

167.¹ OFFER OF SETTLEMENT; AWARD OF LITIGATION COSTS

167.1 Definitions.

(a.) When used in this rule, the following definitions apply:

(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.² The term includes:

- (A) court costs³;
- (B) reasonable fees for not more than two testifying expert witnesses; and
- (C) reasonable attorney's fees.⁴

¹More 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 Recommended for inclusion as a comment to the rule:

In determining the reasonableness of litigation costs the trial court may consider, in addition to other factors, the extent the costs and fees were reasonably related to the actions of the rejecting party and the claims that were the subject of the offer.

³ Is this limited to taxable court costs?

⁴ Recommend for inclusion as a comment to the rule:

Among the factors the trial court should consider in determining the reasonableness of attorney's fees the trial court should consider, are those factors set forth in *Arthur Anderson v. Perry*, 945 S.W.2d 812 (Tex. 1997): (1) whether the attorney's fee was a contingent fee or an hourly fee, (2) the total number of hours worked, (3) the novelty or difficulty of the claims and defense presented, (4) the extent to which employment in this case precluded employment in other matters, and (5) whether any of the fees charged in the case were for time or expenses incurred

(6) "Settlement offer" means an offer to settle or compromise a claim made in compliance with Chapter 42 of the Civil Practices & Remedies Code and this rule.

167.2 Applicability and Effect.

(a) The settlement procedures provided in this rule apply only to claims for monetary relief.

(b) This rule does not apply to:

- (1) a class action;
- (2) a shareholder's derivative action;
- (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 court.⁵

(c) This rule does not apply until a defendant⁶ files a declaration that the settlement procedure allowed by Chapter 42 of the Civil Practices & Remedies Code and this rule is available in the action. If there is more than one defendant, the settlement procedure allowed by this rule 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 45 days before the date the case is set for a conventional trial on the merits.

(d) This rule 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; or
- (2) offer to settle or compromise a claim to which this rule does not apply.

(e) An offer to settle or compromise that is not made in compliance with Chapter 42 and Rule 167.3 or an offer to settle or compromise made in an action to which this rule does not apply does not entitle the offering party to recover litigation costs under this rule.

in prosecution of a prior lawsuit as well as the constraints set forth in Disciplinary Rule of Professional Conduct 1.04.

⁵ Actions filed in justice court includes small claim proceedings.

⁶ Any "defendant" may file the declaration to put fee shifting in play. As defined by the rule, a defendant is "a person from whom a claimant seeks recovery on a claim, including a counterdefendant, cross-defendant or third party defendant."

167.3 Making Settlement Offer.

(a) A settlement offer must:

- (1) Be in writing
- (2) State that it is made under this rule and Chapter 42 of the Civil Practices and Remedies Code.
- (3) State the terms by which the claims may be settled and must offer to settle all monetary claims between the defendant and claimant.⁷ The offer must state whether the offer to settle includes or excludes costs or interest accrued up to the date of the offer, without the necessity of specifying an amount.⁸
- (4) State the settlement offer per claimant and per defendant, except that if a claimant alleges that one defendant is vicariously liable for the conduct of another defendant then a combined offer may be made by or to those defendants.
- (5) State that payment will take place within 30 days of acceptance of the offer or approval by the court when approval of a settlement is required.⁹
- (6) State a deadline by which the settlement offer must be accepted which must be a date at least 14 days after the offer is served.¹⁰
- (7) Be served on all parties to whom the settlement offer is made. The offer of settlement shall not be filed with the court, until the offer is accepted or in connection with a motion to recover litigation costs under this Rule.
- (8) State that the offer includes a request for the following release and dismissal, if applicable:

Claimant agrees to release, acquit, and forever discharge the defendant from any and all claims and demands for monetary damages directly or indirectly arising from or in connection with this lawsuit, including all claims currently on file and all claims which

⁷ So, for example, an offer by a defendant to settle only its counterclaim but not the claims made the basis of the Plaintiff's suit, would be inadequate to qualify as a fee shifting offer under this rule.

⁸ An alternative: "It is deemed that any offer to settle made under this rule is for the stated monetary terms and in addition for costs and interest that has accrued up to the date of the offer."

⁹ For example, a settlement made as to a minor.

¹⁰ The offeror may elect to leave an offer open for a period longer than 14 days.

could have been filed relating to the matters asserted in this lawsuit. The monetary claims will be terminated by dismissal with prejudice.¹¹

(9)

Version A:

State that the offer includes a request for the following indemnity provision, if applicable. "Claimant agrees to indemnify the defendant from any and all claims and demands for monetary damages, including attorneys' fees, brought by, through, or under claimant."

Version B:

Include a request for an indemnity provision where applicable.

Version C: (Unnecessary if A or B is adopted)

If there are any statutory or contractual liens on the claimant's cause of action, the settling defendant may condition the settlement on a release [or indemnity] of the settling defendant by the lienholder(s). If the claimant accepts the monetary offer, the claimant has 30 days to obtain the release(s) [or indemnity].¹² Failure to obtain the release(s) [or indemnity] is deemed a rejection of the offer and may subject the claimant to the award of litigation costs.¹³

Version D: (Unnecessary if A or B is adopted)

"If there are any statutory or contractual liens on the claimants cause of action, the settling defendant may condition the settlement on the claimant's providing indemnity. The condition regarding indemnity must be in the form prescribed in subsection () [Version A]."

¹¹ It has been suggested by a sub-committee member that in some circumstances, indemnification must be required to fully resolve the case and would advocate this alternative to subsection (8): "The offer may include a requirement that the offeree execute settlement papers containing appropriate release and indemnification provisions."

¹² It may not be possible to obtain a release from a lienholder, particularly when a governmental agency is involved. (Medicaid or Social Security.) Accordingly, it is argued that either a release *or indemnity* should suffice to satisfy the requirements of Rule 167.3(a)(9), even when a release is sought. The argument against including indemnity as a method of satisfying Rule 167.3(a)(9) is that the trial court is required to compare an offer with an award to determine if fee shifting should take place. Satellite litigation over the language of the indemnity agreement would place the trial court in a tenuous position in determining whether to impose litigation costs. An alternative may be to require proof of payment to the lienholder.

¹³ If a plaintiff is willing to settle for the amount offered by the defendant but is unable to obtain the agreement of the worker's comp carrier to the settlement, should the claimant be required to pay litigation costs? As the carrier is not a party to the suit, would the trial court have any authority to order the carrier to pay litigation costs?

(10) Any condition added to a settlement offer, other than as provided in this section, will prevent the application of the award of litigation costs.

167.4 Time Limitations on Making Offer.

- (a) *Requirements.* The offer must:
- (1) be made after a declaration is timely filed by a defendant,
and,
 - (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;¹⁴
 - (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,
 - (B) no less than thirty days before the date the case is set for a conventional trial on the merits¹⁵, or if in response to a prior offer, within seven days of the prior offer, whichever is later.¹⁶

167.5 Successive Offers. A party may make an offer after having made or rejected a prior offer. A rejection of an¹⁷ offer that exceeds an offeror's prior offers, if any, is subject to

¹⁴Various proposals differ greatly over this start time. The point of the rule is to encourage early evaluations of cases, but often some discovery as to the merits of the case is needed. The party with less information to start with may be unduly pressured by a quick offer.

¹⁵ The Committee has previously approved the following comment: "Trial commences when the first witness is called to testify." This may or may not occur on the day of the trial setting. The committee may wish to reconsider whether the addition of this comment is prudent, as the litigants would likely prefer a date certain to compute this time period.

¹⁶ 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.

¹⁷ Imposing costs for the rejection of the best 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 120% 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. But the issue is not a simple one.

imposition of litigation costs 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.¹⁸

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.¹⁹ Once an unaccepted offer has been withdrawn, it cannot be accepted or be the basis for imposing litigation costs 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, the offeror or offeree may file the offer and acceptance along with a motion for judgment.²⁰

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 Offer Void Under Certain Circumstances.

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.²¹

¹⁸ While it is improper to file an offer to settle with the court before acceptance, the declaration required by Rule 167.2 (c) is filed with the court, so the court will be aware of the fee shifting potential.

¹⁹ It should be noted, here and elsewhere, that service is ordinarily effective upon the sender's completion of the prescribed process and does not await receipt.

²⁰ Under Rule 167.3(a)(5), "the settlement offer must state that payment will take place within 30 days of acceptance of the offer." Technically, then, payment in satisfaction of an accepted offer may precede judgment, particularly when non-economic claims remain to be litigated. Alternative: "When an offer is accepted, the offeror or offeree may file the offer and acceptance along with a motion for enforcement of an award of litigation costs."

²¹ The Committee has voted to carry forward the statutory language verbatim and to leave to case law development the proper interpretation of this provision within the context of legislative intent. Queries for case law development: Can the offeree declare the offer void after acceptance? Should there be a time limit? 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." Joinder of parties is subject to a more liberal time frame. How will a party that has fully settled its claim be aware of the designation of the RTP or joinder of additional parties?

167.11 Awarding Litigation Costs.

(a) If a settlement offer is made and rejected²² and the judgment²³ that would otherwise be rendered on a monetary claim before setoff 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 on the monetary claim or claims will be less than 80 percent of the rejected offer;²⁴ or

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

(3) The rejecting party is a defendant and the award on the monetary claim or claims would have been more than 120 percent of the rejected offer, but for the imposition of statutory caps on the monetary damages.

(c) The litigation costs that may be recovered by the offering party under this section are limited to those litigation costs incurred²⁵ by the offering party,²⁶ after the date the rejecting party rejected the settlement offer up until the date the judgment is signed.²⁷

(d) The litigation costs that may be awarded under this rule²⁸ may not be greater than an amount computed by:

²² The failure of the trial court or an ad litem to approve a settlement made in relation to a minor is not a rejection, for purposes of imposing litigation costs. [An alternative to this comment is to exempt minors from the operation of this rule, recognizing a child should not be penalized with litigation costs for a settlement that the ad litem or trial judge does not approve].

²³ In determining whether a judgment is significantly less favorable to the rejecting party, the court must consider any modifications to the judgment, including the granting of a judgment n.o.v.

²⁴ In determining whether a party that rejected an offer has obtained a significantly less favorable judgment, the trial court should not consider litigation costs, but rather should compare the amount of the offer to settle the monetary claim or claims with the amount of the award on the monetary claim or claims.

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 should be segregated as to the offeree against whom the fees are sought.

²⁷ The rule must specify the time frame after which litigation costs are not to be shifted. For example, appellate costs and attorneys fees will not be shifted under this proposed rule.

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. Thus, if a take-nothing judgment is entered, no fee shifting will occur.

(1) determining the sum of:
 (A) 50 percent of the economic damages²⁹ to be awarded to the claimant in the judgment;
 (B) 100 percent of the noneconomic damages³⁰ to be awarded to the claimant in the judgment; and
 (C) 100 percent of the exemplary³¹ 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.³²

(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.³³

(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).

(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.

(h) When litigation costs are to be awarded against a party, the party is entitled to conduct discovery in relation to the reasonableness of those costs.³⁴

²⁹ "Economic damages" include "compensatory damages intended to compensate a claimant for actual economic or pecuniary loss". CPRC 41.001(4).

³⁰ Noneconomic damages" are defined as "damages awarded for the purposes of compensating a claimant for physical pain and suffering, mental or emotional pain or anguish, loss of consortium, disfigurement, physical impairment, loss of companionship and society inconvenience, loss of enjoyment of life, injury to reputation and all other nonpecuniary losses of any kind other than exemplary damages. CPRC 41.001(12).

³¹ "Exemplary damages" means "any damages awarded as a penalty or by way of punishment but not for compensatory purposes." CPRC 41.001(5).

³² 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?

³³ Thus, for example, if attorney's fees are recoverable under "another law", Rule 167 fee shifting is not available.

³⁴ It is necessary that the rules expressly address the propriety of discovery in relation to fee shifting. Technically, existing discovery rules are inadequate to support discovery in regards to fee shifting: discovery periods will be closed so the pre-trial discovery rules will not support discovery, and this is not discovery after rendition of

167.12 Hearing Required. The court, after a hearing at which the affected parties may present evidence, shall impose litigation costs as required by this rule.

167.13 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 costs. The provisions of this rule may not be made known to the jury by any means.

167.14 Other Dispute Resolution Mechanisms Not Affected. This rule does not apply to any offer made in a mediation or arbitration 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.

judgment to aid in the enforcement of the judgment that would implicate Rule 621a. Accordingly discovery in relation to the imposition of litigation costs should be expressly provided for in the rule.