

Getting Serious About Senseless Claims

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Unsupported lawsuits have no place in the courts. Unfortunately, attorneys are often faced with junk claims against which they must defend. In products liability litigation, sometimes suits are filed in which the basis of all asserted claims have not been fully explored. In the mass-tort context, defense attorneys can ask for a "Lone Pine Order," *Lore v. Lone Pine Corp.*, 1986 N.J. Super. LEXIS 1626 (Law Div. Nov. 18, 1986), to weed out junk claims through an initial showing, but these are often not granted.

For mass-tort products liability claims, the result can be a large amount of cases with no basis in law, no chance of success, and no place in a piece of serious litigation. Attorneys are forced to quarrel over whether a plaintiff ever used a product or even sustained a compensable injury, instead of focusing on substantive issues such as causation.

The law has a term for these cases: frivolous litigation.

New Jersey's Frivolous Litigation statute, N.J.S.A. 2A: 15-59.1, was enacted in 1988 to deter litigants from filing frivolous claims and to compensate parties defending against junk suits. *Toll Bros. v. Township of West Windsor*, 190 N.J. 61, 67 (2007). Following the Supreme Court's holding in *McKeown-Brand v. Trump Castle Hotel & Casino*, 132 N.J. 546 (1993), that the statute infringed on the court's exclusive constitutional authority to regulate attorneys, the court amended Rule 1:4-8 to supplement the statute and to address when it is appropriate to impose sanctions, including costs and attorney fees, against attorneys. *Toll Bros.*, 190 N.J. at 67-68. The statute remains in effect against parties pursuing frivolous litigation. Because of New Jersey's strong policy favoring ready access to the judiciary, the statute has been given a restrictive interpretation by the courts. See *Belfer v. Merling*, 322 N.J. Super. 124, 144 (App. Div.), cert. denied, 162 N.J. 196 (1999).

Although the rule has been amended several times, the statute has remained unaltered since a 1995 amendment permitting public entities to recover costs and fees for frivolous

lawsuits. L.1995, c.13, §1. Sen. Ronald Rice (D-Essex), however, has introduced S.1396, which would expand the provisions of the statute, further deter *parties* from filing frivolous lawsuits, and add several arrows to the quiver of litigants defending against frivolous conduct on both sides of the caption.

Expanding Recovery

S.1396 would allow for more opportunities for recovery compared to the current statute. The statute currently permits recovery of attorney fees against a party only by the litigant successful in the overall civil action. Under the bill, a litigant may recover reasonable fees and costs against a party regardless of the litigant's ultimate success in the civil action.

The statute as currently constructed also details that a judge may find frivolous a "complaint, counterclaim, cross-claim or defense." The bill would expand this to include a "claim, counterclaim, cross-claim, defense, motion, pretrial application, affidavit or other pleading, or any portion thereof." Notably, the bill would correct for the ambiguity the Supreme Court found in *Lewis v. Lewis*, 132 N.J. 541, 545 (1993), which concluded that the statute does not apply to motions. Additionally, the bill would allow recovery if part of a filing was frivolous, which the Appellate Division has contemplated. See *Lake Lenore Estates, Assocs. v. Township of Parsippany-Troy Hills Bd. of Educ.*, 312 N.J. Super. 409, 424 (App. Div. 1998).

Expanded recovery puts teeth behind the statute and a shield against a party, rather than just against their attorney. The bill would place a responsibility upon the claimant to make certain that they have a basis for submissions to the court. A mass-tort plaintiff may see no reason to leave litigation when he/she can only "win" rather than "lose" something in the litigation. Expanded recovery would help change that.

Beyond Fees

The statute permits a prevailing party to file for reasonable fees and litigation costs. However, the bill explicitly expands what is included: "litigation costs, including expenses for experts and counsel fees, and prejudgment interest, and any consequential damages that are proximately related to the frivolous action." This portion of the bill would codify the

courts' practice of sanctioning a party for expert costs. See, e.g., *Maintainco v. Mitsubishi Caterpillar Forklift America*, 408 N.J. Super. 461, 482 (App. Div. 2009).

Interestingly, the bill would expand recovery to "consequential damages." Consequential damages include the damages that flow as a consequence of the harm. See Restatement (Second) of Torts, §917 (1979). Given that "litigation costs" is separate from "consequential damages" within the text, the bill sends a clear message that recovery would be beyond what is currently covered under Rule 1:4-8, and the fees and costs under the current statute.

Beyond monetary sanctions, the bill would also permit a judge to issue non-monetary "directives" to deter repetition of frivolous conduct. Although such a power may already exist, the bill's explicit mention of nonmonetary sanctions is a clear indication of the policy to stamp out frivolous behavior. See, e.g., *Atkinson v. Pittsgrove Twp.*, 193 N.J. Super. 23, 32 (Ch. Div. 1983) ("In short, this court has the power and duty to protect the purity and efficiency of its own processes against the type of conduct pursued by plaintiff herein. The court has the inherent power to protect itself and litigants against harassment and vexacious litigation and an abuse of process").

This message is needed, not to the court, but to the mass-tort party. Especially in a mass tort, where hundreds of frivolous lawsuits can hide while a bellwether proceeding dictates litigation direction, an express statutory threat of fees, costs and damages compels a plaintiff to think hard about whether he/she wants to maintain a claim that has no place in litigation. The plaintiff's attorney can urge a client to dismiss a suit, but it is the plaintiff client—not the attorney—who has the control of that decision.

Expanding Frivolous Conduct

S.1396 would make parties liable for frivolous conduct that attorneys are prohibited from engaging in. The statute currently contemplates recovery of fees and costs if the alleged frivolous conduct is commenced, used or continued in bad faith or for the purpose of harassment, delay or malicious injury, or if it is "without any reasonable basis in law or equity and could not be supported by a good-faith argument for extension, modification or

reversal of existing law." *Shore Orthopaedic Group v. Equitable Life Assur. Soc. of U.S.*, 397 N.J. Super. 614, 627 (App. Div. 2008) (quotation marks and citations omitted). Courts have interpreted this to mean that "[a] claim will be deemed frivolous or groundless when no rational argument can be advanced in its support, when it is not supported by any credible evidence, when a reasonable person could not have expected its success, or when it is completely untenable." *Belfer*, 322 N.J. Super. at 144.

The bill would expand the grounds on which a judge may find frivolous conduct through four main changes. First, the bill would allow for recovery if a party engaged in frivolous conduct as a result of "retaliation against the assertion of a legitimate claim." Second, it would permit recovery if a party attacked "individuals or organizations who in good faith communicate information to any public entity on any issue that is reasonably of concern to the individual, to the public or to the organization." Third, it would require that factual allegations have evidentiary support or are likely to have evidentiary support. Fourth, the bill would codify that denials of factual allegations are reasonably based upon a lack of information or belief.

These changes codify against parties what is incumbent upon attorneys: due diligence and good faith. See R. 1:4-8(a). Nowhere is this more important than in a mass tort, where some parties think they have a legitimate basis for suit simply because they think they match an attorney advertisement profile. Certainly a plaintiff's attorney has a responsibility to discern whether there is a good-faith basis to file, but the plaintiff client also should be responsible for the evidentiary support underlying the claim.

Shrinking Safe Harbor & Codifying Judicial Administration

A noticeable departure from the existing rule is a change in the safe-harbor timing for withdrawing a frivolous filing. Although the statute does not mention the time in which a frivolous filing must be withdrawn, Rule 1:4-8(f) makes applicable, "[t]o the extent practicable," the procedural requirements of the rule to parties governed by the statute. This means that notice and demand for voluntary dismissal must be made, and 28 days must be given, to the party to withdraw the filing. See *Toll Bros.*, 190 N.J. at 69-73. The bill, however, would shrink the safe-harbor timing to 21 days and would make this timing mandatory.

Although a litigant could bring such a motion, the bill would permit the judge to enter an order to show cause sua sponte regarding whether a party has violated the statute. This would bring the statute further in line with the rule. See R. 1:4-8(c).

The effect here for the mass-tort attorney is monumental. In traditional litigation there exists a more linear path for litigation. In a mass tort, seven fewer days required for every demand letter add up to time saved and costs reduced. Motion practice can move forward and attorneys can address frivolous lawsuits at a faster rate. Further, allowing judicial intervention provides a mass-tort judge with the ability to address particular cases as potentially frivolous. In short, frivolous cases have fewer places to hide.

Conclusion

Although Rule 1:4-8 has seen several changes, N.J.S.A. 2A:15-59.1 governing party conduct has not similarly evolved. S.1396 would attempt to bring the statute in line with the rule and would place more responsibility on a party to contemplate whether the case has merit. Further, the bill would expand recovery, what may be recovered, and what constitutes frivolous conduct. The bill places more pressure on parties engaged in frivolous conduct by shrinking response time to notice and demand for dismissal, and by allowing judges to issue nonmonetary directives against parties and institute actions sua sponte. Although further debate may be necessary, overall it appears to advance "the policy interests of deterrence and reparations that animate" the statute. *Toll Bros.*, 190 N.J. at 72. Such changes against parties are necessary in products liability mass-tort litigation, to bring forth frivolous cases, and to dismiss them from serious litigation.