



## **NEW TEXAS COVERAGE CASE ALERT – February 18, 2011**

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### **Texas Rule 167's "Offer of Settlement" Procedures: "Turning the Tables" on the Plaintiff Or Starting A Dangerous Game of "Russian Roulette?"**

Anyone handling claims for any length of time has probably dealt with a likely no/very minimal liability case that they are, nevertheless, willing to settle for close to "top dollar" simply because of the attorney's fees and costs that will be required to win. But what do you do when the plaintiff is simply so unreasonable as to make that impossible?

Chapter 42 of the Texas Civil Practices and Remedies Code and Rule 167 of the Rules of Civil Procedure were enacted in 2004 as part of a "tort reform" package designed to level the playing field in such situations by creating real monetary risk to plaintiffs that use litigation as extortion. They created a formal "offer of settlement" procedure whereby if the plaintiff rejects a settlement offer, plaintiff is then potentially exposed to defendant's attorney's and expert witness fees incurred thereafter if the plaintiff's recovery is more than 20% less than the amount of the offer. However, as evidenced by the fact that there are only a couple of reported appellate decisions even discussing the Rule in the last seven years since it was promulgated, the Rule is rarely utilized by defendants. This is likely because, ironically, it does not apply when the plaintiff's case is so meritless that the defendant is found not liable at all. Moreover, once it is invoked by the defendant, it can also be used by the plaintiff to potentially shift fees and costs the other way, *i.e.*, to the defendant. *Thus, while the Rule is a valuable potential weapon to keep in mind in the proper case, it should be used only after a very careful pro v. con analysis.*

Rule 167 can only be activated initially by a defendant by the filing of a Declaration with the Court, at least 45 days prior to trial. Once activated, however, it is a "two-way street" that can then also be used by the plaintiff. Since plaintiffs generally cannot recover attorney's fees in pure tort (*i.e.*, negligence, product liability, premises liability, etc.) cases, a defendant that invokes the Rule potentially opens the door to the prevailing plaintiff being able to recover attorney's fees that plaintiff would not otherwise be able to recover.

If the settlement offer is made by the defendant, then the plaintiff is exposed to the Rule's expense shifting if the plaintiff's recovery against that defendant is less than 80% of the offer amount. If a Rule 167 settlement offer is made by the plaintiff, then the defendant that invoked the process is exposed to the expense shifting if the plaintiff's recovery from that defendant exceeds 120% of the offer amount. If the plaintiff's recovery is within 20% of the offer amount, either way, there is no expense shifting. The litigation costs that can be recovered are reasonable attorney's fees, plus the costs of up to two testifying experts, plus usual taxable court costs that the offeror incurred after the offer was rejected.

By way of example, assume the plaintiff's damages are \$5,000 in medical bills, \$5,000 in lost earnings and \$10,000 of pain and suffering for a total recovery of \$20,000. If the defendant had made a settlement offer of at least \$25,000 that was rejected by the plaintiff, then plaintiff would be exposed to defendant's attorney's fees and expert's costs incurred after the rejection. If, on the other hand, the



plaintiff had offered to settle early on for \$16,000, and defendant rejected that offer, then defendant would be exposed to fee shifting under the Rule (because \$20,000 is more than 120% of 16,000.)

But what if, in our example, the defendant offers to settle the case for \$10,000 early on just to avoid litigation and then is found not liable? Ironically, there is no fee shifting in that scenario. This is because the amount of fees and expenses that can be shifted cannot exceed the following formula: the sum of 50% of the economic damages, plus all noneconomic damages, plus all exemplary/punitive damages and less any statutory liens. Thus, if plaintiff is not entitled to recover any damages at all, the Rule does not apply. Instead, where there is recovery by plaintiff but for an amount less than 80% of the rejected offer, the fee shifting occurs in the form of a credit against the plaintiff's judgment. Thus, the irony is that if the Rule is invoked, the plaintiff may be better off in the end by getting poured out completely as opposed to obtaining a judgment that is less than the settlement offer.

The settlement offer must state the terms upon which all monetary claims, including court costs, interest and attorney's fees incurred up to that point in time by the plaintiff, can be settled with the defendant. Thus, if the case is not a pure tort case and the plaintiff can potentially recover attorney's fees (*i.e.*, breach of contract claims), the settlement offer v. award comparison will encompass not just the damages awarded, but also any attorney's fees that the plaintiff has incurred through the date of the offer. Estimating those fees incurred for purposes of making a settlement offer obviously can be difficult in many cases.

**PRACTICE POINTERS:** Rule 167's "offer of settlement" procedures should only be invoked by a defendant after a very careful analysis of the pros and cons of doing so because once invoked, the procedure is open to the plaintiff, as well. The procedure carries the least risk and the greatest benefits in pure tort/negligence cases where the defendant is fairly confident that it will either not be liable at all or will only be liable for an amount that is going to be less than or very close to the amount that the defendant is willing to offer in settlement. The risk of the procedure backfiring against the defendant goes up, even in small cases, when there are harder to quantify elements of damage possibly recoverable, such as pain and suffering and other noneconomic losses, because in those cases it is more difficult to predict how the settlement offer amount will compare to the recovery. Finally, before the procedure is invoked, there must be a clear understanding as between the defendant, its insurer, and insurance defense counsel as to the risks involved and who is going to be responsible for paying the plaintiff's costs and expenses should the procedure backfire to the plaintiff's advantage.

If you wish to discuss any insurance-related issues or needs, please feel free to contact Schubert & Evans, P.C. at 214.744.4400 or visit our website at [www.schubertevans.com](http://www.schubertevans.com).