



## ELIMINATE ONE-SIDED FEE-SHIFTING

Fee-shifting provisions are showing up in proposed legislation in New Jersey with increasing frequency. These provisions, which allow prevailing plaintiffs to recover attorney's fees and court costs, encourage frivolous litigation, discourage settlement, and drive up the cost of lawsuits.

### **Incentive for Litigation:**

In situations where the fees at issue vastly dwarf the underlying damages, it is the lawyers who have the greatest incentive to find violations and bring litigation. As a result, these provisions often create not just a remedy but an industry.

### **Impediment to Settlement:**

Fee-shifting also impedes settlement and creates potential conflicts of interest between lawyers and their clients. While the consumer hopes to obtain compensation as quickly as possible, the lawyer whose fees are being covered by someone other than his client has little incentive to settle.

In addition, New Jersey has an offer of judgment rule which is designed to encourage settlement and discourage rejection of reasonable settlement offers. Under the offer of judgment rule, should either party make a settlement offer that is rejected and the outcome is within 20% of the rejected offer, the rebuffing party is responsible for the offering party's attorney fees and court costs incurred from the time the offer was made. Fee-shifting provisions nullify this rule, eliminating the state's single most powerful tool for encouraging settlement, thus compounding the incentives toward litigation and against resolution.

### **Encouraging Lawyers to File Cases of Dubious Merit:**

In New Jersey, fee-shifting provisions also reward attorneys for taking a gamble on questionable cases. The standard fee-shifting language authorizes the court to grant "reasonable" attorney's fees to the prevailing party, typically the number of hours worked on the case \* the attorney's hourly rate. However, New Jersey courts are then permitted "enhance" awards by tacking on as much as double the actual fees to compensate attorneys for the contingency that they might not have been paid for their work had they lost the case. That contingency will be highest in those cases where there was the greatest risk of nonpayment, so the most marginal of cases potentially reward the plaintiff's attorneys with the highest fees.

### **Proliferation in State Legislation:**

Despite the added expenses and inefficiencies, fee-shifting provisions are increasingly being added to bills targeting a variety of relatively narrow substantive issues. Bills with fee-shifting introduced this legislative session include everything from a requirement that digital records be deleted from photocopiers before the machines are discarded, to the regulation of pharmacy internet sales, to limits on rent increases on senior citizens' apartments.

Proponents argue that fee-shifting provisions enhance access to the courts for plaintiffs who might lack the resources to hire an attorney. However, consumers could often obtain redress far more efficiently via an administrative remedy with a schedule of fines, likely without incurring the added expense of hiring lawyer.

The New Jersey Civil Justice Institute therefore believes that fee-shifting provisions should be used sparingly, only at the request of the bill sponsor, and only in situations where litigation is necessary to resolving a dispute and compensating an injured party.