

# THE RECORDER

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## Curtailing Attorneys Fees

### 'Goodman' affects monetary recovery for lawyers, plaintiffs

By Harry I. Price, Esq.

A claimant's counsel initiates a lawsuit with one litigation goal — to achieve a monetary recovery that will make his client whole, including (in those cases where there is a contract or statutory award provision) recovery of attorneys fees. Attorneys fees can represent an increasing portion of the amount in controversy, many times eclipsing the amount of actual damages. Those cases are known as ones where “the

tail is wagging the dog.”

#### Litigation

**T a i l**  
docking is a medical procedure: the amputation of part of the tail of the dog. The California Supreme Court's Feb. 4 ruling in *Goodman v. Lozano*, 10 C.D.O.S. 1582, is an example of a comparable legal procedure: the curtailing of awarding attorneys fees, as a further inducement to settle rather than require a trial of an action. The holding will change how litigants sift and weigh risks before going to trial, cropping certain cases from trial calendars.

The *Goodman* court's judgment applied a clear-eyed view of applicable statutes and specifically overruled the contrary holding in *Wakefield v. Bohlin*, 145 Cal.App.4th 963 (2006), based upon the facts presented, including transparent information about all pretrial settlement agreements or offers in-



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volving all litigants. The parties before the trial court were the plaintiff, a home purchaser who sued his seller and other defendants (contractor, architect and real estate broker) in a construction defects action involving a newly built single-family home, and one hold-out defendant: the seller, the only defendant with a written contract containing an attorneys fees clause in favor of the prevailing party.

After the plaintiff received

more than \$230,000 in settlement proceeds from the settling defendants, he rejected a Code of Civil Procedure §998 offer of compromise from the seller in the amount of \$35,000. If the plaintiff had accepted the CCP §998 offer, he would have received the total proceeds of more than \$265,000. Instead, the plaintiff elected to go to trial against the defendant. That decision proved to be costly.

Following a bench trial, the trial court found against

the seller on liability, and determined a total amount of damages that would have otherwise been awarded against said defendant in an amount just under \$146,000, of which \$64,000 represented contract damages under plaintiff's claims. However, because the settlement amount eclipsed the \$146,000 awarded to plaintiff, the trial judge not only ordered that plaintiff should receive nothing by the action, but also, exercising his discretion under section CCP §1032(a)(4), the judge determined that defendant was the prevailing party since they “paid nothing under the judgment.” The court then awarded the defendant \$132,000 in attorney fees and \$12,000 in costs, which was upheld by both the appellate court and, now, the California Supreme Court.

Consequently, for this plaintiff, the pendulum of benefits received in litigation swung from more than \$230,000 cash received (not even counting the opportunity to be paid an additional \$35,000 that the plaintiff rejected) to retaining \$86,000 (after paying defendant seller's trial costs). If and when post-appeal costs and attorneys fees are awarded to defendant (since, after all, this case went all the way to the state Supreme Court), plaintiff's net recovery will prove to be close to zero.

The *Goodman* decision establishes that when a plaintiff goes to trial against one remaining defendant, after

receiving a monetary settlement from all other defendants, the plaintiff must receive a positive monetary judgment in excess of the settlement monies previously received (“net monetary recovery”) in order to be the prevailing party entitled to costs and attorneys fees. If the remaining holdout defendant at trial “achieved their goal of proving damages in an amount less than the settlement proceeds, by which they avoided having to pay plaintiffs anything,” then that party has accomplished its litigation goal. Litigation goals can change during the course of pretrial litigation proceedings when partial settlements are paid by other defendants. Those payments, when they cause plaintiffs’ claims to be financially satisfied, can be a game-changer for the remaining defendant. In that circumstance, the trial defendant will be able to argue it is the prevailing party and, in the trial court’s discretion, receive an award of fees and costs.

Before *Goodman*, many plaintiff counsel were *Wakefield* disciples, of the opinion that their best target defendant was the one who faced exposure for attorneys fees. That is because the plaintiff’s litigation goal was two-fold from the outset: establishing financial responsibility of, and obtaining a monetary recovery from, the defendant in a way that would make the plaintiff whole, including the attorneys fees incurred in seeking such a recovery. Those attorneys were under the belief that as long as the trial court awarded damages to the plaintiff in any amount (even if not a positive number after setoff from prior settlements), they were the prevailing party and would be separately awarded their fees — an important component in making their client whole. The dramatic and costly financial lesson of *Goodman*

will not be lost upon future claimants. The overt message is that plaintiffs must sift and weigh their litigation goals as circumstances change with each settling defendant; the covert message is: Once your actual damages are fully paid, don’t be greedy by pushing for the recovery of attorneys’ fees against that last defendant.

**Practice Tip:** Plaintiff counsel must tell their clients, from the outset, that they must remain flexible about settlement. This is because, notwithstanding the fact that the agreement upon which the lawsuit will be based contains an attorneys fees clause, statutes and case law may emasculate the ability to recover fees depending upon the circumstances that evolve during litigation. The client must know not only that he or she may not be made whole, but that even if their claim is meritorious, they may be held financially responsible for the defendants’ attorneys fees if they go all the way through trial and do not achieve a net positive monetary recovery.

Reading between the lines of the “litigation goals” analysis of the court discloses that the court’s own goals are paramount: encouraging the expeditious resolution of disputes by discouraging unnecessary trials. However, while the short-term intended impact is to avoid unnecessary trials where there is no anticipated net positive recovery, the holding creates a “be careful what you wish for” prospect of encouraging defendants in a multiparty litigation to be stragglers. As the law of unintended consequences unfolds, there is a risk that certain defendants will be emboldened to not enter into an early resolution, determining that it pays to be the last one to settle, let alone any settlement. The object of trial avoidance may be overshadowed by the larger number of trials resulting from defendants

who refused to settle unless they are part of a global settlement — thus enabling smaller defendants to have veto power over partial settlements. Any such entrenchment will only increase the pretrial litigation costs of all of the parties.

If such a mixed message reading of the *Goodman* opinion is received by defendants’ attorneys, the result may be to frustrate the litigation goals established by the state legislature at the urging of insurers. The statutes establishing partial settlement procedures employing the “good faith” settlement statutes, CCP §§877-877.6, enable parties to extract themselves not merely from actions but also from cross-complaints for indemnity. Those statutes were designed to promote early settlements, even if only a partial resolution of the dispute were achieved. While including an “offset” mechanism in that scheme did include a risk of going forward against remaining defendants, the measure of that risk increases exponentially when the last remaining party defendant can claim the benefit not only of offset, but also of a right to attorneys fees. In that respect, the *Goodman* ruling is much like tail docking: rather controversial. Defense counsel will support it as establishing a routine procedure that is practical and minimally painful; on the other hand, plaintiff counsel will disapprove of it as a distressing immobilization of a tool needed to try to make their clients whole — the attorneys fees clause.

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