

# EC RISK REVIEW

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## Pros and Cons of Prevailing Party Contract Clauses

*The following material is provided for informational purposes only. Before taking any action that could have legal or other important consequences, speak with a qualified professional who can provide guidance that considers your own unique circumstances.*

A “prevailing party” contract clause (also commonly called an attorney’s fee clause) is a contract provision that requires the loser of a lawsuit or claim to pay the winning party’s legal fees. In the absence of such a contractual provision, each party typically bears its own legal costs.

Prevailing party clauses can be unilateral (applied to only one party to the contract) or mutual (applied to both parties). A typical mutual prevailing party clause includes language such as:

***In the event of any litigation arising from breach of this agreement, or the services provided under this agreement, the prevailing party shall be entitled to recover from the non-prevailing party all reasonable costs incurred including staff time, court costs, attorneys fees, and all other related expenses incurred in such litigation.***

Historically, many in the insurance industry and the legal professions recommended that mutual prevailing party clauses be included in environmental professional contracts. The logic was that such clauses make a client think twice before bringing a frivolous or otherwise questionable claim against an environmental firm. The prospect of paying the defendant’s legal bills in the

event the plaintiff does not prevail makes a prospective plaintiff reconsider filing a lawsuit.

Prevailing party clauses were especially attractive from an environmental firm’s prospective when forced to sue a client for nonpayment of fees. The prospect of spending thousands of dollars in legal fees to collect receivables without the possibility of recovering legal costs caused many professionals to throw up their hands, forget about recovering the fees and chalk the loss up to experience. With a prevailing party clause, an environmental firm is more apt to keep its resolve and fight for the fees it deserves.

### Pros and Cons

Recently there has been much discussion as to whether or not a prevailing party clause is, in fact, in an environmental consultant’s best interest. First, there is the fact that if your contract has such a clause and a court or other trier of fact finds you negligent as alleged, you have to pay the other party’s legal expenses in addition to the damages you caused. Making matters worse, this voluntary contractual assumption of liability for the other party’s legal defense costs may not be covered by your professional liability policy.

Professional liability insurance covers your legal liability arising out of your negligent acts, errors or omissions. However, it does *not* generally cover contractual assumptions of liability unless you would be legally liable in absence of the contract clause.

Because of this, the insurance industry remains divided on its opinion regarding the use of prevailing party clauses. Some companies continue to believe that these clauses effectively discourage frivolous claims. They encourage their usage and, for the most part, will cover

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prevailing parties' legal costs unless a unique circumstance prohibits it.

Other insurers see the clause as a double-edged sword and hedge their support of usage. They say they have had situations in which a prevailing party clause has been used to an insured's advantage, but warn that it can also result in significant costs should a plaintiff prevail against an environmental firm. They say a clause may or may not be covered by the professional liability insurance policy, depending on the specific language of the clause and the circumstances of the situation.

Other insurers are clearly against the prevailing party provision. In fact, they take the firm position that the contractual assumption of another's legal fees will not be covered under their PL insurance policies. While they acknowledge that prevailing party clauses can be a deterrent to a lawsuit, if the insured environmental firm is in fact the loser in a claim then the defense costs incurred by the plaintiff would be excluded contractual liabilities and uninsured as such. A liability assumed by contract that would not otherwise be a liability, they argue, would not be covered.

Interestingly attorneys who represent environmental firms are also split on the value of the prevailing party clause. Attorneys in favor of the clause say they recommend them because they discourage frivolous claims. More specifically, these attorneys say that without a prevailing party clause, an environmental firm typically cannot afford to pursue fee claims.

Attorneys opposed to the provision state they may be a trap for environmental consultants, actually encouraging owners to sue if they think they have a strong case. This is particularly true, they say, for large clients who can extend a substantial (and expensive) effort to win their lawsuit. Plus, these attorneys recognize that prevailing party legal expenses are uninsurable under a growing number of professional liability policies. They contend that the "American Rule" is that parties bear their own attorneys' fees in litigation and prevailing party clauses are far from typical. They argue these clauses can actually promote litigation when the proper thing for the parties to do is to work out their difficulties through alternative dispute resolution such as mediation.

Some attorneys who draft contracts for environmental consultants say they always discuss the pros and cons of a prevailing party clause. They advise clients that such a clause can deter a plaintiff from filing a claim out of fear of an award of attorneys' fees. They remind their clients, however, that most claims settle before going to court and the settlement rarely includes a recovery for fees and costs.

### **Your Course of Action**

So what should an environmental firm do if a client presents a contract with a prevailing party clause? If the clause is unilateral in favor of the client, ask that the clause be removed. Explain to the client that the clause is not only unfair since it is being imposed unilaterally, but it is likely uninsurable. Even if your insurance company agrees to cover the prevailing party legal costs at the time the contract is entered into, there is no guarantee these costs will be covered at the time a claim is made and reported. Remember: professional liability insurance is a claims-made and reported policy and the insurance that is in effect is the insurance in place when the claim is made and reported. At that time, your insurance company may have changed its policy toward prevailing party clauses or you may have a different insurer.

If the client refuses to remove the clause, then, at a minimum, environmental firms and their lawyers might try to negotiate a mutual prevailing party clause so that it applies to the client as well as the environmental firm. Also, your attorney may want to make sure that the clause specifies "reasonable" legal costs – otherwise, a client could pull out all the stops in mounting an extravagant claim and your firm could be obligated to foot the entire legal bill. Some attorneys also recommend that the language specify that the clause only applies to "breach of contract" matters, rather than broader language such as matters "arising out of" or "related to" the contract.

Should an environmental firm ever present a prevailing party contract clause to a client? As a general rule, such an action is not recommended unless there are extenuating circumstances that may call for one. For example, if a new client has a less-than-stellar credit history, an environmental firm might want to negotiate a limited prevailing party clause in the contract's billing and collection provisions only. Such a clause would be

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limited to suits for fees, where such a clause makes it financially feasible to attempt to collect unpaid amounts. Such a clause might include language such as:

*In the event legal action is required to enforce the payment terms of this agreement, the consultant shall be entitled to collect from the client any judgment or settlement sums due plus reasonable attorneys' fees, court costs and other expenses incurred by the consultant for such collection action.*

### **Alternative Contract Clauses**

The primary purpose of a prevailing party clause, most proponents claim, is to reduce the number of frivolous claims and protect innocent parties from having to pay huge legal fees to defend themselves. Fortunately, there are two other types of contract clauses that can better achieve these aims:

**Certificate of merit clause.** This clause requires that before a party to the contract can file a claim against the other party, it must obtain a written certificate from a qualified professional that such a claim has merit.

**ADR provision.** This contract clause requires that before a party can file a formal lawsuit against the other, it must first submit to an alternative dispute resolution (ADR) technique such as mediation or arbitration. Such a clause can dramatically lower the legal costs incurred by both parties to the claim and help reach an amicable resolution.

### **Talk to Your Attorney**

The inclusion or exclusion of a prevailing party clause – or any alternative clause intended to achieve similar objectives – should be discussed thoroughly with your attorney. Keep in mind that professional liability insurers have moved away from promoting their use and it is likely that fewer, not more, insurers will be providing full coverage for such contractual liabilities.

Above all, you should not accept unilateral prevailing party contract provisions that only benefit the client. This is simply unfair, regardless of whether your insurer would cover such a provision.

What's more, before accepting even a mutual prevailing party provision, check the current stance of your insurer. And beware: That stance may change in the future.

We welcome the chance to discuss any insurance-related questions that you might have regarding these or other contract clauses that may increase your liabilities.

### **Can We Be of Assistance?**

*We may be able to help you by providing referrals to consultants, and by providing guidance relative to insurance issues, and even to certain preventives, from construction observation through the development and application of sound human resources management policies and procedures. Please call on us for assistance. We're a member of the Professional Liability Agents Network (PLAN). We're here to help.*