Committee Votes Against Offer-of-Judgment Proposal

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An advisory panel turned its thumbs down on a proposal that the Texas Supreme Court enact a rule to allow the shifting of litigation costs to a party who rejects a settlement offer and ends up with a less favorable judgment. But don't look for the issue to go away. After vigorously debating an "offer of judgment" proposal on March 8, the high court's Rules Advisory Committee voted 17-3 against the concept, only to be told by the chairman, Charles "Chip" Babcock, that the issue will be brought back before the panel in May.

Politics may be at play. Lt. Gov. Bill Ratliff, who has sponsored legislation to allow the fee-shifting when a litigant refuses to settle, says he asked the Supreme Court to look at the issue. S.B. 532, by Ratliff, passed the Senate in 1999, but its companion bill was left pending in a House committee, a spokeswoman for the lieutenant governor says.

A member of the advisory committee member objects to having the offer-of-judgment proposal brought back before the panel.

"Proceeding down a path you don't want to proceed down causes some confusion," says 4th Court of Appeals Chief Justice Phil Hardberger, a member of the committee. "Frankly, I had hoped the Supreme Court would simply take our vote. You wanted it, you got it."

Tommy Jacks, another member of the committee, says the 17-3 vote showed there is "a real serious level of misgivings" among lawyers on both sides of the docket and judges about introducing "something this radical" into the system.

Judge David Peeples, of the 224th District Court in Bexar County, says he voted against the proposal because of the complexity that he believes such a rule would add to the system. However, Peeples says he's not opposed to taking another look at the issue.

"I'm not convinced we can write a good rule that will do some good without paying a larger price in complexity," Peeples says. "But why not try?"

Babcock, a partner in the Houston office of Jackson Walker, says it's not unusual for the committee to advise the court on a rule, even though the members don't think the rulemaking is necessary.

"The court needs to know, if there is going to be a rule, what our thinking is about it - what would the best rule look like," Babcock says.

"We need to de-politicize the issue and start looking at the mechanics of what would make the system work better," says Supreme Court Justice Nathan Hecht, the court's liaison for rules.

The Supreme Court's Task Force on Civil Litigation Improvements, headed by Houston attorney Joe Jamail, also is considering the issue and drafted the proposed rule looked at by the advisory committee. Under the task force's initial proposal, post-offer litigation costs - including attorneys' fees - could be shifted if the difference between the damages awarded and the settlement offer equals at least 25 percent of the amount offered. It would be up to the judge whether to award those costs, says Elaine Carlson, a South Texas College of Law professor who headed the subcommittee that reviewed the proposal.

There is precedent for the rule in the federal courts and in other states. According to a report prepared by Carlson, 28 states and the District of Columbia have rules similar to Federal Rule of Civil Procedure 68, which provides that a plaintiff must pay a defendant's costs - attorneys' fees aren't included - if he refuses to accept an offer to settle and receives less in the judgment. Another 13 states have offer-of-judgment provisions that differ from the federal rule in "significant ways," the report said.

The report also noted that the U.S. District Court for the Eastern District of Texas adopted a rule which allowed the shifting of litigation costs and fees to a party who rejected an offer to settle and obtained a judgment less than 10 percent better than the amount offered.

In 1997, the 5th U.S. Circuit Court of Appeals held the rule to be invalid. The 5th Circuit held in Ashland Chemical Inc. v. Barco Inc. that the local rule was substantive rather than procedural and thus required congressional approval.

Authority Questioned

Several members of the advisory committee question whether this state's Supreme Court has the authority to enact an offer-of-judgment rule.

"This is a major state policy issue," state Rep. Jim Dunnam, D-Waco, an ex officio member of the committee, said at the meeting.

Dunnam, a partner in Dunnam & Dunnam, said the Legislature has been asked "session after session" to allow this type of relief but, despite being pressured by big-moneyed interests, has not passed a bill.

The reason it hasn't passed, he said, is because it's a bad change in the law.

Ratliff says he believes such a change is necessary to avoid needless litigation. "What this does is get people to settle early," Ratliff says.

"Here's what it comes down to - saving money for the clients and the system," Hecht says. Any rule adopted by the court would "nudge" plaintiffs and defendants to settle their disputes and spare the system the costs of having to try cases that should be settled, he says.

However, Hardberger said such a rule would have a "chilling effect" on litigants. "To put it in common terms, it would scare the hell out of most," he told fellow committee members.

Linda Eads, a former deputy state attorney general and professor at the Southern Methodist University Dedman School of Law, said changing the law would benefit the Office of the Attorney General, which handles huge amounts of litigation and often is opposed by lawyers unwilling to settle cases that should be settled. But Eads said the proposal involves a substantive change that the Legislature should consider, not a procedural change that the Supreme Court can enact through rulemaking.

Ratliff says he asked the Supreme Court to look at the issue to see if it is something that the court can do by rule. "My impression is the court thought it could," he says.

Hecht says the court "clearly" has the authority to enact a rule that would shift certain costs to a party who refuses an offer to settle but ultimately loses the case or receives less than the amount offered. The court also has authority to shift attorneys' fees if a party is "abusing the process" by unreasonably rejecting an offer to settle, he says.

But Jacks, a partner in the Austin office of Mithoff & Jacks, says the only way that he believes the issue falls within the court's rulemaking authority is if the sanctions are reserved for cases involving "egregious conduct."

Before fees and costs are shifted, Jacks says, a hearing should be held. He also says there is a serious question whether a jury trial would be required in such cases.

Jacks says parties in civil suits are not under any legal obligation to settle. "There's no law anywhere that imposes that requirement," he says.

Another consideration, Jacks says, is whether there is insurance coverage for this type of penalty. Jacks says insurance companies often decide whether to settle cases on behalf of those they insure. If a policy doesn't cover attorneys' fees for the opposing party, the insurer can opt not to settle and leave the insured to pay the fees if that proves to be the wrong decision.

Carlson, who voted for considering the concept, says she favors crafting a "limited" rule that allows only costs to be shifted. The rule would have to be crafted carefully to make sure it is within the court's authority to enact procedural rules, she says.

"I frankly think that if we don't include attorneys' fees, we're wasting our time," Babcock says. "In the federal system, where it's just the filing fee and relatively modest costs, it's not worth the time and effort to go ahead and use the rule."

Babcock says the Jamail task force, which met on March 11 in Houston, is going back to the drawing board and will redraft the rule to address some of the concerns raised. Jacks and Carlson also serve on the task force.

The rules advisory committee will revisit the issue when it meets May 17-18 in Austin.