

RESOLUTION 11-07-05

DIGEST

Bad Faith: Awarding Attorney's Fees In Frivolous Litigation

Adds Code of Civil Procedure section 1037 to award attorney's fees to the defendant where the court determines that the action was brought without reasonable cause or in good faith.

RESOLUTIONS COMMITTEE RECOMMENDATION

DISAPPROVE

History:

No similar resolutions found.

Reasons:

This resolution adds Code of Civil Procedure section 1037 to award attorney's fees to the defendant where the court determines that the action was brought without reasonable cause or in good faith. This resolution should be disapproved because its terms are internally inconsistent, which would lead to confusion as to its application. It should also be disapproved because of the ambiguity in its use of the term "prevailing party," as well as its vagueness as to when a judge is to determine whether an action was brought with reasonable cause and in the good faith belief that there was a justifiable controversy under the facts and law. It should also be disapproved because it is unfairly balanced in favor of defendants – it will chill claims by plaintiffs, but there is no corresponding disincentive for defendants to engage in expensive delay tactics.

The proposed section provides that "In any civil proceeding where the court determines that the action was not brought in good faith, the court *may* award attorney's fees and costs" (emphasis added.) However, subdivision (a) to the proposed code section provides that "In any civil proceeding the court, upon motion or sua sponte, *shall* determine whether or not the plaintiff, petitioner, cross-complainant or intervenor brought the proceeding with reasonable cause and in good faith If the court should determine that the proceeding was not brought in good faith and with reasonable cause, an additional issue *shall* be decided as to the defense costs . . . and the court *shall* render judgment in favor of that party in the amount of all reasonable and necessary defense costs" Thus, in one section of the proposed statute, the court has discretion to award defense costs, while in another, the award is mandatory under set circumstances.

This resolution should also be disapproved because the proposed section is ambiguous in its use of the term "prevailing defendant." The language could be read to allow attorney's fees and costs to be awarded only if the defendant prevails on the claim, or as allowing an award if the defendant prevails on the motion for recovery of costs. Increasing the potential for confusion is the reference in the resolution to "prevailing party" in subdivision (a), where the section provides that the court shall award "all reasonable and necessary defense costs, in addition to those normally awarded to the *prevailing party*." Presumably the reference in subdivision (a) is intended to refer to Code of Civil Procedure section 1032, subdivision (b), which provides as follows: "Except as otherwise expressly provided by statute, a *prevailing party* is entitled as a matter of right to recover costs in any action or proceeding. Because the resolution does not define "prevailing party," it is ambiguous, as well as potentially inconsistent in its use of the term.

Should the term "prevailing defendant" be meant to refer to a defendant prevailing on or winning a determination that the civil proceeding was not brought in good faith, then the resolution should be disapproved because it creates ambiguity as to when a judge is required to determine whether an action was brought with reasonable cause and in the good faith belief that there was a justifiable controversy under the facts and law. Moreover, it would allow the court to grant defense costs before ruling on the substantive issues of the case, creating the potential for defense costs to be awarded in cases with substantive merit that are not ultimately resolved on motion. A ruling that a proceeding was not filed with

objective reasonable cause might conflict with the denial of a motion to dispose of the case under the law as applied to the facts in the case.

This resolution will chill claims with merit, without providing any disincentive for defendants to engage in expensive delaying tactics. Arizona Statute section 12-349, cited by the resolution's proponent in support of the resolution, allows for imposition of attorney's fees and costs if the attorney or party "[b]rings or defends a claim without substantial justification," "[b]rings or defends a claim solely or primarily for delay or harassment," "[u]nreasonably expands or delays the proceeding," or "[e]ngages in abuse of discovery." (Az. St. § 12-349, subd. A (emphasis added).) Similarly, California Code of Civil Procedure section 128.7 allows the imposition of attorney's fees and costs when a party denies factual contentions without a factual basis. (See Code Civ. Proc. § 128.7, subd. (b)(4).) In contrast, the proposed resolution only allows award of attorney's fees and costs "to the prevailing defendant." Thus, this resolution should also be denied because it is too unfairly balanced in favor of defendants.

TEXT OF RESOLUTION

RESOLVED that the Conference of Delegates recommends that legislation be sponsored to add Code of Civil Procedure section 1037 as follows:

1 §1037
2 In any civil proceeding where the court determines that the action was not brought in good faith, the
3 court may award attorney's fees and costs to the prevailing defendants on motion or sua sponte
4 (a) In any civil proceeding the court, upon motion or sua sponte, shall determine whether or not the
5 plaintiff, petitioner, cross-complainant, or intervenor brought the proceeding with reasonable cause
6 and in good faith belief that there was a justifiable controversy under the facts and the law which
7 warranted the filing of the complaint, petition, cross-complaint, or complaint in intervention. If the
8 court should determine that the proceeding was not brought in good faith and with reasonable cause,
9 an additional issue shall be decided as to the defense costs reasonably and necessarily incurred by
10 the party or parties opposing the proceeding, and the court shall render judgment in favor of that
11 party in the amount of all reasonable and necessary defense costs, in addition to those normally
12 awarded to the prevailing party.
13 (b) "Defense costs," as used in this section, shall include reasonable attorney's fees, expert witness
14 fees, the expense of services of experts, advisors, and consultants in defense of the proceeding, and
15 where reasonably and necessarily incurred in defending the proceeding.

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

PROPONENT: Santa Barbara County Bar Association

STATEMENT OF REASONS:

Existing Law: Existing law does not provide sufficient protection for frivolous litigation.

This Resolution: This Resolution would provide justifiable protection from frivolous litigation and provide ethical relief from costs incurred should a defendant face such frivolous litigation. This is not the same as a malicious prosecution action since "malice" is not required, but this code section change would force a would-be litigant to seriously consider whether this is a proper action to bring before a court. And, it would allow the court not to be burdened with actions which should not take up court time. Thus, it would create a "civil" equivalent of the protection afforded by Penal Code sections 1447 and 1448.

The Problem: Currently, a defendant can be brought into court on the filing of a frivolous lawsuit without recourse. The defendant may lose simply due to lack of funds. Unless the action specifically falls under "malicious prosecution" under Government Code section 821.6 for liability of public employees, Penal Code sections 1447 and 1448 for criminal actions brought wherein the defendant is subsequently exonerated, or Penal Code section 374.2 with respect to discharge or release by sewers or sewer systems, there is no protection.

Both Arizona (ARS §12-341.10(a) for contract actions and ARS §12-349 for all other civil actions) as well as Ireland have provided for attorney's fees and costs in frivolous litigation cases. Rule 11 of the Federal Rules of Civil Procedure (28U.S.C.) also provides for such attorney's fees and costs.

In Europe, the filing of personal injury cases has boomed in the last few years - its nickname in some circles is "the American disease". The Republic of Ireland has gone the furthest in its reform by imposing sentences for false evidence of up to 10 years in prison or a 100,000 euro (\$130,000) fine resulting in a 20% drop in such cases according to the Wall Street Journal January 26, 2005. Other European countries have also taken steps. The U.K.'s Chief Justice Lord Woolf has introduced reforms aimed at the cost of litigation in civil claims courts. The French government has sought to slow the runaway costs of medical malpractice insurance by setting up a state office to settle certain cases out of court. Europe is closely watching the success of the Irish reforms to determine further restrictions. In Ireland, one American style company had so many claims filed against it for personal injury (120 by the year 2000) that the filers of such claims became known as "have-a-go-Charlies". It is time that California joins the effort to curb frivolous litigation and preserve the sanctity of our judicial system for the legitimate cases.

Adding Code of Civil Procedure section 1037 will further public policy by affording all defendants protection from frivolous litigation, saving huge amounts of taxpayer funds by keeping frivolous litigants out of the courts by having a deterring effect upon those who would otherwise bring frivolous lawsuits, and would have a beneficial effect upon the process.

IMPACT STATEMENT

This proposed resolution will affect California Code of Civil Procedure section 1717.

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COUNTERARGUMENTS

SAN DIEGO COUNTY BAR ASSOCIATION

This resolution would have an unacceptable chilling effect on the bringing of just and meritorious litigation. There are ample protections already in place to discourage bad faith and frivolous lawsuits. Having the trial judge make a finding as to whether the lawsuit over which he or she just presided was or was not in good faith would almost certainly lead to unfair results, and provide an uncertain new area for appeal and continued litigation.

BAR ASSOCIATION OF SAN FRANCISCO

This resolution would add an entirely new section to the Code of Civil Procedure dealing with awarding fees and costs as a sanction for engaging in frivolous litigation. Code of Civil Procedures Sections 128.5 through 128.7 currently deal with this problem, and Resolution 09-04-05 proposes amendments to strengthen Section 128.6 when Section 128.7 expires. It would be confusing for the Conference to adopt two different proposals dealing with the same issue. Resolution 09-04-05 is the preferable solution, as it establishes more specific standards for the courts to implement and encourages resolution of disputes over frivolous litigation through meet and confer efforts.

SACRAMENTO COUNTY BAR ASSOCIATION

This resolution suffers two flaws. It is unfairly one-sided, and it is unconstitutional. It is not even-handed because it proposes to sanction only plaintiffs for bringing frivolous lawsuits. It does nothing to the defendant who frivolously denies a complaint simply to delay justice and force the plaintiff

and the court to suffer the needless burden and expense of litigating an action to which there is no plausible defense. Nor does it penalize the defendant who frivolously asserts every affirmative defense known to Anglo-American jurisprudence.

In contrast to this resolution, FRCP rule 11, which the author cites, is even-handed. It provides sanctions for *any* frivolous document presented to the court—complaint, answer or other document—regardless of which party presented it.

The resolution also denies due process. It would require the court to sanction a plaintiff *sua sponte* if the court determines that the action, including a cross-complaint or complaint in intervention, was frivolous.

A court's *sua sponte* imposition of sanctions for frivolous litigation, without prior fair warning and opportunity to be heard, denies rudimentary due process. *O'Brien v. Cseh* (1983) 148 Cal.App.3d 957, 962; *Marriage of Fuller* (1985) 163 Cal.App.3d 1070, 1078); see also *Marriage of Flaherty* (1982) 31 Cal.3d 637, 652 (same where frivolous appeal sanctions imposed without prior notice and opportunity for hearing).

The resolution also denies due process in not providing that the court must state in detail its reasons for imposing sanctions. *Flaherty*, 31 Cal.3d at 654; *O'Brien*, 148 Cal.App.3d at 962. Requiring the court to specify the reasons for sanctions is also important to ensure that a court does not abuse its power to sanction, and to aid a reviewing court in determining whether the trial court abused its discretion in imposing sanctions. *Lavine v. Hospital of the Good Samaritan* (1985) 69 Cal.App.3d 1019, 1029.