

New Offer of Judgment Rule **By Dev Sethi**

The Arizona Supreme Court has acted to cure some of the confusion surrounding offers of judgment. In revising Rule 68, the Court has streamlined how offers are made, clarified what sanctions are in play, and put in place a mechanism that forces parties to complain about deficient offers, as opposed to lying in the weeds until the end of the case. The new rule is effective January 1, 2008.

Rule 68 authorizes a party to make an offer of settlement, which if rejected by the offeree carries with it the potential for significant post-judgment sanctions. If a party rejects a valid offer of judgment and does not do better than that offer at trial, the party must pay, as a sanction, reasonable expert witness fees and double the reasonable taxable costs incurred by the offeror after making the offer, as well as prejudgment interest on unliquidated claims accruing from the date of the offer. Taxable costs are defined by A.R.S. §12-332 and include filing fees and deposition expenses.

While in principle the offer of judgment rule was good, problems with its execution, especially in cases with multiple parties, limited its effectiveness. The new rule is an improvement and should result in more effective use of this tool.

There are three significant changes in the new rule. First, the rule simplifies how offers are worded. Now the offer of judgment must simply contain a single, specifically stated sum that includes all damages, taxable costs, interest, and – if appropriate – attorneys' fees. This is a great improvement over the old language which left lawyers scratching their heads about what was and was not included in an offer and how to figure attorneys' fees.

Second, it is no longer okay to ignore defects in an opponent's offer of judgment and then object to the validity of the offer when sanctions are sought against your client. Lawyers now have an affirmative obligation to raise objections to the validity of an offer within 10 days of receipt. Failure to raise these objections in writing within this time will now bar you from raising these problems in a proceeding to determine sanctions against your client.

Third, multiple parties may now make a joint, unapportioned offer to a single offeree. So, two defendants can combine their money and make a single offer to a plaintiff, or husband and wife plaintiffs may make a single offer to a defendant. But unapportioned offers may not be made to multiple offerees. A plaintiff cannot, then, make a global offer of judgment to several defendants.

This language creates a potential pitfall for plaintiffs. Settling with individual defendants in a multi-party case where more than one defendant is alleged to be at fault means going to trial with an empty chair at the defense table. The remaining defendants can then point the finger at the empty chair and reduce their liability.

The new rule recognizes this problem. While a single offer cannot be made to multiple parties, a party may make apportioned offers to multiple parties that are conditioned upon acceptance by all of the offerees. So Plaintiff could extend offers to Defendant A, B and C. But those offers would only be binding on Plaintiff if all three accept. If, however, only Defendant A accepts, Plaintiff would have the option of settling with Defendant A and going to trial against B and C. The choice remains the offeror's.

These revisions go a long way toward clarifying what had become a confounding rule, so we can expect to see an increase in the use of offers of judgment.

RESOURCES:

The full text of amended Rule 68, showing a comparison to the old rule, is available at www.kbsds.com/legalissues.htm.