

To: Commission
From: Keith P. Ronan
Re: Attorney's Fees in Special Civil Part Actions
Date: January 9, 2012

MEMORANDUM

Commission Staff monitors case law in the State to identify decisions in which the court calls for Legislative review or action. This memorandum results from one such case and seeks Commission authorization for a project modifying *N.J.S. 22A:2-42* to address the issue of attorney's fees in the Special Civil Part. The court in *Chase Bank USA, N.A. v. Staffenberg*, 419 *N.J. Super.* 386 (App. Div. 2011), examined whether attorney's fees are mandatory under *N.J.S. 22A:2-42* in special civil actions, and if so, whether in-house counsel is precluded from recovering attorney's fees under *N.J.S. 22A:2-42* by application of *N.J.S. 17:3B-40* and *N.J.S. 17:16C-42(d)*. The Appellate Division held that attorney's fees are mandatory under *N.J.S. 22A:2-42*, and it held that in-house counsel may receive attorney's fees because *N.J.S. 17:3B-40* and *N.J.S. 17:16C-42(d)* are not applicable to *N.J.S. 22A:2-42*. Staff's research has indicated a trend of mandatory attorney's fees, and the Commission is currently drafting a report clarifying that attorney's fees are mandatory under *N.J.S. 34:15-28.1* (attorney's fees penalty in workers compensation law).

In *Staffenberg*, the defendant, Jennifer Staffenberg held a credit card issued by the plaintiff, Chase Bank. *Staffenberg, supra*, 419 *N.J. Super.* at 388. In October 2009, Chase Bank filed a complaint in Special Civil Part, alleging that Staffenberg was indebted on her credit card, and sought recovery of the balance due in the sum of \$5,868.98. *Ibid.* The plaintiff sought \$133.14 in counsel fees under *N.J.S. 22A:2-42*, "consisting of a \$25 portion (equaling five percent on the first \$500 due) plus an additional portion of \$108.14 (comprising two percent of the \$5,406.93 remainder)." *Id.* at 390. In addition, the complaint listed plaintiff's counsel as two attorneys from its in-house legal department. *Id.* at 389. On December 7, 2009, the Special Civil Part entered a default judgment against Staffenberg, and included the \$133.14 in counsel fees. *Id.* at 390. Subsequently, the defendant appealed asserting that plaintiff was precluded from recovering attorney's fees under *N.J.S. 22A:2-42* because *N.J.S. 17:3B-40* and *N.J.S. 17:16C-42(d)* preclude recovery of attorney's fees for creditors that use in-house counsel. *Id.* at 391.

First, the court held that attorney's fees are mandatory under *N.J.S. 22A:2-42*. *Id.* at 396. The applicable statute reads:

There shall be taxed by the clerk of the Superior Court, Law Division, Special Civil Part in the costs against the judgment debtor, a fee to the attorney of the prevailing party, of five per centum (5%) of the first five hundred dollars (\$500.00) of the judgment, and two per centum (2%) of any excess thereof.
[*N.J.S. 22A:2-42.*]

The court applied the statutory framework of *Quereshi v. Cintas Corp.*, 413 *N.J. Super.* 492 (App. Div. 2010), that "[t]he use of the word 'shall' ordinarily denotes action that is mandatory, unless the context suggests otherwise." *Staffenberg, supra*, 419 *N.J. Super.* at 396 (internal quotation marks omitted). The court found that the intent of attorney's fees under *N.J.S. 22A:2-*

42 is akin to a taxed cost of suit, meant to shift a portion of the actual cost incurred, not to reflect the actual cost of retaining counsel. *Id.* at 397. The court found that the legislature did not intend to create any exclusions to the mandatory attorney's fees, and found its conclusion "consistent with the expedited nature of a Special Civil Part proceeding." *Id.* at 398.

Secondly, the court held that *N.J.S.* 17:16C-42(d) and *N.J.S.* 17:3B-40 do not preclude recovery of attorney's fees under *N.J.S.* 22A:2-42 when a plaintiff uses in-house counsel. *Id.* at 413. *N.J.S.* 17:16C-42(d) was passed under the Retail Installment Sales Act ("RISA"), and states that a "retail installment contract . . . may provide for the payment of attorney fees not exceeding 20% of the first \$500 and 10% of any excess . . . when referred to an attorney, not a salaried employee of the holder of the contract." *Id.* at 400. *N.J.S.* 17:3B-40 was passed under the Market Rate Consumer Loan Act ("MRCLA"), and states that if a bank refers the collection to a non-salaried employee of the bank, it may collect a reasonable attorney's fee if the agreement governing the plan so provides. *Id.* at 401-02.

The court looked to the legislative history of the statutes, and presumed that the Legislature was aware of *N.J.S.* 22A:2-42 when it enacted RISA in 1960 and MRCLA in 1996, and did not intend to overrule its statutory attorney's fee mandate. *Id.* at 402-03. Additionally, the court found that *N.J.S.* 17:16C-42(d) and *N.J.S.* 17:3B-40 do not partially repeal *N.J.S.* 22A:2-42 by implication because there is no basis to overcome the "strong presumption in the law against implied repealers." *Id.* at 403 (internal quotation marks omitted). To harmonize the three statutes, the court interpreted *N.J.S.* 22A:2-42 as a statutory tax, and distinguished it from *N.J.S.* 17:3B-40 and *N.J.S.* 17:16C-42(d), which it concluded were contractual attorney's fee provisions. *Ibid.* *N.J.S.* 22A:2-42 applies to Special Civil Part actions, which have a limit of \$15,000, and the statute mandates attorney's fees to the prevailing party not to exceed 5% of the first \$500 recovered and 2% of any excess. *Ibid.* Thus, the highest possible fee under *N.J.S.* 22A:2-42 is only \$315. *Id.* at 407. The court found *N.J.S.* 22A:2-42 more akin to a tax that "does not attempt to reimburse the creditor fully for the reasonable costs of its counsel's services. . . . the award . . . operates to shift only a small portion of the burden of litigating the matter to the judgment debtor." *Id.* at 404. In contrast, the Court interpreted *N.J.S.* 17:3B-40 and *N.J.S.* 17:16C-42(d) as contractual fees designed to reimburse the prevailing party for the reasonable cost of attorney's fees. *Id.* at 404. Furthermore, fees awarded pursuant to those statutes are not conditioned upon the actual institution of a suit, whereas fees awarded under *N.J.S.* 22A:2-42 require a special civil suit. *Ibid.* Moreover, the court found that the public policy behind denying in-house counsel fees, in response to over-reaching by banks, does not apply to special civil actions where the fee is nominal. *Id.* at 406-07.

The court additionally relied on a prior Appellate Division case, *Bancredit, Inc. v. Bethea*, 65 *N.J. Super.* 538 (App. Div. 1961), which "recognized the qualitative distinction between statutory counsel fees awarded as taxed costs under *N.J.S.* 22A:2-42 and counsel fees recoverable under contractual provisions." *Id.* at 407. The court in *Bancredit*, held that an earlier version of 17:16C-42(d) could coexist with *N.J.S.* 22A:2-42 because one represents a contract to cover all legal expenses where the other is a court-imposed cost. *Id.* at 409.

The court in *Staffenberg*, also addressed the concerns regarding potential "double counting" of attorney's fees. *Ibid.* The court held that because attorney fees must be reasonable,

it has discretion not under *N.J.S. 22A:2-42*, which mandates an amount, but under a separate contract-based request under *N.J.S. 17:3B-40* or *N.J.S. 17:16C-42(d)*, to consider that a party already received a modest fee under *N.J.S. 22A:2-42*. *Ibid*.

In summary, the court held that attorney's fees are mandatory under *N.J.S. 22A:2-42* and are not restricted by *N.J.S. 17:3B-40* and *N.J.S. 17:16C-42(d)*, which prohibit an award of attorney's fees to parties who use in-house counsel. In light of the appellate court's decision, Staff seeks the Commission's guidance on whether to pursue modifying *N.J.S. 22A:2-42* to reflect the court's interpretation. Staff has prepared a draft change to the statute.

DRAFT

N.J.S. 22A:2-42. Attorney's or counsel's fees

~~There shall be taxed by~~ The clerk of the Superior Court, Law Division, Special Civil Part shall award in the costs against the judgment debtor, a fee to the attorney of the prevailing party, of five per centum (5%) of the first five hundred dollars (\$500.00) of the judgment, and two per centum (2%) of any excess thereof. An award of attorney's fees granted under this section shall constitute a nominal taxed cost of the court, and in-house counsel are not precluded from recovery under this section by application of *N.J.S. 17:16C-42(d)* or *N.J.S. 17:3B-40*.

In actions of replevin the court shall allow the attorney of the prevailing party a fee of not less than five dollars (\$5.00) nor more than ten dollars (\$10.00), to be taxed and collected as aforesaid.

Upon entry of any order adjudging a person in contempt for violation of any order of the court or upon any motion or application to the court made subsequent to the commencement of an action or proceeding in the Special Civil Part, the court, in its discretion, may award an attorney or counsel fee of not more than ten dollars (\$10.00) to be paid in such manner as the court shall direct.

COMMENT

The revision in *N.J.S. 22A:2-42* clarifies that attorney's fees are mandatory under *N.J.S. 22A:2-42*, and reflect a nominal taxed cost of the court. Additionally, in-house counsel are not precluded from recovery under this section by application of *N.J.S. 17:16C-42(d)* or *N.J.S. 17:3B-40*. The revision codifies the reading of the statute found in *Chase Bank USA, N.A. v. Staffenberg*, 419 *N.J. Super.* 386, 396 (App. Div. 2011).

In *Staffenberg*, the court applied the statutory framework of *Quereshi v. Cintas Corp.*, 413 *N.J. Super.* 492 (App. Div. 2010), that "[t]he use of the word 'shall' ordinarily denotes action that is mandatory." *Id.* at 396 (internal quotation marks omitted). This revision added language to clarify that the clerk of the court must award attorney's fees to the prevailing party.

Additionally, the court in *Staffenberg* held that *N.J.S. 17:16C-42(d)* and *N.J.S. 17:3B-40* do not preclude recovery of attorney's fees under *N.J.S. 22A:2-42* when the plaintiff uses in-house counsel. *Id.* at 413. The court found that the intent of attorney's fees under *N.J.S. 22A:2-42* is akin to a taxed cost of suit, meant to shift a portion of the actual cost incurred, and not to reflect the actual cost of retaining counsel. *Id.* at 397. In contrast, the court

interpreted *N.J.S. 17:16C-42(d)* and *N.J.S. 17:3B-40* as contractual attorney's fees provisions, designed to reimburse the prevailing party for the reasonable cost of attorney's fees. *Id.* at 404. The court found that the legislature did not intend to create any exclusions to the mandatory attorney's fees tax, and found its conclusion "consistent with the expedited nature of a Special Civil Part proceeding." *Id.* at 398. This revision added language to clarify that attorney's fees under *N.J.S. 17:16C-42(d)* and *N.J.S. 17:3B-40* are qualitatively different than those awarded under *N.J.S. 22A:2-42*, and they do not prohibit the court from awarding attorney's fees to in-house counsel under *N.J.S. 22A:2-42*.