

REAL-WORLD LITIGATION: WINNING TORT REFORM'S SETTLEMENT GAME

BY JOY E. PALAZZO

"Money was never a big motivation for me, except as a way to keep score. The real excitement is playing the game." That's what Donald Trump wrote in his book, "Trump: The Art of the Deal."

"The Contender." "Survivor." "The Ultimate Fighting Championship." "The Apprentice." "The Amazing Race." With reality TV shows trumping the ratings and captivating our attention, this phenomenon embraces Trump's truth when he said, "The real excitement is playing the game."

If honest, most lawyers would admit that playing the game motivates their litigation practice on some level. The thrill of competition, pretrial maneuvering and achieving the result only dreamed for — these are drivers that press us onward. Of course, there is always the fear of hearing the unfathomable "you're fired" to inspire us continually toward greatness.

Undoubtedly, successful competitors master the rules of their game. The rules of the litigation game changed in 2004 when the Texas Legislature added a new settlement strategy to Texas lawyers' playbook. Housed in Chapter 42 of the Texas Civil Practice & Remedies Code (TCP) and Texas Rule of Civil Procedure (TRCP) 167, the new settlement option alters the way litigators can approach the civil litigation game.

Designed to help level the defendant's playing field, the new rule affects cases filed after Jan. 1, 2004, and challenges parties to pensively evaluate the merits of a case, artfully craft offers of settlement and thoughtfully examine proposals to circumvent further cost. Impacting most monetary damage civil cases, the rule allows the maker of a settlement offer to recover some attorney's fees and other litigation costs if the offer is rejected and the final judgment awarded is significantly different than the offer.

Real world tip No 1: How and when to make, accept or reject an offer. To trigger the new rule, a defendant must first file a declaration invoking the settlement procedures of Chapter 42 no later than 45 days before trial. Once a declaration has been filed, either par-

ty can make a settlement offer for monetary claims.

The offer must:

- be in writing;
- state that it is made under TRCP Rule 167 and TCP) 42;
- state the terms by which the claims may be settled (including attorneys' fees, interest and costs that would be recoverable up to the time of the offer);
- state a deadline by which the settlement offer must be accepted (no sooner than 14 days after the offer is served); and
- be served on all parties to whom the settlement offer is made.

When it comes to conditions and timing, an offer may include reasonable conditions; however, the offeree may object to the conditions. With limited exception, the offer may not be made 1. before the declaration is filed; 2. within 60 days after the appearance in the case of the offeror or offeree; or 3. within 14 days before trial. Further, successive offers are permitted; however rejection of an offer is penalized only if the successive offer is more favorable than any prior offer.

When it comes to the acceptance of offer, an offer that has not been withdrawn can be accepted in writing before the deadline stated in the offer. Once accepted, either party may then file the offer and acceptance and move the court to enforce the settlement.

Real world tip No 2: Fee Shifting and its limitations. Characterized as fee-shifting in nature, the scheme recognizes that if a party rejects a reasonable offer, and thereby causes the offering party to incur additional costs and fees, those post-rejection litigation fees and costs can be shifted to the rejecting party. This shifting of post-rejection litigation costs only takes place when the judgment is significantly less favorable to the rejecting party than was the settlement offer.

The effect of a significantly less favorable judgment is this:

- claimant's costs shift if the judgment is less than 80 percent of his settlement offer to the defendant; or

- defendant's costs shift if the judgment is more than 120 percent of his settlement offer to claimant.

This fee-shifting, however, is not without limitation. First, a court may permit limited discovery into the reasonableness of costs. Additionally, double recovery is prohibited if a claimant or defendant is entitled to recover fees and costs under another law. Further, a party can only receive post-rejection litigation costs in an amount that does not exceed a damages cap outlined in the rule. The damages cap is stated below:

Post-rejection litigation cost cap:

50 percent of economic damages awarded
+ 100 percent of non-economic damages awarded
+ 100 percent of exemplary or additional damages

eligible amount of damages awarded
— any statutory or contractual liens

cap on post-rejection litigation costs

Finally, if litigation costs are to be awarded against a claimant, those litigation costs shall be awarded as an offset against the claimant's recovery.

By providing a steep cost-shifting mechanism after the rejection of an offer, the new settlement rules reward parties who critically contemplate whether to make or reject an offer and create compelling penalties to those who proceed flippantly. In the end, the ultimate fighting litigator (which is what, in TV land, the lawyer would be called) may be the strategist whose savvy settlement know-how saves the client's resources and the lawyer's energy — making him the true "survivor" in the real world of Texas litigation.

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