

RESOLUTION 1-13-03

DIGEST

Attorney Fees: Payment After Rejection of 998 Offer

Amends Code of Civil Procedure section 998 to award attorney fees if the settlement offer is made more than 60 days after the deadline to file an answer.

RESOLUTIONS COMMITTEE RECOMMENDATION

DISAPPROVE

History:

None known.

Reasons:

This resolution amends Code of Civil Procedure section 998 to award attorney fees if the settlement offer is made more than 60 days after the deadline to file an answer. This resolution should be disapproved because it incorrectly assumes that most cases are factually simple, unfairly distributes the risk of a fee-shifting award in favor of defendants, and reduces access to justice for those of limited means.

This resolution seeks to move the American system of civil law, in which each party bears its own costs and attorneys' fees, toward the English system, in which the loser pays the prevailing party's costs and fees. California long ago enacted law (initially section 997, now section 998) to encourage early settlement by the threat of shifting costs onto the party that could have settled early for a reasonable amount and did not. This resolution proposes the next step: shifting attorney fees onto parties that had enough time to conduct initial discovery and discover the weakness and strengths of each side's case but did not agree to a reasonable early settlement. The proponent's theory is apparently that parties should know, after reviewing the initial discovery, the merits of the case.

This resolution assumes too much. Except in the simplest cases, initial discovery rarely reveals the true strengths and weaknesses of each side's case. Thus, for even moderately complex cases, at its worst this resolution would raise the risk of filing or continuing with a suit to levels that will chill legitimate litigation. In essence, only litigants with large financial resources would feel sufficiently comfortable with this risk to prosecute a case. At its best, this resolution would force parties to conduct extensive, aggressive discovery very early in the case. But, such early discovery will merely accelerate and make certain the financial burden of litigation without necessarily increasing the chances of early settlement or reducing the total burden on parties and the courts. Again, only wealthy litigants would feel comfortable with such risk.

Compounding this effect is the provision in this resolution which makes fee-shifting mandatory when the plaintiff does not prevail, but discretionary when the defendant does not prevail. This presumes that plaintiffs are more likely to bring weak suits than defendants are to make weak defenses. While at least one other fee-shifting statute does make this presumption, it concerns a narrow class of cases the state wishes to discourage (chilling defendants' free speech rights), requires a court to make an early determination that the plaintiff fits this undesirable category, and offers the plaintiff significant evidentiary advantages to overcome the label, thereby avoiding the threat of a fee-shift. (see Code Civ. Proc., § 425.16) None of those policy reasons or safeguards exist in section 998. This resolution will restrict access to the legal system for middle class and poor plaintiffs without bringing commensurate benefits for our legal system.

TEXT OF RESOLUTION

RESOLVED, that the Conference of Delegates of California Bar Associations recommends that legislation be sponsored to amend Code of Civil Procedure section 998 to read as follows:

1 §998

2 (a) The costs allowed under Sections 1031 and 1032 shall be withheld or augmented as
3 provided in this section.

4 (b) Not less than 10 days prior to commencement of trial or arbitration (as provided in
5 Section 1281 or 1295) of a dispute to be resolved by arbitration, any party may serve an offer in
6 writing upon any other party to the action to allow judgment to be taken or an award to be entered in
7 accordance with the terms and conditions stated at that time.

8 (1) If the offer is accepted, the offer with proof of acceptance shall be filed and the clerk or
9 the judge shall enter judgment accordingly. In the case of an arbitration, the offer with proof of
10 acceptance shall be filed with the arbitrator or arbitrators who shall promptly render an award
11 accordingly.

12 (2) If the offer is not accepted prior to trial or arbitration, within 30 days after it is made,
13 whichever occurs first, it shall be deemed withdrawn, and cannot be given in evidence upon the trial
14 or arbitration.

15 (3) For purposes of this subdivision, a trial or arbitration shall be deemed to be actually
16 commenced at the beginning of the opening statement of the plaintiff or counsel, and if there is no
17 opening statement, then at the time of the administering of the oath or affirmation to the first witness,
18 or the introduction of any evidence.

19 (c)(1) If an offer made by a defendant is not accepted and the plaintiff fails to obtain a more
20 favorable judgment or award, the plaintiff shall not recover his or her postoffer costs and shall pay
21 the defendant's costs from the time of the offer. If an offer is made by a defendant more than 60 days
22 after defendant's deadline to file an answer to the plaintiff's initial complaint (as such deadline may
23 be extended by stipulation of the parties or with leave of the court) and such offer is not accepted and
24 the plaintiff fails to obtain a more favorable judgment or award, the plaintiff shall be obligated to pay
25 the defendant's reasonable attorneys' fees from the time of the offer, in addition to any award
26 provided pursuant to the previous sentence. In addition, in any action or proceeding other than an
27 eminent domain action, the court or arbitrator, in its discretion, may require the plaintiff to pay a
28 reasonable sum to cover costs of the services of expert witnesses, who are not regular employees of
29 any party, actually incurred and reasonably necessary in either, or both, preparation for trial or
30 arbitration, or during trial or arbitration, of the case by the defendant.

31 (2)(A) In determining whether the plaintiff obtains a more favorable judgment, the court or
32 arbitrator shall exclude the postoffer costs.

33 (B) It is the intent of the Legislature in enacting subparagraph (A) to supersede the holding
34 in Encinita Plaza Real v. Knight, 209 Cal. App. 3d 996, that attorney's fees awarded to the prevailing
35 party were not costs for purposes of this section but were part of the judgment.

36 (d) If an offer made by a plaintiff is not accepted and the defendant fails to obtain a more
37 favorable judgment or award in any action or proceeding other than an eminent domain action, the
38 court or arbitrator, in its discretion, may require the defendant to pay a reasonable sum to cover costs
39 of the services of expert witnesses, who are not regular employees of any party, actually incurred and
40 reasonably necessary in either, or both, preparation for trial or arbitration, or during trial or
41 arbitration, of the case by the plaintiff, in addition to plaintiff's costs. If an offer is made by a
42 plaintiff more than 60 days after defendant's deadline to file an answer to the plaintiff's initial
43 complaint (as such deadline may be extended by stipulation of the parties or with leave of the court)
44 and such offer is not accepted and the defendant fails to obtain a more favorable judgment or award,
45 the court or arbitrator, in its discretion, may require the defendant to pay the plaintiff's reasonable
46 attorneys' fees from the time of the offer, in addition to any award provided pursuant to the previous
47 sentence.

48 (e) If an offer made by a defendant is not accepted and the plaintiff fails to obtain a more
49 favorable judgment or award, the costs and any attorneys' fees awarded under this section, from the
50 time of the offer, shall be deducted from any damages awarded in favor of the plaintiff. If the
51 aggregate of the costs and attorneys' fees awarded under this section exceed the amount of the
52 damages awarded to the plaintiff the net amount shall be awarded to the defendant and judgment or
53 award shall be entered accordingly.

54 (f) Police officers shall be deemed to be expert witnesses for the purposes of this section;
55 plaintiff includes a cross-complainant and defendant includes a cross-defendant. Any judgment or
56 award entered pursuant to this section shall be deemed to be a compromise settlement.

57 (g) This chapter does not apply to either of the following:

58 (1) An offer that is made by a plaintiff in an eminent domain action.

59 (2) Any enforcement action brought in the name of the people of the State of California by
60 the Attorney General, a district attorney, or a city attorney, acting as a public prosecutor.

61 (h) The costs for services of expert witnesses for trial under subdivisions (c) and (d) shall not
62 exceed those specified in Section 68092.5 of the Government Code.

63 (i) This section shall not apply to labor arbitrations filed pursuant to memoranda of
64 understanding under the Ralph C. Dills Act (Chapter 10.3 (commencing with Section 3512) of
65 Division 4 of Title 1 of the Government Code.

(Proposed new language underlined; language to be deleted stricken.)

PROPOSERS: Mark Sonnenklar, James Talley, Marc Sallus, Janet Frangie, Laurence Hutt, Helene Wasserman, Mark Gursky, Adam Abrahms, Brian Porter, and Matt Zandi

STATEMENT OF REASONS

Existing Law: Permits any party to recover the costs of litigation (excluding attorney fees) from an opposing party if (a) the party makes an offer to settle, (b) such offer is rejected by the opposing party, and (c) the opposing party subsequently fails to obtain a judgment or award that is more favorable than the settlement offer.

This Resolution: Allows a Code of Civil Procedure section 998 offeror to also recover attorney fees if the settlement offer is made after the parties have had an opportunity to conduct some discovery.

The Problem: Despite California's long-standing public policy in favor of reasonable pretrial settlements, today, many litigants choose to shoot for the moon rather than accept reasonable settlement offers, further overburdening our already-taxed court system. Thus, California needs to strengthen section 998 to provide additional incentives for litigants to accept reasonable pretrial settlement offers.

The purpose of existing section 998 is to encourage settlement before trial and penalize litigants who fail to accept what, in retrospect, is determined to have been a reasonable settlement offer. See e.g. *Carver v. Chevron U.S.A., Inc.* (2002) 97 Cal.App.4th 132. Public policy in favor of settlement is primarily intended to reduce the burden on the limited resources of the trial courts. *Wilson v. Wal-Mart Stores, Inc.* (1998) 72 Cal.App.4th 382. Thus, in theory, section 998 intends to encourage parties faced with a pretrial settlement offer to realistically assess the merits of their case (*Stell v. Jay Hales Devel. Co.* (1992) 11 Cal.App.4th 1214) and provide a strong financial disincentive for a party to refuse to accept a reasonable settlement offer (*Mesa Forest Products, Inc. v. St. Paul Mercury Ins. Co.* (1999) 73 Cal.App.4th 324).

However, as currently drafted, section 998 fails to satisfy its purposes because it only provides for the reimbursement of costs (which are generally quite low), not attorney fees (which can be more

substantial). Thus, section 998 does not currently provide much financial incentive for a litigant to accept a reasonable settlement offer.

This resolution, which provides for the reimbursement of attorney fees that accrue after a rejected section 998 offer, would increase the financial incentive for litigants to be more circumspect about whether to accept a reasonable pretrial settlement offer. Moreover, because it is important to protect a litigant's right to conduct a certain amount of discovery before accepting a settlement offer, the proposed resolution would apply only if the section 998 offer of settlement was made more than 60 days after the defendant's deadline to file an answer to the initial complaint. Thus, we believe that the enactment of this resolution would result in more post-discovery, pretrial settlements, thereby helping to resolve litigation more efficiently and to reduce the caseloads of our trial courts.

IMPACT STATEMENT

This resolution does not affect any other law, statute or rule.

AUTHOR AND/OR PERMANENT CONTACT: Mark Sonnenklar, 1125 S. Hauser Blvd., Los Angeles, CA 90019, phone 323/933-4700, fax 323/843-9595, e-mail marks@corp counselgroup.com

RESPONSIBLE FLOOR DELEGATE: Mark Sonnenklar

COUNTERARGUMENTS

BEVERLY HILLS BAR ASSOCIATION

Stealth is an inappropriate way to change the "American Rule." The statute already affords a remedy to the offeror in a case where attorneys' fees may be recovered as an element of costs. The resolution, in an unbalanced fashion, proposes to extend the remedy to cases where attorneys' fees are not available as an element of costs. No good policy reason is advanced for: 1. Treating defendants better than plaintiffs by mandating payment by an unsuccessful plaintiff, but leaving payment by an unsuccessful defendant to the discretion of the tribunal, in utter disregard of the chilling effect the proposal will have on the assertion of claims. 2. Permitting this scenario to occur "within 60 days after defendant's deadline to file an answer to the plaintiff's initial complaint," even though the action may not then be at issue because of successful pleadings challenges. If the parties are to have the opportunity to conduct meaningful discovery, as the proponent suggests, before engaging in this 998 exercise, the threshold should occur as of the initial Case Management Conference (or initial status conference in those courts not conducting case management conferences).

BAR ASSOCIATION OF NORTHERN SAN DIEGO COUNTY:

Many cases cannot be accurately evaluated until later in the case when an IME has been conducted, expert witnesses depositions taken, demonstrative testing accomplished, etc. This resolution could force pro per or litigants with limited resources to accept unreasonably low settlement offers given the risk of paying large attorney fee bills for firms hired by insurance companies and large companies (who can afford to pay the other side's attorney's fees and costs). This resolution might work in cases which are capable of early evaluation if all settlement offers were reasonable and parties had relatively equal economic status, but that is not the case in many litigated cases.

SAN DIEGO COUNTY BAR ASSOCIATION

Section 998 as currently drafted does allow the prevailing section 998 offeror to recover its expert witness

fees which otherwise would not have been recoverable. To allow recovery of attorneys fees would make the risk too great in smaller cases, especially those where attorney's fees would ordinarily not be available, thereby resulting in forced acceptance of unreasonable settlements merely because of the potential punitive aspects of pursuing the case further.