

LITIGATION INFORMATION MEMO

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All is Not Lost: Considerations for the Shifting of Attorney's Fees Associated with Unsuccessful Claims

One of the questions often asked when a client is either considering bringing a lawsuit or when they are on the receiving end of a lawsuit is whether they can recover their attorney's fees and costs if they win. While attorney's fees can be recovered in some cases, many times, they cannot. Typically, a litigant that wins a lawsuit can recover attorney's fees only where there is a contract at issue that allows for the prevailing party to recover their fees, or if a relevant statute provides such a right to recovery. Whether a prevailing party is entitled to the recovery of attorney's fees is particularly important in class and collective matters that arise under the Fair Labor Standards Act (FLSA) and New York Labor Law. Parties are faced with significant fees in these types of actions because of their complexity and scope and whether there is the chance of the recovery of fees can impact a party's litigation strategy.

In September 2022, the Second Circuit provided useful insight into attorney's fee awards in *Holick v. Cellular Sales of New York, LLC*, 48 F.4th 101 (2d Cir. 2022). In *Holick*, the plaintiffs filed a class and collective action against Cellular and claimed that Cellular did not properly pay them. The employees sought damages for unfair wage deductions, unpaid compensable work, untimely commissions, unjust enrichment and failure to pay minimum wage and overtime under the FLSA and New York Labor Law. The claims arose from Cellular's alleged misclassification of the class and collective members as independent contractors instead of employees. Cellular was successful in opposing the plaintiffs' motions for class and collective action certification, but the litigation continued to adjudicate the claims of the individual named plaintiffs. After a bench trial, the plaintiffs prevailed on only two of their claims - unpaid minimum wage and overtime, receiving an award of \$11,121.

Plaintiffs' counsel sought an award of attorney's fees because their clients prevailed on some of their claims. In analyzing the application for an award of fees, the trial court determined that plaintiffs' unsuccessful claims largely required similar proof and were sufficiently intertwined with the claims that plaintiffs succeeded on at trial. Accordingly, the court declined to reduce the requested fees for the services performed in plaintiffs' pursuit of their unsuccessful unfair wage deduction, unpaid compensable work and untimely commission claims. Ultimately, the court reduced the requested \$961,450 in attorney's fees to \$576,870.30 in recognition of the fact that some of the attorneys' time was spent on the voluntarily withdrawn unjust enrichment claim, fees associated with unrelated unemployment claims, time spent for travel and unnecessary and redundant billing associated with preparing deposition errata sheets, document organization and the request for attorney's fees submission.

On appeal, the Second Circuit agreed with the trial court that plaintiffs' successful and unsuccessful claims shared a common legal issue (whether plaintiffs were employees or independent contractors) and arose from a common set of facts (the conditions of employment). Accordingly, the fees attributable to the successful claims and the unsuccessful claims were intertwined, and the trial court's decision not

to reduce the attorney's fees for all of the time spent on the unsuccessful claims was appropriate. In affirming the award of \$576,870.30 in attorney's fees in *Holick*, the Second Circuit held that there is no bright-line rule mandating a reduction in the amount of the attorney's fees awarded where the plaintiffs seek but fail to certify a class and collective action. Accordingly, the Second Circuit held that the reduction applied to the attorney's fees by the trial court was within the trial court's discretion given the failure to achieve a class action or collective certification and the other factors outlined above.

The litigation implications of the *Holick* decision are twofold. First, even where a defendant has successfully defended against claims, attorney's fees associated with an unsuccessful claim may *still be shifted* to the defendant where the plaintiff succeeds on other claims that are sufficiently intertwined with the unsuccessful claim. Second, *plaintiffs may still recover* attorney's fees associated with class actions despite ultimately failing to certify a class or collective action. When entities are evaluating their potential litigation exposure, it is important that the potential of fee shifting be considered as part of the analysis. Further, while *Holick* addressed fee shifting provided by statute, its implications are equally applicable to contracts that contain "prevailing party" provisions. When negotiating contracts with such provisions, parties should be aware of the possibility that a party can prevail only "in part" but still recover the entirety of their attorney's fees.

For any questions about this issue, please feel free to contact [Eric O'Bryan](#), any attorney in Bond's [litigation practice](#) or the attorney at the firm with whom you are regularly in contact.

