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## "Loser Pays" Loses Again

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# **"Loser Pays" Loses Again**

*Senate bill stalls; ABA now offers alternative to House version*

BY SUSAN J. BECKER  
LITIGATION NEWS ASSOCIATE EDITOR

The most recent congressional attempts to mandate "loser pays" rules for attorneys' fees in many federal civil cases have lost out—at least for the time being—but the push for such legislation has prompted the ABA to adopt a "loser pays" proposal of its own.

As currently written, the "offer of judgment" provision of Rule 68 of the Federal Rules of Civil Procedure allows for the shifting of costs but *not* attorneys' fees if a claimant rejects an offer and subsequently obtains a judgment that "is not more favorable than the offer."

During this year's Midyear Meeting, however, the ABA House of Delegates approved (by a margin of 202-188) a resolution urging Congress and state legislatures to modify Rule 68 (or state court equivalents) to allow for a shifting of attorneys' fees under certain circumstances.

The ABA resolution may be viewed as a response to extensive civil justice reform measures passed by the House of Representatives last year, which provided for an assessment of attorneys' fees and costs against a losing claimant in diver-

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## Loser Pays

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sity cases and in securities litigation. For example, the Attorney Accountability Act (H.R. 988), if enacted, would have amended 28 U.S.C. § 1332 to allow an award of attorneys' fees against a party who rejected a written offer of settlement if the offeror's final judgment was "not more favorable to the offeror with respect to the claim or claims than the last such offer."

A Senate subcommittee held a hearing on H.R. 988, but the legislation has not been brought to the floor. The Senate's apparent lack of interest in moving the legislation forward may be due in part to intense lobbying efforts by opponents, including the ABA Section of Litigation. Similar lobbying efforts led to the removal of attorney fee-shifting provisions from the Private Securities Litigation Reform Act of 1995, which was enacted last December over President Clinton's veto.

Despite these hard-fought victories, the continued clamor for additional civil justice reform suggests that "loser pays" provisions will continue to surface in future legislation. The ABA's resolution

provides a more narrowly tailored alternative, which may refocus legislative reform efforts in that arena.

The 12 detailed sections of the resolution, which was cosponsored by the Section of Litigation and the Section of Tort and Insurance Practice, allow a 25 percent margin of error for a party who rejects a settlement offer before attorneys' fees are implicated.

For example, if a claimant offers to settle for \$100,000, the defendant rejects the offer, and the claimant obtains a final judgment exceeding \$125,000, then the defendant-offeree may be liable for the claimant-offeror's costs, including

reasonable expenses and attorneys' fees but excluding expert witness fees, incurred after the date of the claimant's offer. If the claimant obtains \$125,000 or less, however, the defendant is not li-

able for attorneys' fees. Conversely, if the defendant extends an offer of \$100,000 to the claimant, the claimant rejects it, and the claimant-offeree's final judgment does not exceed \$75,000, then the claimant-offeree may be liable for the defendant-offeror's post-offer costs and attorneys' fees.

"In the past, I have wished there was a provision in the rule like this," says

James E. Carbine, Baltimore, who specializes in complex business litigation and serves as Co-Chair of the Section of Litigation's Trial Practice Committee. "Oftentimes my clients have valid positions, but the litigation economics just do not warrant the expenditure of attorneys' fees. The potential for some attorney fee shifting would at least give me another tool to work with."

The ABA's proposal does not apply to cases based on constitutional rights, family law and divorce matters, class actions, and cases where attorneys' fees are provided by statute. It allows the court to reduce or eliminate the fee amount based on equitable considerations. *C*

*"The potential for some attorney fee shifting would at least give [litigators] another tool to work with."*

