**Attorney's Fees in Maritime Law:**
**A Primer for Scriviners, Storytellers, & Jurists**

By: F. Daniel Knight[1]

"Everybody has a plan until they get punched in the face"

The foregoing is a phrase often turned by former lineal heavyweight boxing champion "Iron" Mike Tyson. While lawyers are not pugilists (there are exceptions, of course)[2] in a physical sense, in the practice of our profession we usually formulate plans of attack for our clients/cases.

One aspect of any good plan in the legal world is to (ultimately) try to have someone else bear some or all of the financial risk for that which you are trying to accomplish. For example, an entire well of jurisprudence and scholarship in maritime law exists surrounding the enforceability of indemnity clauses in master service agreements on the Outer Continental Shelf (where state law applies to fixed platforms) in light of the Texas and Louisiana anti-indemnity acts.[3] Legalese aside, the contractual drafting decisions (as well as the policy decisions made by state legislatures and courts) all returned to one basic idea: how can we get someone else to pay for all this?

Don't worry. This paper does not tread down that well-worn path to the offshore oil patch. Rather, it deals with a far more simplistic hypothetical:

Alan and Bob have a maritime contract. Bob sues Alan under that contract and wins. How can Bob get Alan to pay the attorney's fees associated with the suit?

My mentors in this profession taught me to investigate maritime casualty accidents by asking the basic reporter questions: ***who, what, when, where, why, and how***.

Each of these reporter questions creates a different angle for legal scholarship. Other, more learned scholars than this author have, in the past, given extensive treatment to the "why" and "where" (as well as the corollary "should") questions surrounding the issue of attorney's fees in maritime cases.[4] Indeed, the primary authoritative paper on the subject is by Professor Robertson, for whom this Conference is named. Other scholars have, in more recent times, delved into analysis of

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[1] Mr. Knight is a Shareholder at Chamberlain Hrdlicka in Houston, Texas, as well as a graduate of the University of Texas and the University of Texas School of Law. His musings on Admiralty and litigation issues can be found at the Maritime Proctor Blog - https://www.chamberlainlaw.com/maritime-proctor/about

[2] *See, e.g.* Elliott, Josh K., "Bare-knuckle lawyer fight leaves bloody mess inside courthouse," *Global News* July 18, 2019, retrieved on September 9, 2020 at https://globalnews.ca/news/5654767/lawyer-fight-courthouse/

[3] Two examples of such fine scholarship are found here: Robertson, David W. *The Outer Continental Shelf Lands Act's Provisions on Jurisdiction, Remedies, and Choice of Law: Correcting the Fifth Circuit's Mistakes*, 38 J. MAR. L & COM. 487 (2007) and Engerrand, Kenneth G., *Maritime Oilfield Contracts Reconsidered*, 41 HOUS. J. INT'L L. 241 (2019).

[4] Robertson, David W., *Court-Awarded Attorneys' Fees in Maritime Cases: The "American Rule" in Admiralty*, 27 J. MAR. L. & COM. 507 (1996) (hereinafter "Robertson at …").

specific instances of attorney's fees in maritime disputes, examining more of the "who" and "what" issues.[5]

The purpose of this paper is simply to discuss the "when" and "how" of claims for attorney's fees in maritime cases. In other words, the goal here is to provide a roadmap for transactional lawyers, litigators, and judges on the types of maritime cases giving rise to attorney's fees claims (the "when"), and the different methods of presenting those fees to the trier of fact (the "how") so as to make the best sense of when one party makes a case for passing the buck along to someone else.

In order to accomplish the just-stated goals of this paper, we must begin with a brief historical overview of the American Rule of attorney's fees, how it applies in maritime law in 2020, and what exceptions exist to the American Rule. It is those exceptions that create the "when" of a situation where attorney's fees may be recoverable. Then, we will discuss "how" federal courts prefer attorney's fees be presented to them.

## WHAT DOES THE AMERICAN RULE MEAN GENERALLY IN 2020

In the United States, the aptly named "American Rule" generally prohibits recovery of attorney's fees by the prevailing party in litigation.[6] An early recitation of the Rule by the Supreme Court of the United States is found in the 1796 decision of *Arcambel v. Wiseman.*[7] Therein, the Court held an award of $1,600.00[8] was not allowed in a prize case[9], stating:

> We do not think that this charge ought to be allowed. The general practice of the United States is in opposition to it; and even if that practice were not strictly correct in principle, it is entitle do the respect of the court, till it is changed, or modified, by statute.[10]

In contrast, the "English Rule" requires the loser to pay the attorney's fees of the prevailing party.[11] As Professor Peter Karsten stated in his 1998 article on the history of contingent fee contracts:

> In England, the losing party was generally obligated by the court to pay the attorney's fees of the winning party, and since these could be quite substantial (often amounting to a sum greater than what was being recovered in damages in the suit itself), the prospect of paying court costs and both parties' attorneys fees was quite daunting.

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[5] Crawford, D. Scott, NOTE: *Breaking the "American" Rule: The Bad Faith Exception in* Moench v. Marquette *and a Tale of Two Standards*, 42 TUL. MAR. L. J. 593 (2018).
[6] *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 257 (1975).
[7] 3 U.S. 306, (1976).
[8] According to the website www.officialdata.org this translates into $31,406.18 in 2020 dollars.
[9] Robertson at 518. Professor Robertson took to task other authors who believed *Arcambel* was proof that the American Rule was well-established prior to 1800. This author has no reason to disagree with Professor Robertson's analysis.
[10] This is, essentially, the sum total of the reported opinion.
[11] *Alyeska*, 421 U.S. 240, 247 n. 18.

Texas, Louisiana, and Mississippi generally follow the American Rule in state courts.[12] Maritime law incorporates the American Rule as well.[13] But, even with that incorporation, there are a significant amount of exceptions to the American Rule, some of which arise in the maritime context.

An important distinction to make is the difference between attorney's fees as costs, and attorney's fees as damages. In 1996, Professor Robertson articulated that the American Rule is:[14]

> actually two rules: one forbidding or drastically limiting the inclusion of attorneys' fees among the costs of litigation normally taxed against the losing litigant, whether plaintiff or defendant; and a second addressing the award of attorneys' fees as an element of damages to a victorious plaintiff.

The winner of the lawsuit, sometimes referred to as the prevailing party, usually receives costs.[15] However, one must make a claim (as opposed to just defend themselves from a claim) in order to receive damages. For example, in *Vaughan v. Atkinson*, the Supreme Court also determined any award of attorney's fees was not "costs" in the traditional sense, but instead a separate category of damages.[16]

Thus, if attorney's fees are costs, anyone can get them under the right circumstances (i.e., an exception or statute or sanction). But if the context of the case mandates attorney's fees are damages, only a party with an affirmative claim for relief can receive them. Therefore, a careful proctor will, to the extent possible, guard against being the only party at the litigation dance without an attorney's fees partner.

## EXCEPTIONS TO THE AMERICAN RULE IN CURRENT JURISPRUDENCE

A good starting point for any analysis of the modern-day American Rule[17] is the 1975 Supreme Court decision in *Alyeska Pipeline Service Company v. Wilderness Society*.[18] In that case, the Wilderness Society and other environmental groups sued to stop the Secretary of the Interior for issuing permits whereby the Trans-Alaska pipeline could be built.[19] The environmental groups requested and received attorney's fees for their work, arguing that they were, in effect, acting as a

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[12] *FDIC v. Barton*, 233 F.3d 859, 865 (5th Cir. 2000)(Louisiana generally follows the American Rule, with exceptions); *Barden Mississippi Gaming, LLC v. Great Northern Insurance Company*, 638 F.3d 476, 479 (5th Cir. 2011)(Mississippi follows the American Rule, with exceptions); *Ortiz v. State Farm Lloyds*, 589 S.W.3d 127, 134-35 (Tex. 2019) (Texas generally follows the American Rule, with exceptions).

[13] *Texas A&M Research Foundation v. Magna Transportation, Inc*., 338 F.3d 394, 405 (5th Cir. 2003); citing to *Galveston County Navigation District No. 1 v. Hopson Towing Co.*, 92 F.3d 353, 356 (5th Cir. 1996).

[14] Robertson at 515.

[15] FED. R. CIV. P. 54.

[16] 369 U.S. 527, 530-31 (1962).

[17] Or, to be more accurate, *Alyeska* is the lens through which the Supreme Court (and lower courts) analyze the American Rule.

[18] 421 U.S. 240 (1975).

[19] 421 U.S. 240, 241.

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