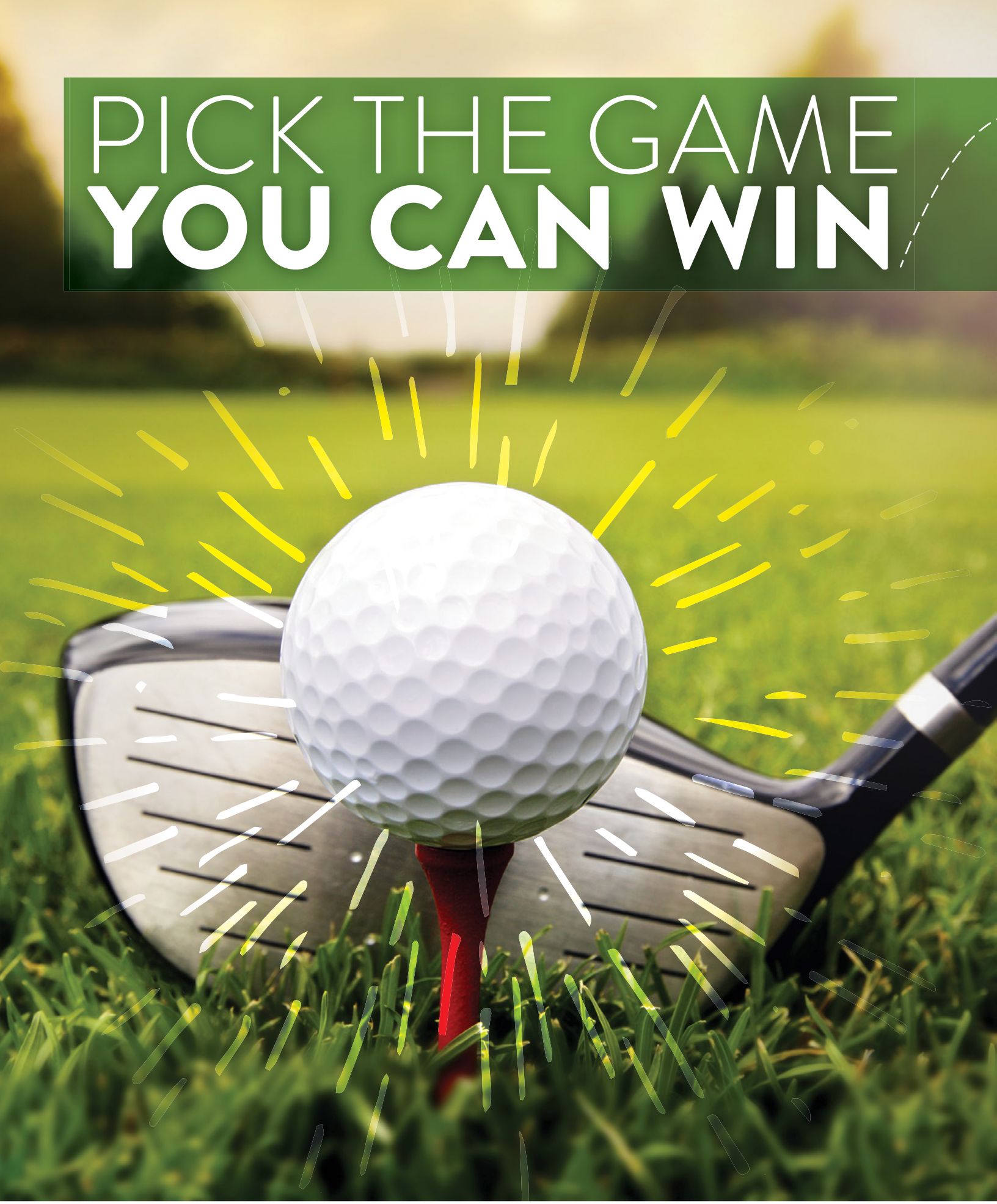
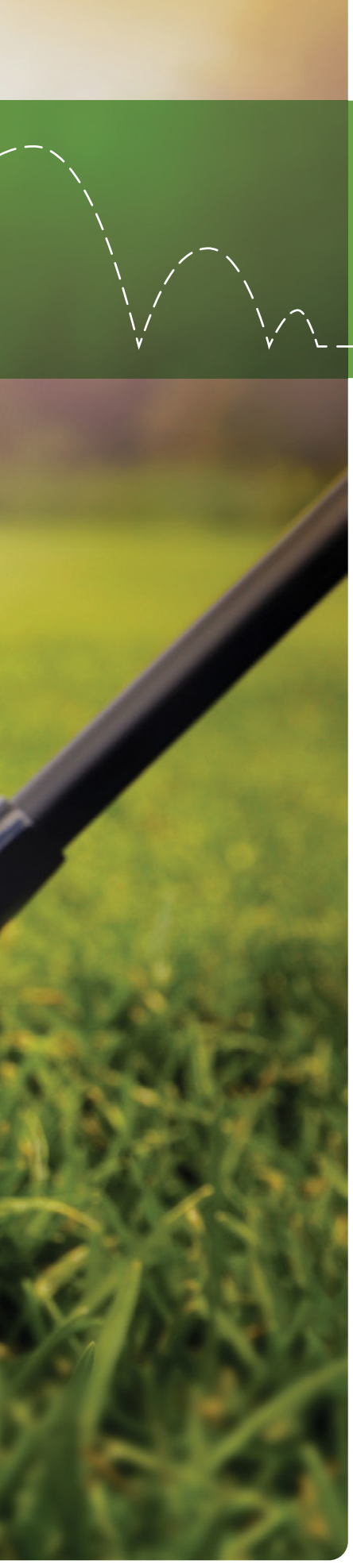
PICK THE GAME **YOU CAN WIN**





Merits, attorneys' fees, and practical realities in defense of FDCPA and other fee-shifting claims.

By Patrick D. Newman

As part of my misspent youth, I worked summers at a golf course. "Misspent," you ask? Indeed, you may wonder aloud—as my parents surely did upon learning that I would spend my days washing carts and raking bunkers—"How much trouble can he get into working at such a refined establishment?" The answer, dear reader, is lots. ***Lots***.

Happily, I learned plenty of life lessons in those formative seasons (mostly the hard way), including the fine art of golf gambling, the foundational principle of which is simple: the bet is won or lost on the first tee. Meaning, assess your opposition (e.g., handicap, trash-talking ability, general demeanor and disposition, etc.) vis-à-vis your own skillset before you pick the game you're playing that day. Then, formulate your strategy from there.

Choose correctly, you win; choose poorly, pay up, Big Shooter.[1]

Or, for those of you who aren't comfortable with gambling analogies and instead prefer more tried-and-true sports adages: **Play to your strengths based on the circumstances**.

A similar thought process applies to dealing with fee-shifting claims under the Fair Debt Collection Practices Act, the Fair Credit Reporting Act, and other state and federal statutes. No, really! Indulge me.

MISJUDGING THE "GAME" BRINGS KNOWN PITFALLS OF FEE-SHIFTING STATUTES INTO PLAY

Here's the part you probably already know. The FDCPA and FCRA allow for statutory damages of $1,000 (relatively small), actual damages (varying amounts, but for a "run-of-the-mill" claim, also fairly small), *plus the prevailing plaintiff's attorneys' fees and costs*.[2] And if you've spent any time in this industry, you know full well that the fees component is almost always the tail that wags this litigation dog.

So, taking a "scorched earth" approach to defense will—if not totally successful in defeating the plaintiff's claim—actually end up costing the defendant significant money, even if the plaintiff only obtains a partial victory on the merits. And this is where the "first tee" analogy takes hold. Except in the case of a fee-shifting claim, it's the "first hour" spent assessing your merits position that is most critical. In those crucial 60 minutes, you (and your counsel) should consider the following:

- The plaintiff has attempted to tell a story in the complaint. What is our story? How compelling is our theory of the case?
- Is this a case that can be disposed of on a legal basis (i.e., potentially without the time and expense of discovery)?
- If not, are the facts in our favor?
- Who might need to give a deposition? What policies, procedures, and other company documents are relevant and in play?
- If necessary, how do we like our story with a jury?
- If none of the above yield positive answers, what is the settlement value of this case? How much of that will go to the plaintiff and how much will go toward the plaintiff's attorneys' fees?

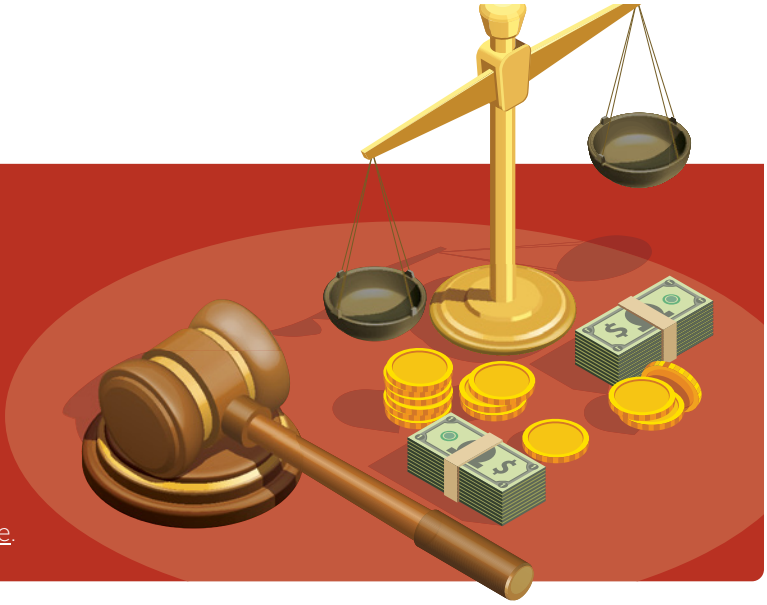
Just like golf wagers, this holistic assessment of your opposition and the circumstances will dictate the course of the "game" (i.e., litigation), which gets doubly expensive as you go. Get the answers right so you can employ a strategy that plays to your strengths from the outset!

[1] *There is nothing quite like watching a 50-year-old "scratch" player take $300 off a 16-year-old cart kid who thought (incorrectly) that he was "hot stuff" to drive home the critical importance of not misjudging your position at the outset.*

[2] *But note: the FCRA also allows for punitive damages under certain circumstances. Actual damages can also be significant under the right circumstances in FDCPA and FCRA litigation.*

Court Holds Consumer's Attorney Personally Liable for Collector's Attorney's Fees

A district court in Minnesota recently required an attorney to personally satisfy excess attorney's fees reasonably incurred as a result of that attorney unreasonably and vexatiously multiplying the proceedings or manifesting intentional or reckless disregard of the attorney's duties to the court. Read more.



THE DEEPLY CYNICAL "GOLDILOCKS ZONE" OF PLAINTIFF DEMANDS

The golf theme breaks down here a bit, but this is a necessary note on the nature of settlement demands in fee-shifting cases. Sometimes, the initial demand so far outstrips the value of the claim that the choice to defend is made very simple for the defendant. But a savvy plaintiff's attorney understands that there is a "just right" number that balances:

1. The defendant's risk of "paying the freight" for the plaintiff's fees after protracted litigation;
2. The defendant's desire to put the matter behind it; and
3. Not spending a fortune to do so.

Thus, early-litigation settlement demands often come in at the four-figure level in an effort by the plaintiff's counsel to hit that Goldilocks Zone, which gets the defendant out early and "cheaply," while the plaintiff and their attorney get paid for relatively little litigation effort. Frankly, it's an economic analysis meant to perfectly thread a needle that incentivizes prompt payment by the defendant. A business model, if you will.

These scenarios further magnify the importance of determining the nature of the "game"—and, more importantly, your chances of winning it—right away if there is any chance the case is to be fought. (To be sure, there are instances in which that makes sense, notwithstanding a "small" demand. For example, if a business practice is challenged and needs defending. Or, if the same attorney comes to the well too often.)

HEDGING YOUR BETS (OR CHANGING THE "GAME" TO ONE YOU CAN WIN)

Let's talk "offers of judgment" and how they fit into the defense of a fee-shifting claim. There are two scenarios to consider.

First Scenario: We're fighting this one all the way to the Supreme Court (or the 18th hole)!

You've sized up your opponent; they can be beaten by your "game" under the circumstances and on the merits. So you're litigating this case. That's great! But remember, you've gotta ***win outright*** for this strategy to pay off completely—unless you hedge your "bet."

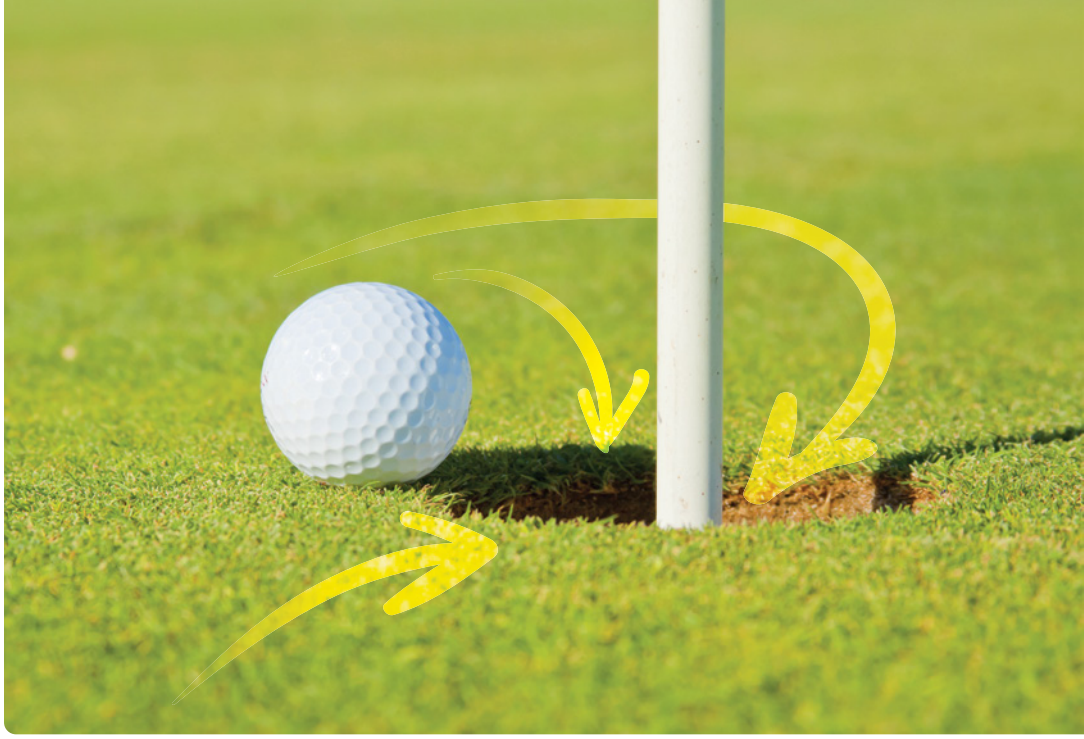
Under the federal civil rules (and in many state courts as well), the defendant can serve the plaintiff with an offer of judgment, which is essentially a contract in which the defendant offers to allow the court to enter judgment against it and in favor of the plaintiff on specified terms, including payment of a certain amount to the plaintiff and, in fee-shifting cases, an amount of attorneys' fees and costs as well. This mechanism can be very useful in simply bringing the litigation to a sudden halt where the plaintiff accepts the offer, the parties negotiate the fees and costs, and the matter is finished.[3]

Regarding the attorneys' fees component, there are several ways to approach that. Offers of judgment can simply convey an "all-in" number that is inclusive of fees. Or, if the goal is to potentially put the fee issue into controversy with the court, the offer can include a "to-be-determined" amount of fees, to be determined as between the parties through negotiation or by the court if necessary. Breaking that down a layer further, a "TBD" amount can encompass fees incurred up to the date of the offer, or without such a limitation. All circumstances are unique, and crafting an appropriate offer of judgment is equal parts art and science, so do your homework and consult with able counsel before taking any steps in this regard.

In terms of mitigating your litigation risk, if the plaintiff fails to accept the offer, an offer of judgment can serve as a "backstop" to the continued accrual of the plaintiff's attorneys' fees under the fee-shifting statute. Specifically, courts have ruled that, under the right circumstances, a plaintiff who rejects an offer of judgment, but then fails to obtain a judgment for more than the amount offered after continued litigation, is precluded from seeking attorneys' fees and costs incurred after the date the defendant made the offer.[4] Simply put, even if the defendant "loses" on the merits of the case following months (or even *years*) of

[3] *Caution here: if the plaintiff accepts the offer of judgment and files that acceptance with the court, a judgment will most likely be entered against the defendant.*

[4] *Of course, this is not a universal proclamation of the law in all jurisdictions. You'll need to consult with counsel to determine the efficacy of an offer of judgment in this regard in the relevant jurisdiction.*



litigation, it may not be on the hook for all of the plaintiff's attorneys' fees when all is said and done.

Second Scenario: We aren't in love with our merits defenses and the plaintiff is demanding too much in fees. (My interoffice golf rival is making me play a match I don't want to play!)

Sometimes the facts or the law just aren't on your side. Or maybe the settlement demand has broken Earth's orbit (and you've assessed that the demand is mostly comprised of attorneys' fees). Or both! An offer of judgment can be an effective tool in changing the "game" here by putting a sum certain in front of the plaintiff and separating the fee component of the claim to be negotiated or litigated. That is, getting rid of the more troublesome component of the case and focusing on the part you can win given the circumstances.

If the fees issue is litigated, the plaintiff's attorney's recovery is limited by the bounds of reasonableness. That's a fact-specific determination, but if your assessment that the fee demand is too rich is correct, then you can potentially save substantial money by using an offer of judgment to take the focus off the merits of the claim and the amount to be paid to the plaintiff and instead apply it to the reasonableness of the fees demanded by the plaintiff's attorney.

THE 19TH HOLE: RECAP

Of course, litigation is not gambling, nor should it be treated as such. But the reality is that defendants in fee-shifting cases must perform an astute (and quick) risk analysis as a starting point for picking their defense strategy. Sometimes that assessment is as "simple" as deciding whether it's the merits of the claim you're going to fight or the fees component. But picking wrong can hurt (just like losing that $20 Nassau to Harold in accounting who has an *awful* short game). The good news is there are ways to mitigate the risk of either path—just make sure to consider them on the "first tee" (rather than in the clubhouse after the round settling up)!

TAKEAWAYS

- *Your initial holistic assessment of the plaintiff and the circumstances will dictate the how you approach your defense and, ultimately, how successful you are.*
- *Sometimes the facts and the law support a robust merits defense. Sometimes they don't. Offers of judgment can help mitigate your risk and turn the focus of the litigation to the component the defendant is more likely to prevail upon in either event.*
- *Reasonableness is key—for both sides. Whether you are working to establish a merits defense, a fee challenge, or even both, you always want to be the most reasonable party. The courts are keenly aware of who is "playing nice" and who is not.*

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This information is not intended to be legal advice and may not be used as legal advice. Legal advice must be tailored to the specific circumstances of each case.