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"NJ: Waiver of Attorneys' Fees Must Be Clear and Unambiguous in Settlement Agreements," by Iram Valentin, Esq., Legal Malpractice.com, 2-7-2011

NJ: Settlement Agreements; Attorneys Fees

By Iram P. Valentin and Edward P. Abbott

The New Jersey Appellate Division reiterated the need for care in addressing the issue of attorney's fees in settlement agreements in a recent opinion approved for publication. It is customarily assumed by attorneys that unless specifically provided by statute, rule or case law, litigants bear their own attorney's fees under the "American Rule." Nonetheless, attorneys routinely provide for a release of claims for attorney's fees in settlement agreements that resolve litigation. However, Porreca v. City of Millville suggests that this should be standard practice, and a failure to clearly and unambiguously waive such fees may lead to exposure for the client.

The plaintiff In Porreca, a resident and taxpayer of the defendant's municipality, brought two separate actions "in lieu of prerogative writs," alleging violations of the municipality's tax abatement program and a failure to collect "review and inspection fees" from developers in violation of the municipal code. The parties subsequently executed a settlement agreement addressing the claims in both matters. The settlement agreement was silent on the issue of attorney's fees, although it stated that the parties released "all claims for damages." Further, the settlement agreement indicated that the municipality had taken action on the plaintiff's complaints both prior and subsequent to the litigation.

In overruling the trial court, the Appellate Division determined that R. 4:42-9(a)(2), the so-called "fund in court" exception, could apply in this instance. The "fund in court" exception can apply when a litigant does more than merely advance his or her own interests, which results in a benefit to a class of persons of which the litigant is a member. If this is the case, then the court has discretion to award the amount of attorney's fees, if any, which are reasonable in light of the facts of the case. There does not need to be an actual fund or amount of money in the court's possession for this to apply and the litigant does not need to obtain all the relief sought as a result of the lawsuit. In applying these principles to Porreca, the Appellate Division found that the plaintiff could be entitled to attorney's fees under R. 4:42-9(a)(2), as he obtained relief for taxpayers in the defendant municipality by increasing revenue for the municipality as a result of cell towers being placed on the tax rolls and the return of fees to the municipality.

The Appellate Division then looked to the settlement agreement to determine if the plaintiff had waived the claim for attorney's fees. Again, the settlement agreement did not reference attorney's fees. The Appellate Division specifically rejected a bright-line rule that the claim for attorney's fees would survive the settlement agreement unless it was expressly and specifically waived. The Court then looked to basic contract principals and found that the terms of the settlement agreement were ambiguous as only "all claims for damages" were released and the claims asserted by the plaintiff did not involve claims in which attorney's fees were a traditional element of damages. The Appellate Division therefore remanded the matter to the trial court to address the issue of whether the plaintiff had waived his claim for attorney's fees in the settlement agreement.

A Costly Lesson Learned

This case demonstrates the need for specificity in the drafting of all settlement agreements. In negotiating a settlement, the issue of attorney's fees must be addressed and resolved with clear and unambiguous language in the settlement agreement. Failure to do so may result in the imposition of attorney's fees against a client.

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