

Litigation

Appellate Judges Reopen Big Law Pro Bono Client's Quest for Attorney Fees, in About-Face on Earlier Ruling

August 18, 2025 By  **Brian Lee**



Orrick logo. Courtesy photo

A pro bono team from Orrick Herrington & Sutcliffe convinced a panel of New York appellate judges to walk back an earlier ruling and close a legal loophole relative to a plaintiff's ability to recover attorney fees from the state government.

The Third Department's 5-0 decision on Thursday by Justice Sharon A.M. Aarons holds that plaintiffs in Article 78 proceedings may be awarded attorney fees if they are a prevailing party—even without a court ruling.

The prior loophole the Third Department established four years ago let the government off the hook for attorney fees in the event a state agency reversed an administrative decision and made a plaintiff whole during the course of a claimant's Article 78 petition.

That was the case in *Peter Markey v. Daniel W. Tietz*, a decision that marked a win for Orrick litigators [Parth Sagdeo](#), [Jared Bobrow](#) and [Rene Kathawala](#), with co-counsel from [Volunteers of Legal Services](#).

Their client, Markey, a disabled Navy veteran, had sought state assistance for back rent and utility arrearage through the COVID-era Emergency Rental Assistance Program, when his landlord commenced a lawsuit against him in a Manhattan Housing Court.

The holding opened the possibility that Markey may recover for his legal fees under the catalyst theory within the New York Equal Access to Justice Act, a decades-old law that allows courts to award attorney fees for successful lawsuits against state agencies that were proven to have taken unjust actions.

"The New York Equal Access to Justice Act was designed to improve access to justice by providing attorneys' fees to plaintiffs who sue to remedy wrongful government conduct," the Orrick team said in a joint statement to the Law Journal on Monday.

"Despite that noble goal, multiple New York appellate courts, including the Third Department, created a loophole: if the government voluntarily made the plaintiff whole after being sued, the plaintiff was not entitled to attorneys' fees," Orrick said. "We're gratified by the Third Department's decision, in which it recognized its mistake and closed that loophole. By incentivizing attorneys to take meritorious cases even when the plaintiff can't afford their fees, the Court's decision will improve access to justice for millions of New Yorkers. We're deeply thankful to VOLS for trusting us to handle this important appeal."

Markey sued the New York State Office of Temporary and Disability Assistance in February 2023. Tietz was its commissioner at the time.

The claim challenged the OTDA's denial of Markey's application for \$14,400 in rental assistance and \$1,698 for utility arrearage, though he was said to have met the program's financial criteria.

During the course of the litigation, the OTDA reversed its prior position on his application and provided him all of the relief he was entitled to.

Markey then moved for a judgment to have his attorney fees covered, and acting State Supreme Court Justice Gerald Connolly denied, based on a 5-0 Third Department decision in 2021 captioned *Willie Clarke v. Anthony Annucci*, the former acting commissioner of the state prison system.

Clarke had been found guilty of several charges following a prison disciplinary proceeding, filed an Article 78 petition, and the state administratively reversed the disposition and expunged the charges from his institutional record during the course of the litigation.

The Third Department decided against Clarke's petition for attorney fees in 2021.

"We hold," Aarons updated in the Third Department's repeal, "that a party prevails in whole when the party obtains all of the relief sought in a lawsuit against the State—including when the relief is granted voluntarily by the state after the action is commenced—and is thus a prevailing party under the state EAJA as a matter of law. To the extent Clarke is to the contrary, it should no longer be followed."

The decision remitted *Markey* to the trial court to evaluate two remaining EAJA requirements—whether the state's position was justified and whether special circumstances make fee recovery unjust. If Markey meets those two remaining prongs, the trial court will grant his request for legal fees.

Page printed from: <https://www.law.com/newyorklawjournal/2025/08/18/appellate-judges-reopen-big-law-pro-bono-clients-quest-for-attorney-fees-in-about-face-on-earlier-ruling/?kw=Appellate+Judges+Reopen+Big+Law+Pro+Bono+Client%27s+Quest+for+Attorney+Fees,+in+About-Face+on+Earlier+Ruling>

NOT FOR REPRINT

© 2025 ALM Global, LLC, All Rights Reserved. Request academic re-use from www.copyright.com. All other uses, submit a request to asset-and-logo-licensing@alm.com. For more information visit [Asset & Logo Licensing](#).