



## Fee-shifting Basics Part Two: Interplay Between A.R.S § 12-341.01(A) and Contractual Fees Provisions

By Robert S. Pearson

In a previous article, my coauthor and I illustrated the offer-judgment comparison test set forth in the second sentence of § 12-341.01(A). This article addresses an issue raised by the third sentence: If a contract has an attorney's fees provision, does the offer-judgment comparison test still apply? Answer: . . . (wait for it) . . . It depends.

**Quick refresher.** Recall that § 12-341.01(A) has three sentences. The first allows the court to award attorney's fees to the successful party. The second adds the offer-judgment comparison test: If a party rejects a written settlement offer and later obtains a judgment less favorable than the rejected offer, the party who made the offer is the successful party from the offer date forward. The third sentence says that the statute itself cannot alter, prohibit, or restrict contracts that provide for attorney's fees.

**Third-sentence issue.** At least some prior case law suggested that the third sentence meant that if a contract had a provision for attorney's fees – however worded – then the statute didn't apply at all. Under this interpretation, a fees provision would preclude the application of the offer-judgment comparison test, meaning there'd be just one successful party – the party who won on the merits. A recent case decided by the Arizona Supreme Court, however, rejects this interpretation and clarifies the interplay between § 12-341.01(A) and contractual fees provisions. See *Am. Power Prod., Inc. v. CSK Auto, Inc.*, No. CV-16-0133-PR, 2017 WL 2473261 (Ariz. May 11, 2017).

**CSK Auto.** In *CSK Auto*, American and CSK entered a contract. The contract had a choice-of-law clause incorporating Arizona law, and a provision entitling the successful<sup>1</sup> party to recover attorney's fees; the fees provision didn't define "successful party" and made no mention of the offer-judgment comparison test.

American later sued CSK for breach. Before trial, CSK made an offer of judgment to American under Rule 68 (which operates as a written settlement offer under § 12-341.01(A)) for \$1,000,001. American rejected the offer, went to trial, and obtained a \$10,733 verdict. On the post-trial issue of fees, the court determined that American was the successful party essentially because American won on the merits and obtained monetary damages. The court awarded American fees, costs, and interest, for a total judgment of ~\$861,000.

On appeal, CSK challenged the trial court's determination of the successful party. CSK argued that it was the successful party from the offer date forward under § 12-341.01(A) because American had rejected CSK's offer (\$1,000,001) and then obtained a less favorable judgment (~\$861,000). American, on the other hand, argued that because the contract had an attorney's fees provision, the statute's offer-judgment comparison test didn't apply. The court of appeals rejected CSK's argument and affirmed American's award of fees, reasoning that "[w]hen attorneys' fees are based on a contract – as here – the contract controls to the exclusion of A.R.S. § 12-341.01(A)."

The Arizona Supreme Court granted review to consider the fees question. The Court first disapproved of prior case law suggesting that any attorney's fees provision – however worded – precluded the application of the statute. The Court said that such an interpretation of the statute's third sentence was too broad. The Court explained that a fees provision did not simply supplant the statute, but rather the statute was inapplicable only when it conflicted with a fees provision. Having cleared the brush, the Court then held that the offer-

judgment comparison test applied to the parties' contract, citing the contract's choice-of-law clause incorporating Arizona law (i.e., § 12-341.01), and observing that the second sentence of the statute (i.e., the offer-judgment comparison test) did not directly conflict with the contract's fees provision. The Court reversed American's award of fees and remanded the case to the trial court to apportion fees between both successful parties – American up to the date of the offer, and CSK from the offer date forward.

**Practice pointer.** Don't assume that the existence of a contractual fees provision automatically precludes application of the offer-judgment comparison test for determining the successful party. If you want the term "successful party" to mean just the party who wins on the merits, then you should say so expressly in your contract.

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### FOOTNOTE

<sup>1</sup> The contract used the word "prevailing," not "successful." The Court equated "prevailing" under the contract with "successful" under the statute. Thus, for simplification, this article uses "successful" throughout.

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