SUPREME COURT OF NEW JERSEY
SUPREME COURT DOCKET NO.: 63,813

WILMAN PINTO AND ALVARO VASQUEZ, Plaintiffs-Appellants, vs. SPECTRUM CHEMICALS AND LABORATORY PRODUCTS AND SPECTRUM CHEMICAL MANUFACTURING CORPORATION, Defendants-Respondents.	On Appeal from the Interlocutory Order of the Superior Court, Appellate Division, dated January 21, 2009 APPELLATE DIVISION DOCKET NO.: AM-000289-08T1 SAT BELOW: Hons. Mary Catherine Cuff, P.J.A.D. and Linda G. Baxter, J.A.D.

BRIEF OF *AMICI CURIAE* AMERICAN CIVIL LIBERTIES UNION OF NEW JERSEY FOUNDATION, JOHN J. GIBBONS FELLOWSHIP IN PUBLIC INTEREST & CONSTITUTIONAL LAW, DISABILITY RIGHTS NEW JERSEY, EDUCATION LAW CENTER AND NEW JERSEY APPLESEED PUBLIC INTEREST LAW CENTER

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PRELIMINARY STATEMENT

The undersigned organizations and programs (collectively, "*amici*") respectfully disagree with the position taken by their esteemed colleagues of the New Jersey public-interest bar at Legal Services of New Jersey ("LSNJ") that the rule of Coleman v. Fiore Brothers applies to actions beyond those brought under the Consumer Fraud Act. Contrary to LSNJ's argument on behalf of Plaintiffs/Appellants Wilman Pinto and Alvaro Vasquez ("Plaintiffs") touting the universal merits of the rule, expansion of the Court's holding in Coleman to other fee-shifting statutes would result in deleterious consequences for plaintiffs in civil rights and discrimination cases, and would also have a detrimental impact upon the courts, the public interest, and even the public-interest law firms whose ability to receive the fruits of fee-shifting provisions the Coleman Court sought to protect.

No jurisdiction in the twenty years since Coleman was decided has adopted, or even cited to, the restrictive rule on settlements fashioned therein. As such, New Jersey stands alone as the only jurisdiction that - in any context - completely bars the simultaneous negotiation of fees and merits, requires bifurcated settlements, or places disparate restrictions on public interest but not private counsel.

Amici certainly agree with LSNJ that strong-arm settlement tactics, if exploited by defendants, can adversely affect the ability of public-interest law firms to obtain fees to which they are rightfully entitled. *Amici* also agree that the simultaneous negotiation of merits and attorneys' fees by public-interest counsel (or even by private attorneys) pose challenging conflict-of-interest questions. But outside the field of consumer fraud, and especially within the arena of discrimination and civil rights litigation, where attorneys' fees often dwarf actual or even potential damages, the Coleman prescription is the wrong medicine. In practice, the rule will, as described below, supplant one ethical concern for another, by creating new conflicts between client and attorney. Moreover, the imposition of such a rule will lead to fewer settlements, with the biggest brunt of the restrictions being borne by the civil rights plaintiffs themselves. Simply put, in the province of civil rights litigation, the Coleman rule will do much more harm than good.

Amici herein propose an alternate solution that addresses the concerns raised in Coleman while ensuring that the rights and interests of civil rights clients are not undermined. *Amici* propose that, in fee-shifting cases other than those brought under the Consumer Fraud Act, public-interest counsel be permitted to negotiate with defendants for a lump-sum settlement

that would include all damages and attorneys' fees (as well as non-monetary relief), so long as the defendant is barred from dictating a specific apportionment between damages and fees. That allocation should be a matter between the attorney and client and, to address conflict-of-interest concerns, both the process and the substantive parameters for such apportionment should be defined within the public interest law firm's retainer agreement. Adherence to these simple guidelines will reduce the potential for conflict, protect public interest firms from coercive defense tactics calculated to secure oppressive fee waivers, protect the rights and interests of plaintiffs, and foster settlements.

As an additional protective measure, court oversight in the allocation of fees and damages - similar to the court approval required to resolve class-action cases - may be implemented to assure that damages and fees are fairly apportioned. These rules would be a superior alternative to the Coleman rule, which, by contrast, undermines client interests and clogs the arteries of our judicial system.

INTEREST OF *AMICI CURIAE*

The following public-interest organizations and programs, all of which provide *pro bono* representation to clients in actions brought under state statutes that allow for prevailing party attorneys' fee awards, seek to participate in this matter as *amici curiae*:[1]

(i) The *American Civil Liberties Union of New Jersey Foundation* is the legal and educational arm of the American Civil Liberties Union of New Jersey (collectively, "ACLU-NJ"), a private non-profit, non-partisan membership organization dedicated to the principle of individual liberty embodied in the Constitution. Founded in 1960, ACLU-NJ has nearly 15,000 members in the State of New Jersey. ACLU-NJ is the state affiliate of the American Civil Liberties Union, which was founded in 1920 for identical purposes, and is composed of nearly 500,000 members nationwide. See Certification of Edward Barocas, Esq. ("Barocas Cert."), ¶ 5.

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[1] Pursuant to R. 1:13-9, these groups should be permitted to participate in this matter as *amici curiae* since their motion to do so is timely, will not prejudice the parties, and because, as demonstrated by the accompanying Certification of Edward Barocas, Esq., their unique expertise, experience and perspective on the negotiation of settlements by public-interest counsel in fee-shifting cases "will assist in the resolution of an issue of public importance." Id. Moreover, participation of *amici curiae* is particularly appropriate in cases, like this one, with "broad implications." Taxpayers Assoc. of Weymouth Twp. v. Weymouth Twp., 80 N.J. 6 (1976).

To vindicate a wide-range of injustices in the areas of civil liberties, civil rights and discrimination, ACLU-NJ has provided *pro bono* representation for hundreds of individuals and groups, most often representing plaintiffs. ACLU-NJ settles many of its cases out-of-court and/or prior to trial. As representative of plaintiffs in civil rights and Law Against Discrimination ("LAD") matters, ACLU-NJ frequently undertakes to settle both the merits of claims as well as attorneys' fees available under applicable fee-shifting statutes.[2] Id.

(ii) The *John J. Gibbons Fellowship in Public Interest & Constitutional Law* (the "Gibbons Fellowship"), sponsored since 1990 by Gibbons P.C., undertakes a wide variety of public interest and constitutional law projects and litigation. Working with a broad cross-section of public interest and non-profit groups, as well as with needy individuals and at the requests of federal and state courts, the Gibbons Fellowship has become widely known both in New Jersey and nationally for its

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[2] Over two decades ago, ACLU-NJ participated as *amicus curiae* in Coleman v. Fiore Brothers, Inc., the Consumer Fraud Act case that is at the center of this dispute. There, ACLU-NJ supported the position of the plaintiffs, who were represented by the Passaic County Legal Aid Society, and *amicus* LSNJ, that fee waivers and the simultaneous negotiation of attorneys' fees and merits should not be permitted. After more than twenty years of experience with settlement negotiations since Coleman in scores of civil rights and LAD cases, ACLU-NJ is persuaded that its earlier position was incorrect, and substantially changes its position here. See Certification of Edward Barocas, ¶ 6.

work on behalf of the poor and underrepresented and on cases at the cutting edge of the law. Id., ¶ 8.

Many of these cases implicate fee-shifting provisions, and the Gibbons Fellowship has, on occasion, been the recipient of attorneys' fees under these provisions. The Fellowship is concerned that it will be stymied in the settlement of fee-shifting cases by the inability of counsel to discuss a resolution of attorneys' fees in the context of an overall disposition of such matters, and for that reason, seeks to participate as *amicus curiae* here.[3] Id., ¶ 9.

(iii) *Disability Rights New Jersey* ("DRNJ") is a private, non-profit, consumer-directed corporation. DRNJ was designated by Governor Whitman in October 1994 as New Jersey's protection and advocacy system for people with disabilities. DRNJ is responsible for protecting and advocating for the human, civil and legal rights of persons with disabilities under a number of federal statutes, particularly, the Developmental Disabilities Assistance and Bill of Rights Act, 42 U.S.C. §§ 15041 to 15045; the Protection and Advocacy System for Individuals with Mental Illness Act, 42 U.S.C. § 10801 to 10851; and section 794e of the

[3] The Coleman Court's distinction between private and public-interest counsel does not clearly indicate whether the rule applies to private attorneys handling matters *pro bono*, but its rationale reflects that it would.

Vocational Rehabilitation Act of 1973, as amended (Protection and Advocacy of Individual Rights). Barocas Cert., ¶ 10.

DRNJ provides legal services without a fee exclusively on behalf of individuals with disabilities, the intended beneficiaries of the federal statutes governing DRNJ as a protection and advocacy system. When appropriate, DRNJ brings actions on behalf of these individuals to vindicate their rights under New Jersey's Law Against Discrimination and Civil Rights Act, as well as under federal law. DRNJ's legal activities are performed in accordance with the priorities adopted annually by its Board of Directors following extensive outreach to individuals with disabilities, family members, advocates, professionals, advocacy groups, and the general public. Consistent with these directives, DRNJ has tirelessly worked to ensure the civil rights of people with disabilities, and protect them from discrimination. Id., ¶ 11.

(iv) The *Education Law Center* ("ELC"), founded in 1973 as a non-profit organization, advocates on behalf of public school children for access to an equal and adequate education under state and federal laws. ELC's work is based on a core value: if given the opportunity, all children can achieve high academic standards to prepare them for citizenship and to compete in the economy. Id., ¶ 12.

As a Court-approved legal services organization and a participant in New Jersey's protection and advocacy system, ELC provides free representation to disadvantaged students, including students with disabilities and other special needs, to enforce their educational rights. To fully vindicate the rights of the students it represents, ELC raises all appropriate claims, including those arising under New Jersey's Law Against Discrimination, Open Public Records Act, and other fee-generating statutes. With the vast majority of ELC's cases seeking the time-sensitive provision of educational services as the primary relief, ELC needs all available options to achieve settlement as quickly as possible, including the ability to negotiate attorneys' fees where doing so best serves its clients' interests. Id., ¶ 13.

(v) *New Jersey Appleseed Public Interest Law Center* ("NJ Appleseed") is a nonprofit corporation established to provide legal advocacy on behalf of New Jersey residents in matters raising significant public policy issues. The Center was initially authorized by the faculty of Rutgers Law School to develop and expand the reach of public interest law and education in the State. Since 1998, the Center has been affiliated with Appleseed, a national public interest organizing project created by alumni of Harvard Law School. Id., ¶ 14.

NJ Appleseed currently focuses its work on health care reform, election reform, government and corporate accountability issues, and low-wage workers. Over the years, NJ Appleseed has brought litigation on behalf of individuals and community organizations seeking both damages and injunctive relief under the federal and state constitutions, entitling the organization to prevailing party attorneys' fees. Such fees are applied towards the Center's mission, enabling it to undertake additional litigation when appropriate. Id., ¶ 15.

The outcome of this appeal, determining whether or not the simultaneous negotiation of fees and merits should be prohibited in all New Jersey fee-shifting cases, will have a profound effect on the manner in which *amici* conduct settlement negotiations in the future. See id., ¶ 3. Ultimately, the Court's decision in this case may impact the ability of these organizations to provide legal services to their clients. See id. The participation of *amici curiae* will assist the Court in the resolution of this question of public importance by providing additional context to the issue.

ARGUMENT

I. THE COLEMAN COURT'S DECISION WAS LIMITED TO THE SPECIFIC CONTEXT OF CONSUMER FRAUD CASES.

Amici agree with the trial court, for substantially the same reasons already articulated by Defendant/Respondent Spectrum Laboratory Products, Inc. ("Spectrum") (Db8-16), that this Court did not intend for its decision in Coleman v. Fiore Brothers, Inc., 113 N.J. 594 (1989), to apply to cases other than those brought under the New Jersey Consumer Fraud Act. While the Coleman court raised issues germane to all fee-shifting cases, it identified the unique circumstances of Consumer Fraud Act cases as the predominant basis for reaching its conclusion. Id. at 601, 605-06. Indeed, much of the Court's discussion referred solely to Consumer Fraud Act cases and, as Spectrum has argued (Db8-9), the Court's specific references to the Act lead inexorably to the conclusion that it did not intend its ruling to apply outside the context of consumer fraud.[4]

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[4] For example, the Court wrote:

> *New Jersey Consumer Fraud Act's* public policy of deterring fraudulent trade practices is best served by precluding public interest counsel from simultaneous negotiation of statutory claims for fees until the merits of the claim have been settled and by precluding defense counsel from attempting such simultaneous disposition.

Of greatest importance to *amici*, however, is the Coleman court's specific acknowledgement - in its discussion of the factors justifying its proscription of the simultaneous negotiations of fees and merits - that Consumer Fraud Act cases are "unlike civil rights claims." Id. at 601. This observation underscores that it may have reached a different conclusion had it been formulating a rule for the cases with which *amici* here are most concerned. The Court wrote:

> [U]nlike civil-rights claims that might involve extensive injunctive relief for litigants, such as the provision of increased health care services for emotionally retarded children as in *Evans v. Jeff D.*, most consumer fraud claims will primarily provide monetary relief. The equal measure of the claims (the money that consumers might receive versus the money that consumer advocates might receive) enables us to make the judgment of the Legislature's intention with greater confidence.

Id.

Thus, essential to the Coleman court's reasoning under the Consumer Fraud Act was both the monetary nature of the relief and the substantial equilibrium between the liability for

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Id. at 605 (emphasis added). The Court added:

> We wish to make it clear that our ruling does not require that public-interest counsel demand fees in every *consumer-fraud action* that they have maintained, only that defense counsel not insist on waiver of fees as a condition for settlement.

Id. at 606 (emphasis added).

damages and the responsibility for fees in those cases. Id. As is discussed in Point III, infra, the nature of civil rights lawsuits, the relief sought in such actions, and the disproportionate ratio of fees to damages commonly incurred in the same render the Coleman rule especially unsuitable for civil rights matters. Accordingly, *amici* urge that, to the extent that the Coleman rule endures, it should not be enlarged beyond its limited application to Consumer Fraud Act cases.[5]

II. NEW JERSEY'S BAN ON THE SIMULTANEOUS NEGOTIATION OF FEES AND MERITS IN CONSUMER FRAUD ACT CASES IS AN ABERRATIONAL DEPARTURE FROM OTHER JURISDICTIONS.

In the more than thirty years since Congress enacted the 1976 Civil Rights Attorney's Fee Awards Act, 42 U.S.C. § 1988, and made prevailing party attorneys' fees widely available to federal civil rights plaintiffs, courts and members of the bar have struggled with the issue of how the negotiation of settlements that incorporate attorneys' fees should be conducted. See Simultaneous Negotiation of Fees and Merits, ABA/BNA Lawyers' Manual on Professional Conduct, 41:1601 (2003). Since that time, both the federal and state governments have broadened the categories of litigation with fee-shifting provisions, recognizing that "[p]rivate citizens must be given not only the right[] to go to court, but also the legal

[5] Since *amici* do not normally engage in Consumer Fraud Act litigation, they take no position on whether the Coleman rule should be preserved in those cases.

resources." Rendine v. Pantzer, 141 N.J. 292, 323 (1995). See also id. ("without the availability of counsel fees, these rights exist only on paper"). In New Jersey, prevailing party attorneys' fees have become available under, *inter alia*, the Consumer Fraud Act, N.J.S.A. 56:8-1, et seq., the Law Against Discrimination, N.J.S.A. 10:5-1, et seq., the Conscientious Employee Protection Act, N.J.S.A. 34:19-1, et seq., the Open Public Records Act, N.J.S.A. 47:1A-1, et seq., and the Civil Rights Act, N.J.S.A. 10:6-1, et seq.

With these expanded rights to counsel fees has come increasing instances in which plaintiff's counsel is called upon to negotiate settlements that fairly compensate both her client and herself. Various courts, ethics committees and legal scholars from around the country have sought to address this tension, and the related concern that surfaces when defendants request fee waivers. These issues have emerged both in cases involving fee-shifting statutes as well as in the analogous circumstances that arise when attorneys attempt to settle fees in class-action lawsuits. The inflection point in the debate was reached with the United States Supreme Court's decision in Evans v. Jeff D., 475 U.S. 717, 732-34 (1986).

In Evans, the Supreme Court determined that there should be no bar to the simultaneous negotiation of fees and merits, or to settlements calling for a waiver of attorneys' fees. In

reaching its conclusion, the Evans court was dubious of circuit court precedents such as Prandini v. National Tea Co., 557 F.2d 1015 (3d Cir. 1977), in which the Third Circuit held that the settlement of the damages aspect of class actions must be concluded separately from and prior to the negotiation and award of attorneys' fees. See Evans, 475 U.S. at 732-38 & n.10 & 11. In abrogating the requirement that such a procedure be followed under federal law,[6] the Court expressed its view that a general proscription against the negotiated waiver of attorneys' fees "would itself impede vindication of civil rights, at least in some cases, by reducing the attractiveness of settlement." Id. at 732.

Since the Court's decision in Evans, numerous lower courts and courts in other jurisdictions have addressed the questions arising from the simultaneous negotiations of fees and merits. While these tribunals have differed on how to best protect the rights of all parties in these situations, no court (other than this Court in Coleman) has deemed it appropriate or necessary to institute a blanket prohibition on the concurrent negotiation and resolution of claims on the merits and attorneys' fees (whether for private or *pro bono* lawyers). See Ashley v.

[6] In Ashley v. Atlantic Richfield Co., 794 F.2d 128, 137-38 (3rd Cir. 1986), the Third Circuit acknowledged that the U.S. Supreme Court's decision in Evans had effectively overruled Prandini.

Atlantic Richfield Co., 794 F.2d 128, 137-38 (3rd Cir. 1986) (finding no absolute ban on simultaneous negotiations); Holden v. Burlington Northern Inc., 665 F. Supp. 1398, 1427-28 (D. Minn. 1987) (rejecting argument that negotiations of class relief and attorneys' fees should be resolved separately); Cisek v. Natl'l Surface Cleaning Inc., 954 F. Supp. 110, 111 (S.D.N.Y. 1997) (requiring careful judicial scrutiny of simultaneously negotiated merits and fee settlements, and opining that the "better practice" may be for counsel to either (1) abstain from discussion of fees until agreement is reached on relief for the plaintiff, or (2) negotiate a lump sum settlement and allow the court to allocate the funds between counsel and client); Ramirez v. Sturdevant, 26 Cal. Rptr.2d 554, 565-67 (Cal. Ct. App. 1994) (in class-action context, discouraging the simultaneous negotiation of attorneys' fees and substantive issues, but permitting such settlements and requiring the trial court to ensure that the settlement is not tainted by the plaintiff's attorneys' conflict); see also Maine Ethics Op. 95 (1989) (rejecting previous position prohibiting simultaneous negotiations, leaving the question of reasonableness of the settlement behavior of the parties to a case-by-case resolution); New York City Ethics Op. 1987-4 (1987) (withdrawing prior opinion, and finding that it is not unethical *per se* for defense counsel to propose settlements conditioned on fee

waivers, but calling for case-by-case scrutiny of attorneys' fee waivers); accord Kentucky Ethics Op. E-330 (1988). See also Simultaneous Negotiation, supra, 41:1601.

New Jersey, with its 1989 Coleman decision under the Consumer Fraud Act, stands alone as the only jurisdiction that has constructed any framework that prohibits the simultaneous negotiation of merits and fees, mandates bifurcated settlements, or employs any limitations exclusively on public-interest attorneys. Cf. Paul D. Reingold, Requiem for Section 1983, 3 Duke J. Const. L. & Pub. Pol'y 1, n.129 (2008). Unlike the United States Supreme Court in Evans, the Coleman court was persuaded by Prandini, and the reasoning behind its bifurcated settlement procedure.[7] But the New Jersey Supreme Court viewed the conflict to be more acute in the case of public-interest lawyers, believing that private counsel's interest in attorneys' fees would be more aligned with the client, since "the client remains responsible to private counsel for the fee" and private attorneys "can arrange a fee agreement that would allow them to

[7] The Coleman court acknowledged that its circumstances were the "flip-side" of Prandini, "where instead of a generous offer to the lawyer and a paltry one to the client, the defense offers generous terms to the client and little or nothing to the lawyer." Coleman, 113 N.J. at 602.

insist upon a statutory fee as part of any settlement." Coleman, at 603.[8]

The Coleman court's rationale emanated from its belief that: (1) public interest law firms would be hindered in their ability to represent clients if defendants could offer settlements that included damages but no fees (which the Court presumed clients would likely accept since they are not liable for payment to their *pro bono* attorneys); and (2) if the "plaintiff's lawyer suggests rejection of the offer because it is inadequate, it may reasonably *appear* to the client, and the public at large, that she is modifying her advice to reflect her

[8] Although the question of what settlement negotiation guidelines are appropriate for private counsel is not before the Court, *amici* note that the disparate constraints placed on public-interest counsel by Coleman create bright-line distinctions between public-interest and private attorneys notwithstanding that it is not at all clear that there is a difference in the two groups' susceptibility to conflicts. For example, a public-interest attorney who does not heavily rely on funding from prevailing party fees may have less of a conflict than a private attorney working on some form of contingency arrangement, particularly in cases where damages are low but attorney hours are high. Indeed, conflicts are hardly unique even to the settlement of fee-shifting and class action cases; all attorneys earning an hourly fee arguably have an incentive - at odds with their clients - to resist settlement and prolong litigation. Rather than implement stringent procedures to protect against every such potential conflict, the profession instead relies upon faithful adherence to ethical codes in which loyalty to the client is paramount. There is no reason to believe that such reliance is fundamentally misplaced.

personal pecuniary interest." Id., at 604 (italics in original).[9]

In order to avoid this potential conflict, the Court, in Coleman, imposed a *per se* rule, precluding public interest counsel from the negotiation of statutory claims for fees until the merits of the claim have been settled. Id. at 605. But commentators have universally derided the Coleman/Prandini rule, noting that even though the concerns underlying it might be legitimate, its restrictions do more harm than good (see discussion, infra, § III) and better solutions are available (see id., § IV). *Amici* here agree.

III. THE EXTENSION OF COLEMAN TO CIVIL RIGHTS AND LAD FEE-SHIFTING STATUTES WOULD UNDERMINE CLIENT INTERESTS AND STIFLE SETTLEMENT.

As noted in Point I, supra, this Court in Coleman expressly distinguished between, on the one hand, civil-rights claims "that might involve extensive injunctive relief for litigants" and where attorneys' fees might greatly outweigh damage awards and, on the other hand, the "equal measure of the claims (the

[9] It should be noted that this significant underpinning of the Coleman decision - i.e., the "appearance of impropriety" - has been considerably undercut since the time of the decision. Specifically, the Court has since eliminated the "appearance of impropriety" doctrine, and has limited conflict-of-interest inquiries to whether an *actual* conflict exists. See In re Supreme Court Advisory Committee on Professional Ethics, 188 N.J. 549, 558-59 (2006).

money that consumers might receive versus the money that consumer advocates might receive) . . ." in consumer fraud lawsuits that "primarily provide monetary relief." Id. at 601; see also Db10. By this observation, the Court acknowledged that the calculus justifying bifurcated settlements in consumer fraud cases might not add up in legal areas like civil rights.

A. Bifurcated Negotiations Thwart Settlements.

The Coleman Court was "not so naive as not to recognize the many difficulties posed by [its] solution." Coleman, 113 N.J. at 606. And, as noted, Evans and myriad other authorities have criticized the Coleman/Prandini rule as a serious impediment to settlement. See Evans, at 732-38; Cisek, 954 F. Supp. at 111 ("a flat prohibition on settlements in which the defendants' total exposure - including both relief and attorney's fees - is fixed or capped no doubt would discourage settlements . . . ."); Moore v. Nat'l Ass'n of Sec. Dealers, Inc., 762 F.2d 1093, 1105 (D.C. Cir. 1985) (under the rule, "[d]efendants would be more reluctant to settle at this early stage because of uncertainty about their ultimate liability for attorneys fees and costs . . . [and] many more cases would fail settlement and proceed to trial."); Richard M. Eittreim, et al., Ethical Issues in the Settlement of Complex Litigation, 41 Tort & Ins. L. J. 21 (2005) ("The difficulty presented by this piecemeal approach is rooted in settlement negotiation dynamics - the parties

generally need to know what the total package is before giving a final agreement[;] [t]his difficulty discourages settlements.").

Amici join in the view that "while the proposed vaccine in Prandini seems attractive in isolation, it is flawed because its effects may be more destructive than the disease it is designed to prevent." David Brainerd Parrish, Comment, The Dilemma: Simultaneous Negotiation of Attorneys' Fees and Settlement in Class Actions, 36 Hous. L. Rev. 531, 553 (1999). *Amici* do not endorse these criticisms merely in the abstract. Years of real-world experience settling civil rights and LAD cases has taught the undersigned that defense counsel will seldom agree to enter into a settlement that does not resolve all outstanding issues, including fees. See Barocas Cert., ¶ 18.

This reality stems in part from the fact, as observed by the Supreme Court in Evans, that attorneys' fee awards are highly unpredictable and not susceptible to calculation by "precise rule or formula." Evans, at 735. Although the Coleman court requires public-interest counsel to disclose, upon request, hourly charges they have incurred (id., at 606, 611), by no means does this mandate provide any meaningful certainty. If defendants were required to settle the merits of a case prior to discussing fees, they would be left with all of the same unpredictability that would, absent settlement, be resolved by the trial court, e.g.: (1) what hours were reasonably expended

on what claims; (2) whether that expenditure was reasonable in light of the success obtained; and (3) what hourly rate is appropriate for the services rendered. See Evans at 736. As the Supreme Court stated in Evans, a "defendant's liability for his opponent's attorney's fees in a civil rights action cannot be fixed with a sufficient degree of confidence to make defendants indifferent to their exclusion from negotiation." Id.

But even if the amount of attorneys' fee liability *could* be accurately measured at the time of negotiations, where a defendant believes that he has a reasonable chance of prevailing at trial he may have nothing to lose by eschewing settlement and rolling the dice in court. This is particularly true in civil rights cases, where attorneys' fees often far exceed damages; indeed, *amici* have handled numerous cases raising constitutional and/or LAD claims where the amount of attorneys' fees has dwarfed any likely damages award. Barocas Cert., ¶ 20.

For example, free speech or freedom of religion claims challenging municipal or school policies are frequently brought primarily to obtain injunctive relief, and may warrant only minimal damage awards. Id. Similarly, class-action prison or jail conditions cases may raise *only* injunctive claims. Id. Moreover, some *amici* gravitate towards those LAD and police misconduct cases at the cutting-edge of the law, which are not

only most uncertain of resolution on the merits, but which frequently require a great deal of attorney time and expense even where the potential damages are small. Id. It is in these prototypical lawsuits brought by *amici* that the Coleman rule would have the most negative impact.

By way of example, in a typical free speech case, the plaintiff principally seeks injunctive relief ensuring his right to speak in the future. Most often, the plaintiff is entitled to only minimal damages stemming from a government entity's prior actions denying those rights. All things being equal, the defendant may be willing to sit at the bargaining table, and offer to reverse its policies and provide some monetary compensation, say $20,000, to resolve the case. But under a Coleman-style regime, the defendant would balk at settlement where it is reasonably certain that the plaintiff's counsel has accrued (for the purposes of this hypothetical) $100,000 in attorneys' fees. This is so because any concession by the defendant to settle the merits of the case may well confer prevailing party status upon the plaintiff under New Jersey's catalyst rule, and thus entitle him to the award of the accrued fees. See Mason v. City of Hoboken, 196 N.J. 51, 73-74 (2008) (discussing the catalyst theory).

Accordingly, in this scenario, if the defendant agrees to some relief in the first stage of a bifurcated settlement, it

will be subject to the $100,000 fee award as a matter of course. If instead, the defendant takes the case to trial, it has a chance of prevailing on the merits and paying no attorneys' fees. Thus, *amici* share in the Evans court's apprehension that "a significant number of civil rights cases will refuse to settle . . . , thereby forcing more cases to trial, unnecessarily burdening the judicial system, and disserving civil rights litigants." Id.

Especially where there is a 50/50 or less chance of plaintiff prevailing on the merits (which may be the case in many of the cutting-edge cases *amici* accept), defense counsel's odds of winning at trial (and paying no attorneys' fees whatsoever) are far more attractive than the prospects of settling a low damages award, and remaining on the hook for whatever attorneys' fees are deemed reasonable by the court. This scenario, where the defendant has something to gain only when plaintiff's counsel can discuss reducing her fee, exemplifies the Coleman court's reasoning for limiting its holding so as not to apply to cases, like civil rights cases, beyond those brought under the Consumer Fraud Act.

Although *amici* are not, of course, eager to waive all of their attorneys' fees, the ability of public-interest attorneys to offer a reduction in fees often serves as a particularly useful sword in pursuit of the best possible result for their

clients. Likewise, such fee concessions often achieve the objectives of the organization representing the client, which may accept cases not for the fees they may generate but for their underlying principles and potential for positive changes to public policy. See Barocas Cert., ¶ 17. If, in the hypothetical free speech case described above, plaintiff's counsel were willing and permitted to discuss substantially reducing her fees, and make a lump-sum counter-offer of, for example, $60,000 including damages and fees (plus the desired policy terms),[10] the defendant would no longer be "in for a penny, in for a pound," and would have something to gain by accepting the offer: a substantial hedge of its risk of going to trial.

B. An Impediment to Settlements in Fee-Shifting Cases Adversely Affects Clients, Public-Interest Attorneys, and the Courts.

Virtually all of the stakeholders involved in civil rights and LAD actions brought by public-interest lawyers stand to benefit from a reasonable settlement. The clients can return to devoting full-time attention to their businesses, jobs and families; public-interest lawyers can refocus their energies on other laudable goals; and the courts can shift their attention to truly intractable disputes. However, as demonstrated above,

[10] Mechanisms to fairly allocate this lump sum between attorney and client are discussed infra, § IV.

mandatory bifurcated negotiations would stand in the way of many agreements, even in cases where *everyone* sincerely wishes to settle.

Such a scenario hurts no one more than plaintiffs - the very individuals the Legislature had in mind when it enacted fee-shifting statutes. In practice, the Coleman rule may ensure that public-interest law firms always obtain fees in successful cases, but it does so at the expense of the *client*, whose interests should never be subordinated to those of his lawyer.

Indeed, the plaintiff may wish to avoid the time-drain and unpleasantness of discovery and the uncertainty of a jury verdict, and be willing to accept less compensation in exchange for finality; or the defendants may be willing to offer the plaintiffs all of their desired damages or injunctive relief. But in cases where attorneys' fees are the chief hurdle to settlement, the public-interest lawyer cannot, under the Coleman rule, uphold her duty to the client to negotiate a deal that would be in his best interest.

This generates a new ethical dilemma: in some cases subject to the Coleman rule, it may be clear to plaintiff's counsel that her client can achieve the *entirety* of his desired result if a reduction or waiver of fees could be negotiated. Under these circumstances, the sole impediment to consummating (or even discussing) a settlement is the public-interest credentials of

plaintiff's advocate. Since, under Coleman, unrepresented plaintiffs and plaintiffs with private counsel are not subject to the restriction, it would be in the client's best interest to dismiss his public-interest attorney and pursue settlement discussions *pro se* or with the assistance of a private attorney. If the public-interest lawyer is aware of this, her duty of loyalty to the client may compel her to disclose this reality, and afford her client the opportunity to obtain the best possible result.[11]

The barrier to settlement spawned by the Coleman rule would not only hurt *amici*'s clients, but *amici* as well. While the diverse coalition of public-interest groups opposing LSNJ's position here vary significantly in the degree to which they rely on budgetary support from prevailing party attorneys' fees, they - without exception - stand in very different shoes from those of LSNJ, which has stated that "the amount of attorneys' fees it collects has a direct bearing on the number of public interest and low income clients it can represent." Pb18; Barocas Cert., ¶ 21. To the contrary, for *amici*, attorney *time* is a resource perhaps more valuable than monetary fees. Id.

[11] See RPC 1.4(c) ("A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation"); RPC 1.4(d) ("When a lawyer knows that a client expects assistance not permitted by the Rules of Professional Conduct or other law, the lawyer shall advise the client of the relevant limitations on the lawyer's conduct").

This is especially true in the case of *amicus* ACLU-NJ, which receives the majority of its legal support from *pro bono* cooperating counsel. Id. If, in consideration for a partial fee waiver, a complex case can be favorably resolved, hundreds of hours of attorney time may be redirected to other worthy public-interest clients and causes.

For these reasons, if Coleman were extended to all fee-shifting cases, and fee waivers could not even be discussed prior to settlement on the merits, many of *amici*'s cases would needlessly be prolonged and be rendered hopelessly unable to settle. Id., ¶ 19. Given the increase in the number of such cases proceeding to trial, such a decision would likely reduce the number of cases that *amici* could take on. Id. Thus, unlike LSNJ, the Coleman rule would likely reduce (rather than increase) the ability of *amici* to provide services to the public.

IV. THE LUMP-SUM SETTLEMENT OF ATTORNEYS' FEES AND MERITS SERVES AS A PRACTICAL ALTERNATIVE TO BIFURCATED NEGOTIATIONS.

The Coleman rule unnecessarily forecloses an essential avenue of settlement. *Amici* submit that the best resolution to the difficulties discussed above is one that permits counsel to negotiate a lump-sum settlement, but excludes defendant from specifying, as part of such settlement, the allocation of the funds between plaintiff and his counsel.

Specifically, *amici* propose that public-interest counsel be permitted to negotiate with defendants for a lump-sum settlement that would include all damages and attorneys' fees (as well as non-monetary relief), so long as the defendant is barred from dictating a specific apportionment between damages and fees. That apportionment should be determined by the plaintiff and his attorney; and to address conflict-of-interest concerns, the process and/or formula for such apportionment should be contained within the public-interest law firm's retainer agreement.

This procedure is not intended to foreclose the *option* of addressing attorneys' fees after settling the merits, if all parties are willing to do so. But as an alternative to bifurcated negotiations, this solution addresses the main concerns of Coleman - i.e., the ability of public interest firms to obtain fees and the ethical issues raised by the simultaneous discussion of merits and fees - without needlessly encumbering the negotiations.

The best mechanism to address the allocation of the lump-sum may differ depending on the nature of the action and the requirements of the public-interest organization. In an action that seeks substantial monetary damages, a traditional contingency arrangement, in which the public-interest firm recovers, for example, one-third of the lump sum as its

attorneys' fees, may be appropriate. By contrast, in cases in which the plaintiff solely seeks injunctive relief, it is not unusual for public-interest organizations and *pro bono* attorneys to defer to the complete discretion of the client as to whether a settlement satisfactorily compensates their counsel. Barocas Cert., ¶ 22. Some public-interest firm retainer agreements expressly request that the client seriously consider the limited resources of the organization and the adequacy of the attorneys' fees provided through a settlement. Id. As explained in the Certification of Edward Barocas, Esq., filed herewith, civil rights plaintiffs often voluntarily reject settlement offers that they believe do not fairly compensate their *pro bono* attorneys.[12] Id., ¶ 23.

Similarly, in a case where both the attorney and client agree from the outset that damages are nominal and that compensation for attorneys' fees will predominate over any monetary lump-sum offer, the client can consent to cap his damages at a fixed amount, and agree with his attorney that any portion of the settlement offer in excess of the cap will be allocated towards attorneys' fees (not to exceed the reasonable

[12] Plaintiffs who bring actions challenging the constitutionality of governmental policies often seek to achieve greater impact than the mere eradication of the unlawful practice; they sometimes desire the imposition of a monetary penalty on the defendant - through the sting of attorneys' fees - to deter future violations. Barocas Cert., ¶ 23.

value of the attorney's services). Nevertheless, it should still be entirely within the discretion of the client to accept any settlement offer, regardless of whether it is below, equal to, or above the cap triggering counsel's entitlement to attorneys' fees.

A far more exacting prescription has been fashioned by two commentators, one of whom is a former staff attorney with the Legal Aid Society of Central Texas, who drafted a model retainer agreement that treats all settlement payments as lump sums, and incorporates a complex formula to allocate settlements between attorney and client. See Stephen Yelenosky and Charles Silver, A Model Retainer Agreement for Legal Services Programs: Mandatory Attorney Fee Provisions, 28 Clearinghouse Rev. 114 (1994). Under the authors' proposal, the client's anticipated recovery at trial is estimated at the time plaintiff's counsel is retained, and the scheme undertakes to fairly allocate any lump-sum settlement between damages and fees based upon the amount of time expended on the matter by counsel and whether the total settlement amount exceeds or is short of the funds required to make the client whole. This methodology tackles the counterpart concerns that either the attorney will receive an unconscionably large fee or that the client will receive a windfall at the expense of his attorneys' entitlement to fees.

One additional approach is to inject terms into the retainer agreement that permit the attorney and client to negotiate between themselves for a reasonable apportionment of the lump sum with a proviso that the court or an arbitrator determine the allocation if the attorney and client are unable to agree. Consistent with that approach, in order to assure that the allocation between damages and fees is a fair one, the Court may wish to consider a rule that would empower New Jersey courts to approve, allocate or modify the allocation of lump sums to ensure fairness to both attorney and client. This was the approach favored by the Southern District of New York in one fee-shifting case. See Cisek, 954 F. Supp. at 111. See also Parrish, supra, 36 Hous. L. Rev., at 558 (arguing that this method is the best mechanism to address the problem in the context of class action settlements); Reingold, supra, 3 Duke J. Const. L. & Pub. Pol'y, at 42 (advocating requirement that the "court review all settlements . . . and prohibit settlements in which the plaintiffs' lawyers do not earn reasonable fees."). Indeed, such a process would be an extension of the rule that already requires the court to approve counsel fee awards in class action suits. See R. 4:32-2; Sutter v. Horizon Blue Cross Blue Shield of New Jersey, 406 N.J. Super. 86, 103 (App. Div. 2009).[13]

[13] Given the importance and difficulty of the questions before

While each public-interest organization may have their own preferences as to how settlement funds should be apportioned, the important element is that the allocation be determined by the attorney and client (with the oversight of the court if deemed necessary), and not between the adverse parties. Where the parties simply negotiate a lump sum, defendants are limited in their ability to oppressively demand a fee waiver, and public-interest counsel have the opportunity to, where appropriate, reduce their fees for the benefit of the client and in the interest of settlement. Certainly, counsel - in their negotiations - should be permitted to discuss the amount of fees for which they believe the defendant would ultimately be liable; but defense attorneys should be prohibited from negotiating a specific apportionment between damages and fees.

So long as a retainer agreement provides parameters for the fair allocation of attorneys' fees in the event of a settlement, the guidelines discussed above will ensure fairness to attorney and client, promote settlements and minimize conflicts. Accordingly, to resolve the concerns of Coleman without the pitfalls of the Coleman rule, the Court should, in fee-shifting

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the Court, it may wish to refer this issue to an appropriate committee where these policy concerns can be addressed after a more thorough inquiry. Here, however, the Court need only determine whether the restrictive rule of Coleman applies outside the context of Consumer Fraud Act cases, and the Court should decide that it does not.

cases other than those brought under the Consumer Fraud Act, permit the negotiation of lump-sum settlements encompassing all attorneys' fees and damages, provided that the defendant plays no role in the allocation of the funds between attorney and client.

CONCLUSION

For all of the foregoing reasons, *amici* respectfully submit that the Court should hold that its decision in Coleman v. Fiore Brothers does not apply outside the context of Consumer Fraud Act claims and that, in other fee-shifting cases, counsel are permitted to negotiate lump-sum settlements on the condition that the apportionment of the funds between attorneys' fees and damages is not prescribed or approved by the defendant.

Respectfully submitted,

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Dated: September 4, 2009