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**RECENT FEE SHIFTING DEVELOPMENTS: THE NEW JERSEY  
SUPREME COURT DECISION IN THE MATTER OF NILES**

**Gerard G. Brew, Esq.  
McCarter & English, LLP  
Newark, New Jersey**

**FEE SHIFTING DEVELOPMENTS: THE NEW JERSEY SUPREME  
COURT DECISION IN THE MATTER OF NILES**

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**I. Introduction**

Implicit in the American legal system is the concept that each side bears its fees and costs incurred in the litigation. This is ordinarily true regardless of the outcome of the litigation; some say this approach is designed to ensure equal access to the courts to all litigants, regardless of wealth.

In the estate litigation, certain fees are often paid from the estate (or trust). For example, a fiduciary is typically allowed to charge its counsel fees to the estate or trust, particularly with respect to account proceedings and the like. In probate disputes, the proponent of the will (and some instances, the challenger) are reimbursed by the estate for the fees they incur. (In each of these instances, most jurisdictions provide for some form of court approval). In addition to these concepts, however, some have argued that fee-shifting should be permitted in certain (typically egregious) cases, such that one party should be obliged to pay counsel fees incurred by the other party

This program will explore recent New Jersey case law that has carved out an exception to the so-called “American Rule” and allows fee-shifting to a fiduciary personally for certain courses of conduct.

**II. The American Rule Regarding Counsel Fees**

In general, the so-called “American Rule” prohibits recovery of counsel fees by the prevailing party against the losing party. (This is called the “American” Rule to distinguish it from the English approach, in which the loser

may be required to pay the fees incurred by the prevailing party.). The New Jersey Supreme Court in the Matter of Niles notes that there are three purposes for the general rule: (1) unrestricted access to the courts for all persons; (2) ensuring equity by not penalizing persons for exercising their rights as litigants, even if they should lose; and (3) administrative convenience. See Niles, 176 N.J. 282, 294 (2003).

In New Jersey, this rule is embraced and embodied in a counsel fee rule, N.J. Court R. 4:42-9. That Rule provides that “[n]o fee for legal services shall be allowed in the taxed costs or otherwise,” except in a clearly defined set of exceptions within the Rule and when provided for in a statute. Exceptions to the general rule are created by Courts when public policy or equity demands it, and include instances where frivolous claims are filed (N.J.S.A. 2A:15-59.1, the NJ Frivolous Claims Statute and N.J. Court Rule 1:4-8); in attorney malpractice cases (Packard-Bamberger & Co. v. Collier, 167 N.J. 427 (2001)) and other instances where counsel fees are a traditional element of damages under a particular cause of action (In re Estate of Lash, 169 N.J. 20, 31 (2001)). These exceptions are similar to those in other jurisdictions, which allow for fee-shifting where the litigant seeking payment of fees would not have been brought into the litigation but for the wrongdoing or frivolous conduct of the other party. See, e.g. New York Surrogate’s Court Procedure Act §2302(3)(a) (allowing award of successfully proponent’s legal fees where court finds contest was brought in bad

faith or is frivolous); Fed. R. Civ. Proc. 11 (sanctions allowed where claim is determined to be frivolous).

**III. New Jersey’s Departure from the American Rule: *In the Matter of Niles***

In a relatively recent decision, the New Jersey Supreme Court rejected the American Rule regarding fee shifting among litigants where the fees were incurred due to the misconduct of a fiduciary. See Niles, 176 N.J. 282 (2003). In Niles, the defendant mother and son were alleged to have unduly influenced a sick, elderly woman into altering her estate planning documents and giving them substantial fiduciary control over her assets (which they promptly began to systematically loot). The lawsuit was brought by the former trustee of several *inter vivos* trusts established by the Decedent and the private foundation that was the named remainderman of the trusts. Both the trustee and the remainderman asked that their legal fees be paid by the defendants, rather than from the estate (thus preserving the value of the estate).

The Court found that the defendants exerted undue influence over Decedent. It held that where a fiduciary “reaps a substantial economic or financial benefit from undue influence, the fiduciary may be assessed counsel fees incurred [by other parties] in litigation to restore the estate’s assets to what they would have been had the undue influence not occurred.” See id. at 286. The court found that undue influence, when committed by a fiduciary to obtain a

significant financial benefit for himself is “especially pernicious” because it is an intentional wrongdoing, “generally committed against vulnerable persons such as older people with progressively disabling health conditions.” See id. at 299.

Most importantly, the court noted that this undue influence exception does not violate the spirit of the American Rule requiring each party to bear its own counsel fees and will not “open the floodgates” to litigants seeking to have counsel fees paid by the opposing party. Under New Jersey law “undue influence represents such an egregious intentional tort that it establishes a basis for punitive damages in a common law cause of action. The exception we have created directly follows from the special status of the undue influence tort.” See id. at 300 (citing the Punitive Damages Act, N.J.S.A. 2A:15-5.9—5.17). Where a fiduciary exerts undue influence for his own financial benefit, he is responsible for the counsel fees of those parties who litigate to restore the value of the estate.

#### **IV. *Niles Revisited: In the Matter of Vayda***

The New Jersey Supreme Court has recently been asked to revisit its decision in Niles. It has granted certification in the Matter of Vayda (the Supreme Court’s decision is pending as of this writing), involving an appeal from an Appellate Division decision (No. A-4653-02T2, June 11, 2004). In Vayda, the trial court determined that the executor of Decedent’s estate (and Decedent’s son), while not committing undue influence to convince Decedent to change her estate plan, was inattentive in managing the estate and recouping assets that had been

lost. The other beneficiary of the estate (and the executor's sister) sought to have her counsel fees paid by the executor personally, under the guise of Niles. The trial court agreed with the beneficiary, and shifted approximately two-thirds of her fees to the executor. See id. at 16-17.

The Appellate Division reversed the trial court on the issue of fees (among other issues). The court found that the Niles exception was not applicable in this matter, inasmuch as the trial court determined that there was no undue influence involved (an issue that was upheld on appeal). See id. at 18. The beneficiary nonetheless argued that, even if the Niles undue influence exception did not technically apply, it should be expanded in cases, like this, where the executor's bad faith in performing his fiduciary duties was egregious. See id. The Vayda Appellate Division declined to so expand the holding of Niles, noting that

The authority to make such an expansion rests with the Supreme Court, which has the requisite constitutional rule-making authority. As an intermediate appellate court, we decline to race ahead of the Supreme Court on this issue. [Id. at 18 (citing In re Farnkopf, 363 N.J. Super. 382, 396 (App. Div. 2003)]

As noted above, the Supreme Court has granted certification in this matter. It remains to be seen whether New Jersey's undue influence exception to the American Rule regarding fee shifting will be further expanded to situations in which the fiduciary was not unduly influencing the Decedent, but was derelict in his or her duties under the law.

*Fee Shifting . . .6*

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