

RESOLUTION 1-14-03

DIGEST

Payment of Attorney Fees After Dismissal on the Pleadings

Amends Code of Civil Procedure section 128.6 to make the award of expenses mandatory and to create a rebuttable presumption that certain pleadings are in bad faith.

RESOLUTIONS COMMITTEE RECOMMENDATION

DISAPPROVE

History:

None known.

Reasons:

This resolution amends Code of Civil Procedure section 128.6 to make the award of expenses mandatory and to create a rebuttable presumption that certain pleadings are in bad faith. This resolution should be disapproved because it seeks to amend a statute that by its own language never became law, and because the proposed amendment would apply to actions which were not actually frivolous or intended for delay.

Section 128.6 was to become operative on January 1, 2003, “unless a statute that becomes effective on or before this date extends or deletes the repeal date of section 128.7.” (Code Civ. Proc., § 128.6, subd. (f).) The 2002 Legislature extended the operative date of section 128.7 to January 1, 2006. (Stats. 2002, ch. 491 (Sen. Bill No. 2009); Code Civ. Proc., § 127.7, subd. (j).) Thus, section 128.6 has never become operative. Any revival will require legislative action not contemplated by this resolution.

Apart from this problem, this resolution should still be disapproved because it makes sanctionable pleading mistakes on individual causes of action without any showing that the pleader acted in bad faith. Many types of claims are extremely complex, and the difference between a valid pleading and an invalid one may turn on legal issues about which even judges can make mistakes. Moreover, by making an award of sanctions mandatory, the proposed resolution reduces judicial discretion to punish only those who are intentionally trying to use the judicial system for a wrongful purpose. Finally, the provision giving the trial court power to decide the issue of sanctions “in its sole discretion” could be interpreted to insulate the trial court from review by an appellate court under the normal abuse of discretion standard. This resolution has the potential to chill the legitimate exercise of rights and to restrict access to justice for those with limited resources.

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 128.6 to read as follows:

- 1 §128.6
- 2 (a) Every trial court ~~may~~ shall order a party, the party's attorney, or both to pay any reasonable
- 3 expenses, including attorney's fees, incurred by another party as a result of bad-faith actions or tactics
- 4 that are frivolous or solely intended to cause unnecessary delay. There shall be a rebuttable
- 5 presumption that a plaintiff or cross-complainant has engaged in bad faith actions or tactics that are
- 6 frivolous when a judgment is entered in favor of a defendant or cross-defendant, as applicable,
- 7 dismissing a cause of action with prejudice as a result of a demurrer, a motion to strike, or a motion for
- 8 judgment on the face of the pleadings, which motion for judgment on the face of the pleadings was
- 9 filed within 30 days after defendant's or cross-defendant's deadline to file an answer to the plaintiff's
- 10 or cross-complainant's initial complaint (as such deadline may be extended by stipulation of the

11 parties or with leave of the court); provided, however, that such rebuttable presumption shall be
12 deemed rebutted if the trial court determines, in its sole discretion, that (i) the plaintiff or cross-
13 complainant, as applicable, asserted such cause of action based on a reasonable and good faith belief
14 that the laws governing such cause of action should be extended to provide relief for such claim; or (ii)
15 the dismissal is based on a change in law arising after the filing of the relevant complaint or cross-
16 complaint, as applicable, such that the judgment would not have been entered if such change in law
17 had not occurred. This section also applies to judicial arbitration proceedings under Chapter 2.5
18 (commencing with Section 1141.10) of Title 3 of Part 3.

19 (b) For purposes of this section:

20 (1) "Actions or tactics" include, but are not limited to, the making or opposing of motions or
21 the filing and service of a complaint or cross-complaint. The mere filing of a complaint without
22 service thereof on an opposing party does not constitute "actions or tactics" for purposes of this
23 section.

24 (2) "Frivolous" means (A) totally and completely without merit or (B) for the sole purpose of
25 harassing an opposing party.

26 (c) Expenses pursuant to this section shall not be imposed except on notice contained in a
27 party's moving or responding papers; or the court's own motion, after notice and opportunity to be
28 heard. An order imposing expenses shall be in writing and shall recite in detail the conduct or
29 circumstances justifying the order.

30 (d) In addition to any award pursuant to this section for conduct described in subdivision (a),
31 the court may assess punitive damages against the plaintiff upon a determination by the court that the
32 plaintiff's action was an action maintained by a person convicted of a felony against the person's
33 victim, or the victim's heirs, relatives, estate, or personal representative, for injuries arising from the
34 acts for which the person was convicted of a felony, and that the plaintiff is guilty of fraud,
35 oppression, or malice in maintaining the action.

36 (e) The liability imposed by this section is in addition to any other liability imposed by law for
37 acts or omissions within the purview of this section.

38 (f) This section shall become operative on January 1, 2003, unless a statute that becomes
39 effective on or before this date extends or deletes the repeal date of Section 128.7.

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

PROPOSERS: Mark Sonnenklar, James Talley, Helene Wasserman, Jack Fine, Janet Frangie, Larry
Liebenbaum, Ralph Perry, Adam Abrahms, Mark Gursky, Matt Zandi, and Brian Porter

STATEMENT OF REASONS

Existing law: A trial court currently has absolute discretion to order or not order a party to pay the reasonable expenses, including attorney fees, of an opposing party when such party has engaged in "bad-faith actions or tactics that are frivolous or solely intended to cause unnecessary delay."

This Resolution: Obligates a trial court to order a party to pay the reasonable expenses, including attorney fees, of an opposing party when the party is guilty of "bad-faith actions or tactics that are frivolous or solely intended to cause unnecessary delay." In addition, this resolution creates a rebuttable presumption that a plaintiff has engaged in "bad-faith actions or tactics that are frivolous or solely intended to cause unnecessary delay" when a cause of action is dismissed without prejudice early in the litigation based solely on flaws on the face of the pleadings. However, the resolution contains a caveat (i) to prevent the chilling of certain special interest lawsuits that are based on a reasonable and good faith belief that the laws governing such actions should be extended to provide relief; and (ii) to preclude unfair awards where there has been an intervening change in the law.

The Problem: It is well known that California is the most litigious state in the United States. Frivolous lawsuits exact a heavy financial toll on California businesses, which, in turn, pass on the costs of litigation to the consumers of this state. Code of Civil Procedure section 128.6, in its current form, does not appear to be discouraging frivolous lawsuits. It gives too much discretion to the trial courts and fails to provide them with any clear standard for bad faith actions or tactics. In turn, trial courts have demonstrated that they generally do not have the fortitude to make awards under this section. By obligating trial courts to order the payment of reasonable attorney fees in frivolous cases and by establishing a bright line test for bad faith actions or tactics, this resolution would put teeth in the current law and would encourage trial courts to award attorney fees in egregious cases. At the same time, the caveat contained in this resolution would protect against the chilling of lawsuits that raise triable issues of fact or that are designed to extend the current state of the law.

IMPACT STATEMENT

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

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COUNTERARGUMENTS

BEVERLY HILLS BAR ASSOCIATION

California Code of Civil Procedure § 128.6 is not the law in California. It probably never will be the law in California. No purpose is served by amending it. Section 128.7 sets the standards and provides a remedy. Defendants should start using it more often, especially now that the "safe harbor" has been reduced to 21 days (compare Fed.R.Civ.P. 11, with its 20-day safe harbor).

BAR ASSOCIATION OF NORTHERN SAN DIEGO COUNTY:

The fact that a single cause of action is dismissed should not result in sanctions. This resolution virtually eliminates the discretion of the trial judge in determining whether sanctions are appropriate by changing "may" to "shall" and creating the presumption that the loser alleged the cause of action in bad faith. Sanctions should be limited to cases of abuse and should not be used to compensate the prevailing party.

SACRAMENTO COUNTY BAR ASSOCIATION

Action is unnecessary on this Resolution. The statute which the proponent purports to modify (Code Civil Procedure section 128.6) is inoperative. It was contingent upon the extension or deletion of repeal date contained in 128.7, which was extended per 128.6, subd. (f). The repeal date in Code Civil Procedure section 128.7 was extended by Stats 2002 ch 491 § 1 (SB 2009).

Further, the proposed resolution would undermine established public policy that strongly encourages parties to peacefully resolve disputes in the courts. In re Marriage of Flaherty (1982) 31 Cal.3d 637, 647. The award of attorneys' fees and expenses to the prevailing defendant by creating a rebuttable presumption that plaintiff has acted frivolously or in bad faith, results in the imposition of sanctions, which will chill plaintiffs' assertion of arguably valid claims. Such sanctions should be "sparingly applied". Id. at 649.

Because sanctions are punitive in nature, the right to an attorneys' fee sanction must be established by

"clear and convincing evidence, well beyond a mere preponderance and approaching the criminal standard of beyond a reasonable doubt." *San Bernardino Community Hospital v. Meeks* (1986) 187 Cal.App.3d 457, 470. The Third Appellate District has cautioned that "sanctions should not be imposed except in the clearest of cases." *Atchison, Topeka & Santa Fe Ry. Co. v. Stockton Port Dist.* (1983) 140 Cal.App.3d 111, 117.

This proposed amendment is contrary to established public policy, statutory and case law and would discourage resolution of disputes in the courts, by punishing inept pleading as bad faith, and chilling the assertion of arguably meritorious legal claims.

SAN DIEGO COUNTY BAR ASSOCIATION

The proponent's resolution seeks to amend the wrong statute. Code of Civil Procedure section 128.6 was to become operative on January 1, 2003, unless section 128.7 is extended by statute. (Code of Civ. Proc., §128.6, subd. (f).) Code of Civil Procedure section 128.7 was amended to extend its operation until January 1, 2006.

BAR ASSOCIATION OF SAN FRANCISCO

No party should face a rebuttable presumption of bad faith simply for seeking redress in court. This resolution, while seeking to discourage frivolous litigation, chills a party's legal right to assert a claim. Courts express considerable reluctance to penalize parties for taking arguable positions, even in cases of malicious prosecution. This resolution fundamentally alters this balance and discourages legitimate claims.

Trial courts have the authority to order a party who has filed a frivolous or bad-faith action to pay the reasonable expenses, including attorneys' fees, of the other party. Although the proponent suggests tougher standards for penalizing frivolous litigation (to be exercised more frequently and consistently), this resolution is far too harsh. Rather than suggesting guidelines for trial courts to use the authority they already have, the resolution establishes a rebuttable presumption that an action was frivolous and brought in bad faith any time a complaint is dismissed on the pleadings – a not uncommon occurrence. The resolution would have a particularly severe and expensive effect on parties without counsel who might inartfully draft a complaint, subjecting it to dismissal, even when they may have a valid legal grievance. Such parties, of course, would also be particularly ill-suited to rebut the resolution's presumptions.

SANTA CLARA COUNTY BAR ASSOCIATION

There is not a discretionary statute on the books that has not been under-applied at one time or another. However, that does not mean that they should all be made mandatory. In this case, the proposed resolution would leave a clueless, but non-malicious in pro per litigant in a difficult situation. Having filed a poorly drafted complaint that is dismissed, he or she would have little hope of fitting into the two narrow exceptions to the mandatory award of attorneys' fees, and no hope of drafting appropriate papers to avoid the presumption.

This resolution is ill-advised and should not be approved.