## 167.[1] OFFER OF SETTLEMENT; AWARD OF LITIGATION EXPENSES

**167.1** DEFINITIONS~~. In this chapter:~~

(1) "Claim" means a request, including a counterclaim, cross-claim, or third-party claim, to recover monetary damages.

(2) "Claimant" means a person making a claim.

(3) "Defendant" means a person from whom a claimant seeks recovery on a claim, including a counterdefendant, cross-defendant, or third-party defendant.

(4) "Governmental unit" means the state, a unit of state government, or a political subdivision of this state.

(5) "Litigation costs" means money actually spent and obligations actually incurred that are directly related to the case in which a settlement offer is made. The term includes:

(A) taxable court costs[2];

(B) reasonable fees for not more than two testifying expert witnesses who are not regular employees of the offeror and when expert testimony is necessary[3]; and

(C) reasonable attorney's fees.

(6) "Settlement offer" means an offer to settle or compromise a claim made in compliance with this rule~~chapter~~.

167.2 ~~Sec. 42.002.~~ APPLICABILITY AND EFFECT. (a) The settlement procedures provided in this rule ~~chapter~~ apply only to claims for monetary relief.

(b) This rule ~~chapter~~ does not apply to:

(1) a class action;

(2) a shareholder's derivative action;

---

[1]More of the purpose and intended operation of this rule can be explained in comments as was done, for example, in the discovery rules changes.

[2] It may be useful to limit court costs recoverable to those that are "taxable", to provide some certainty to the amount of costs that may be shifted.

[3] This limitation comports with the vote taken at the April 2003 SCAC meeting.

(3) an action by or against a governmental unit;

(4) an action brought under the Family Code;

(5) an action to collect workers' compensation benefits under Subtitle A, Title 5, Labor Code; or

(6) an action filed in a justice of the peace or small claims[4] court.

(7) the Deceptive Trade Practices—Consumer Protection Act, sections 17.41-.63 of the Business and Commerce Code;[5] [6]

Others?????????????[7]

(c) This rule ~~chapter~~ does not apply until a defendant files a declaration that the settlement procedure allowed by this rule ~~chapter~~ is available in the action. If there is more than one defendant, the settlement procedure allowed by this rule ~~chapter~~ is available only in relation to the defendant that filed the declaration and to the parties that make or receive offers of settlement in relation to that defendant. Such a declaration must be filed no later than the defendant's appearance date.?????? [8]

(d) This rule ~~chapter~~ does not limit or affect the ability of any person to:

(1) make an offer to settle or compromise a claim that does not comply with this rule ~~chapter~~; or

(2) offer to settle or compromise a claim to which this rule ~~chapter~~ does not apply.

(e) An offer to settle or compromise that is not made under this rule ~~chapter~~ or an offer to settle or compromise made in an action to which this rule ~~chapter~~ does not apply does not entitle the offering party to recover litigation costs under this rule ~~chapter~~.

---

[4] It would be odd if a JP action were exempt from the rule, but not a Small Claims action.

[5] The DTPA has its own remedies for refusal to settle. TEX.BUS.&COM.CODE §§17.505-.5052.

[6] Committee discussion. Transcript, p. 8211. Query. If the lawsuit asserts claims, some excluded (DTPA) some not excluded, is the rule inoperative to the entire proceeding?

[7] Under HB4, the Supreme Court has the authority to designate other actions that will be exempt from the operation of the offer of settlement rules.

[8] The time for the defendant to make the declaration should be early in the lawsuit. This will allow parties to expedite discovery if necessary to assist in evaluation of the value of the case.

167.3. MAKING SETTLEMENT OFFER. A settlement offer must:

(1) be in writing;

(2) state that it is made under this rule ~~chapter~~;

(3) state the terms by which the claims may be settled; and must offer to settle all monetary claims raised by the pleadings between the offeror and offeree??? [Query, may the offer encompass other conditions the offeror may choose to include, perhaps knowing the offer will be rejected because of those conditions, as a means of achieving fee shifting? Ex. Return all discovery, confidentiality, etc.] [9]

(4) state a deadline by which the settlement offer must be accepted which must be date at least 14 days after the offer is served[10]; and

(5) be served on all parties to whom the settlement offer is made.

**~~Generally.~~** ~~A party[11] who rejects an offer of settlement made in accordance with this rule may be responsible for avoidable litigation expenses except in an action brought in a small claims or justice court or under:[12]~~

~~(a) article 5.14 of the Texas Business Corporation Act;[13]~~

~~(b) Rule 42 of the Texas Rules of Civil Procedure in which a class has been certified;[14]~~

---

[9] Nevada's rule provides extensive provisions regarding multi-parties.

a) Multi-parties may make a joint offer of judgment.
b) A party may make two or more parties an apportioned offer of judgment that is conditioned upon acceptance by all the parties.
c) The sanctions for refusing an offer apply to each party who rejected the apportioned offer, but not to a party who accepted the offer.

[10] This reflects the April 2003 vote at our last SCAC meeting.

[11] This includes governmental entities and cases like eminent domain, delinquent taxes, etc. Some proposals would exclude actions by and against the government.

[12] Committee discussion. Transcript, p. 8211. Query. If the lawsuit asserts claims, some excluded (DTPA) some not excluded, is the rule operative to the entire proceeding?

[13] A settlement of a shareholder derivative suit must have court approval. TEX.BUS.CORP.ACT art. 514(I).

[14] A settlement of a certified class action must have court approval. TEX.R.CIV.P. 42(e).

~~(c) the Deceptive Trade Practices—Consumer Protection Act, sections 17.41-.63 of the Business and Commerce Code;~~[15]

~~(d) the Family Code;~~[16]

~~(e) chapter 410, subchapters F and G of the Labor Code.~~[17] -[18]

**167.4 Time Limitations on Making Offer.**

(a) *Requirements*. The offer must:

(1) be made

(A) for cases governed by

(i) Rule 190.2, more than thirty days after the appearance in the case of the offeror or offeree, whichever is later;[19]

---

[15]The DTPA has its own remedies for refusal to settle. TEX.BUS.&COM.CODE §§17.505-.5052.

[16]It is not yet clear how procedures like these could apply in family cases.

[17]A settlement of a workers' compensation case must be approved by the court. TEX.LABOR CODE § 410.256.

[18]The rule does not apply to cases in which group settlement must be approved by the court (i.e., (a), (b), and (e)), cases in which the consequences for refusing to settle are provided by statute (i.e., (c)), and family law cases. Some proposals would also exclude:

! actions for which recovery of attorney fees and costs is provided by statute. But this is so large a category of cases (see TEX.CIV.PRAC.&REM.CODE § 38.001) that the effect of the rule would be severely limited. Moreover, it is not clear why such cases should be excluded. The principal argument appears to be that application of the rule in such cases may be more difficult.

! actions for nonmonetary relief. Again, it is not clear why, other than that the rule is more difficult to apply. The proposed change in FED.R.CIV.P. 68 would have included such actions. Thus, such cases are not excluded entirely under this rule, although a claim for nonmonetary relief may not provide a basis for the imposition of costs pursuant to this Rule.

~~! actions in which damages are capped. The concern is that settlement offers will be distorted by the cap. For example, if the plaintiffs recovery were capped at $100,000, the defendant could trigger the rule by a $70,000 offer, even if the plaintiff believed damages might well exceed the cap. Plaintiffs could use similar strategies against defendants. But many cases asserting actions with a damage cap would not be subject to this strategic abuse. The better solution is to deal with strategic abuse rather than except entire categories of cases.~~

~~! actions in the justice and small claim courts. It would be difficult for the rule to apply in eviction cases, for example, but there might be instances when it would apply. Many unsophisticated litigants would not be able to use the rule effectively, and perhaps that is a reason to exclude such cases.~~

[19]Various proposals differ greatly over this start time. The point of the rule is to encourage early evaluations of cases, but often some discovery is needed. The party with less information to start with may be unduly pressured

(ii) Rule 190.3 or Rule 190.4, more than ninety days after the appearance in the case of the offeror or offeree, whichever is later; and,

~~(iii) Rule 190.4, on or after a date to be stated in the scheduling order; and~~ (B) no less than thirty days before the date the case is set for a conventional trial on the merits[20], or if in response to a prior offer, within three days of the prior offer, whichever is later.[21]

167.5 Successive Offers. A party may make an offer after having made or rejected a prior offer. A rejection of an[22] offer that exceeds an offeror's prior offers, if any, is subject to imposition of litigation expenses under this rule.

167.6 Modification of Time Limits. The court may modify any of the time limits proscribed by this Rule by written order entered before trial for good cause shown upon the motion of any party or on its own initiative.

**167.7 Withdrawal of Offer.** An offer can be withdrawn before it is accepted. Withdrawal is effective when written notice of the withdrawal is served on the offeree.[23] Once an unaccepted offer has been withdrawn, it cannot be accepted or be the basis for imposing ~~avoidable~~ litigation expenses under this rule.

**167.8 Acceptance of Offer.** An offer that has not been withdrawn can be accepted only by written notice served on the offeror by the acceptance date. When an offer is accepted,

---

by a quick offer.

[20] Trial commences when the first witness is called to testify.

[21] While the purpose of the rule is to encourage early evaluation of cases, it can be anticipated that often settlement discussions will be more serious very close to trial. Even if the only savings were trial expenses, the purpose of the rule would be served.

[22] Imposing costs for the rejection of the last offer that exceeds all prior offers is intended to encourage parties to arrive at a realistic offer sooner than later. While it might be argued that imposing costs only for the rejection of a party's last offer would not seem to encourage plaintiffs to make lower offers earlier, the fact that plaintiffs can only recover costs if the judgment is at least 130% of their highest offer provides a strong incentive for plaintiffs not to make their highest offer unrealistically high. Additionally, the dynamics of settlement negotiations usually serve to discourage ever – increasing offers from plaintiffs. Awarding costs only from the time of the highest offer should encourage defendants to make higher offers earlier, when expenses can be avoided. ~~Sanctioning the rejection of any offer, not just the last offer, appears to be the most common proposal. Sanctioning only the rejection of a party's last offer would not seem to encourage plaintiffs to make lower offers earlier and defendants to make higher offers earlier, which expenses can be avoided. Thus, for example, a plaintiff who offered $10,000 sixty days before trial, $20,000 thirty days before trial, and $30,000 ten days before trial, and who recovered $20,000, would be entitled to sanctions under the rules as written, but not if only the last offer mattered. By the same token, a defendant who offered $30,000 sixty days before trial, $20,000 thirty days before trial, and $10,000 ten days before trial, and who suffered a $20,000 judgment, would be entitled to sanctions under the rule as written, but not if only the last offer mattered.~~ But the issue is not a simple one.

[23] It should be noted, here and elsewhere, that services is ordinarily effective upon the sender's completion of the prescribed process and does not await receipt.

the offeror or offeree may file the offer and acceptance along with a motion for judgment. (Is it desirable to include a provision that the acceptance must be unconditional?)

**167.9 Rejection of Offer.** An offer may be rejected by written notice served on the offeror by the acceptance date, or by failure to respond on or before the acceptance date; which is deemed to be a rejection.

167.10 OFFEREE MAY DECLARE OFER VOID UNDER CERTAIN CIRCUMSTANCES.

HB 4 mandates inclusion of the following:

In actions involving multiple parties, if the offering party joins another party or designates a responsible third party after making the settlement offer, the party to whom the settlement offer was made may declare the offer void.

Query: Can the offeree declare the offer void after acceptance? Should there be a time limit? What is the outside time limit for a defendant to designate a responsible third party? HB4 amends Ch. 33, CPRC 33.004(a): "The motion must be filed on or before the 60th day before the trial date unless the court finds good cause to allow the motion to be filed at a later date."

**167.11** AWARDING LITIGATION COSTS.

(a) If a settlement offer is made and rejected and the final[24] judgment to be rendered will be significantly less favorable to the rejecting party than was the settlement offer, the offering party shall recover litigation costs from the rejecting party.

(b) A judgment will be significantly less favorable to the rejecting party than is the settlement offer if:

(1) the rejecting party is a claimant and the award will be less than 80 percent of the rejected offer; or

(2) the rejecting party is a defendant and the award will be more than 120 percent of the rejected offer.

(c) The litigation costs that may be recovered by the offering party under this section are limited to those litigation costs incurred [25]by the offering party, in relation to the offeree,[26] after the date the rejecting

---

[24] In determining whether a judgment is significantly less favorable to the rejecting party, the court must consider any remittiturs, and any modifications to the judgment, including the granting of a judgment n.o.v..

It may be necessary to modify Tex. R. Civ. P. 315. It currently provides: Rule 315 (Tex. R. Civ. P.): "Any party in whose favor a judgment has been rendered may remit any part thereof in open court, or by executing and filing with the clerk a written remittitur signed by the party….Execution shall issue for the balance only of such judgment." Tex. R. App. P. 46, allows the court of appeals to suggest a remittitur, and if accepted it is to "reform and affirm the trial court's judgment in accordance with the remittitur." Two problems: Is a modified judgment necessary upon remittitur? Can a plaintiff voluntarily remit to bring the case outside the 20% margin?

party rejected the settlement offer. until the date the final judgment is signed????[27]

(d) The litigation costs that may be awarded under this rule [28]~~chapter~~ may not be greater than an amount computed by:

(1) determining the sum of:

(A) 50 percent of the economic damages to be awarded to the claimant in the judgment;

(B) 100 percent of the noneconomic damages to be awarded to the claimant in the judgment; and

(C) 100 percent of the exemplary or additional damages to be awarded to the claimant in the judgment; and

(2) subtracting from the amount determined under Subdivision (1) the amount of any statutory or contractual liens in connection with the occurrences or incidents giving rise to the claim. [29]

(e) If a claimant or defendant is entitled to recover fees and costs under another law, that claimant or defendant may not recover litigation costs in addition to the fees and costs recoverable under the other law.[30]

(f) If a claimant or defendant is entitled to recover fees and costs under another law, the court must not include fees and costs incurred by that claimant or defendant after the date of rejection of the settlement offer when calculating the amount of the judgment to be rendered under Subsection (a).[31]

---

[25] Should "incurred" be defined? Are attorney's fees incurred at the billable rate or some lesser rate that the firm has contracted to accept from an insurer, for example?

[26] So, for example, when multiple parties are incurred, the attorney's fees that might be shifted must be segregated as to the offeree against whom the fees are sought.

[27] Making clear appellate attorney's fees, for example, may not be shifted.

[28] Apparently this cap applies to both Plaintiffs and Defendants, so that Defendant's liability for fees shifted are capped by the Plaintiff's recovery. Further, if a take-nothing judgment is entered, apparently no fee shifting will occur.

[29] What would this include? Hospital liens-Chapter 55 Texas Property Code- See Karen L. Neal, Ten Basic Facts to Know-The Texas Hospital Lien Statute, 61 Tex. B. J. 428 (1998). Would the attorney's have a lien?

[30] Is a party "entitled" to attorney's fees under "another law" when the granting of fees is discretionary? Can a party elect between a statute and this rule?

(g) If litigation costs are to be awarded against a claimant, those litigation costs shall be awarded to the defendant in the judgment as an offset against the claimant's recovery from that defendant.

167.12 Hearing Required.

The court, after a hearing at which the parties may present evidence, shall impose litigation expenses as required by this rule.[32] A motion to impose or to oppose the award of litigation expenses made after judgment is signed is a motion to modify, correct, or reform the judgment and is governed by the timetables in Rule 329b.

QUERY: Is discovery permissible on reasonableness of attorney's fees, expert fees?

167.13 Trial Court Discretion to Reduce or Deny The Imposition of Litigation Expenses.

(a) Notwithstanding the provision of 167.12,the trial court may reduce the amount of ~~avoidable~~ litigation expenses awarded or refuse to award any amount of ~~avoidable~~ litigation expenses, but only if the court determines in written findings[33] that an imposition of ~~avoidable~~ litigation expenses:

(1) would unjustly punish or unjustly reward unfair, strategic conduct rather than a good faith attempt to reach a settlement,

(2) would not further the purpose of this rule in promoting reasonable settlements and avoiding the expense to the public and to the parties of unnecessary litigation,

(3) would otherwise include an amount the trial court determines is unreasonable or unnecessary.

The following FACTORS SHOULD BE FOOTNOTE to 167.13 above
In determining the amount of reduction, if any, under 167.12 the

---

[31] This seems to suggest that otherwise the amount of attorney's fees and costs are included in calculating the amount of the judgment to be rendered under Subsection (a).

[32] Should the presentation of evidence be optional re reasonableness of fees, etc. or just part of the offerror's burden of proof, subject to cross-examination. Should discovery be allowed as to these issues, and, if so, when? Are we certain this is a matter for the court to determine and there is no right to a jury trial?

[33]The trial court must have enough discretion to prevent an unjust or perverse application of the rule, but not so much that it can simply refuse to follow the rule. The requirement that findings be made is intended to provide an appellate court with an adequate, understandable explanation of the reasons for not applying the rule in a particular situation.

court should consider, along with any other relevant factor, the following

(i) the then-apparent merit or lack of merit in the claim;[34]

(ii) the number and nature of the offers made by the parties;

(iii) the closeness of questions of law and fact in issue;

(iv) whether the party making the offer had unreasonably refused to furnish information necessary to evaluate the reasonableness of the offer;

(v) whether the suit was in the nature of a test case presenting questions of far-reaching importance;

(vi) the amount of this additional delay, cost and expense that the party making the offer reasonably would be expected to incur if the litigation were to be prolonged; and

(vii) whether there is evidence that the rejecting party has a history of suffering the imposition of ~~avoidable~~ litigation expenses under this Rule that would indicate a pattern or practice of unreasonable litigation conduct. **(Jacks' proposal from April 15 email)**

(b). The trial court's written findings required by this rule are to be prepared in accordance with the timetable in Texas Rule of Civil Procedure 297, may be dictated into the record, appear in the judgment, or in a separate writing, and may be reviewed on appeal, if properly challenged to determine if there is substantial evidence in the record to support the finding. SUGGESTED BY Justice Gray

**167.14 Evidence Not Admissible.** Evidence relating to an offer made under this rule is not admissible except for purposes of enforcing a settlement agreement or obtaining litigation expenses. The provisions of this rule may not be made known to the jury by any means.

**167.15 Other Dispute Resolution Mechanisms Not Affected.** This rule does not apply to any offer made in a mediation proceeding and should not affect other alternative dispute resolution mechanisms. The rule does not apply to or preclude offers of settlement that do not comply with the rule.

[34] i.e., apparent at the time of rejection of the offer.

167.16 **Appellate Review.** A judgment awarding litigation expenses or reducing or refusing to award ~~avoidable~~ litigation expenses under 167.13 may be reviewed for an abuse of discretion on the appeal of the judgment.