



# Fee-shifting Basics: Understanding A.R.S. § 12-341.01



By Robert S. Pearson & Mark W. Heckeles

Last month's December 2016 Writ issue included this article concerning fee-shifting basics. Unfortunately, however, we mistakenly featured an incorrect version. Therefore, please disregard last month's version, and consider this to be the correct, submitted article on the subject. We greatly apologize to Mr. Pearson and Mr. Heckeles for our previous mistake, and regret any inconvenience or confusion that may have occurred as a result of our error.

Section 12-341.01 allows a court to award attorney's fees to the successful party in a contested contract action. And although many practitioners know of the statute, fewer know how it works. For those who do, it can be a powerful tool in resolving disputes.

**Two layers.** The statute seems straightforward. The first sentence says that the court may award fees to the successful party. The second sentence, however, adds another layer. It says that if a party rejects a written settlement offer and later obtains a judgment equal to or less favorable than the offer it rejected, the party who made the offer is the successful party from the date of the offer.

**Second-sentence issues.** This second sentence raises two issues that commonly confuse practitioners: (i) how to calculate a judgment finally obtained so that it can be compared to an offer; and (ii) whether one party can be successful under the first sentence while the other party can be successful under the second. This article addresses both. Consider a hypothetical:

**Hypothetical.** Plaintiff sues Defendant on a breach-of-contract claim. During litigation, Defendant makes a \$100,000 written settlement offer, which Plaintiff rejects. At trial, Plaintiff wins its contract claim, and is awarded \$70,000 in damages. After trial, both parties request fees under § 12-341.01 (costs are omitted herein for simplification). Plaintiff argues that it's the sole successful party because it won its contract claim. Defendant argues that Plaintiff can't be the successful party because Plaintiff's judgment finally obtained was less than Defendant's offer. Who's right?

**Analysis.** Neither. Here's why: After the trial, the court will determine the overall successful party by considering which party accomplished its objective. This isn't always clear, but here it is. Plaintiff accomplished its objective because it won its contract claim, and is thus eligible for an award of fees. The court will then make that award. For our hypothetical, let's say the court awards Plaintiff \$31,000 in fees, \$15,000 of which were incurred as of the date of the offer.

Next, the court must apply the second sentence of the statute. That is, the court must compare Defendant's rejected offer to Plaintiff's judgment finally obtained. Here, Plaintiff's judgment finally obtained seems to be \$101,000 (\$70,000 in damages + \$31,000 in fees), and so Plaintiff seems to have done better than the \$100,000 offer it rejected. That's wrong. In calculating the judgment finally obtained to compare it to the offer, the court will include only fees incurred as of the date of the offer. In this case, \$15,000 of Plaintiff's total fee award of \$31,000 were incurred before Defendant's offer. So the proper calculation of Plaintiff's judgment finally obtained is \$85,000 (\$70,000 in damages + \$15,000 in fees). Because Defendant's

offer (\$100,000) was more than Plaintiff's judgment finally obtained (\$85,000), Defendant is the successful party from the date of the offer and is eligible for an award of fees incurred from the offer date forward. Both parties are therefore "successful" under the statute.

**Finishing the calculation.** Now that we've calculated the judgment finally obtained, compared it to the offer, and determined that both parties can be considered the "successful party" at different points in the litigation, the question then becomes how to calculate the final award. For our hypothetical, let's say that from the date of its offer through trial, Defendant incurred \$16,000 in fees, and that the court awards it those fees under the second sentence. How do we calculate the final award? Two possibilities exist:

- Plaintiff's damages (\$70,000), plus Plaintiff's total fees (\$31,000), minus Defendant's fees from the offer date (\$16,000) = \$85,000 final award for Plaintiff.
- Plaintiff's damages (\$70,000), plus Plaintiff's fees up to the offer date (\$15,000), minus Defendant's fees from the offer date (\$16,000) = \$69,000 final award for Plaintiff.

So which is correct? Cases reviewed for this article didn't present a clear answer. But an unpublished Arizona case suggests the latter. *See Estate of Chasan v. Farmers Ins. Exch.*, No. 1 CA-CV 12-0397, 2013 WL 2297026, at \*9 (Ariz. App. May 23, 2013). That is, that a rejecting party who wins on the merits but obtains a judgment less favorable than the offer is cut off from recovering fees incurred after the offer date. At least one other jurisdiction interpreting a somewhat similar fee-shifting statute, however, has found that in some circumstances the offeror and the party that wins on the merits might both be eligible for fees after the offer date, making the fee shift more of an offset for the offeror. *See Tierra Holdings, Ltd. v. Mercantile Bank*, 78 So. 3d 558 (Fla. Dist. Ct. App. 2011).

**About the authors.** Robert S. Pearson and Mark W. Heckeles are attorneys with Harlow Spanier & Heckeles PLLC. Pearson practices civil litigation, and consults on trial and appellate court brief-writing (read: if you have a high-stakes brief, he will help you improve it). Heckeles practices primarily in the areas of business and real estate law. Both can be reached at [www.reallawtucson.com](http://www.reallawtucson.com).

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