

167.¹ OFFER OF SETTLEMENT; SANCTIONS² FOR UNREASONABLE³ REJECTION

167.1 Generally. a party⁴ who rejects an offer of settlement made in accordance with this rule may be sanctioned except in an action brought under:

- (a) article 5.14 of the Texas Business Corporation Act;⁵
- (b) Rule 42 of the Texas Rules of Civil Procedure in which a class has been certified;⁶
- (c) the Deceptive Trade Practices – Consumer Protection Act, sections 17.41-.63 of the Business and Commerce Code;⁷

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.

²The use of sanctions in the procedural rules to shift costs, expenses, and attorney fees for improper conduct has solid precedent. *See* TEX.R.CIV.P. 13 (frivolous pleadings); TEX.R.CIV.P. 215 (discovery abuse); TEX.R.APP.P. 45 and 62 (frivolous appeals). The improper conduct addressed by this rule is unreasonable refusal to settle. The sanction must, of course, fall on the culprit, so whoever controls settlement -- an insurer, for example -- bears the responsibility for sanctions. *See* 167.6(c).

³This is the essential point. The rules should not force settlement of claims that should fairly be litigated, but neither should they condone unnecessary or harassing litigation. The rule describes what is unreasonable.

⁴This includes governmental entities and cases like eminent domain, delinquent taxes, etc. Some proposals would exclude actions by and against the government.

⁵A settlement of a shareholder derivative suit must have court approval. TEX.BUS.CORP.ACT art. 514(I).

⁶A settlement of a certified class action must have court approval. TEX.R.CIV.P. 42(e).

⁷The DTPA has its own remedies for refusal to settle. TEX.BUS.&COM.CODE §§17.505-.5052.

(d) the Family Code;⁸

(e) chapter 410, subchapters F and G of the Labor Code.^{9 10}

167.2 Making an Offer.

(a) *Requirements.* The offer must:

(1) be made

⁸It is not yet clear how procedures like these could apply in family cases.

⁹A settlement of a workers' compensation case must be approved by the court. TEX.LABOR CODE § 410.256.

¹⁰The 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.
- actions in which damages are capped. The concern is that settlement offers will be distorted by the cap. For example, if the plaintiff's 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.

- (A) more than thirty days after the appearance in the case of the offeror or offeree, whichever is later;¹¹ and
 - (b) no less than ten days before the date set for trial, or if in response to a prior offer, within three days of the prior offer, whichever is later.¹²
- (2) be in writing;
 - (3) identify the party or parties making the offer and the party or parties to whom the offer is being made;
 - (4) state that it is being made in accordance with this rule;
 - (5) offer to settle all the claims¹³ in the action between the offeror and offeree;¹⁴
 - (6) specify the terms of settlement;¹⁵
 - (7) specify a deadline by which the offer must be accepted – “the acceptance date” – which must be either a date at least fourteen days after the offer is served or the date set for trial, whichever

¹¹Various 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 by a quick offer.

¹²While 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.

¹³This includes monetary and non-monetary claims. A nominal offer could not be the basis for sanctions if not made in good faith. See 167.6(d)(3)(A).

¹⁴Difficulties in applying the rule may arise in multi-party cases when only some of the parties are attempting to settle. An offer to one party that is conditioned on acceptance of another offer to another party may also give rise to difficulties, but these factors should be considered by the court under 167.6(d)(3). This point can be made in a comment.

¹⁵Some proposals require that the offeror agree to rendition of judgment consistent with the terms of settlement, but agreement to a judgment should simply be on term an offer may make.

is earlier; and

(8) be served¹⁶ on the offeree.

- (b) *Successive offers.* A party may make an offer after having made or rejected a prior offer. A rejection of any¹⁷ offer is subject to sanctions under this rule.

167.3 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.¹⁸ Once an offer has been withdrawn, it cannot be accepted or be the basis for sanctions under this rule.

167.4 Acceptance of Offer. An offer that has been withdrawn can be accepted 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.

167.5 Rejection of Offer. An offer that is not withdrawn or accepted is rejected. An offer may also be rejected by written notice served on the offeror by the acceptance date.

167.6 Sanctoins.

¹⁶This rule can specify that service is under Rule 21a (as for other post-petition papers) and include Rules 4 and 5 (which prescribe time periods), or that point, which ought to be apparent, can be made in a comment.

¹⁷Sanctioning 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.

¹⁸It 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.

- (a) *Availability.* If judgment is rendered¹⁹ and is significantly less favorable to a party than an offer the party rejected, the offeror may move sanctions. A judgment is significantly less favorable than an offer –
- (1) to a party making a claim if:
- (A) a monetary award – including, if awarded, only those costs, attorney fees, and interest incurred as of the date of the offer was rejected – is less than 70%²⁰ of the amount offered;²¹ and
- (B) a nonmonetary award is at least substantially all²² of the nonmonetary relief sought.
- (b) *Amount.* The court, after a hearing at which the parties may present evidence, must²³ award the offeror as sanctions those amounts reasonably and necessarily²⁴ incurred by the offeror after the offer was rejected for

¹⁹The rule is not limited to judgments on verdicts but includes, for example, summary judgments, judgments after directed verdicts, and judgments notwithstanding verdicts.

²⁰Some proposals have a 10% differential. The margin of error should reflect the usual difficulties involved in evaluating cases for settlement.

²¹Of course, all of the terms of the offer must be considered in determining “the amount offered”, so that a pay-out over time may be worth less than immediate payment, and a secured offer may be worth more than an unsecured one. This point can be made in a comment. A comment should also warn against use of the margin of error to determine the amount of the offer in cases in which damages are capped.

²²The point should be made in a comment that “substantially all” is meant to incorporate the same margin of error for measuring monetary offers.

²³This initial proposition is nondiscretionary. Discretion can be employed in the situations later described in 167.6(d)(3).

²⁴Nothing is said specifically about contingent fee arrangements, but under existing law, which can be referenced in a comment, such agreements may be taken into account in determining a reasonable fee.

- (1) court costs;²⁵
 - (2) fees for no more than two testifying expert witnesses²⁶ who are not regular employees of the offeror²⁷ (but not for consulting expert witnesses); and
 - (3) attorney fees, if the offeror was represented by an attorney.
- (c) *Person Liable*. Sanctions must be imposed on the person, or persons jointly, who had the right to accept or reject the offer, which may be an insurer.²⁸
- (d) *Limitations and Exceptions*. The imposition of sanctions is subject to the following limitations and exceptions:
- (1) sanctions may not exceed \$50,000;²⁹
 - (2) sanctions imposed on a claimant with respect to claims for monetary relief may not exceed the amount awarded the claimant by the judgment; and³⁰
 - (3) the court may reduce the amount of sanctions awarded or refuse to award any amount of sanctions at all if the court determines in detailed, written findings³¹ that an imposition of

²⁵Court costs are defined only in the case law, not by rule or statute.

²⁶The rule does not specify which two.

²⁷A party would not ordinarily pay its own employee a fee for expert testimony.

²⁸Sanctions may be imposed irrespective of damage caps or coverage limitations.

²⁹This absolute dollar limit ought to be at the 70- or 90-percentile level of cases affected, so that cases with exceptionally large trial expenses are not subjected to a “lottery” kind of rule.

³⁰These subsections apply independently. Thus, for example, a sanction on a claimant cannot be as much as the amount awarded by judgment if that amount exceeds \$50,000.

³¹The 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

sanctions:

- (A) would unjustly punish a party or unjustly reward unfair, strategic conduct rather than a good faith attempt to reach a settlement,³²
- (B) 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.

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

167.8 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.

explanation of the reasons for not applying the rule in a particular situation.

³²For example, in a case in which damages are capped, refusal of an offer that attempts to make strategic use of that cap should not be subject to sanctions.