

That's the Way the Cookie Crumbles: When Neither Party Prevails in the "Predominance of the Litigation," Each Side Must Bear Its Own Attorneys' Fees

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While the Delaware Court of Chancery will generally uphold contractual prevailing-party fee-shifting provisions, a party must actually "prevail" in the litigation in order to recover attorneys' fees and expenses. In *The Mrs. Fields Brands, Inc. v. Interbake Foods LLC*, C.A. No. 12201-CB (Letter Op.) (January 5, 2018), the Court of Chancery was again called upon to determine which party "prevailed." Chancellor Bouchard found that because the parties split the two "chief" issues in the case, neither party "prevailed" and, thus, each party must bear its own fees and expenses.

The Mrs. Fields Brands, Inc. ("Mrs. Fields") filed a complaint (and an amended complaint) against Interbake Foods LLC ("Interbake") alleging four (4) claims arising out of the parties' License Agreement (the "Complaint"). Interbake filed an answer and counterclaim asserting three (3) claims (the "Counterclaim"). The Court held a six-day trial and issued its post-trial opinion (a) ruling in Mrs. Fields' favor on Count I of the Complaint, in part, and on Counts I-III of the Counterclaim; (b) ruling in Interbake's favor on Count I of the Complaint, in part, and on Counts II-III of the Complaint; and (c) dismissing Count IV of the Complaint.[1] The Court retained jurisdiction to resolve the parties' competing requests for attorneys' fees and expenses pursuant to Section 22(j) of the License Agreement.

The Court of Chancery generally adheres to the American Rule with respect to attorneys' fees. A recognized exception to that rule, however, is where the parties have a contractual agreement concerning the payment of fees, in which instance the Court will routinely enforce such contractual provisions arising from a breach of that contract. Section 22(j) of the License Agreement is such a provision and provided that "the Party prevailing in [a judicial proceeding to enforce the License Agreement] shall be entitled to reimbursement of its reasonable costs and expenses." Naturally, any determination of the payment of attorneys' fees under the License Agreement depends on which party "prevails" in the litigation.

In enforcing "prevailing-party" fee-shifting contractual language, the Court of Chancery applies the "predominance in the litigation" standard, which requires that in order for a party "to achieve predominance, a party should prevail on the case's chief issue." *Mrs. Fields*, C.A. No. 12201-CB Letter Op. at 5 (quoting *2009 Caiola Family Tr. v. PWA, LLC*, 2015 WL 6007596, at *33 (Del. Ch. Oct. 24, 2015) (alterations omitted)).

Importantly, the "predominance in the litigation" standard is an all-or-nothing approach and, as such, the Chancellor declined to "parse the parties' level of success claim-by-claim." *Id.* at 6. Rather the Chancellor focused on the "chief" or "core" issues in the case and found that there

were two “chief” issues. The first “chief” issue was whether Interbake validly terminated the License Agreement in April 2016. Mrs. Fields prevailed on this issue. The second “chief” issue was whether Mrs. Fields was entitled to money damages as a result of harm Interbake “allegedly caused to the value of the Mrs. Fields retail cookie business it operated under the License Agreement.” *Id.* at 8. Interbake prevailed on the second issue. Accordingly, because the parties split the two equal “chief” issues, with each side both winning and losing, the Court found that neither party “predominated in the litigation and thus neither is entitled to an award of attorneys’ fees or expenses as the ‘prevailing party’ under Section 22(j) of the License Agreement.” *Id.* at 10. This decision highlights that under Delaware law, contractual fee-shifting provisions will be enforced but only when a party predominately prevails in the litigation. As such, contracting parties should seriously consider both the merits and the risks of potential litigation and not count on recovering their attorneys’ fees and expenses under a contractual fee-shifting provision.

[1] The Court’s opinion can be found at *Mrs. Fields Brand, Inc. v. Interbake Foods LLC*, 2017 WL 2729860, at *1 (Del. Ch. June 26, 2017). On July 27, 2017, the Court issued its Order of Clarification and Denial of Motion for Reargument, available at *Mrs. Fields Brand, Inc. v. Interbake Foods LLC*, 2017 WL 3863893 (Del. Ch. July 27, 2017).