

Peeples, David

To: mun@scotthulse.com; Justice Boyd (jeff.boyd@txcourts.gov); ecarlson@stcl.edu; Elaine Carlson (elainecarlson@comcast.net); Cortell, Nina (Nina.Cortell@haynesboone.com); rhardin@rustyhardin.com; cristina.rodriguez@hoganlovells.com
Subject: RE: Offer of Judgment Rule
Attachments: 2017-7-14 C. Babcock letter to 166-166a Subcommittee re July 5, 2017 Referral Letter.pdf; SCAC-July 5, 2017 Referral Letter and Attachment.pdf

Dear Subcommittee,

We have been asked to take on the following assignment:

Texas Rule of Civil Procedure 167. Rule 167.2(e)(2) imposes a 60-day waiting period after the appearance of the offeror or offeree, whichever is later, before an offer of settlement can be made under the rule. Subsection (b)(4) requires that the terms of a settlement offer include "attorney fees . . . that would be recoverable up to the time of the offer." Practitioners report that the 60-day waiting period is often unnecessary and increases the amount required to settle a claim under the rule. The Court asks the Committee's advice whether the 60-day waiting period should be eliminated or shortened.

This task arose from the correspondence below between Former Justices Enoch and Wainwright and the Court's rules attorney, Martha Newton. I ask each of you to reread Rule 167 and to think about the issue that has been raised. I would like to have a conference call to discuss this on one of the following days: Monday-Tuesday-Wednesday, Oct. 23-25, or Friday, Nov. 3. I am open to any hour between 8:00 a.m. and 5:30 p.m. Please reply and let me know what is best for you. I envision a 30- or 45-minute discussion.

Thanks,
David

From: Craig Enoch [mailto:cenoch@enochkever.com]
Sent: Wednesday, July 05, 2017 12:29 PM
To: Martha Newton <Martha.Newton@txcourts.gov>; wainwrightd@gtlaw.com
Subject: RE: Offer of Judgment Rule

Yes, that's correct. It's fees that could be run up after the defendant answers, because the defendant cannot even make an offer to settle until after 60 days expires from when it answered.

- Craig



5918 W. Courtyard Drive, Suite 500 | Austin, TX 78730
512.615.1202 (dir.) | 512.615.1198 (fax) | cenoch@enochkever.com

From: Martha Newton [<mailto:Martha.Newton@txcourts.gov>]
Sent: Monday, June 26, 2017 10:09 AM
To: Craig Enoch; wainwrightd@gtlaw.com
Subject: RE: Offer of Judgment Rule

Thanks for this response. So to confirm: the complaint is that fees incurred in the first 60 days increase the amount that must be offered to settle a lawsuit under the rule (as opposed to the amount of litigation costs at stake when an offer is rejected)?

If that's accurate, we'll ask SCAC to take another look. We're working on a letter now that refers other issues, and we'll add this one.

From: Craig Enoch [<mailto:cenoch@enochkever.com>]
Sent: Tuesday, June 20, 2017 4:26 PM
To: Martha Newton <Martha.Newton@txcourts.gov>; wainwrightd@gtlaw.com
Subject: RE: Offer of Judgment Rule

Martha – Thanks for the question. It is true under the current rule that AFTER the offer is rejected any further-incurred fees cannot be considered. But the problem Dale and I've been asked to present is that under the existing rule, a newly-added party cannot even make a settlement offer until after 60 days, and additional attorney's fees can be incurred during that 60 day period, which must then be considered.

For example, let's say that at the time the plaintiff sues a defendant, only \$250 in attorney's fees have been incurred. No further fees are then incurred, as the plaintiff waits to see whether the defendant will appear and not default. When the plaintiff either learns the defendant will appear or actually answers the lawsuit, the plaintiff's lawyer then has 60 days during which he can incur additional fees that must be considered. So, despite the defendant recognizing that the case should be settled, and knowing it could be settled while accounting for \$250 in fees, the defendant cannot make the offer to settle for at least 60 days. And the plaintiff's lawyer is free to start billing to the file, investigating, drafting discovery, etc. So as a result, the defendant can't offer to settle covering only \$250 in fees, but must now account for fees incurred during that 60-day period – perhaps as much as several thousands of dollars that may have been totally unnecessary to the settlement process, but the defendant had no hope to avoid with an early settlement offer.

I hope this gives more clarity to my concern about the rule as written. And I'm happy to visit further.

Dale – please feel free to weigh in.

Martha - Thanks again for looking at this.

- Craig



5918 W. Courtyard Drive, Suite 500 | Austin, TX 78730
512.615.1202 (dir.) | 512.615.1198 (fax) | cenoch@enochkever.com

From: Martha Newton [<mailto:Martha.Newton@txcourts.gov>]
Sent: Thursday, June 15, 2017 5:13 PM
To: Craig Enoch; wainwrightd@gtlaw.com
Subject: Offer of Judgment Rule

Justices Enoch and Wainwright:

I seek some clarification on the problem with Rule 167 that your clients have raised. At our lunch meeting, I understood the complaint to be that opposing counsel are running up attorneys' fees within the 60-day waiting period prescribed by Rule 167.2(e)(2) in order to maximize any potential recovery of litigation costs later on. But under Rule 167.4(a), litigation costs awarded under the rule are measured "from the time the offer was rejected to the time of judgment." That measuring period is prescribed by HB 4 and CPRC § 42.004(c).

Is the complaint that lawyers are running up fees after an offer has been rejected? Or is it something else related to the 60-day waiting period?

Martha G. Newton
Rules Attorney
Supreme Court of Texas
512.463.1353 (direct)
martha.newton@txcourts.gov

Peeples, David

From: Martha Newton <Martha.Newton@txcourts.gov>
Sent: Monday, July 24, 2017 10:46 AM
To: Peeples, David
Subject: FW: Offer of Judgment Rule

Here you go. They initially raised the issue during an in-person meeting with me and the Chief. This email exchange is a follow up to that meeting.

From: Craig Enoch [<mailto:cenoch@enochkever.com>]
Sent: Wednesday, July 05, 2017 12:29 PM
To: Martha Newton <Martha.Newton@txcourts.gov>; wainwrightd@gtlaw.com
Subject: RE: Offer of Judgment Rule

Yes, that's correct. It's fees that could be run up after the defendant answers, because the defendant cannot even make an offer to settle until after 60 days expires from when it answered.

- Craig



5918 W. Courtyard Drive, Suite 500 | Austin, TX 78730
512.615.1202 (dir.) | 512.615.1198 (fax) | cenoch@enochkever.com

From: Martha Newton [<mailto:Martha.Newton@txcourts.gov>]
Sent: Monday, June 26, 2017 10:09 AM
To: Craig Enoch; wainwrightd@gtlaw.com
Subject: RE: Offer of Judgment Rule

Thanks for this response. So to confirm: the complaint is that fees incurred in the first 60 days increase the amount that must be offered to settle a lawsuit under the rule (as opposed to the amount of litigation costs at stake when an offer is rejected)?

If that's accurate, we'll ask SCAC to take another look. We're working on a letter now that refers other issues, and we'll add this one.

From: Craig Enoch [<mailto:cenoch@enochkever.com>]
Sent: Tuesday, June 20, 2017 4:26 PM
To: Martha Newton <Martha.Newton@txcourts.gov>; wainwrightd@gtlaw.com
Subject: RE: Offer of Judgment Rule

Martha -- Thanks for the question. It is true under the current rule that AFTER the offer is rejected any further-incurred fees cannot be considered. But the problem Dale and I've been asked to present is that under the existing rule, a newly-added party cannot even make a settlement offer until after 60 days, and additional attorney's fees can be incurred during that 60 day period, which must then be considered.

For example, let's say that at the time the plaintiff sues a defendant, only \$250 in attorney's fees have been incurred. No further fees are then incurred, as the plaintiff waits to see whether the

defendant will appear and not default. When the plaintiff either learns the defendant will appear or actually answers the lawsuit, the plaintiff's lawyer then has 60 days during which he can incur additional fees that must be considered. So, despite the defendant recognizing that the case should be settled, and knowing it could be settled while accounting for \$250 in fees, the defendant cannot make the offer to settle for at least 60 days. And the plaintiff's lawyer is free to start billing to the file, investigating, drafting discovery, etc. So as a result, the defendant can't offer to settle covering only \$250 in fees, but must now account for fees incurred during that 60-day period – perhaps as much as several thousands of dollars that may have been totally unnecessary to the settlement process, but the defendant had no hope to avoid with an early settlement offer.

I hope this gives more clarity to my concern about the rule as written. And I'm happy to visit further.

Dale – please feel free to weigh in.

Martha - Thanks again for looking at this.

- Craig



5918 W. Courtyard Drive, Suite 500 | Austin, TX 78730
512.615.1202 (dir.) | 512.615.1198 (fax) | cenoch@enochkever.com

From: Martha Newton [<mailto:Martha.Newton@txcourts.gov>]
Sent: Thursday, June 15, 2017 5:13 PM
To: Craig Enoch; wainwrightd@gtlaw.com
Subject: Offer of Judgment Rule

Justices Enoch and Wainwright:

I seek some clarification on the problem with Rule 167 that your clients have raised. At our lunch meeting, I understood the complaint to be that opposing counsel are running up attorneys' fees within the 60-day waiting period prescribed by Rule 167.2(e)(2) in order to maximize any potential recovery of litigation costs later on. But under Rule 167.4(a), litigation costs awarded under the rule are measured "from the time the offer was rejected to the time of judgment." That measuring period is prescribed by HB 4 and CPRC § 42.004(c).

Is the complaint that lawyers are running up fees after an offer has been rejected? Or is it something else related to the 60-day waiting period?

Martha G. Newton
Rules Attorney
Supreme Court of Texas
512.463.1353 (direct)
martha.newton@txcourts.gov