

BUSINESS LITIGATION ALERT

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New Jersey and U.S. Supreme Courts Still Disagree About Enhancement of Attorney's Fee Awards

New Jersey Supreme Court Reaffirms Its Approval of Contingency Enhancements

Contingency enhancements are alive and well in New Jersey. The state Supreme Court has rejected a recent challenge to its 1995 decision authorizing enhanced attorney's fees awarded under New Jersey fee-shifting statutes. Fee enhancements remain a serious risk and should be taken into account when gauging potential for loss associated with litigation in New Jersey.

In January, the New Jersey Supreme Court considered whether its pronouncements in *Rendine v. Pantzer*, 141 N.J. 292 (1995) concerning attorney's fee awards under state fee shifting statutes were still valid in light of the recent U.S. Supreme Court decision in *Perdue v. Kenny A.*, 130 S. Ct. 1662 (2010). In the consolidated cases of *Walker v. Guiffre* and *Humphries v. Powder Mill Shopping Plaza*, the high court in New Jersey held "that the mechanisms for awarding fees, including contingency enhancements, that we adopted in *Rendine* shall remain in full force and effect as governing principles for attorney's fee awards made pursuant to fee-shifting provisions in our state statutes and rules."

The New Jersey Court began its analysis in *Walker* and *Humphries* with an approving review of the longstanding essential

purposes of fee-shifting statutes: those statutes and rules address the problem of unequal access to courts; they provide the people whose rights are protected by the statutes with the resources to enforce those rights in court; they encourage adequate representation which ensures that the laws will be enforced; and they promote respect for the underlying law and deter potential violators.

The Court then quoted extensively from its *Rendine* opinion where it explained that an attorney's fee award in the context of a fee shifting statute begins with determining the "lodestar" – a reasonable number of hours multiplied by a reasonable hourly rate. 141 N.J. 334-35. *Rendine* further held that once the lodestar is established, the trial court may increase the award "to reflect the risk of nonpayment in all cases in which the attorney's compensation entirely or substantially is contingent on a successful outcome." *Id.* at 337. This potential increase, called a contingency enhancement, enables trial courts to increase attorney's fees in cases that might never be filed if not for the permissible fee shifting.

The *Rendine* Court "fixed the ordinary range for a contingency enhancement" between five and fifty percent of the lodestar and suggested the "typical range" at twenty to thirty-five percent. *Id.* at 343. The Court

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also acknowledged the possibility of a one hundred percent enhancement in the “rare and exceptional case” where there was “no prospect . . . for the attorney to be compensated by payment of a percentage of a large damages award, and in which the relief sought was primarily equitable.” *Id.*

When *Rendine* was decided, the U.S. Supreme Court had already rejected contingency enhancements under federal fee shifting statutes in the case of *City of Burlington v. Dague*, 505 U.S. 557 (1992). The issue came to the fore recently again in *Perdue v. Kenny A.* when the U.S. Supreme Court revisited and reaffirmed its prior ruling in *Dague*. The *Purdue* decision “formed the lynchpin” for the New Jersey Appellate Division decisions in *Walker* and *Humphries* that rejected trial court fee awards and appeared to alter the *Rendine* framework.

With this background, the New Jersey Supreme Court granted certification in *Walker* limited to the issue of enhancement of the attorney’s fee award and in *Humphries* to consider the standard applicable to requests for attorney’s fees. In *Walker*, the Court emphatically rejected “the Appellate Division’s conclusion that the *Rendine* framework for evaluating attorney’s fee awards

made pursuant to state statutory fee-shifting provisions has been altered in any way by the United States Supreme Court’s *Perdue* decision.” The Court strongly reiterated that “the considerations we identified in *Rendine* remain those that guide the analysis of fee-shifting provisions found in our statutes.” In *Humphries*, where the relief sought under the Law Against Discrimination and Barrier-Free Subcode “was almost entirely equitable,” the Court found a fifty percent contingency enhancement “both reasonable and appropriate.”

Parties to lawsuits involving New Jersey’s fee shifting statutes would do well to keep these principles in mind when fixing reserves or assessing risk in connection with threatened or filed litigation. ■

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