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IN PRACTICE

CIVIL PROCEDURE

Maximize the Effectiveness of A Defense Offer of Judgment

Evaluate the claim early and weigh the pros and cons

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Just as the plaintiffs' personal injury bar will often bemoan the conduct of defendants, insurers and "file-churning" defense attorneys who needlessly delay the negotiation of clear liability claims, those who defend claims under fee-shifting statutes are often frustrated by an adversary's refusal to articulate a reasonable settlement demand before engaging in extensive discovery. In such instances, litigation under fee-shifting statutes may be characterized as "fee-driven," since the plaintiff's attorney will have a financial interest in "working up" the file in pursuit of a larger settlement and thus a larger fee.

In certain cases a litigant or attorney may have good reason not to negotiate early. In those cases where the delay is unjustified, however, the filing of an offer of judgment can be a powerful negotiating tool.

For years the value of New Jersey Court Rule 4:58 to litigants in non-fee-shifting cases has been fairly clear. A plaintiff who obtains a judgment 20 percent larger than the amount previously demanded through an offer to take judgment generally will be entitled to an award of fees from the filing through entry of judgment. Rule 4:58-2. Similarly, a defendant against whom judgment is entered could recover fees incurred after the rejection of an offer if the judgment is 80 percent or less of the rejected offer. Rule 4:58-3.

Rule 4:58-3(c)(4) was amended in September 2006 to prohibit the recovery of attorney fees in circumstances where "a fee allowance would conflict with the policies underlying a fee-shifting statute or rule of court." While the amendment made it fairly clear that prevailing defendants themselves would not be entitled to fees from unsuccessful plaintiffs asserting fee-shifting claims — in the absence of a finding of frivolousness, such a result would frustrate the remedial aims of fee-shifting legislation — the absence of any guidance within the rule or cases construing it rendered the offer of judgment a tool of questionable utility to defendants in fee-shifting litigation filed in Superior Court.

The Federal Approach

In *Marek v. Chesny*, 473 U.S. 1, 5 (1985), the U.S. Supreme Court gave "teeth" to the federal offer of judgment rule codified at F.R.C.P. 68 by holding that when a claimant in a fee-shifting case rejects a settlement offer and later receives a judgment for a lesser amount, the offeror will not be liable for attorney fees incurred by the offeree after the rejection of the offer. Thus an offer of $5,001 plus fees will effectively freeze the plaintiff's fee award as of the offer date if after years of litigation the plaintiff obtains a judgment of $5,000. In a typical hard-fought civil rights case this can mean a savings of tens or hundreds of thousands of dollars to the defendant.

The "Marekization" of Rule 4:58?

With the publication of its unanimous decision in *Best v. C&M Doors* on October 14, the New Jersey Supreme Court brought Rule. 4:58 closer to F.R.C.P. 68 by providing defendants in fee-shifting cases with a strong incentive to file reasonable offers of judgment, as such a filing may limit plaintiff's fee award to fees incurred prior to the filing.

In *Best*, the Appellate Division had ruled that the exception for fee allowances to defendants in Rule 4:58-3 applied to claims for violations of Conscientious Employee Protection Act (CEPA) but not to claims under the Prevailing Wage Act (PWA). The Supreme Court disagreed, reversing the Appellate

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Division insofar as it had permitted a fee award to the prevailing defendant on the PWA claim.

Nevertheless, the Court made clear that when a plaintiff prevails in a fee-shifting case, the reasonableness of his or her fees will be determined in part by plaintiff's response, if any, to prior offers of judgment: "[I]f a judge determines, under all the circumstances, that defendant proffered a reasonable offer of judgment that plaintiff unjustifiably rejected, that is a factor to be taken into account in determining plaintiff's entitlement to fees."

Complications on Remand

The *Best* Court remanded for a determination of whether the offer in question was indeed reasonable. The reason for the remand provides a valuable lesson to those defendants inclined to offer a sum certain inclusive of all monetary relief sought, including both damages and attorney fees.

In *Best*, the defendant made a "global" $25,000 offer towards both damages and attorney fees. At trial, the jury awarded Best $2,600 on the PWA claim. Subsequently, plaintiff sought counsel fees and costs in excess of $122,000. The trial court limited plaintiff's fee award to fees incurred before the offer was filed. However, the fees awarded exceeded $62,000, which was more than twice the global offer of judgment. The Supreme Court asked rhetorically:

> How could a global offer of $25,000 for Best's CEPA and PWA claims and all costs and fees (even assuming some compromise on the fees) be reasonable if the judge ultimately determined that the reasonable fees and costs accrued up to that point, standing alone, were over $62,000? Conversely, how could fees of $62,000 be deemed reasonable, if the $25,000 offer, inclusive of fees, was reasonable? That disconnect requires a reversal and remand for reconsideration of the issue of whether, under all relevant circumstances, C&M's offer, in fact, was reasonable and whether Best rejected it without cause.

What "relevant circumstances" should the trial court consider on remand? Should the plaintiff's fee award be capped because he refused to accept an offer which would have made him more than whole but which would not have made his attorney whole? Should the trial court consider the retainer agreement between plaintiff and counsel to determine whether plaintiff would have been left with an outstanding legal bill had he accepted the offer of judgment? Suppose the parties agreed to a one-third contingency fee from any settlement approved by the plaintiff — should the attorney be penalized for refusing to accept $8,333 for $62,000 worth of work?

The Risk of Offering Fixed Sums Towards Both Damages and Fees

Following the Supreme Court's ruling in *Best*, attorneys quoted in the *New Jersey Law Journal* suggested that in the future, defendants in fee-shifting cases are likely to offer separate, discrete sums towards damages and counsel fees. This approach would invite complications as well.

Suppose a defendant offers two sums: one towards damages and another towards fees. Should both of these offers be compared to the corresponding sums awarded, requiring that both figures exceed the amounts actually awarded to limit the fee award? Or should the damage and fee offers be added and the sum compared to the total of the judgment and plaintiff's attorney fees at the time the offer was filed, limiting plaintiff's fee award to pre-offer fees only if the former sum is 80 percent or less than the latter?

Further, should the Rule's 80 percent threshold even apply to consideration of fee offers or global offers inclusive of fees? The *Best* decision makes no mention of the 80 percent threshold. If the threshold applied to fee offers then defendants would need to offer plaintiffs 125 percent of their reasonable fees in order to obtain a determination that the fees ultimately awarded were 80 percent or less than the amount offered. One would not expect our courts to require defendants to offer excessive fee payments to obtain the benefits of a rule designed to reward reasonable offers.

How To Maximize the Effectiveness of a Defense Offer of Judgment

Neither Rule 4:58 nor *Best* provides answers to these questions. However, federal law does suggest avoidance of these pitfalls by offering a sum certain towards all damages "plus, in addition thereto, all reasonable fees and costs incurred to date." See, e.g., *Guerrero v. Cummings*, 70 F.3d 1111, 1113 (9th Cir. 1995); *Marek v. Chesny*, 473 U.S. 1, 5-6 (1985).

Obviously, such an offer would sacrifice certainty for the sake of negotiating power. While defendants and insurers initially are likely to balk at the prospect of an open-ended offer, the anticipated fees of plaintiff's counsel usually may be predicted based on the same factors considered by courts when awarding fees. See generally *Rendine v. Pantzer*, 141 N.J. 292 (1995).

In the odd event the offer is accepted formally as contemplated by the rule — a rarity in our experience, as most settlements prompted by an offer of judgment are negotiated between attorneys — plaintiff's fee award is likely to fall within a reasonably predictable range.

Obviously, the earlier in the case one makes the offer, the more predictable plaintiff's fees will be and the lower the defendant's exposure will be. This is fitting, as early settlement is a central goal of the Offer of Judgment Rule. We would suggest, then, that the key to maximizing the utility of the rule by defendants in fee-shifting cases is to evaluate the claim early, weigh the pros and cons of an early offer, and if determined appropriate, formally offer a reasonable sum towards damages "plus, in addition thereto, all reasonable fees and costs incurred to date."■