



Chapter 2

Cite as 22 *Energy & Min. L. Inst.* ch. 2 (2002)

Picking Up the Litigation Tab: Statutory Attorneys' Fees

Timothy W. Gresham¹

Penn, Stuart & Eskridge

Abingdon, Virginia

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¹ Shareholder and Director, Penn, Stuart & Eskridge; B.A., Morehead State University; J.D., University of Tennessee.

§ 2.01. Introduction.

Litigation is expensive business. It becomes even more expensive when someone sues your client and not only wants the court to issue an injunction or award damages, but wants your client to pay his attorney. It becomes frustrating, when eventually you win, but the court cannot make the plaintiff pay your fees.

This chapter is intended to provide an overview and discussion of statutory attorneys' fee-shifting under various statutes enacted by Congress. It begins with a discussion of the common law rule that each party paid its own attorneys and the traditional exceptions to that rule. It then proceeds on to the principles underlying attorney fee-shifting generally and environmental statutes, specifically.

While most statutes also provide for recovery of costs, that is not dealt with in any detail in this chapter. Generally, cost-shifting has been around much longer than fee-shifting and the rules are much more developed. The chapter continues with a discussion and analysis of who is eligible to receive attorneys' fees and the nature of the relief a party must obtain to receive an award of attorneys' fees. Next is an analysis of the case law on what constitutes a "reasonable attorneys' fee." The last two parts deal with the Equal Access to Justice Act and Federal Rules of Civil Procedure 68.

§ 2.02. The American Rule.

Under American common law, absent an enforceable contract between the parties or a statute, parties ordinarily bear their own attorney's fees incurred in litigation.² This is in contrast to the procedure in England, where statutes since 1278 and 1607 have authorized prevailing plaintiffs and defendants, respectively, to recover attorneys' fees from the losing party.³

² *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 245 (1975).

³ *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 717 (1967).