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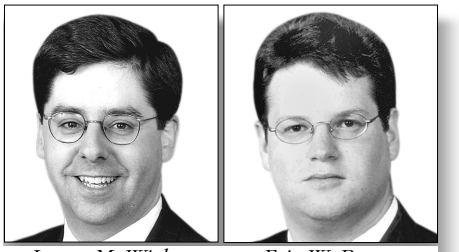
The 'Shindler Rule': An Exception to the Rule on Attorney's Fees?

Under the "American rule," attorney's fees are "incidents of litigation and a prevailing party may not collect them from the loser unless an award is authorized by agreement between the parties, statute or court rule."[1] As opposed to the British rule, requiring the unsuccessful litigant to pay legal expenses for both sides, our rule "encourages the submission of grievances to the judicial determination and provides freer and more equal access to the court promoting democratic and libertarian principles."[2] What happens, however, when party A causes party B to incur legal expenses in a suit with a party C? Can party B seek recovery of attorney's fees from party A?

A plaintiff may recover litigation expenses from a defendant, where that plaintiff was forced to litigate against a third party in an earlier litigation as a result of the defendant's wrongful acts. That rule takes root from the 1959 case, *Shindler v. Lamb*, which was decided in state court in New York County.[3] It was dubbed the "Shindler Rule" by U.S. District Judge Sonia Sotomayor in 1995. Although reported cases discussing the Shindler Rule are legion, cases actually upholding the rule are scarce.



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Background

The facts of *Shindler* are worth considering. The *Shindler* case was brought by plaintiff, David Shindler, against the officers and directors of a corporation for fraudulently inducing him to lend money to the corporation on a chattel mortgage. The corporation filed for bankruptcy, and Mr. Shindler alleged that because of defendants' fraud, he was required to retain counsel and commence a proceeding in the bankruptcy court to recover the sum lent to the corporation. He sued defendants seeking to recover his legal expenses incurred in the bankruptcy proceeding.

On defendants' motion to dismiss, the state trial court determined that Mr. Shindler's claim to recover the litigation expenses incurred in the bankruptcy proceeding, namely, his attorney's fees, was cognizable under New York law. The court stated that a "well-recognized" exception to the general rule prohibiting the recovery of attorney's fees applied.

As stated by the court, "if, through the wrongful act of his present adversary, a person is involved in earlier litigation with a third person in bringing or defending an action to protect his interests, he is entitled to recover the reasonable value of attorney's fees and other expenses thereby suffered or incurred."[4] The case was affirmed by both the Appellate Division[5] and the Court of Appeals,[6] without opinions by either court.

Limited Exception

Though the Shindler Rule has been frequently cited in judicial decisions, it has been actually applied sparingly, with most courts finding the exception inapplicable to the facts. A review of those cases would seem to indicate that this may be attributable to litigants' attempts to expand the exception beyond its intended application. The exception has been strictly limited to situations in which a party is seeking attorney's fees from its present adversary based on a prior litigation with a different party, caused by the wrongful conduct of the present adversary. The present adversary, under those circumstances, is liable for all those expenses that are the "reasonable and the natural and necessary consequences of the defen-

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dant's acts." The exception does not apply where, for example, the present adversary was also a party to the earlier litigation, or where the present adversary can be said to "stand in the shoes" of the party to the earlier litigation.

For example, in *Chase Manhattan Bank, N.A. v. Each Individual Underwriter Bound to Lloyd's Policy No. 790/004A89005*,[7] Chase sued its insurance broker for alleged negligence in failing to procure sufficient all-risk coverage for the bank as an "additional insured" under its messenger's policy. Defendant moved to dismiss Chase's complaint to the extent it sought to recover attorney's fees and expenses incurred in connection with the plaintiff's earlier coverage litigation with the insurer.

The lower court denied the motion, but the Appellate Division reversed, holding that the general rule prohibiting the recovery of attorney's fees applied.[8] The Appellate Division further held, in response to Justice Angela M. Mazzarelli's dissent, that the Shindler Rule was inapplicable because the defendant broker was not a stranger to the earlier litigation with the insured. Rather, the court noted that, as a matter of law, the broker "stands in the shoes of the insurer as concerns liability to the insured."[9] As such, the exception was held to be inapplicable.

Similarly, in *Goldberg v. Mallinckrodt, Inc.*,[10] the U.S. Court of Appeals for the Second Circuit held that the Shindler Rule was inapplicable where both parties to the action were also parties to the prior litigation. In that case, the plaintiff, a medical doctor, was exposed to a new dye manufactured and marketed by the defendant. He used the dye to perform a test on a patient. The patient thereafter suffered severe nerve damage, as did another of the doctor's patients. Both injured patients brought lawsuits. One patient sued the doctor, who impleaded the manufacturer as a third party in the action. The other patient sued the manufacturer, which impleaded the doctor as a third party.

The case before the Second Circuit was brought by the doctor against the manufacturer, seeking damages for fraud in misrepresenting the dye's safety. The damages sought included attorney's fees and litigation expenses incurred by the doctor in connection with both actions initiated by his patients. The court denied recovery of attorney's fees under the Shindler Rule, reasoning that even though the manufacturer's wrongful conduct exposed the doctor to litigation with third parties, the manufacturer and doctor were both parties to those litigations.[11]

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Notably, Judge J. Edward Lumbard dissented, espousing the view that the doctor's legal expenses, at least with respect to the direct action brought against him by his patient, was the proximate result of the defendant's allegedly fraudulent conduct, and the doctor's litigation expenses were a proper measure of damages.[12]

Proceedings and Parties

Judge Sotomayor similarly rejected a litigant's attempt to expand the exception in *Chase Manhattan v. Traditional Investments*.[13] That litigation was an interpleader action involving a number of adverse claims against the bank, requiring the court to determine the manner in which to distribute the balances remaining in accounts that the bank had previously frozen. One claimant sought to recover attorney's fees from the bank, relying upon the Shindler Rule.

The court held, however, that the Shindler Rule did not apply because the interpleader action was not an "additional proceeding" in which the claimant incurred extraneous litigation expenses. Indeed, the court made clear that the exception to the general rule prohibiting the recovery of attorney's fees was inapplicable to compensate parties for litigation expenses incurred in suits against the actual party that committed the wrongful act.[14]

The New York Court of Appeals briefly revisited the Shindler Rule in *Hunt v. Sharpe*,[15] where the Court affirmed the Appellate Division's decision denying defendants an award of $406,000 in legal fees and interest. In that case, the plaintiff, the board of managers of a condominium, sought a permanent injunction restoring the building to its original condition and declaring that the defendants had the right to perform structural alterations, improvements or repairs to the building. The Appellate Division affirmed the lower court's finding that the defendants had the right to perform structural alterations, but determined that the trial court improperly applied the Shindler Rule in awarding the defendants/counterclaim-plaintiffs their legal fees.

The Appellate Division stated that, unlike other actions involving a corporation and one of its principals sued in an individual capacity, the plaintiffs had sued the defendants in their capacity as members of the condominium's board of managers. Thus, the court noted that there was

"simply no third party involved in this action; moreover, the third party exception has no application here because only one action is involved and there is no 'earlier litigation with a third person' as is necessary to bring defendants' counterclaim within the exception to the rule."[16]

The Court of Appeals affirmed, noting that the "American Rule" precluded recovery of attorney's fees, and the facts of the case did not support application of the Shindler Rule.[17] Rather, the court noted that the exception "is unavailable where, as here, the purported 'third-party' wrongdoer is, either legally or as a practical matter, the same as the claimant's opponent in the main action."[18]

The Shindler Rule was analyzed by a Nassau County district court judge in *State-Wide Insurance Company v. Dimarzo*,[19] the court holding that the exception was inapplicable. The insurance company plaintiff in that case sought to recover monies paid by it to or on behalf of the defendants under a no-fault insurance policy, for health services rendered in connection with a "hit and run" accident. The court granted summary judgment in the plaintiff's favor, requiring return of the sums paid. The action for reimbursement of expenses incurred by the plaintiff in defending the defendants' claim for uninsured motorist benefits was litigated.

The court held that the Shindler Rule was inapplicable because the claimant in the prior proceeding was the infant defendant, also a party (through her father and natural guardian) to the case before the court. In strictly construing the Shindler Rule, the court relied upon the Appellate Division's decision in *Nardiello v. Stone*,[20] where the court stated that "the narrow exception of *Shindler* is unavailable where the purported third party wrongdoers … are the legal and the practical equivalent of the defendant alleged to have committed the fraud."

More recently, another Nassau County district court judge applied the exception in *Old Oak Realty v. Abram*.[21] There the court determined that the plaintiff real estate broker was entitled to recover litigation expenses from defendant, one of the prospective purchasers of real property offered by the plaintiff. The plaintiff had commenced an earlier litigation against the owner of a house to recover a commission. In doing so, the plaintiff allegedly relied upon defendant's promise to testify that she was ready, willing and able to purchase the house. The plaintiff then commenced the earlier litigation against the owner of the house to recover a commission.

After testifying favorably for the plaintiff at a deposition, the defendant recanted her testimony, allegedly as a result of threats by the attorney for the owner to the effect that he would subpoena the defendant's tax returns. The defendant testified at the trial of the earlier litigation that her deposition contained testimony that she did not mean and that the testimony contained in her affidavit was truthful.

In the district court action brought by the plaintiff (broker) against the defendant (prospective purchaser), the judge noted that inasmuch as the case was a small claims case, the court was not bound by rules of substantive law and procedure. Attempting to mete out substantial justice between the parties, the court found that, but for the defendant's willingness to testify as the plaintiff's witness, the plaintiff would not have commenced the earlier action against the owner of the house. Thus, the plaintiff was entitled to recover from the defendant the legal expenses incurred in its attempt to recover a commission from the owner.

In so holding, the court relied, in large part, on Judge Kenneth Gartner's decision in *State-Wide Insurance*, noting that the Shindler Rule provided a basis for an award of attorney's fees because, but for the defendant's promise to testify in the action against the owner, the plaintiff would not have sued the owner to recover its commission. The court noted that "defendant's wrongful acts of leading the plaintiff down the 'primrose path' to cause plaintiff legal expenses and then 'pull the rug out' will not be tolerated."

While there are, no doubt, cases where application of the Shindler Rule is warranted, those cases appear to be infrequent.

(1) *Hooper Assocs., Ltd. v. AGS Computers, Inc.*, 74 N.Y.2d 487, 491, 548 N.E.2d 903, 581 N.Y.S.2d 720 (1989) (citations omitted).

(2) *Chapel v. Mitchell*, 84 N.Y.2d 345, 349, 642 N.E.2d 1082, 618 N.Y.S.2d 626 (1994) (citations omitted).

(3) 25 Misc. 2d 810, 811, 211 N.Y.S.2d 762 (Special Term N.Y. County 1959), aff'd, 9 N.Y.2d 621, 172 N.E.2d 79, 210 N.Y.S.2d 226 (1961).

(4) See 25 Misc. 2d at 811, 210 N.Y.S.2d at 765.

(5) 10 A.D.2d 826, 200 N.Y.S.2d 346 (1st Dept. 1960).

(6) 9 N.Y.2d 621, 172 N.E.2d 79, 210 N.Y.S.2d 226 (1961).

(7) 258 A.D.2d 1, 590 N.Y.S.2d 570 (1st Dept. 1999).

(8) See Id. at 4.

(9) Id. at 5-6.

(10) 792 F.2d 305 (2d Cir. 1986).

(11) Id. at 309.

(12) Id. at 311 (Lumbard, J. dissenting).

(13) 1995 U.S. Dist. LEXIS 2031 (S.D.N.Y. 1995).

(14) Id. at 14.

(15) 85 N.Y.2d 883, 649 N.E.2d 1201, 626 N.Y.S.2d 57 (1995).

(16) See 202 A.D.2d 151, 152, 608 N.Y.S.2d 188.

(17) See 85 N.Y.2d 883, 649 N.E.2d 1201, 626 N.Y.S.2d 57.

(18) Id. at 886.

(19) Index No. 8776/99 (Dist. Ct. Nassau County) (Gartner, J.).

(20) 235 A.D.2d 681, 652 N.Y.S.2d 647 (3d Dept. 1997).

(21) N.Y.L.J. Oct. 17, 2001, p. 25 (Dist. Ct. Nassau County) (Fairgrieve, J.).