

Application of the "Offer of Settlement" Statute: Less than Legislative Intent?

- by Kevin F. Amatuzio and Joyce L. Jenkins, *The Colorado Lawyer*, Nov. 1995, p. 2557.

CRS § 13-17-202 is commonly known as the "offer of settlement statute." It became effective May 31, 1990.¹ Its enactment eliminated the need for Colorado Rule of Civil Procedure ('C.R.C.P.,") 68 (Offer of Judgment), and that Rule was repealed July 12, 1990. Under Rule 68, only a defendant could make an offer of settlement. Further, the case law construing Rule 68 had so limited the type of costs recoverable that the expressed purpose of the Rule, to encourage settlements, was largely frustrated.² On the other hand, CRS § 13-17-202 made the offer of judgment concept available to both the plaintiff and the defendant and provided for the recovery of a party's "actual costs," not merely "costs." These expansive changes reflected a legislative intent to expand the costs recoverable to a party under the statute and thereby increase the use and coercive force of the cost-shifting risk as a settlement inducement.

However, interpretations of the statute appear to allow for substantial discretion in the trial court to disallow and limit claimed actual costs. It is suggested that the likelihood of the recovery of actual costs under CRS § 13-17-202 will increase substantially if counsel makes use of the legislative history of the statute. Arguably, the use of the legislative history also can support a modification of the restrictive case law that has so far developed on the issue.

The offer of settlement statute was one of the few survivors of Colorado Senate Bill ("S.B.") 90-150, which had initially proposed sweeping changes to the legal system, including adoption of the English Rule of awarding attorney fees to the prevailing party in most civil litigation. As enacted, the statute mandates an award of actual costs to a plaintiff or defendant who has made a settlement offer pursuant to the terms of the statute, which is rejected, and who thereafter ultimately fares better than the offer at trial. The words "actual costs" are not defined in the statute, thereby leading to judicial interpretation of the phrase.

Armed with the legislative history, counsel can make a persuasive argument that the intended scope of recoverable costs under CRS § 13-17-202 is broader than current judicial construction and prior authorities allow, and perhaps thereby obtain a more inclusive award for his or her client. In this regard, CRS § 2-4-201 (1)(c) and (g) authorize a Colorado court to consider legislative history, including the legislative declaration of purpose, in determining the intent of an ambiguous statute.

Legislative History

S.B. 90-150, entitled "Concerning Changes to the Legal System," was sponsored by Senators Considine and Owens and House Representative Schauer. While many of the proposed judicial reforms, including adoption of the English Rule, were ultimately rejected or deferred for further study, the floor debate and testimony provide insight into the lawmakers' intent with respect to CRS § 13-17-202.

In explaining his original proposal to the Senate Judiciary Committee at a hearing on February 7, 1990, Senator Considine said, "We have a legal system where our costs are disproportionate to the gains," and, so, the goal of the proposal is to "place [the] cost on those causing the problem." Disapproving of the American Rule (each party pays its own attorney fees), he instead favored the assessment of reasonable attorney fees as costs to make a party whole. He envisioned that attorney fees should be "borne by the person who insisted, instead of by the person found innocent," believing that the proposed provision would reduce the volume and life-span of cases in line with the overall goals of S.B. 90-150 as expressed in the legislative declaration,³ to "provide dispute resolution at a lower cost and sooner."

However, testimony presented to the Senate Judiciary Committee on February 7, 1990, regarding S.B. 90-150 was uniformly critical of a sudden switch to the English Rule in the absence of careful study of the anticipated effects of such a fundamental change. This viewpoint won the day, and the Committee voted to amend the Bill by removing the English Rule from its provisions.

On February 28, 1990, a second hearing on S.B. 90-150 was held before the Senate Judiciary Committee, where Senator Considine attempted to revive the idea of awarding attorney fees when an offer of settlement was rejected and the outcome at trial was less favorable to the rejecting party. A lobbyist for the Colorado Trial Lawyers Association ("CTLA") testified that Senator Considine's Proposal had already been rejected by the Committee and that he agreed with those who had testified at the initial hearing that a shift to the English Rule needed study. However, he suggested that the Senator rewrite his renewed proposal to speak to "actual costs," specifically including reasonable deposition expenses and costs of investigation:

CTLA: Our trial lawyers . . . would suggest that this amendment be rewritten so that it does not include attorneys' fees but includes costs, but goes beyond what the courts now call taxable costs, to all actual costs of the litigation. Taxable costs translate to witness fees, expert witness fees, docket fees, things of that nature. Actual costs would include deposition expenses, investigative expenses, things of that nature which . . . are far more expensive than the \$2 or \$3 you pay a witness to come in or the \$75 or whatever . . . it is to file a suit with a jury fee. These actual costs of litigation, such as deposition and investigative fees, would make a more meaningful recovery to the person who tendered the offer of judgment and was refused [than] what the rule now provides. [Emphasis supplied.]

Considine: . . . the Trial Lawyers Association would support /9 if it were amended to refer not to attorney fees but reasonable actual costs?

CTLA: Actual costs, yes Senator.

On the floor of the Senate, Senator Considine offered an amendment proposed by Senator Wells to specify that "actual costs" did not include attorney fees. The Senate passed that amendment and sent the revised bill to the House for consideration:

- 13-17-202. Award of actual costs when offer of settlement was made. (1)(a) Notwithstanding any other statute to the contrary, in any civil action of any nature commenced or appealed in any court of record in this state:

(I) If the plaintiff makes an offer of settlement which is rejected by the defendant and the plaintiff recovers a final judgment in excess of the amount offered, then the plaintiff shall be awarded actual costs accruing after the offer of settlement to be paid by the defendant. (II) If the defendant makes an offer of settlement which is rejected by the plaintiff and the plaintiff does not recover a final judgment in excess of the amount offered, then the defendant shall be awarded actual costs accruing after the offer of settlement to be paid by the plaintiff. (b) for purposes of this section, "actual costs" shall not include attorneys' fees.⁴

The House State of Affairs Committee considered S.B. 90-150 on March 20, 1990. Senator Considine supported the bill and had as an example of actual costs the expense of obtaining an expert witness. Significantly, the Senator characterized recoverable costs under S.B. 90-150 as constituting a "third category" of costs, distinguishable from both attorney fees and traditionally recoverable court costs:

Considine . . . [T]he only costs that are involved are the - other costs. There are two defined categories. One is court costs, which are the costs paid directly to the legal system such as docket fees. And secondly would be attorneys' fees, which are not covered. And so third - it's the third category which would be other costs like expert witness fees [which] is the example that has been used. And it's just one more incentive to accept a reasonable settlement offer . . . [T]he purpose of it is to encourage parties to settle without litigation, without the cost and delay of litigation . . . [Emphasis supplied]

A representative from American Family Insurance Company also testified before the House. He opined that the offer of settlement provision needed three changes, paralleling the mechanisms found in repealed Rule 68: that an offer of settlement should be in writing; that it should be served; and that a cutoff point not too close to trial, such as ten days prior, should be established. American Family's central concern was that if an offer of settlement was made too close to or during trial, there could be no significant cost shifting because the majority of costs would have been incurred prior to the time the offer was made. Senator Considine stated that an offer made at any time still served the settlement policy behind the statute, but acknowledged that litigants should be encouraged to make a reasonable offer of settlement as early as possible because substantial costs are incurred in pretrial depositions and discovery.

During this exchange, the Senator repeated his view that the goal of the offer of settlement statute was that "people [should] bear the costs of litigation which they cause":

Considine: [I]f it was a reasonable offer then that's the same offer he's going to get after I presented my case, so I might as well have the incentive to save my own costs. If under this - my practice as a defense lawyer or as a plaintiff's counsel would be to make my best reasonable offer as early as possible because now I would call up the other side and say, "Listen, we have this case and controversy between us. I'm prepared to settle it today for a reasonable number and by the way, if you are not prepared to accept it, then some of the costs that both of us are incurring you're going to have to bear." And that is the essential policy that we're trying to get at is that people bear the costs of litigation which they cause . . . And most of the costs are likely to have been incurred in advance of the trial by reason of depositions and discovery. [Emphasis supplied]

American Family: Yes. That's right.

The House State of Affairs Committee approved the proposed additions based on American Family's comments, and S.B. 90-150 was passed on the House floor with the following new subsection:

(3) At any time more than ten days before the trial begins, a party defending against a claim may serve upon the adverse party an offer of settlement to the effect specified in his offer, with costs then accrued. If within ten days after the service of the offer, the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance, together with proof of service thereof, and thereupon the clerk shall enter judgment. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs. If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree shall pay the costs incurred after making of the offer. The fact that an offer is made but not accepted does not preclude a subsequent offer. When the liability of one party to another has been determined by further proceedings, the party adjudged liable may make an offer of settlement, which shall have the same effect as an offer made before trial (except with respect to costs already incurred) if it is served within a reasonable time not less than ten days prior to the commencement of hearings to determine the amount of extent of liability.⁵

Judicial Application of the Statute

Colorado courts quickly recognized that the expressed purpose of CRS § 13-17-202 included encouraging settlements and reducing the high costs of protracted and fruitless litigation.⁶ The question of what constitutes "actual costs" within the meaning of the statute was first addressed by a Colorado appellate court in *Jorgensen v. Heinz*.⁷ There, the plaintiff sought to recover actual costs pursuant to his offer of settlement. The trial court declined to award the full amount of the actual costs claimed, finding that some of the items claimed were "unreasonable."

On appeal, the question of first impression was "whether § 13-17-202 (1)(a)(II) requires a court to award defendants all of their actual costs, or just those costs that the court finds reasonable."⁸ The Court of Appeals, relying on the assumption that a just and reasonable result is presumptively intended by the legislature, determined that the trial court may disallow costs that it finds unreasonable, because to do otherwise " . . . would allow a defendant to incur unreasonable costs and then claim an entitlement to them."⁹ Certiorari was denied by the Colorado Supreme Court in *Jorgensen*, with two justices voting to grant review of the following issues: (1) whether all the claimed expenses constituted actual costs; and (2) whether § 13-17-202 requires a court to award all actual costs accruing after the offer of settlement or merely those actual costs that are reasonable.¹⁰

The need for reasonableness of actual costs was addressed by the Colorado Supreme Court in *Scholz v. Metropolitan Pathologists, P.C.*¹¹ At trial, the plaintiff was awarded actual costs pursuant to CRS § 13-17-202, but less than the full amount claimed. In doing so, the trial court made no specific findings as to reasonableness or any other basis for its decision. Consequently, the matter of costs was remanded to the trial court to make appropriate findings.

In so holding, the Supreme Court in *Scholz* discussed the application of the offer of settlement statute and noted that although the provisions of the statute are "mandatory and nondiscretionary in many respects" (citing *Centric-Jones v. Hufnagel*¹²), the trial court retains discretion over the amount of actual costs awarded. In support, the Supreme Court relied on the rationale expressed in *Jorgensen*. Thus, the court has apparently interpreted CRS § 13-17-202 to mean that the award of actual costs to a prevailing party under the statute is mandatory, but that only actual costs reasonably incurred should be awarded, with the determination of reasonableness vested in the discretion of the trial court.¹³ Several subsequent decisions have expressly followed *Scholz*.¹⁴

Shortly after *Jorgensen* was decided, another panel of the Colorado Court of Appeals decided *Callaham v. First American Title Insurance Co.*¹⁵ In *Callaham*, the court recognized that an award of costs to a prevailing defendant who had successfully used the settlement statute was mandatory, but determined that the particular items and amounts of costs awardable remained in the discretion of the trial court. In support of this holding, the *Callaham* court relied on case law concerning the award of costs under C.R.C.P. 54(d) and CRS §13-16-122(1)(b), as applied prior to the effective date of CRS § 13-17-202.¹⁶

In effect, the Court of Appeals in *Callaham* returned to the statutory and case law predating the offer of settlement statute and applied that precedent in awarding costs under CRS § 13-17-202. Thus, the court declined to award as actual costs such expenses as jury meals, deposition travel, deposition transcript costs and expenses for service of subpoenas.¹⁷ Other decisions of the Colorado Court of Appeals also have applied pre- CRS § 13-17-202 case law or the pre-existing cost recovery statute, CRS §13-16-122, to determine recoverable actual costs under CRS § 13-17-202.¹⁸

Analysis

A party seeking a broad interpretation of "actual costs" under CRS § 13-17-202 can highlight the apparent dichotomy between the unambiguous statements of intention in the legislative history and the more restrictive applications suggested by the reported decisions. For example, such items as deposition costs and expert witness expenses, which would probably be denied under current case law, are in actuality expensed that the legislature expressly contemplated as among the actual costs awardable under the statute, as shown earlier in this article. Significantly, it appears from a review of the reported decisions regarding CRS § 13-17-202 that no trial or appellate court was furnished with or had the opportunity to consider the relevant legislative history of the statute. Thus, there is a sound basis to question the precedential value of those decisions.

There also are persuasive arguments as to why statute and case law regarding the allowance of costs that predate the settlement statute should not be applied to determine actual costs under CRS § 13-17-202, as was done in Callaham. It is significant that those who created CRS § 13-17-202 never referenced the existing statutory delineation of recoverable costs in CRS §13-16-122(1) in attempting to define the costs recoverable under the settlement statute. Indeed, the legislative history demonstrates that the language of the settlement statute was not intended to either (1) adopt or incorporate the enumerated costs in the existing cost statute (CRS §13-16-122) or (2) use CRS §13-16-122 as a guideline for recoverable costs. Rather, CRS §13-16-122 costs were to remain recoverable as before, and the settlement statute was intended to provide for the recovery of a whole new category of costs in addition to those previously awardable, essentially encompassing all other post-offer costs of litigation.

To the extent other statutes regarding the assessment or recovery of costs may conflict with the settlement statute, the latter by its express language controls.¹⁹ The legislative history of CRS § 13-17-202 discusses recoverable costs in terms of broad, sweeping categories such as discovery, investigation, experts and depositions. In the authors' opinion, a strong argument can be made that the use of pre-statute authorities to interpret CRS § 13-17-202 appears to have largely circumvented and negated the changes intended by the enactment of the settlement statute and the repeal of C.R.C.P. 68.

Certainly, the settlement statute must be subject to a rule of reason in its operation. The essence of the common law is a court's ability to fashion, within parameters, a proper and equitable result in a particular case. Yet, the legislative history of CRS § 13-17-202 confirms that the express inclusion of the word "actual" before "costs" in the statute was meant to do something more than merely reaffirm the pre-statute criteria for the allowance and recovery of costs and the broad discretion attendant thereto. Therefore, counsel can credibly argue that a different balance between the lockstep application of the statute and the current breadth of judicial discretion in its application is warranted.

The specific articulation of the "new category" of recoverable costs contemplated by the drafters of CRS § 13-17-202 should afford litigants a basis to argue the recovery of actual costs in all future cases. The question then remains as to what extent the exercise of judicial discretion may depart from the mandatory language of the settlement statute. One way to fully implement the settlement statute while still affording the needed judicial discretion to prevent an unconscionable result might be to adopt presumptions of reasonableness, and of inclusion rather than exclusion, of claimed actual costs. Such an approach would be consistent with the requirement that the statute be "liberally construed" to fulfill its stated purposes and yet still allow the courts discretion to prevent gross inequities in operation of the statute.

Counsel taking this position should be prepared to address the policy considerations attending an expansive reading of the statute. The risk that a litigant could be excessively "punished" under a strict application of the settlement statute by grossly excessive or exorbitant costs, for example, is probably overstated. There are many ways to prepare and try the same suit, and few litigants are so sure of their claims or defenses that they should be forced to scale back or to forego the zealous and thorough presentation of their case. In that regard, a party who has offered to settle pursuant to CRS § 13-17-202 should not be penalized for doing a thorough and successful job of trial preparation by the denial of the recovery of its actual costs, absent the most compelling of circumstances.

Moreover, the concern that a party will spend "unreasonable or unnecessary" costs in the prosecution of a suit stems from an unsupported assumption. Few, if any, parties have unlimited funding to squander on litigation, and most employ a cost-benefit analysis in determining how to proceed in developing their case for trial. It is also unlikely that any significant proportion of litigants will generate exorbitant or unnecessary litigation expenses merely in the hope of "punishing" an opponent who declines an offer of settlement. Thus, there are several meaningful factors that favor broader application of CRS § 13-17-202, including adequate recompense to a party subjected to protracted litigation and the encouragement of early, realistic evaluation and settlement of cases.

While a more rigorous application of the statute may lead to some results that seem harsh, the same can be said of the current scheme. The allocation of the burden of costs in civil litigation is a matter within the province of the legislature. Trial and appellate courts, supplied with a historical explanation of the phrase "actual costs," may be receptive to a more literal (and therefore more expansive) application of the statute.

Conclusion

In sum, the legislative history of CRS § 13-17-202 should afford counsel a sound basis to argue an expansive application of the statute that embraces as actual costs many types of costs now frequently disallowed.²⁰ Counsel should take care to ensure a complete record of the treatment of this issue in the trial court, in order to fully preserve the issue for consideration on appeal. This is particularly true in that, notwithstanding the evidence of legislative intent, a trial court may feel constrained to apply the statutory construction reflected in current case law.

NOTES

1. The statute was recently amended effective July 1, 1995, to clarify the mechanics of its operation, S.B. 95-217.

2. 5 Hardaway and Hyatt, Colorado Civil Rules Annotated § 68.2 p. 239 (1985).

3. Inter alia, the legislative declaration to S.B. 90-150, § 1, provides: The general assembly finds that the changes encompassed in this act are designed to make the legal system more effective and efficient by discouraging the filing of unnecessary litigation, by encouraging settlement, and by encouraging more timely resolution of disputes which will result in victims getting compensated for their injuries in a more timely manner. In enacting these changes, the intent of the general assembly is to improve the legal system and reduce the high cost to individual citizens and to society caused by protracted and fruitless litigation, thereby lowering the cost of goods and services to consumers and resulting in the promotion of economic growth in this state.

4. S. 90-150, 57th Gen. Assembly, 2d Reg. Sess. §

5. S.J. at 817, April 10, 1990.

6. 829 P.2d 507 (Colo.App. 1992).

7. 847 P.2d 181 (Colo.App. 1992).

8. Id. at 184.

9. Id.

10. Justices Kirshbaum and Mullarkey, Jorgensen v. Heinz, S.Ct.No. 92SC696, cert. denied, March 15, 1993.

11. 851 P.2d 901 (Colo. 1993).

12. 848 P.2d 942 (Colo. 1993); see also martin v. Minnard, 862 P.2d 1014 (Colo.App. 1993); Taylor v. Clark, 883 P.2d 569 (Colo.App. 1994).

13. Scholz, supra, note 11 at 910.

14. See, e.g., Evenson v. Colorado Farm Bureau Mutual Insurance Co., 879 P.2d 402 (Colo.App. 1993); McCormick v. Bradley, 870 P.2d 599 (Colo.App. 1993).

15. 837 P.2d 769 (Colo.App. 1992).

16. See, e.g., Dorrance v. Family Athletic Club, 772 P.2d 667 (Colo.App. 1989); Shultz v. Linden-Alimak, Inc., 734 P.2d 146 (Colo.App. 1986).

17. Callaham, supra, note 15 at 772.

18. See Clark v. City of Gunnison, 826 P.2d 402 (Colo.App. 1991); Carpenter v. Berg, 829 P.2d. 507 (Colo.App. 1992); McCormick, supra, note 14 at 600; Cedar Lane v. St. Paul Fire & Marine, 883 P.2d 600 (Colo.App. 1994).

19. CRS § 13-17-202(1)(a) begins, "Notwithstanding any other statute to the contrary . . ." See also DeCordova v. State, 878 P.2d 73, 77 (Colo.App. 1994) (Tursi, J., dissenting) [above-quoted language of settlement statute indicates that it controls over governmental liability limitation of CRS §24-10-114(1)(a), such that costs may increase liability beyond \$150,000].

20. In the preparation of this article, the authors' office obtained and transcribed the relevant excerpts of the legislative history of CRS § 13-17-202. Anyone who would like access to this material may call either author in Denver at (303)534-4800

Articles: [Application of the "Offer of Settlement" Statute: Less than Legislative Intent?](#)

[Using Substantial Factor Analysis In Closed Head Injury Cases](#)

[Return to Kevin F. Amatuzio Profile](#)

Copyright © Montgomery, Kolodny, Amatuzio & Dusbabek, L.L.P. All rights reserved.

[Firm Overview](#) | [Our Lawyers](#) | [Articles](#) | [Practice Areas](#)
[Contact Info](#) | [Home](#)

Web Development Provided by [Kinetic Webs, LLC](#)