EXAMINING THE NEW JERSEY OFFER OF JUDGMENT RULE'S BIASES AGAINST DEFENDANTS

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INTRODUCTION

An offer of judgment is a judicially constructed device used to encourage settlement. In operation, offers of judgment penalize parties who rebuff settlement offers determined (in hindsight) to be reasonable, while rewarding parties who make reasonable but rejected offers. This article examines four aspects of the New Jersey State Court offer of judgment rule (R. 4:58) that undermine, if not eliminate, the deterrent value of defendants' offers.

THE MECHANICS OF NEW JERSEY'S OFFER OF JUDGMENT RULE

New Jersey's offer of judgment rule enables a plaintiff to serve on a defendant an offer to take a specific monetary judgment in the plaintiff's favor, and it also enables a defendant to serve on a plaintiff an offer to take a specific monetary judgment against the defendant. R. 4:58-1(a).

If an offer of judgment is not accepted, and the offering party receives a “favorable determination” at trial, the opposing party can be responsible for certain sanctions, including litigation expenses, prejudgment interest, and attorneys' fees. R. 4:58-2(a), 4:58-3(a). Whether a judgment is “favorable” depends upon the offeror's status as either a “claimant” (typically the plaintiff) or a “non-claimant” (typically the defendant). A favorable determination for an offering plaintiff is one whereby the plaintiff obtains a money judgment that is 120% or more than the amount of its offer. R. 4:58-2(a). Similarly, a favorable determination for an offering defendant is one whereby the plaintiff obtains a money judgment that is 80% or less than the defendant's offer. R. 4:58-3(b).

The following simple illustration shows how the offer of judgment rule operates in practice: Assume a defendant makes an offer of judgment for $10,000 to the plaintiff; the plaintiff rejects the offer and counters with an offer of $100,000; finally, the defendant rejects the plaintiff's counter-offer. If the case proceeds to trial and the jury awards the plaintiff $120,000 or more, then the plaintiff has obtained a “favorable determination” and would be entitled to benefit from the rule. Conversely, if the jury awards the plaintiff $8,000 or less (but, as discussed below, an amount more than nominal damages), then the defendant has obtained a favorable determination, and it would

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be entitled to benefit from the rule.

THE RULE'S DISPARATE TREATMENT OF DEFENDANTS AND PLAINTIFFS

At first glance, New Jersey's offer of judgment rule appears to benefit plaintiffs and defendants alike. In fact, since defendants typically have greater and earlier access to discoverable information, defendants may be better positioned to make an informed offer of judgment sooner in the litigation (and thus start the fee/expense clock earlier) than plaintiffs can. Notwithstanding the existence of such potential advantages, several provisions of the rule work to the detriment of defendants.

1. The paradox of prohibiting defendants from benefitting from an offer of judgment if they obtain a verdict that is "too favorable."

Ironically, a number of exceptions prohibit a defendant from recovering under R. 4:58 if the defendant makes an offer of judgment and later obtains a trial outcome that is too favorable: "No allowances shall be granted if (1) the claimant's claim is dismissed, (2) a no-cause verdict is returned, [or] (3) only nominal damages are awarded…." R. 4:58-3(c). Continuing with our earlier hypothetical, assume the defendant made an offer of judgment of $10,000, and either the plaintiff's case was dismissed or the jury found no cause. In this situation, the defendant would not be entitled to collect its costs or attorneys' fees to which it otherwise would be entitled, despite receiving a "favorable determination," i.e., a judgment substantially less than 80% of the offer.

The same inequitable result is obtained if a jury were to award the plaintiff one dollar (or some other small amount that the court deems to be "nominal") in damages. Thus, in order for our hypothetical defendant to recover pursuant to the rule, a jury must award the plaintiff damages somewhere between a non-nominal amount (e.g., $500) and $8,000.

Given the one-sided application of the rule, a defendant could very well be better off by having a jury award a plaintiff a small but non-nominal verdict than if the jury were to find no cause or award zero or nominal damages. The New Jersey Supreme Court acknowledged the existence of this paradox and suggested that the Civil Practice Committee consider revising the rule. Schettino v. Roizman Development, Inc., 158 N.J. 476, 488–89 (1999). However, more than 15 years later, although some of the rule's language has been revised, the paradox remains written in.

It has been suggested that this inconsistency is "understandable" in light of the rule's purpose to induce settlement (rather than be used as a pure fee-shifting device). See A Potent Olive Branch: The Offer of Judgment Rule, New Jersey Law Journal (Dec. 29, 2008). Such a justification might hold some appeal if the rule prohibited recovery where a defendant makes a nominal offer of judgment, rather than where a jury awards nominal damages. A defendant can make a very generous, good-faith settlement offer—one much larger than the amount of the verdict—yet be precluded from recovering under the rule.

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A better explanation for this paradox was provided in Reid v. Finch, where the trial court concluded that "[t]he exceptions to Rule 4:58-3 for (1) dismissals, (2) no cause verdicts, and (3) nominal damages awards demonstrate the Court's intent that the rule not cause parties to lose money." 425 N.J. Super. 196, 207 (Law Div. 2011). Still, this justification is merely a variant of the "hardship exception," which is discussed below.

2. Fee-shifting statutes prevent defendants from benefitting from an offer of judgment.

The next carve-out prohibits parties from recovering under the offer of judgment rule if "a fee allowance would conflict with the policies underlying a fee-shifting statute or rule of court." R. 4:58-3(c). The New Jersey Supreme Court explicitly held this provision applies only to defendants: "[A] defendant can never be awarded fees under Rule 4:58 in a case involving [the Conscientious Employee Protection Act], the [Prevailing Wage Act], or a similar fee-shifting statute." Best v. C&M Door Controls, Inc., 200 N.J. 348, 354 (2009). The Best court strongly intimated that this holding likewise applies to cases involving New Jersey's Consumer Fraud Act and Law Against Discrimination. See id. at 354, 358–59 & n.3. Thus, in cases involving fee-shifting statutes—frequently found in the employment context—the offer of judgment rule provides plaintiffs with both a sword and a shield.

3. The "hardship exception" likely benefits plaintiffs disproportionately.

A party may not recover under the offer of judgment rule if "an allowance would impose undue hardship." R. 4:58-3(c). "If, however, undue hardship can be eliminated by reducing the allowance to a lower sum, the court shall reduce the amount of the allowance accordingly." Id.

In Reid, the defendants obtained a favorable determination at trial and sought over $26,000 in attorneys' fees and expenses pursuant to R. 4:58-3—a sum that exceeded the $20,647 in damages that the jury awarded the plaintiff. 425 N.J. Super. at 199. The court concluded that awarding the amount requested by the defendants would impose an undue hardship because the plaintiff would "lose money merely by bringing a meritorious lawsuit." Id. at 207. Instead, the court (1) took the amount of the jury award ($20,647); (2) subtracted from it the costs and attorneys' fees expended by the plaintiff ($17,026); and (3) awarded the difference ($3,621) to the defendants pursuant to the rule. Id. at 207–08.

There are several significant takeaways if other trial courts follow the Reid formula. First, as alluded to earlier, it appears that, no matter how high a prevailing defendant's costs and fees are, they cannot completely offset the amount of a jury verdict for the plaintiff. Second, if a court looks to the fees and expenses incurred by the offeree, the deterrent functions of the offer of judgment are undermined, as plaintiffs could reduce defendants' fee awards simply by running up their own legal bills. (Of course, the same analysis could apply if the plaintiff is the prevailing party for offer of judgment purposes, but it seems less likely that a court would sympathize with a defendant that ran up large defense costs and then claimed undue hardship.) Except in cases in which both sides are large entities, plaintiffs—who are typically smaller and have fewer resources than corporate defendants—stand to gain from the hardship exception disproportionately more than defendants.

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4. The rule limits defendants from making pro rata offers of judgment.

New Jersey's offer of judgment rule protects plaintiffs from the consequences of rejecting *pro rata* offers. “[A] plaintiff who has asserted that multiple defendants are jointly and severally liable is not subject to the financial consequences of Rule 4:58-3 for rejecting an offer by a single defendant to settle only the claim against it.” Schettino v. Roizman Development, Inc., 158 N.J. 476, 478 (1999). The purpose of protecting plaintiffs from having to accept pro rata shares from individual defendants is to eliminate an empty chair defense at trial; the rule enables plaintiffs to deal in terms of the total judgment. Id. at 483; see also R. 4:58-4, cmt. 6.1. However, contrary to the rule's purpose of encouraging settlement, the *pro rata* aspect of the rule may actually embolden plaintiffs to reject reasonable settlement offers with impunity.

For example, a defendant that makes an offer of judgment for only its *pro rata* share cannot recover its costs or fees, even if the defendant obtains a favorable determination for its share at trial. Recovery is also barred even if each of the defendants makes a *pro rata* offer and the combined total of those offers exceeds 80% of a verdict. See Cripps v. DiGregorio, 361 N.J. Super. 190, 195–96 (App. Div. 2003). Instead, multiple defendants must make a consolidated group offer in order to benefit from the rule. Id. at 196. At the same time, a defendant wishing to settle will not be able to partake in a group offer of judgment where intransigent co-defendants are also present.

CONCLUSION

While New Jersey's offer of judgment rule ostensibly provides potential benefits to all parties that are willing to settle, several aspects of the rule neuter, if not eliminate entirely, the deterrent value of defendants' offers. Resolving some of the rule's inequities through further amendments to the rule is a laudable goal. Until then, however, defendants must navigate the pitfalls of the rule.

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