bailey} was the same judge whose ruling was reversed in \textit{Phennicie}.} More recently, the court in \textit{In re Marriage of Chapin}\footnote{279}{\textit{Id.}} upheld the district court's award of $400 in attorney fees to the wife without first holding an evidentiary hearing. The supreme court acknowledged its rule in \textit{Phennicie} that an evidentiary hearing should always be conducted, but reasoned that the award of attorney fees was so small that it did not justify a reversal for rehearing of the attorney fees issue.\footnote{280}{\textit{Id.}}

Regardless of the cases in which awards of attorney fees made

\footnote{271}{See, e.g., Whitman v. Whitman, 164 Mont. 124, 132, 519 P.2d 966, 969 (1974); Bordeaux v. Bordeaux, 29 Mont. 478, 482, 75 P. 359, 361 (1904).}
without an evidentiary hearing have been upheld, it clearly is advisable to request attorney fees in the dissolution pleadings. Unless an attorney fees payment arrangement is stipulated by the parties and approved by the court, one also should request an evidentiary hearing to determine which party is responsible for the attorney fees. Provided the evidentiary hearing has been held, the decision to award attorney fees in a marital dissolution action is largely left to the discretion of the trial court. Any award of attorney fees, however, must be based upon competent evidence sufficient to support such an award. If either party to the dissolution has made a formal request for an award of attorney fees, the court must indicate in its written findings of fact, conclusions of law, or order whether or not such attorney fees have been granted, and the reasons for refusing to grant or for granting such attorney fees.

In assigning responsibility for attorney fees in a dissolution action, the court may consider the relative earning potential and health of the parties, the parties’ relative financial status under the property settlement decree, the parties’ relative contribution to the marital estate, and any other relevant factors included in the UMDA. In short, the award of attorney fees in marital cases should be based on the case as a whole. A court, however, should not consider the parties’ rate of success on various claims raised in the proceedings.

If the district court has conducted an evidentiary hearing, the Montana Supreme Court traditionally has been reluctant to reverse district court rulings regarding attorney fees in dissolution actions. Recently, however, the supreme court in In re Marriage

283. An attorney fees payment arrangement set by the district court and stipulated to by the parties was approved as a substitute for the evidentiary hearing in Downs v. Downs, 181 Mont. 163, 167-68, 592 P.2d 938, 941 (1979).
284. Brown, 179 Mont. at 427, 587 P.2d at 367.
292. Id.
293. The Montana Supreme Court has upheld an award of attorney fees against a healthy husband whose earning capacity was shown to be three times that of his unhealthy wife, even though the wife was awarded child custody and monthly maintenance. Carr, Mont. at 667 P.2d at 427. The supreme court also has upheld an award of $1,500
of Vert,\textsuperscript{294} reversed the district court's award of attorney fees, even though the district court had held an evidentiary hearing. The supreme court reasoned that the district court should not have awarded attorney fees to the wife because she had monthly income $250 in excess of her monthly expenses, and because the husband's monthly income equaled his monthly expenses.\textsuperscript{295} Vert may portend a willingness of the supreme court to reverse awards of attorney fees in dissolution cases where the district court has held an evidentiary hearing, but exercised imperfect discretion.

It should be noted that a party represented in a dissolution action by the Legal Services Association may not recover attorney fees, because that party has incurred no personal expense.\textsuperscript{296}

B. Post-Decree Matters

A court, after considering the financial resources of both parties, may award attorney fees for legal services or costs incurred prior to the commencement of the dissolution or after the entry of judgment.\textsuperscript{297} In determining whether to award attorney fees in post-decree proceedings, the courts typically consider the relative financial situations of the parties, as well as any aggravating circumstances which led to the post-decree litigation. For example, district courts routinely grant attorney fees to mothers who must

\[\text{towards the wife's attorney fees where she had only $12 in her bank account at the time of trial, she was earning $100 to $125 per month as a cosmetics salesperson, and she was awarded a one quarter share of the $400,000 marital estate. In re Marriage of Kaasa, 181 Mont. 18, 25-26, 591 P.2d 1110, 1114 (1979). In another instance, the supreme court upheld an award to the wife of $1,591 in attorney fees and costs, even though the district court also awarded the wife 78% of the existing marital estate plus one-third of the husband's retirement benefits. In re Marriage of Laster, 197 Mont. 470, 479, 643 P.2d 597, 602 (1982). The award of attorney fees and costs included an amount contained in an uncontested affidavit which stated the wife's costs of travelling from Pennsylvania to Montana to contest the dissolution action. Id. The supreme court also has upheld the awarding of attorney fees to the wife where the husband refused to supply the district court with necessary financial information. In re Marriage of Dahl, Mont., 612 P.2d 196, 198 (1980). The district court based its award upon the wife's testimony that she could not afford to pay her attorney and that her husband was a good welder and mechanic. Id.}

The supreme court has upheld a district court decision denying attorney fees to the wife where she had been employed for two years, had received 40% of the marital estate, and had testified that she was capable of supporting herself. In re Marriage of Knudson, 186 Mont. 8, 17, 606 P.2d 130, 135 (1980). The court also has upheld a district court's denial of attorney fees to a wife who received only 40% of the marital estate and whose only employment in the previous thirty years had been on the family ranch. In re Marriage of Owen, 187 Mont. 214, 218, 609 P.2d 292, 295 (1980).

\textsuperscript{294} Mont. 18, 25-26, 591 P.2d 1110, 1114 (1979).

\textsuperscript{295} Id.

\textsuperscript{296} In re Marriage of Thompson, Mont., 630 P.2d 243, 244 (1981).

\textsuperscript{297} Mont. Code Ann. § 40-4-110 (1983).
hire lawyers in order to recover delinquent child support payments. Because mothers who must seek court-ordered support payments generally are in financial positions inferior to those of the delinquent fathers, and because the delinquent fathers have breached their moral and legal obligations to support their children, awards of attorney fees to the mothers are justified on the basis of both financial necessity and the aggravating circumstances of nonpayment.

Financial necessity, rather than relative success of the litigation, is the dominant factor in courts awarding attorney fees in post-decree matters. The supreme court has approved a district court’s award of $750 attorney fees to a mother who obtained a court order for increased child support payments. On the other hand, the court has refused to uphold an award of attorney fees to an employed custodial husband who successfully defended against an attempt by his indigent wife to get a court-ordered modification of the child custody decree.

If the moving party’s attempt to modify the custody decree is determined to be vexatious and to constitute harassment, then the non-moving party is entitled to attorney fees as a matter of law. In Easton v. Easton, the supreme court upheld the district court’s award of $1,372.75 to the custodial wife for attorney fees in a vexatious and harassing custodial decree modification action brought by the husband. Determining what is vexatious and harassing is left to the discretion of the district court. Where the petition for modification of the custody decree merely lacks merit, but is not determined to be vexatious or harassing, the court may exercise its discretion and not award attorney fees.

Occasionally in post-decree matters a party’s negligent or wanton disregard for its responsibilities under the property settlement or dissolution decree can give rise to an award of attorney fees. Even though the wife admittedly was self-supporting, the court in

298. Telephone interview with John McRae, Attorney for the Montana Department of Revenue Child Support Enforcement Bureau (CSEB), November 9, 1984. The CSEB typically does not recover attorney fees from delinquent fathers, partly because CSEB does not have the staff to keep formal billing records on individual cases. Without individual billing records, ascertainment of actual attorney fees on individual cases is difficult, and the courts are unlikely to award attorney fees.

301. MONT. CODE ANN. § 40-4-219(2) (1983).
304. Id. at 309-10, 567 P.2d at 469.
In re Marriage of Grace\textsuperscript{305} upheld an award to the wife for reasonable attorney fees incurred in forcing her ex-husband to perform his obligations under the property settlement agreement. Because the husband's failure to pay his federal income taxes caused a tax lien to be placed against the jointly-owned property which the wife received under the property settlement agreement, the supreme court reasoned that the innocent wife should not be made to bear the financial burden, including legal expenses, of her ex-husband's transgressions.\textsuperscript{306}

Commonly a separation agreement or dissolution decree will include a clause which provides that attorney fees shall be awarded to the prevailing party in any action commenced to enforce, modify, or interpret any provision of the agreement or decree. In Jensen v. Jensen\textsuperscript{307} the mother successfully petitioned the court for increased child support from the husband, who earned five times the wife's annual income. Because of the relative financial status of the parties, and because of a clause in the separation agreement providing for an award of attorney fees to the prevailing party, the supreme court held that the wife had both statutory and contractual basis for recovering reasonable attorney fees.\textsuperscript{308} In so ruling, the supreme court implied that an express contractual right for the prevailing party to recover attorney fees is enforceable in a marital action, regardless of the relative financial status of the parties.\textsuperscript{309}

The prevailing party in an appeal brought under the UMDA may recover attorney fees incurred in the appeal.\textsuperscript{310} Awards of attorney fees for an appeal, however, generally should not be made prior to the appeal, for such awards are too speculative to be reasonable.\textsuperscript{311} Where, however, the moving party shows financial necessity for the opposing party to pay all appellate attorney fees, and presents evidence to prove the reasonableness of the fees, the district court may award appellate attorney fees pending the appeal.\textsuperscript{312} Furthermore, the district court must produce written findings to support any ruling on the appellate attorney fees.\textsuperscript{313}

Although the supreme court occasionally may award and set

\textsuperscript{305} ___ Mont. ___, 643 P.2d 1188, 1190 (1982).
\textsuperscript{306} Id.
\textsuperscript{307} ___ Mont. ___, 629 P.2d 765, 769 (1981).
\textsuperscript{308} Id.
\textsuperscript{309} Id.
\textsuperscript{311} Bliss, 187 Mont. at 336, 609 P.2d at 1212.
\textsuperscript{312} Bier, ___ Mont. at ___, 623 P.2d at 554.
\textsuperscript{313} Id.
reasonable appellate attorney fees in a UMDA action, the most common means of determining reasonable appellate attorney fees is for the supreme court to remand the case to the district court. On remand the district court is able to explore the relative financial status of both parties as well as the reasonableness of the attorney fees, and make an appropriate determination under the guidelines of section 40-4-110 of the Montana Code Annotated.

C. Parental Responsibility for Minor’s Vandalism

Damages against a parent whose child maliciously or willfully destroys property belonging to another are limited by section 40-6-238 of the Montana Code Annotated to $2,500, plus court costs, plus attorney fees. Attorney fees against the parent, however, may not exceed $100.

D. Other Family Law Matters

In any action involving child support, custody, or visitation, the court may appoint an attorney to represent the interests of a minor dependent child. The court is required to assess the fees earned by the child’s court-appointed attorney against either or both parents.

Under the Uniform Child Custody Jurisdiction Act (UCCJA), a court may award attorney fees against a party which brings a child custody action in an inappropriate forum. Section 40-7-109(3) of the Montana Code Annotated allows the court to assess the opposing party’s travel expenses and attorney fees against a party which abducts a child from another state and brings the child into Montana for purposes of gaining or retaining physical custody of the child in violation of the child custody decree. Section 40-7-108(7) of the Montana Code Annotated allows a court to assess the opposing party’s travel expenses and attorney fees against a party which brings an action in Montana to initiate or modify a child custody decree, when another state clearly would have been the more appropriate forum. A person who violates a foreign custody decree and who necessitates the enforcement of the foreign decree in Montana may be held responsible for travel ex-

314. Easton, 175 Mont. at 424, 574 P.2d at 994.
315. See, e.g., Bier, ___ Mont. at ___, 623 P.2d at 554-55.
317. Id.
penses and attorney fees of a party who is compelled by the violator’s acts to enforce the child custody decree in Montana.\(^{321}\)

The attorney fees provision in the UCCJA shifts the financial burden of bringing a UCCJA action. Any person who deliberately ignores a child custody decree, brings a child custody action in a clearly inconvenient forum, or takes a child across state lines for the purpose of establishing physical and/or legal custody, bears the burden of attorney fees.

The Legislature has provided a distinct financial incentive for employers and other debtors of a delinquent child support obligor to assist the Department of Revenue in collecting delinquent child support payments. Under section 40-5-242 of the Montana Code Annotated, a party who disobeys a court order to deliver property of the child support obligor, or who disregards a child support lien upon the child support obligor’s property, is liable to the Department of Revenue for an amount equal to 100% of the amount sought from the disobeying party, plus costs, interest, and attorney fees.

XIV. MISCELLANEOUS SITUATIONS INVOLVING THE SOVEREIGN

People expect the government to perform certain societal functions. In attempting to fulfill these expectations, the Legislature has adopted various statutes which allow for the recovery of attorney fees in certain actions brought by private persons for the good of society, in actions against a government official to perform a rightfully expected act, and in civil actions brought by the state against private parties who have failed to fulfill certain substantial obligations to society. Some of these statutes are discussed below. Others, such as consumer protection laws and eminent domain laws, are discussed at other places in this comment.

A. Mandamus and Prohibition Writs

Section 27-26-402 of the Montana Code Annotated states that a successful petitioner for a writ of mandamus may recover the damages sustained, as determined by the jury, court, or referee. A successful petitioner for the counterpart of the writ of mandamus, the writ of prohibition,\(^{322}\) may also recover such damages.\(^{323}\) For

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322. MONT. CODE ANN. § 27-27-101 (1983) defines the writ of prohibition as follows: The writ of prohibition is the counterpart of the writ of mandate. It arrests the proceedings of any tribunal, corporation, board, or person, whether exercising functions judicial or ministerial, when such proceedings are without or in excess of the jurisdiction of such tribunal, corporation, board, or person.
purposes of clarity, writs of prohibition and writs of mandamus both are referred to herein as writs of mandamus.

Because a mandamus action is one in equity and not in law, the damages recoverable under the statute are limited to those incidental to the mandamus proceeding itself, and do not include damages "arising out of the prior preclusion or deprivation which the writ itself was invoked in part to redress." Attorney fees incurred in bringing the mandamus action are included as damages incidental to the mandamus action, therefore they are recoverable as a matter of equity. A court may award attorney fees to a successful mandamus applicant who obtains a writ against a corporate officer, as well as an applicant who obtains a writ against a public official.

Prior to the adoption of the Montana Rules of Civil Procedure in 1962, the supreme court held in *State ex rel. Phillips v. Ford* that a claim for attorney fees should be made in the original mandamus pleadings and proved in open court prior to the entry of final judgment. The *Phillips* court also held that if the pleadings did not include a prayer for attorney fees, but the issue was raised at trial and objected to by the opposing party, the applicant should move to amend its pleadings to include a prayer for attorney fees.

Courts are given authority to award damages to successful applicants for writs of prohibition by MONT. CODE ANN. § 27-27-104 (1983), which makes MONT. CODE ANN. § 27-26-402 (1983) applicable to proceedings for a writ of prohibition.

326. *State ex rel. Lawin v. Polson Plywood Co.*, 135 Mont. 559, 561, 342 P.2d 1070, 1071 (1959). MONT. CODE ANN. § 27-26-102(1) (1983) states that a Writ of Mandamus may be issued by the supreme court or the district court or any judge of the district court to any inferior tribunal, corporation, board, or person to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station or to compel the admission of a party to the use and enjoyment of a right or office to which he is entitled and from which he is unlawfully precluded by such inferior tribunal, corporation, board, or person.

Presumably, attorney fees may be awarded to any successful applicant and against any party which can be made subject to a writ of mandamus. The applicant in *Lawin* was a corporate shareholder who successfully sought a writ of mandamus compelling the board of directors to declare an improperly held corporate election null and void, and to conduct a new election. See supra section X for discussion of attorney fees in actions involving internal affairs of corporations and limited partnerships.

Because attorney fees are recoverable in mandamus actions, and because mandamus is a broad area, a large body of case law has developed wherein attorneys have sought mandamus in a variety of situations in hopes of recovering attorney fees for their clients. See generally, MONT. CODE ANN. § 27-26-402 annot. (1984).

fees. In Johnson v. Rosenbeck, which arose before the adoption of the Rules of Civil Procedure but was decided after the adoption, the supreme court refused to allow attorney fees which the successful applicant requested in a petition filed after the entry of judgment. In a pre-rules case where the record contained no proof of attorney fees incurred by the successful applicant, the applicant’s right to attorney fees was deemed waived.

The Montana Rules of Civil Procedure technically do not apply to mandamus actions, and the Phillips and Johnson cases presumably should control in current mandamus actions. The Montana Supreme Court, however, invoked the Rules in Kadillak v. Department of State Lands (hereinafter Kadillak II) and held that litigation expenses, as a natural and necessary result of a mandamus action, are general damages, and therefore need not be pleaded specifically. Although the supreme court did not state expressly that the Rules of Civil Procedure apply in all facets of mandamus practice, Kadillak II appears to imply such a holding. After Kadillak II, the court likely would hold that the mandamus pleadings may be amended at any time, even after judgment, to conform with the issues raised and evidence presented at trial, as provided by Rule 15(b), and that the judgment may be amended within ten days of its entry, as provided by Rule 52(b). Because of the unsettled issues in this area, an attorney for a mandamus applicant, as a matter of caution, always should include a prayer for attorney fees in the original pleadings.

As in most other situations, reasonable attorney fees in mandamus actions are left primarily to the discretion of the district court. The awarding of attorney fees to the successful mandamus applicant is permissive, not mandatory. Nevertheless, the supreme court consistently has held that a successful claimant who proves damages including attorney fees is entitled to recover attorney fees, even though the non-moving party defended in good faith. In cases where issues other than mandamus are involved,

328. Id.
329. 141 Mont. 72, 76, 375 P.2d 221, 223 (1962).
330. State ex rel. Great Falls Housing Authority v. City of Great Falls, 110 Mont. 318, 333, 100 P.2d 915, 923 (1940).
333. 198 Mont. at 74, 643 P.2d at 1181.
reasonable attorney fees under the mandamus statute include only those charges for the number of hours spent on the mandamus issue.\textsuperscript{335} Reasonable attorney fees to some extent are dependent upon the value of the attorney's services to the applicant.\textsuperscript{336} If the elements of proof are difficult, the court may rely on expert testimony in determining the value of the services expended in obtaining the writ of mandamus.\textsuperscript{337} A court is not bound, however, to follow such expert testimony once it has been received.\textsuperscript{338}

\subsection*{B. Private Attorney General Actions}

When a private party brings an action which normally would be brought by the state, the private party may be entitled to attorney fees if it prevails.\textsuperscript{339}

Section 5-7-305(5)(c) of the Montana Code Annotated provides that any private citizen who brings a successful action against another party to enforce the state lobbying laws\textsuperscript{340} is entitled to recover costs and attorney fees from the other party. If the party fails in its attempt to enforce the lobbying laws, the right to attorney fees is reciprocal.\textsuperscript{341} This provision is one of the few statutory provisions for attorney fees enacted through the citizen initiative process.\textsuperscript{342}

In any successful action by a private party to prevent, restrain, or enjoin any activity prohibited by the Montana Cigarette Sales Act,\textsuperscript{343} the court shall assess attorney fees against the defendant and in favor of the moving party.\textsuperscript{344} The prevailing plaintiff will receive attorney fees even if it cannot prove any other actual damages.\textsuperscript{345} It is not clear whether attorney fees under the Cigarette Sales Act are reciprocal. No cases have arisen under this act, which

\textsuperscript{335} Kadillak II, 198 Mont. at 74, 643 P.2d at 1181.
\textsuperscript{336} State ex rel. Truax v. Town of Lima, 121 Mont. 152, 157, 193 P.2d 1008, 1011 (1948).
\textsuperscript{337} Kadillak II, 198 Mont. at 75, 643 P.2d at 1181.
\textsuperscript{339} See Comment, \textit{Attorney Fees: Slipping From the American Rule Straight Jacket}, supra note 2, at 312, for a detailed discussion of the nonstatutory concept of recovering attorney fees in private attorney general actions.
\textsuperscript{340} Montana's lobbying laws are found at \textit{Mont. Code Ann.} Title 5, ch. 7 (1983).
\textsuperscript{341} \textit{Mont. Code Ann.} § 5-7-305(5)(c) (1983).
\textsuperscript{342} The Montana lobbying laws were amended significantly by Montana Citizen Initiative No. 85, approved by a majority of Montana voters on November 4, 1980. \textit{Mont. Const.} art. III, § 4 provides the constitutional basis for Montana's citizen initiative process. \textit{Mont. Code Ann.} Title 13, ch. 27 (1983) provides the statutory framework for the initiative process.
\textsuperscript{343} \textit{Mont. Code Ann.} Title 16, ch. 10 (1983).
\textsuperscript{345} \textit{Id.}
was adopted in 1965.

C. Right to Know

A prevailing plaintiff in an action brought to enforce the constitutional right to know,346 including the Montana Open Meeting Laws,347 may recover reasonable attorney fees.348 Although numerous right-to-know actions have arisen since the creation of the right to know in the 1972 Montana Constitution, no cases have interpreted the statutory provision for attorney fees in right-to-know actions. In Kadillak v. Anaconda Co. (hereinafter Kadillak I),349 the supreme court refused to decide the issue of the propriety of an award of attorney fees in a right-to-know action, reasoning that it previously had allowed attorney fees to Kadillak on the basis of the mandamus action.350 The award of attorney fees in right-to-know actions is permissive, not mandatory. Because the right to know usually is invoked against the state, and is intended to facilitate open deliberations of all public agencies,351 a party who successfully defends against an action brought under the open meeting laws probably is not afforded reciprocity of the attorney fees provision.

D. Bad Faith Acts of the Sovereign

In any action brought by or against the state or any of its political subdivisions, the opposing party is entitled to recover reasonable attorney fees if it prevails in the action and if the court finds that the state or its political subdivision brought or defended the action frivolously or in bad faith.352 The statute apparently is not reciprocal, although no cases have arisen under it.

349. 184 Mont. 127, 144, 602 P.2d 147, 157 (1979) (hereinafter Kadillak I), aff'd on reh'g, 198 Mont. 70, 643 P.2d 1178 (1982).
350. Id. The supreme court's refusal to address the issue of attorney fees under the right-to-know statutes may have appeared appropriate at the time, in light of the prior award of attorney fees under the mandamus statutes. The ultimate result, however, possibly was to deny Kadillak some attorney fees to which he may have been entitled.

In Kadillak I, the supreme court implied that Kadillak could recover all his attorney fees under the mandamus statute, id., but the court in Kadillak II held that the mandamus statute "provides only for an award of attorney fees for the number of hours spent by the attorney on the mandamus issue." Kadillak II, 198 Mont. at 74, 643 P.2d at 1181. Although Kadillak recovered $11,300 attorney fees under the mandamus statute, he ultimately received nothing for attorney fees under the right-to-know statute.
351. MONT. CODE ANN. § 2-3-201 (1983).
Section 2-9-314(1) of the Montana Code Annotated requires each attorney who files a tort claim against the state or its political subdivision to file with the claim a copy of the attorney employment contract, specifying the fee arrangement between the attorney and his client. Failure to file a copy of the employment contract results in the attorney’s forfeiture of all rights he may have had to collect attorney fees from the state. Section 2-9-301 of the Montana Code Annotated requires that all tort claims against the state be filed with the state Department of Administration, and that all tort claims against the state’s political subdivisions be filed with the clerk or secretary of the respective subdivision.

The Attorney General has opined that an attorney filing a tort claim against the state should file a copy of his contract of employment with the Department of Administration. When filing a tort claim against one of the state’s political subdivisions, it is advisable to file a copy of the attorney employment contract with the clerk or secretary of the respective political subdivision. Because the district court in which the action is filed has jurisdiction to regulate the amount of attorney fees, it clearly is advisable to file the claim and a copy of the employment contract both with the district court where the action is filed and with the Department of Administration, if the claim is against the state, or with the secretary or clerk of the subdivision if the action is against a political subdivision of the state. In awarding reasonable attorney fees, the district court is to consider the time spent by the attorney for the claimant, the complexity of the case, and any other matters which the court finds relevant and appropriate.

E. Administrative Law

The 1983 Legislature adopted section 2-4-406(4) of the Montana Code Annotated, which permits a court to award attorney fees in favor of the challenging party, and against the promulgating agency, when an administrative rule is determined by the court to have been “adopted in arbitrary and capricious disregard for the purposes of the authorizing statute,” provided the Legislature’s Administrative Code Committee first had filed an objection to the administrative rule in question. Although the requirement of the

354. Id. at § 2-9-314(4).
358. Id.
Administrative Code Committee’s prior objection may seem to be a significant hinderance to recovering attorney fees, it is also of significant assistance. Once the Administrative Code Committee has formally objected to the promulgated administrative rule, the burden of proving that the rule was promulgated in compliance with the Montana Administrative Procedure Act rests with the promulgating agency. The purpose of this statute is to “encourage aggrieved persons to litigate the validity of rules that are tainted by formal, legislative committee objection, and ... thus remove one obstacle—financial expense—that discourages persons from seeking judicial review of unlawful agency rules.”

F. Public Contracts

Section 18-1-404 of the Montana Code Annotated provides that, in any contract action against the State of Montana, the district court is to award costs to the successful claimant in the same manner as it would if the state were a private party. Unless the claimant proves that it is entitled to attorney fees under section 25-10-711 of the Montana Code Annotated because of the state’s frivolous or bad faith conduct, “costs shall not include attorney’s fees.”

In Leaseamerica Corporation of Wisconsin v. State, the Montana Attorney General’s office claimed that it was exempted by section 18-1-404 of the Montana Code Annotated from paying attorney fees to a successful claimant, notwithstanding a contract provision requiring the state to pay the plaintiff’s “legal expenses” in the event of the state’s default on a certain lease. The supreme court held that the code section excluding attorney fees from costs does not provide the state with absolute immunity from paying a successful claimant’s attorney fees if the state acted in good faith. The court reasoned that “legal expenses are not synonymous with ‘costs’ but rather, when provided contractually, are treated as a special damage recoverable in addition to the principal sum.” Leaseamerica clearly established that the state is subject to the general rule that the prevailing party in a contract action may recover attorney fees if the underlying contract makes such a

361. See supra this section, subsection D, for discussion of recovering attorney fees from the state because of the state’s frivolous or bad faith conduct.
364. Id. at ____, 625 P.2d at 71.
 provision.

G. Sureties

In any action brought to recover on a performance bond, labor bond, or material bond which is posted as a prerequisite to entering into a contract to do work for the state or any of its subdivisions, the prevailing party is entitled to recover reasonable attorney fees for bringing the action, in addition to the amount due on the contract and other costs. This rule apparently applies not only to bonding for projects undertaken by the state and its subdivisions, but also to federal government projects undertaken within Montana.

Any claim against the surety must be made within ninety days after the government entity affirmatively accepts the work. After filing the claim with the surety, it is wise to wait at least one month before filing suit to recover from the surety, for attorney fees will not be awarded in any suit filed within thirty days of the initial filing of the claim with the surety.

H. Tax Collection and Tax Deeds

If a county treasurer or the state auditor prevails in a suit brought to collect delinquent property taxes, including delinquent coal severance taxes, the party bringing the action is entitled to attorney fees equal to 10% of the amount of taxes due. It appears that the attorney fees are to be awarded in addition to the total amount of taxes due.

Section 15-18-306 of the Montana Code Annotated provides that, in all actions brought by a party other than a county for the purpose of securing a tax deed, the prevailing party is entitled to reasonable attorney fees, regardless of whether the prevailing party is the plaintiff or defendant, but only if the prevailing party is not a county. Because the statutory provision of attorney fees is

365. Such surety bonds are required by MONT. CODE ANN. § 18-2-201 (1983).
368. MONT. CODE ANN. § 18-2-204 (1983). Although the issue has not been litigated and the statute is somewhat ambiguous, the term "the work" appears to mean acceptance of the entire general contract.
370. Coal severance taxes are considered property taxes for purposes of collection. MONT. CODE ANN. § 15-23-704 (1933).
mandatory, it is not necessary to pray for attorney fees in either the complaint or the answer.  

I. Soil Conservation District Ordinances

If the supervisors of a soil conservation district successfully bring an action for a court order requiring a landowner to comply with a properly adopted soil conservation district land use ordinance, the supervisors may recover, in addition to damages, reasonable attorney fees to be fixed by the court. An award of attorney fees in such actions apparently is discretionary, not mandatory.

J. Keeping Dangerous Animals

The 1981 Montana Legislature adopted statutes prohibiting private persons from keeping normally nondomesticated animals known to be capable of transmitting rabies, including skunks, foxes, raccoons, and bats. If the Department of Health and Environmental Sciences or a county attorney prevails in an action to enjoin a party from keeping such an animal, the defendant is liable for the plaintiff's attorney fees.

K. Crime Victims Compensation

The Workers' Compensation Division of the Montana Department of Labor and Industry, which oversees the operation of the Montana Crime Victims Compensation program, may award attorney fees to attorneys who represent persons bringing claims under the program. If the claimant appeals the division's original compensation decision to the workers' compensation judge, the judge may award attorney fees to the attorney representing the

373. Id.
374. MONT. CODE ANN. § 76-15-710(4) (1983). Although the soil conservation statutes were adopted in 1939, no supreme court cases have arisen under this statute.
375. The statute providing for attorney fees is uniquely worded, stating that “[t]he court shall have jurisdiction to enter judgment for . . . costs and expenses, . . . including a reasonable attorney's fee to be fixed by the court.” MONT. CODE ANN. § 76-15-710(4) (1983). The phrase “shall have jurisdiction to . . . ” seems to imply a grant of discretionary authority.
376. See MONT. CODE ANN. Title 50, ch. 23, part 1 (1983).
377. MONT. CODE ANN. § 50-23-106 (1983). This is a unique statute in that it affords the state the right to attorney fees if it prevails, but denies reciprocity to the defendant.
378. The Crime Victims Compensation Act of Montana is found at MONT. CODE ANN. Title 53, ch. 9, part 1 (1983).
claimant before the court. Any award of attorney fees under the Crime Victims Compensation Program must always be in addition to any compensation awarded by the division or by the Workers’ Compensation Court. The Workers’ Compensation Division has authority to regulate attorney fees in any crime victims’ compensation claim. Although the awarding of attorney fees is discretionary rather than mandatory, attorney fees are limited by statute to 5% of the amount paid to the claimant in the particular case.

L. Contests of Elections

In any action contesting the right “of any person to any nomination or election to public office,” the district court, in its discretion, may award reasonable attorney fees to the prevailing party.

XV. Human Rights Actions

To encourage persons who suffer from illegal discrimination to exercise their rights under Montana’s anti-discrimination laws, the Legislature has adopted numerous statutes allowing for recovery of attorney fees by the prevailing party in discrimination cases. If a person is injured due to illegal discrimination on the basis of his race, creed, religion, sex, marital status, color, age, or national origin in any situation involving employment, education, housing, public accommodations, financing and credit transactions, government benefits distribution, or insurance and retirement plans, or if an employer unlawfully terminates a woman’s employment because of her pregnancy or unlawfully

380. Id. at § 53-9-106(3).
381. Id. at § 53-9-106(1).
382. Id. at § 53-9-106(3).
383. Id. at § 53-9-106(2).
384. Id. at § 53-9-106(4).
387. MONT. CODE ANN. § 49-2-303 (1983). Employment discrimination by state and local governments is prohibited by Title 49, ch. 3 (1983). The procedure and remedies are essentially the same as those for actions involving discrimination by nongovernmental entities.
393. MONT. CODE ANN. § 49-2-309 (1983). This section is not effective until October 1, 1985. At the time of this writing, the Montana Legislature was considering various legislation to modify § 49-2-309.
manipulates her maternity leave, then the person injured by such discrimination may file a complaint with the Montana Human Rights Commission. The complaint must be filed within 180 days of the alleged discrimination.

If the informal efforts of the commission staff fail to settle the claim, the commission shall hold a hearing, and the party prevailing at the hearing is entitled, in addition to the relief provided at section 49-2-506 of the Montana Code Annotated, to bring an action in district court for reasonable attorney fees. If no hearing can be held within twelve months of the filing of the original discrimination complaint, and if 180 days have elapsed since the filing, the commission staff, at the request of either party, shall certify the complaint for action in district court. The district court then may award attorney fees to the prevailing party. The award of attorney fees is discretionary, not mandatory.

XVI. APPEALS AND REMOVALS

A. Appeals to the Montana Supreme Court

Rule 32 of the Montana Rules of Civil Appellate Procedure provides that the supreme court may assess damages against a party who appeals a district court decision "without substantial or reasonable grounds, but apparently for purposes of delay only." The supreme court will find that an appeal is frivolous only if, after viewing the record as a whole, it only can come to the conclusion that the appeal was brought solely for dilatory purposes, was unfounded, and was without substantial or reasonable basis. Where there are reasonable grounds for appeal, the supreme court will refuse to award attorney fees incurred in bringing the appeal unless the parties, in an underlying writing, agreed that the prevailing party would be entitled to recover attorney fees.

398. Id. at § 49-2-509(3).
403. See Diehl & Assoc. v. Houtchens, 180 Mont. 48, 53, 588 P.2d 1014, 1017 (1979), in which the parties agreed in a real estate broker's employment contract that the prevailing party would be entitled to attorney fees at "both trial and appellate" levels; and In re Mar-
The supreme court has sent mixed signals regarding awards of appellate attorney fees in cases where a statute allows the prevailing party in district court to recover attorney fees. In *Allen v. Allen*, a marital dissolution action, the supreme court held that attorney fees are not an allowable appellate cost under Rule 33 of the Montana Rules of Civil Appellate Procedure, therefore each party to the appeal should pay its own attorney fees. The *Allen* court did not mention section 40-4-110 of the Montana Code Annotated, which permits the district court to award reasonable attorney fees to either party in a marital dissolution action.

Five weeks after the *Allen* decision, the supreme court in *Erdman v. C & C Sales, Inc.* held that the plaintiff, who was awarded attorney fees by the district court under section 39-3-214 of the Montana Code Annotated after he prevailed in a wage-claim action, also was entitled to recover his reasonable additional attorney fees incurred as a result of the defendant's post-judgment motions and appeal. The supreme court allowed Erdman to recover his reasonable appellate attorney fees, even though the defendant's appeal was not frivolous. The supreme court recently stated in *Simkins-Hallin Lumber Co. v. Simonson* that it was "reluctant to grant additional attorney fees in a case where the amount in controversy totalled only $888, and where the trial judge, having considered the evidence," had already awarded $800 attorney fees to the prevailing lumber company. The court reasoned, however, that the section under which the lumber company sought attorney fees was mandatory and therefore remanded the case to the district court for the sole purpose of determining the lumber company's reasonable attorney fees.

*Erdman* and *Simkins-Hallin Lumber Co.* appear to establish that, in situations involving an award of attorney fees mandated by statute, the party prevailing on appeal is entitled to appellate at-

riage of Bolstad, Mont. 660 P.2d 95, 97 (1983), in which the parties provided that the prevailing party would be entitled to recover attorney fees in any action arising out of the separation agreement.

404. 175 Mont. 527, 575 P.2d 74 (1978).
405. *Id.* at 531-32, 575 P.2d at 77.
407. *Id.* at 184, 577 P.2d at 59.
408. *Id.*
410. *Id.* at 692 P.2d at 427.
411. The section under which the lumber company successfully sought attorney fees was MONT. CODE ANN. § 71-3-124 (1983), regarding attorney fees in mechanics' lien foreclosures. See supra section IV, subsection B, for further discussion of attorney fees in mechanics' lien foreclosures.
Attorney fees, as well as attorney fees at the district court level. Allen, on the other hand, implies that where a statute gives discretionary authority to the district court to award attorney fees, the supreme court is unlikely to award appellate attorney fees unless the appeal is frivolous.

B. Appeals from Justice Court

Justice court judgments generally may be appealed to district court. Section 25-33-304 of the Montana Code Annotated authorizes the district court to attach to the bill of costs damages not exceeding 25% of the justice court judgment, provided the district court finds that the appellant appealed solely for dilatory purposes. One can reasonably infer that such a penalty is intended in part to compensate the prevailing party for extra attorney fees incurred in defending against a frivolous appeal from justice court.

C. Appeals and Removals from Small Claims Court

Whenever a party appeals a judgment from either a district court small claims proceeding or a justice court small claims proceeding, the appellate court may award reasonable attorney fees to the party prevailing on appeal, provided that party is represented by counsel. Such an award of attorney fees is discretionary, not mandatory.

If an action originally is filed in justice court small claims division, where the parties may not be represented by an attorney, and the defendant removes the action to justice court, where counsel is allowed, and the defendant does not prevail in justice court, the court may award reasonable attorney fees to the plaintiff if represented by counsel. The authority to award attorney fees in such situations is discretionary, not mandatory.

XVII. Conclusion

A common thread of social and legal economic policy runs throughout the Montana statutes which allow a prevailing party to recover attorney fees. Persons with valid claims should not be pre-

cluded from exercising their rights merely because the cost of hiring competent legal counsel exceeds the potential economic recovery under the claim.

Unfortunately, this policy does not extend to all similarly situated parties. For example, a party bringing any action sounding in a common law tort is unlikely to recover attorney fees. Perhaps Montana should follow the state of Washington, which has provided for the prevailing party to recover attorney fees in all damage actions where the amount pleaded is $7,500 or less.\footnote{WASH. REV. CODE ANN. § 4.84.250 (1985). After July 1, 1985, the prevailing party will be entitled to attorney fees in any action where the amount pleaded is $10,000 or less.} Under such a law, a party with a legitimate claim is not discouraged by prohibitive attorney fees from bringing an action; yet a party which otherwise might bring frivolous actions is discouraged from doing so by the specter of paying his prevailing opponent's attorney fees.