

Recovery of Attorney Fee's in Litigation

By Michael J. Canning, Esq. and Matthew N. Fiorovanti, Esq.

New Jersey adheres to the American Rule regarding litigation fees and costs, where “the prevailing litigant is ordinarily not entitled to collect a reasonable attorney’s fee from the loser.” The American rule is the antithesis of the English Rule, whose courts have been authorized to award counsel fees to successful parties since as early as 1278. “[w]hile the English rule focuse[s] on providing full compensation to the winner, the American Rule emphasize[s] equal access to justice”. Under the American system, all persons are entitled to their day in court, however poor they may be and however rich their opponents. The courts fear that injured parties, particularly those of modest means, would be discouraged from invoking the judicial system if the cost of losing an action included payment of one’s opponent’s legal bills.

However, while New Jersey has a strong public policy against the shifting of costs, the Legislature and the courts have recognized several exceptions to the general rule. There are several exceptions to the general prohibition against fee-shifting contained in the New Jersey Court Rules, including costs in a family action, out of a fund in court, in a probate action, in an action for the foreclosure of a mortgage, in an action to foreclose a tax certificate or certificates, in an action upon a liability or indemnity policy of insurance, or as expressly provided by the New Jersey Court Rules with respect to certain specified actions.

In addition to the allowances for the recovery of attorney’s fees set forth in the New Jersey Court Rules, recovery of fees is allowed where expressly authorized by statute such as the Consumer Fraud Act, the Law Against Discrimination, the Environmental Rights Act, the Construction Lien Law, Prevailing Wage Act, Uniform Commercial Code and certain federal laws such as civil rights actions.

Also, in 1988, the New Jersey Legislature enacted the New Jersey frivolous claims statute in which a prevailing party in a civil action may be awarded all reasonable litigation costs and attorney’s fees if the judge finds that a pleading was frivolous. A frivolous lawsuit is one which is filed in bad faith, for harassment, delay or malicious injury or where there is no legal or factual basis for the lawsuit. Relief under the frivolous litigation statute has been approached cautiously, so that while baseless litigation will be deterred, “the right of access to the court should not be unduly infringed upon, honest and creative advocacy should not be discouraged, and the salutary policy of the litigants bearing, in the main, their own litigation costs, should not be abandoned.” There is a high bar to overcome in order to be awarded attorney’s fees, and courts have been reluctant to award fees to a prevailing defendant under the statute.

Where a client relies upon the advice of an attorney, legal fees will not be awarded against the client as an attorney's failings are not imputed to the client. However, an aggrieved litigant may recover attorney’s fees and costs directly from the adversary’s attorney where the attorney improperly files a lawsuit in bad faith, with malice or without justification.

Finally, parties to a contract are permitted to agree to shift liability for attorney’s fees. However, even where controlled by contractual provisions, attorney’s fee-shifting provisions will be strictly construed in light of the general policy disfavoring the award of attorney’s fees.