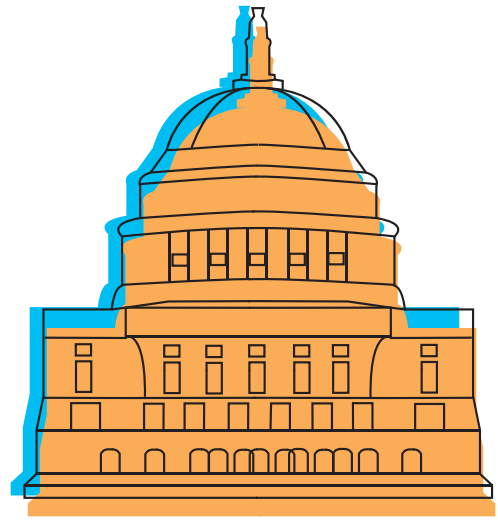


Fee Shifting in Texas



I. Introduction

The Texas Legislature has adopted an Offer of Settlement statute as a part of House Bill 4 (and as new Chapter 42 of the *Civil Practices and Remedies Code*) that will significantly affect settlement strategies and potentially the ultimate judgment rendered in Texas civil suits. It provides for shifting of certain “litigation costs” when an offer to settle is rejected and the ultimate judgment is less favorable to the offeree, by a 20 percent margin. (See Appendix A, HB 4 Offer of Settlement Statutory Provisions) The litigation expenses to be shifted and imposed on the party who “unreasonably” rejected an offer (even though they may win the case), include post-rejection costs, reasonable attorney’s fees, and fees for two expert witnesses. HB4 directs the Texas Supreme Court to adopt rules of civil procedure implementing this new fee shifting mechanism within defined parameters, with some discretion in a few areas.

The Texas Supreme Court through its Advisory Committee (SCAC) has been working on a proposed offer of judgment/settlement rule for the last year and a half, and has substantially completed its work. This paper discusses the current draft of the proposed implementing rule, entitled “Rule 167,” attached as Appendix B. The full committee debates and reports can be found at the Supreme Court website: www.jw.com/scac. This website must be consulted to

Understanding the New Offer of Settlement Practice

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view the final version of the Rule, which must be adopted no later than December 31, 2003. Fee-shifting applies to any action “filed on or after January 1, 2004.”

An offer of judgment rule or statute provides for the shifting of designated litigation expenses upon an offeree who fails to accept an offer to settle from their adversary when the ultimate judgment in the case is less favorable than that offered. Although new to Texas,¹ fee shifting is common in a majority of our states² and has been a part of federal practice since 1938.³ Federal Rule of Civil Procedure 68, as well as many parallel state rules or statutes, provide that if a defendant offers to have judgment entered against him, the plaintiff does not accept, and the plaintiff’s judgment is not more favorable than the offer, then the plaintiff must pay the defendant’s post-offer costs, from the time of rejection through judgment.⁴ “The effect is to reverse the usual rule that a losing party must pay the winner’s costs.”⁵ State rules vary as to whether the offer of judgment mechanism extends to both plaintiffs and defendants and as to what is recoverable beyond costs, with some providing recovery for attorney’s fees as well as expert fees under a myriad of offer of judgment schemes.

HB 4 and proposed Texas Rule of Civil procedure 167

II. Overview of Offer of Judgment Practice – In General

view the final version of the Rule, which must be adopted no later than December 31, 2003. Fee-shifting applies to any action “filed on or after January 1, 2004.”

are far more draconian than the Federal rule, and most closely resembles the Florida Proposal for Settlement practice.⁶ It is an offer of settlement rule that applies to both plaintiffs and defendants and provides for the shifting of post-rejection litigation costs including costs of court, attorneys fees, as well as reasonable expert fees when an offer of settlement is rejected and the offeree suffers a significantly less favorable judgment (defined by a 20 percent buffer from the offer). The mechanics of this new procedure are discussed below.

III. Historical Overview of Fee and Cost Shifting

The United States has long rejected the “English Rule,” followed in Great Britain and most European nations, that the loser must pay the successful party’s attorney’s fees.⁷ The historical justification for the “American Rule”⁸—that parties bear the costs of their own attorney’s fees in litigation whether they win or lose—is premised upon the traditional American belief in liberal access to the courts to redress wrongs.⁹ A deterrent, including the threat of paying the other sides attorney’s fees if suit is unsuccessful, raises the concern that wrongs may go without redress, and that any such rule would disproportionately impact the plaintiff’s access to the courts. It has been suggested that the differences in our two systems justifies these practices:

England virtually abolished juries in civil cases (except for libel and malicious prosecution) more than 50 years ago. Cases are tried before judges whose decisions are narrowly bound by precedent, not only on liability but on damages as well. Outcomes, therefore, tend to be more predictable in England than in the United States. . . . Moreover, lack of predictability in American law is not limited to juries. Substantive and procedural law has undergone constant and sometimes dramatic change during the past 40 years. Law in America is more volatile and less precedent-bound than in England. Propositions that might at one time have been thought frivolous, or at least highly speculative, have become accepted. It is a rare case of which one can say with assurance that it cannot prevail.¹⁰

There are a number of exceptions to the “American” rule that do permit recovery of attorney’s fees by a claimant. For example, a party determined to have brought an action in bad faith may be responsible for the attorneys fees of an opponent.¹¹ Further, a variety of statutory provisions allow the recovery of attorney’s fees by a prevailing party despite the American rule.¹² Many states (now Texas) have adopted offer of judgment rules that allow for the shifting of attorney’s fees when an offeree refuses his opponent’s offer to settle and does no better at trial, further eroding the “American Rule.”¹³

Offer of judgment provisions are intended to encourage settlements and avoid protracted litigation.¹⁴ Perhaps more precisely, the object of such rules is “to encourage more serious evaluation of a proposed settlement at an earlier stage than otherwise might occur, which should lead to more dispositions of cases before the heaviest expenses have been incurred.”¹⁵

Federal Rule 68 provides for an offer of judgment mechanism. It resembles the English practice, except that by its terms it is limited to court costs, generally only a fraction of attorney fees. The rule permits a defendant at any time more than 10 days before trial to serve an offer of judgment for money or other relief and costs then accrued. If the

plaintiff accepts the offer within 10 days, judgment is entered. If the plaintiff does not accept and the final judgment “is not more favorable (to the plaintiff) than the offer,” it must pay the costs incurred after the making of the offer. If an offer is not accepted, a subsequent offer may be made.”¹⁶

Federal Rule 68 was adopted in 1938, and since that time over thirty states have adopted by rule or statute an offer of judgment mechanism.¹⁷ The Federal Advisory Committee on the Civil Rules, noted in its proposed 1983 amendment to Rule 68, however, that the rule “has rarely been invoked and has been considered largely ineffective in achieving its goals.”¹⁸ In particular, the federal rule has been criticized as: (1) it only provides for a defending party to make an offer of judgment, (2) it only provides for the recovery of court costs, and not attorney’s fees so there is insufficient incentive to utilize it, and, (3) the time to make and accept an offer is too limited to allow parties to assess whether the proposed offer should be accepted. Proposed amendments to the federal rules to correct these deficiencies were not adopted.¹⁹ As observed by Professor Sherman:

Although proposals for changes in Rule 68 have primarily focused on expanding it to apply to offers by plaintiffs and recovery of attorneys’ fees, a number of proposals have also tinkered with the basic terms of what triggers cost shifting. One of the more interesting proposals came from the local rule experimentation fostered by the Civil Justice Reform Act of 1990 (CJRA). For example, the CJRA-generated plan adopted in 1993 by the United States District Court for the Eastern District of Texas provides that “a party may make a written offer of judgment” and “if the offer of judgment is not accepted and the final judgment in the case is of more benefit to the party who made the offer by 10 percent, then the party who rejected the offer must pay the litigation costs incurred after the offer was rejected.” “Litigation costs” is defined to include “those costs which are directly related to preparing the case for trial and actual trial expenses, including but not limited to reasonable attorneys’ fees, deposition costs and fees for expert witnesses.” If the plaintiff recovers either more than the offer or nothing at trial, or if the defendant’s offer is not realistic or in good faith, the cost shifting sanctions do not apply. Chief Judge Robert M. Parker reported that in the rule’s first two years, hundreds of parties made offers of judgment, generally resulting in settlement at a subsequently negotiated figure. No sanctions had to be granted under the rule for failure of the offeree to have obtained a judgment less than 10 percent better than the offer. There is a question, however, as to whether such a local federal rule is inconsistent with Rule 68, and similar modification of Rule 68 has not been followed in other local rules. (citations omitted).²⁰

Indeed, the fifth circuit held the local rule to be invalid²¹: In *Ashland Chemical Inc. v Barco Inc.*, the Fifth Circuit held that an award of attorney’s fees as litigation costs under a United States District Court for the Eastern District of Texas local rule was a substantive, rather than procedural, rule and thus required congressional approval. . . . The Fifth Circuit held that Congress must authorize substantive departures from the American rule, which requires each party to pay its own attorney’s

fees. After reviewing congressional history, as well as the Civil Justice Reform Act of 1990, the Fifth Circuit found that there was no congressional approval for the fee-shifting provision of the Eastern District's local rule.²²

IV. Propriety of Court Rule Making Power to Effectuate Fee Shifting – Procedural or Substantive?

The Supreme Court Advisory Committee struggled with whether, and to what extent, an offer of judgment/settlement rule that includes fee shifting is within the rule making power of the courts.²³ The debate has lost most of its significance in light of the legislative enactment of HB 4 creating the fee shifting scheme and directing the court to promulgate implementing procedural rules. HB 4 allows the Texas Supreme Court, in enacting the implementing rule of civil procedure to “address other matters considered necessary by the supreme court to the implementation of this chapter.” A potential issue that remains is the extent to which the Texas Supreme Court may implement procedural provisions that intentionally or unintentionally run afoul of legislative intent.²⁴

A necessary corollary to the debate over rule making authority that is dependent upon whether fee shifting provisions are substantive or procedural in nature, is the question as to the law that should apply when the law of another state is controlling or Erie principles are implicated in federal court. One academician has concluded that “properly read, the rulings suggest that fee-shifting laws related to conduct triggering a cause of action are usually substantive, while fee shifting laws related to conduct during litigation are typically procedural. Fee-shifting laws related to conduct surrounding the commencement of a lawsuit may be either substantive or procedural depending on their purpose.”²⁵ This issue is further discussed in Section VI(B)(14).

V. Pros vs Cons – Offer of Judgment/Settlement Rule

A. Pros – Promotion of Earlier Settlement and Serious Consideration of Offers to Settle

An offer of judgment/settlement rule serves to elicit realistic settlement offers early by giving parties a potential gain together with incentives for an adversary to take the offer seriously.

Settlement at an earlier stage than otherwise might occur, should lead to more dispositions of cases before the heaviest expenses have been incurred.

An offer of judgment/settlement that is not accepted, nonetheless may promote settlement on other terms.

An offer of judgment/settlement device affecting liability for post offer fees should give parties with strong claims or defenses, who otherwise might have to yield more in negotiations than the merits seem to warrant (because of the threat of unrecoverable fees), an effective way of countering groundless opposition.

Offer of judgment/settlement rules may help fulfill a goal of remedial law, full compensation of injured plaintiffs. Rather than being limited to damages minus a large attorney's fee, a party with a strong claim who makes a reasonable, early offer seems likely to get an early settlement with relatively little fee expense or a judgment including a fee award. Similarly, a defendant could be compensated for expenses suffered because of a plaintiff's unjustified persistence.

Application of a properly constructed offer of

judgment/settlement is within the rule making authority of the court and is equitable. Is it fair for a party that makes a reasonable offer to settle that is rejected to bear the post-offer costs and fees for preparing and trying the case successfully to judgment?

B. Criticisms of Offer of Judgment/Settlement Rule

There is no preexisting procedural duty to settle. Parties who file suit do not have a duty to settle. Thus, the premise underlying an offer of judgment/settlement rule is faulty. An offer of judgment/settlement rule undermines access to the courts.

Gain from increased settlement is marginal and is offset by the complexity in applying an offer of judgment/settlement rule

Parties do not have an obligation to accurately predict the outcome of the suit.

An offer of judgment/settlement rule that shifts attorney's fees is arguably beyond the rule making authority of the court and is a matter for legislative determination. (See discussion above.)

Prevailing parties should not be punished for losing a gamble or insisting on litigating a nonfrivolous claim. Offer of judgment/settlement rules are “Vegas rules” that “force a party to accept an offer to settle, even if they reasonably believe that they are entitled to a larger judgment and even if they reasonably believe that they are entitled to adjudicate their legal claim in court—or they may gamble that they will receive more at trial than the offer, thereby risking their status as prevailing party for purposes of costs and, in some cases, attorneys' fees.”²⁶

Given the difficulty of predicting jury verdicts in many cases, is it illogical and incongruous to have a rule of civil procedure that punishes parties who reasonably believe that they will fare better at trial beyond that offered pre-trial?²⁷

Rules of civil procedure should not punish litigants for nonfrivolous, nonvexatious, good faith pursuit of claims or defenses.

Will an auto policy cover the additional costs and fees under an offer of judgment/settlement rule, or must the parties pick up those fees? If the latter, is this fair when the insurer directs the defense? Further, many offers to settle are already routine under the Stowers doctrine.

What is the harm we are trying to address? Ninety-five percent of cases settle. The federal offer of judgment rule was formulated before alternate dispute resolution. Today, a large percentage of cases settle after mediation. Further, sanctions rules allow for the imposition of attorney's fees in appropriate circumstances. Why allow attorney's fees under an offer of judgment/settlement rule in cases where the parties have bona fide differences as to the value of the case? Example: cases where experts advance competing damage models.

An offer of judgment/settlement rule does more than promote or encourage settlements; it coerces settlement. Proposed Rule 167 provides a hammer to the defense, will likely result in lower settlements, and harms plaintiffs of limited means disproportionately. On the other hand, plaintiffs with no assets may actually value the claim higher with the potential increased recovery under an offer of judgment/settlement rule. Instead of encouraging settlements, litigants who believe they have a strong potential for offer of judgment/settlement recovery may “dig in” and not seriously entertain future bona fide offers.²⁸

The savings from settlement are not evenly distributed between the parties and the rule favors wealthier litigants. A defendant willing to offer a particular amount to settle without a cost- (or fee-) shifting rule will offer something less under an offer of judgment/settlement practice. Even with a bilateral rule, the detrimental effects on plaintiffs would remain in the many cases in which the plaintiff is more risk averse than the defendant or when a prevailing plaintiff would already be entitled to costs (or fees) in the absence of an offer of judgment/settlement rule.²⁹

VI. Rule 167 Implementing the Texas Offer of Settlement Statute

A. Overview

The Texas Supreme Court must craft an Offer of Settlement rule within the defined parameters of HB 4. However, a number of variables are left to the court's discretion. The rule is in the proposal stage, and all references to the proposed rule 167 refer to the Texas Supreme Court Advisory Committee July 2003 draft proposal, found in Appendix B.

B. The Mechanics of Offer of Settlement Practice

1. Cases Covered by the Offer of Settlement Statute.

HB 4 governs all civil cases, except it does not apply

to:

- (1) a class action;
- (2) a shareholder's derivative action;
- (3) an action by or against a governmental unit; (defined as "the state, a unit of state government or a political subdivision of the state")
- (4) an action brought under the Family Code;
- (5) an action to collect workers' compensation benefits under Subtitle A, Title 5, Labor Code; or
- (6) an action filed in a justice of the peace court.

HB 4 expressly empowers the supreme court to "designate other actions to which the settlement procedure of this chapter does not apply." Currently, no other exemptions are proposed to be included in the rule. An earlier version of the SCAC proposal also exempted actions brought under the Deceptive Trade Practices—Consumer Protection Act, sections 17.41 to 17.63 of the Business and Commerce Code;³⁰ as the DTPA has its own remedies for refusal to settle, but that exclusion was eliminated in light of the statutory provision exempting the operation of fee shifting when fees may be recoverable "under another law."

2. Putting Fee Shifting in Play – The Defendant's Declaration.

While HB 4 is a "two way" provision that allows both Plaintiffs and Defendants to shift litigation costs when an offer is "unreasonably" rejected, HB 4 requires that before the offer of settlement rule is operative a "defendant" must file a declaration that the "settlement procedure allowed by this chapter is available in the action." In a multi-defendant case, the declaration by one defendant does not inure to the benefit of the other: "If there is more than one defendant, the settlement procedure allowed by this chapter is available only in relation to the defendant that filed the declaration and to the parties that make or receive offers of settlement in relation to that defendant."

It should be noted that a "defendant" that may file the declaration and put fee shifting in play includes "a person from whom a claimant seeks recovery on a claim, including a

counterdefendant, cross-defendant, or third party defendant." Thus, a plaintiff, as a counterdefendant, for example, may file the declaration and invoke potential fee shifting.

The Texas Supreme Court is directed to set a time period in the rule by which this "declaration" must be made. The latest Supreme Court Advisory Committee proposal would allow that declaration to be filed not later than 45 days before trial. A trial commences, under the SCAC proposal, when the first witness is called to testify.

3. Time for Making Offer – HB 4 Directs Supreme Court to Decide.

Timing is important. Should a party be able to make an offer of settlement immediately after service of process when there has not been adequate time for discovery and to fairly evaluate claims and defenses? On the other hand, the offer should be made at some point before trial and at such time as the parties may seriously entertain settlement negotiations and ideally before the heaviest litigation expenses have been incurred.

Under federal rules, an offer of judgment may be made after the complaint is filed. This arguably leads to gamesmanship and does not allow for an honest evaluation of the value of the case before an offer must be responded to. It is probably not desirable to allow an offer to be made too early in the litigation, as evidenced by the following strategies:

Plaintiffs. First, plaintiffs should conduct as much investigation and research as possible before filing suit. Second, plaintiffs should conduct all formal discovery as early in the case as possible. Third, when an unsatisfactory rule 68 offer is received, plaintiffs should immediately launch into intensive discovery before rejecting the offer. Fourth, when unable to evaluate an offer within ten days, plaintiffs should seek an extension of time to respond. Fifth, plaintiffs' attorneys should modify their fee arrangements in fee-shifting cases to account for the new situation created by Marek. Sixth, if a plaintiff ultimately obtains a judgment less favorable than a rejected settlement offer, the plaintiff should be prepared to argue vigorously that rule 68 does not apply.

Defendants. Rule 68 allows a defendant to make an offer of judgment as soon as the complaint is filed. Defendants should take advantage of this right by making rule 68 offers as soon as possible, meaning as soon as the case can be roughly evaluated. If a defendant anticipates suit, then she should evaluate the anticipated suit and prepare a rule 68 offer to be served on the plaintiff immediately after the complaint is filed.

Early offers have several advantages. First, if an offer is successful (i.e., if the offer equals or exceeds the judgment finally obtained by the plaintiff), it stops costs from accruing at the earliest possible point. Especially in fee-shifting suits, cutting off costs at the earliest possible moment will make a substantial economic difference.

Second, an early offer may catch the plaintiff by surprise before the plaintiff has had an opportunity to evaluate the case. The plaintiff may then either accept an offer that is too low or reject one that is too high, saving the defendant money in either instance. More specifically, since the plaintiff is not ordinarily entitled to responses to interrogatories or

document requests until forty five days after the complaint is served, and since the plaintiff has only ten days to respond to the offer, an early offer may force the plaintiff to accept or reject the offer before taking any discovery.

Third, if the plaintiff rejects it, the rule 68 offer will hang over the litigation like a guillotine, influencing the plaintiff's behavior in several ways." (Citations Omitted)³¹

The most recent Supreme Court Advisory Committee proposal would allow an offer of settlement to:

- (1) be made after a declaration is timely filed by a defendant, and,
- (A) for cases governed by
 - (i) Rule 190.2, (Level one discovery) more than thirty days after the appearance in the case of the offeror or offeree, whichever is later;³²
 - (ii) Rule 190.3 or Rule 190.4, (level 2 and 3 discovery) more than ninety days after the appearance in the case of the offeror or offeree, whichever is later; and,
- (B) no less than thirty days before the date a conventional trial on the merits is set for trial³³, or if in response to a prior offer, within seven days of the prior offer, whichever is later.³⁴

Practice Pointer: The earlier the offer of settlement is made in the case, the greater the potential fee shifting, as the litigation costs shift (when the rule is triggered) from the date the offer is rejected. On the other hand, fee shifting will not occur unless the offeree rejects the offer and suffers a substantially less favorable judgment by a 20 percent margin. Thus, an early unrealistic offer will not likely result in fee shifting. However, it may be prudent for counsel to undertake an early investigation that would allow for a more precise evaluation of the case to effectuate a meaningful offer.

4. The Offer.

a. HB 4 — The Fee Shifting Rule Applies to Both Plaintiffs and

Federal rule 68 only applies to defendants. HB 4 and Proposed Rule 167 allows claimants as well as defendants to make offers of settlement once a declaration is filed. A claimant is "a person making a claim." A "claim" is "a request, including a counterclaim, cross-claim or third-party claim to recover monetary damages." A "defendant" is defined as "a person from whom a claimant seeks recovery on a claim, including a counterdefendant, cross-defendant, or third party defendant." Once a "defendant" timely files a declaration, that defendant and any claimant may make an offer of settlement.

Practice Pointer: Serious evaluation (and investigation) should be undertaken before putting fee shifting in play. Once invoked, the offeree may counteroffer and the offeror may end up being tagged with fee shifting depending upon the ultimate judgment entered in the case.

b. The Offer Must Extend to All Monetary Claims

HB 4 limits the operation of the offer of settlement fee shifting to monetary claims.³⁵ Thus, to trigger fee

shifting an offer of settlement need only seek to settle claims seeking monetary damages, and need not seek to compromise non-monetary claims (ex. injunction, declaratory judgment).

Is it necessary to have a qualifying offer, that the offer extend to all monetary claims raised by the pleadings? It would seem so, otherwise, piecemeal settlement would be encouraged and the purpose of the offer of settlement rule would not be fulfilled. HB 4 is silent. The sentiment of the SCAC to date is that the offer, to be effective, must extend to all monetary claims to trigger potential fee shifting.

Practice Pointer: It appears that if a Defendant files a counterclaim against a Plaintiff, the Defendant invoking the fee shifting rule must offer to settle all monetary claims between the plaintiff and defendant merely offering to settle the counterclaim would appear insufficient to invoke the rule.

c. Form and Contents of the Offer to Settle

The latest Supreme Court Advisory Committee proposal 4 directs that the offer:

- (1) Be in writing.
- (2) State that it is made under this rule and chapter 42 CPRC.
- (3) State the terms by which the claims may be settled and must offer to settle all monetary claims between the defendant and claimant. The offer must state whether the offer to settle includes or excludes costs or interest accrued up to the date of the offer, without the necessity of specifying an amount.
- (4) State the settlement offer per claimant and per defendant, except if a claimant alleges that one defendant is vicariously liable for the conduct of another defendant then a combined offer may be made by or to those defendants.
- (5) State that payment will take place within 30 days of acceptance of the offer or approval by the court when approval of a settlement is accepted. [For example, a settlement made as to a minor requiring court approval.]
- (6) State a deadline by which the settlement offer must be accepted which must be a date at least 14 days after the offer is served.
- (7) Be served on all parties to whom the settlement offer is made. The offer of settlement shall not be filed with the court until the offer is accepted or in connection with a motion to recover litigation costs under this Rule.
- (8) State that the offer includes a request for the following release and dismissal, if applicable:

Claimant agrees to release, acquit, and forever discharge the defendant from any and all claims and demands for monetary damages directly or indirectly arising from or in connection with this lawsuit, including all claims currently on file and all claims which could have been filed relating to the matters asserted in this lawsuit. The monetary claims will be terminated by dismissal with prejudice.
- (9) Provide for indemnity.³⁶
- (10) Any condition added to a settlement offer, other than as provided in this section, will prevent the application of the award of litigation costs.

d. Joint Offers

Should multiple parties be entitled to make a joint offer of settlement, and if so, may they be conditioned upon acceptance by all the parties? HB 4 is silent, except to the

extent that it provides:

If there is more than one defendant, the settlement procedure allowed by this chapter is available only in relation to the defendant that filed the declaration and to the parties that make or receive offers of settlement in relation to that defendant.

HB 4 further provides that:

The rules promulgated by the supreme court must address actions in which there are multiple parties and must provide that if the offering party joins another party or designates a responsible third party after making the settlement offer, the party to whom the settlement offer was made may declare the offer void. (Discussed in Section VI(B)(7) of paper.)

The latest SCAC draft allows an offer of settlement to extend to multiple parties, but does not allow acceptance to be conditioned upon acceptance by all parties. (Such an offer to settle is permitted but will not invoke the fee shifting rule.) An offer must “state the settlement offer per claimant and defendant.” Further, a joint “lump sum” offer does not qualify as an offer under proposed Rule 167. An exception lies when a claimant alleges that one defendant is vicariously liable for the conduct of another defendant, in which case a combined offer may be made “by or to those defendants.”

e. Service of Offer (Admissibility)

An offer of settlement is served by the offeror upon the offeree. It is not filed with the court. While HB 4 is silent as to its admissibility, the SCAC proposal expressly provided that the offer of settlement is inadmissible except on the issue of costs and attorneys’ fees. The court will see the offer only if the offeror puts it at issue to recover its litigation expenses.

f. May a Party Make an Offer to Settle, But “Opt Out” of the Fee Shifting Provisions

Yes. First of all, the offer of settlement fee shifting can never occur unless the Defendant files a declaration that the settlement procedure allowed by HB 4 and Rule 167 is available in the suit. Secondly, even if the defendant makes that declaration, any party who wishes to make an offer and invoke potential fee shifting must do so in accordance with the procedural requirements, including stating that the offer is made under the offer of settlement provisions. Any “offer to settle or compromise that is not made under this chapter or an offer to settle or compromise made in an action to which this chapter does not apply does not entitle the offering party to recover litigation costs under this chapter.” Further, “This chapter does not limit or affect the ability of any person to: (1) make an offer to settle or compromise a claim that does not comply with this chapter; or (2) offer to settle or compromise a claim to which this chapter does not apply.” Finally, any addition of impermissible conditions in the offer to settle, “will prevent the application of the award of litigation costs.”

5. Time Period for Keeping the Offer Open.

a. Revocability of Offer

Should an offer be irrevocable for a time period? How long should an offer be open to constitute an offer of settlement? HB 4 directs the Supreme Court to make this call and include it in its rule. The latest SCAC proposal requires that the offer specify a date by which the offer must be accepted which must be a date at least 14 days after the

offer is served. The offeror may choose to leave the offer open for a longer period of time. The SCAC proposal would give the trial court discretion to amend time limits:

The court may modify any of the time limits proscribed by this Rule by written order entered before trial for good cause shown upon the motion of any party or on its own initiative.

6. Withdrawal of Offers and Subsequent Offers.

a. Withdrawal

Is withdrawal of an offer allowed within the time period during which the offer stated that it would remain open? Yes. HB 4 directs the Supreme Court to provide for the withdrawal of offers. The latest SCAC proposal provides:

An offer can be withdrawn before it is accepted. Withdrawal is effective when written notice of the withdrawal is served on the offeree.³⁸ Once an unaccepted offer has been withdrawn, it cannot be accepted or be the basis for imposing litigation expenses under this rule.

b. Successive Offers

Should successive offers be allowed? HB 4 directs the Supreme Court to provide procedures for successive offers. The Advisory Committee favors the allowance of successive offers. An offeror faced with an unaccepted offer, may want to improve its chances of recovery of its costs and attorneys’ fees by improving the offer which further enhances the chances of settlement, thereby fulfilling the objective of the rule. The latest SCAC proposal provides:

Successive offers. A party may make an offer after having made or rejected a prior offer. A rejection of an offer that exceeds an offeror’s prior offers, if any, is subject to imposition of avoidable litigation expenses under this rule.³⁹

7. Offer “Void” Upon Subsequent Joinder of Parties.

HB 4 mandates, and thus Rule 167 incorporates, a provision that “If the offering party joins another party or designates a responsible third party after making the settlement offer, the party to whom the settlement offer was made may declare the offer void.”

This is a troublesome provision in several regards. Ordinarily, declaring an offer “void” is not at the option of a party. Further, it is not clear at what point the settlement offer may be declared void-is it limited to pre-acceptance? Surely, a party cannot, under estoppel principles, accept the benefits of an offer and then declare it void. The SCAC struggled with the legislative intent and ultimately voted to recommend the inclusion of the verbatim provision of HB 4, leaving it to the courts (and practitioners) to ferret out the intended meaning.

HB 4, amends Chapter 33 of the Civil Practices & Remedies Code, and now allows a defendant to designate a responsible third party (without requiring their joinder) on motion filed on or before the 60th day before the trial date unless the court finds good cause to allow the motion to be filed at a later date.”⁴⁰ Joinder of parties, of course, is subject to a more liberal time frame. It is not clear how a party that has fully settled its claim will be aware of the designation of a responsible third party or the joinder of additional parties.

8. Acceptance of Offer of Settlement.

a. Procedures to Accept

HB 4 directs the Texas Supreme Court to include

procedures for accepting a settlement offer. The latest SCAC proposal provides:

An offer that has not been withdrawn can be accepted only by written notice served on the offeror by the acceptance date. When an offer is accepted, the offeror or offeree may file the offer and acceptance along with a motion for judgment [motion for enforcement of litigation expenses].

Technically, payment in satisfaction of an accepted offer may predate judgment, particularly if non-monetary claims remain to be litigated. Thus, the last sentence will likely be amended to delete the word “judgment” and insert the bracketed language to make clear that the motion can be made and granted prior to judgment.

b. Terms of the Acceptance

Should the acceptance of the offer be unconditional to be effective for purposes of cost shifting? That is implicit under the latest SCAC rule proposal.

9. Rejection of Offer of Settlement.

a. Procedures to Reject Offer

HB 4 directs the Texas Supreme Court to include procedures for rejection of a settlement offer. The latest SCAC proposal provides:

An offer may be rejected by written notice served on the offeror by the acceptance date, or by failure to respond on or before the acceptance date; which is deemed to be a rejection.”

b. Date of Rejection

The date of rejection is important as if fee shifting is warranted, the date of rejection is the “starting” date for computing the fees to be shifted.

10. Consequences of Rejection of Offer – Triggering the Fee Shifting Event.

a. When the judgment rendered is significantly less favorable than the rejected offer fee shifting is triggered.

HB 4 provides for the shifting of certain litigation expenses when an offeree rejects a settlement offer and the judgment rendered is significantly less favorable than the rejected offer. What is a “significantly less favorable judgment” that would support shifting of litigation expenses?

HB 4, incorporated in proposed Rule 167, affords offerees a 20 percent margin of error before litigation expenses are subject to cost shifting, recognizing that “case evaluations by parties and their attorneys often lack exact precision and that a margin of error should be accorded to offerees before imposing cost shifting.”⁴¹

Specifically, a judgment will be significantly less favorable to the rejecting party than is the settlement offer when:

The rejecting party is a claimant and the award [on the monetary claim] will be less than 80 percent of the rejected offer; or

The rejecting party is a defendant and the award [on the monetary claim] will be more than 120 percent of the rejected offer.

Further, if the rejecting party is a defendant and the

award on the monetary claim or claims would have been more than 120 percent of the rejected offer, but for the imposition of statutory caps on the monetary damages, litigation costs will be shifted.

The litigation costs that may be recovered by the offering party are limited to “those litigation costs incurred by the offering party after the date the rejecting party rejected the settlement offer” and would run, under proposed Rule 167, up to the date the judgment is signed.

Query: What if the party seeking the award did not actually “incur” the fees sought? For example, if an insurer is contractually bound to pay a defendant’s attorney’s fees, does a defendant “incur” those fees and can the defendant avail itself of fee shifting should the plaintiff reject its offer and suffers a substantially less favorable judgment? What is the obligation of an insurer to pay “litigation costs” when the defendant rejects the plaintiff’s offer to settle and suffers a substantially less favorable judgment?

b. Is a significantly less favorable judgment limited to a verdict after a trial on the merits or does it include summary judgment, directed verdict, or other final disposition of the case?

It appears any final disposition of the case culminating in a judgment will qualify as a judgment for purposes of fee shifting under the rule. (SCAC proposal excepts out settlements reached in mediation and arbitration.)

Arguably, a voluntary dismissal of an action without prejudice after rejection of an offer of settlement would not result in a less favorable judgment and fee shifting would not be implicated.

c. Fees and Costs incurred before and after the expiration of a refused offer – determining the 20 percent margin.

To date the Supreme Court Advisory Committee has not completed its debate and recommendation as to whether fees and costs incurred before and after the expiration of a refused offer are to be included or excluded in determining whether a judgment is significantly less favorable than the offer. In close cases, the inclusion or exclusion of fees and costs as part of the “judgment” may make the difference in whether fee shifting occurs and the 20 percent margin is reached.

For example, assume the defendant offers plaintiff \$50,000 to settle the case, but the plaintiff rejects and proceeds to trial receiving a monetary award of \$39,000 (less than 80 percent of the rejected offer). Plaintiff is the “successful” party and therefore should recover pre-rejection costs – in this case, amounting to \$2,000. Defendant’s post-rejection costs and fees amount to \$10,000. If the pre-rejection costs are included in determining the “monetary award” the judgment would not be “significantly less favorable” to the Plaintiff and no fee shifting would occur. If costs and fees are not to be included in the formula, the trial court conducts a simple comparison of the amount offered to settle monetary claims and the amount awarded for monetary claims, to determine if fee shifting would be proper.

It is unclear whether an award of pre-judgment interest should be included in calculating the “monetary award” to determine if the judgment is significantly less favorable than the offer. An additional issue that must be decided is whether the party who rejects an offer and prevails, but nonetheless suffers a “significantly less favorable judgment,” may recover costs incurred after the date of rejection. Logically, such a party could not.

d. The Take Nothing Judgment.

Is a take-nothing judgment considered a more favorable judgment for the defendant who has made an offer that was rejected by the Plaintiff?

The U.S. Supreme Court held the federal offer of judgment rule does not apply to a take-nothing judgment applying the literal language of the rule. (*Delta Airlines v. August*.) “The virtue of this literal interpretation of the rule . . . is to prevent defendants from making token, rather than serious, offer for small amounts (say \$1) in order to invoke fee shifting in every case in which there is a defendant’s verdict.” On the other hand, it is ironic that a Plaintiff may fare better by a take-nothing judgment than a very small judgment in its favor. HB 4 limits the defendant’s recovery under fee shifting to the plaintiff’s monetary recovery. Thus, under a take nothing judgment, no fees will be shifted.

e. Judgment N.O.V.s, Remittiturs, and Other Changes to the Amount of the Judgment

In determining whether a judgment is significantly fees favorable to the rejecting party, should the court consider modifications to the monetary award in the judgment, perhaps through a judgment n.o.v. or a remittitur? Yes. The “net” (money) judgment should be controlling: the monetary award in the final judgment at the end of the trial process should determine whether fee shifting is justified.

11. *The Fee Shifting Formula: Court Costs, Reasonable Expert and Attorney’s Fees.*

a. What Litigation Costs Are Shifted?

HB 4 defines the litigation costs to be shifted as: “Money actually spent and obligations actually incurred that are directly related to the case in which a settlement offer is made. The term includes: (a) court costs; (b) reasonable fees for not more than two testifying expert witnesses; and (c) reasonable attorney’s fees.”

b. Costs

Do post-rejection costs include both taxable⁴² and non-taxable costs? Under the SCAC proposal, no distinction is made between taxable and non-taxable costs.

c. Fees

1) “Reasonable” attorney’s fees:

HB 4 allows cost shifting of “reasonable” attorney’s fees. Is the reasonableness of fees determined by the court or by the jury? The SCAC viewed this as a post-verdict matter to be taken up by the trial judge. Proposed rule 167 requires the trial court to hold a hearing, at which the parties may present evidence, and the court is to determine the litigation expenses reasonably and necessarily required to compensate the offeror for post-rejection costs, attorneys fees and expert expenses.

Ordinarily, counsel who takes cases on a contingency basis does not keep hourly time records. How may Plaintiff’s counsel prove up reasonableness of attorney’s fees after an offer of settlement is rejected by the Defense when the cases is taken on a contingency basis? Would a lodestar apply? What factors should be considered by the court in determining the reasonableness of attorney’s fees? Must the shifted attorney’s fees be segregated as to those incurred in relation to the offeree and only as to monetary claims?

Two proposed comments to Rule 167 are instructive: In determining the reasonableness of litigation costs, the trial court may consider in addition to other factors, the extent the costs and fees were reasonably related to the action of the rejecting party and the claims that were the subject of the offer.

Among the factors the trial court should consider in determining the reasonableness of attorney’s fees are those factors set forth in *Arthur Anderson v. Perry*, 945 S.W.2d 812 (Tex. 1997): (1) whether the attorney’s fee was a contingent fee or an hourly fee, (2) the total number of hours worked, (3) the novelty or difficulty of the claims and defenses presented, (4) the extent to which employment in this case precluded employment in other matters, and (5) whether any of the fees charged in the case were for time or expenses incurred in prosecution of a prior lawsuit, as well as the constraints set forth in Disciplinary Rule of Professional Conduct 1.04.

It should be noted that HB 4 does not address whether the costs and attorney’s fees to be shifted are limited to trial (“prejudgment”) fees and costs or extend to appellate fees and costs as well. Specifically, HB 4 provides:

“The litigation costs that may be recovered by the offering party under this section are limited to those litigation costs incurred by the offering party after the date the rejecting party rejected the settlement offer.”

Thus, litigation costs under the statute run from the date of rejection but the statute provides no ending date.

d) When a Statutory Basis Already Exists for Recovery of Attorney’s Fees or Other Litigation Costs

May a prevailing Plaintiff under the Offer of Settlement rule double recover fees incurred after the Defense rejects the offer when the Plaintiff obtains a more favorable judgment and an independent statutory basis exists to recover fees? HB 4 expressly prohibits “double dipping.” Specifically, it (and Rule 167) provides:

(e) If a claimant or defendant is entitled to recover fees and costs under another law, that claimant or defendant may not recover litigation costs in addition to the fees and costs recoverable under the other law.

(f) If a claimant or defendant is entitled to recover fees and costs under another law, the court must not include fees and costs incurred by that claimant or defendant after the date of rejection of the settlement offer when calculating the amount of the judgment to be rendered under Subsection (a).

Practice Pointer: If a party’s attorney’s fees are recoverable by law, it would not seem prudent to invoke the offer of settlement provisions, as the fees may be recovered by the prevailing party without having to offer 20 percent less than the anticipated recovery.

Query: May a defending party utilize the offer of settlement scheme to attempt to cut off the plaintiff’s right to recover statutory or contractual attorney’s fees from the date of refusal to the date of judgment?

e) Reasonable Expert Fees

HB 4 allows for the shifting of litigation costs that

include “reasonable fees for not more than two testifying expert witnesses.” The statute does not specify, when multiple experts are retained, which two experts fees may be shifted. It seems reasonably clear that expert fees are reasonable only when necessary to litigate a claim or defense as between the offeror and offeree. Litigation costs that may be recovered “means money actually spent and obligations actually incurred that are directly related to the case in which a settlement offer is made.” Arguably, expert fees for salaried employees would fall outside this definition.

f) Discovery Pertaining to Reasonableness of Litigation Costs

Proposed Rule 167 provides that when litigation costs are to be awarded against a party, the party is entitled to conduct discovery in relation to the reasonableness of those costs. It would seem that discovery would be timely once the amount of the monetary award is determined, as that award will determine whether fees are to be shifted.

g) Caps on Litigation Expenses Shifted

Will a claimant seeking monetary damages win the battle only to lose the war? Can a claimant be required to pay litigation expenses that exceed the amount of their recovery when this offer of settlement rule applies? No. HB 4 imposes a “cap” on the amount of litigation expenses that may be shifted when the offer of settlement rule is triggered, and those may not exceed the claimant’s recovery. Specifically, HB 4 (and Rule 167) provides:

(d) The litigation costs that may be awarded under this chapter may not be greater than an amount computed by:

(1) determining the sum of:

- (A) 50 percent of the economic damages to be awarded to the claimant in the judgment;
- (B) 100 percent of the noneconomic damages to be awarded to the claimant in the judgment; and

(C) 100 percent of the exemplary or additional damages to be awarded to the claimant in the judgment; and

(2) subtracting from the amount determined under Subdivision (1) the amount of any statutory or contractual liens in connection with the occurrences or incidents giving rise to the claim.⁴³

h) How Does a Defendant Recover Fees That Have Been Shifted?

If the claimant is responsible for litigation costs in an amount less than the claimant’s recovery, “those litigation costs shall be awarded to the defendant in the judgment as an offset against the claimant’s recovery from that defendant.”

Presumably, if the defendant is responsible for litigation costs, the recovery of those costs becomes a part of the judgment.

12. *Court Discretion to Deny Fee Shifting.*

Does the trial court have discretion to deny fee shifting? No. While the April 2003 SCAC proposal would have afforded the trial court discretion to reduce the amount of litigation expenses awarded or refuse to award any such

costs, if the court determined that shifting would be inappropriate,⁴⁴ the current SCAC proposal eliminates this provision. Under the current proposed rule, the trial court has discretion to determine the reasonableness of fees shifted, but it was the consensus of the SCAC that to allow the trial court discretion to refuse to shift litigation costs when the fee shifting statute is implicated, is contrary to legislative intent. That is, HB 4 makes the award of litigation costs mandatory once a “significantly less favorable judgment is entered” as defined by the statute. The effect is a non-rebuttable presumption of unreasonableness where the party rejecting the settlement offer suffers a less favorable judgment by a 20 percent margin from the offer.

13. *Changes To the Judgment and Modifications to Fee Shifting.*

Texas adheres to the “one final judgment” rule, so it would seem that the “ultimate” “final” judgment of the trial court will determine whether fees should be shifted. What happens if the trial court suggests a remittitur or grants a judgment n.o.v. changing the amount of the monetary recovery? In this instance, the “revised” judgment may now trigger application of fee shifting provisions, and a mechanism must exist to allow a request for fee shifting. HB 4 and proposed Rule 167 are silent as to this eventuality. However, current Rule 329b may be utilized to move to modify a judgment and seek the imposition or elimination of the shifting of litigation costs when the revised judgment (such as a judgment n.o.v.) triggers or negates the 20 percent margin.⁴⁵

14. *Application of Texas Offer of Settlement Scheme – Federal Court Actions*

When federal court jurisdiction is based upon diversity, is a state offer of settlement scheme operative or does the federal offer of judgment rule apply? Under what circumstances is the Texas offer of settlement statute preempted by federal law? If a federal cause of action is brought in Texas, does the Texas offer of settlement fee shifting scheme apply? If an action is brought in Texas and the substantive law of another state governs the case, does the Texas offer of settlement scheme apply?

Under the *Erie* doctrine, federal courts, when jurisdiction is based upon diversity, are to apply state substantive law, absent an impermissible conflict with federal law, so that the outcome will not differ dependent upon the forum.⁴⁶

The U.S. Supreme Court enunciated in *Hanna v. Plummer* the test for determining how a court should choose between a federal procedural rule and a conflicting state substantive rule:⁴⁷ Where a federal rule “is sufficiently broad to control the issue” but conflicts with a state law, the court is to apply the Federal Rule unless it transgresses the limits of the Rules Enabling Act or the Constitution.⁴⁸ Thus, the initial inquiry is whether the state offer of settlement scheme is procedural or substantive.

Applying the *Hanna* test, the federal First Circuit Court of Appeals held that a state offer of judgment rule allowing the defendant to recover costs as well attorney’s fees incurred after the making of an offer, subsequently rejected, was procedural and in direct conflict with Federal Rule 68 that limits recovery to costs, so that the federal offer of judgment rule controlled.⁴⁹ The Court noted that if the state statute had defined attorney’s fees as part of costs, a different result would be mandated:

Rule 68 itself does not itself supply a definition of ‘costs.’ Instead, it incorporates the definition of ‘costs’ found in the relevant substantive statute of the jurisdiction whose substantive law applies to the case. (Citing *Marek v. Chesny*, 473 U.S. 1, 9, 105 S.Ct. 3012, 3016-17,, 87 L.Ed. 1 (1985)).⁵⁰

The First Circuit acknowledged contrary federal cases applying state offer of judgment statutes when a defendant rejected the offer and did not receive a more favorable judgment. Federal Rule 68 only applies when a defendant makes an offer of judgment, it does not apply when a plaintiff offers to settle. Thus, it has been held, there is no conflict between Federal Rule 68 and a state offer of judgment statute allowing recovering of attorney’s fees when a plaintiff’s settlement offer is rejected.⁵¹ Where there is no direct conflict between state law and a Federal Rule, the Supreme Court has instructed that the decision whether to apply state law should depend on the ‘twin aims’ of *Erie*-prevention of forum shopping and avoiding inequitable administration of the law.⁵² Thus, to avoid an incentive by defendants to remove to federal court, the state offer of judgment scheme prevailed. Applying these principles, the Ninth Circuit upheld application of a state offer of judgment provision awarding the defendant’s attorney’s fees in defending the state law claims when the district court granted the Defendant’s motion for judgment as a matter of law.⁵³ The Court observed that federal rule 68 is inapplicable in a take nothing judgment and thus no conflict:

In an action where a district court is exercising its subject matter jurisdiction over a state law claim, so long as ‘state law does not run counter to a valid federal statute or rule of court, and usually it will not, state law denying the right to attorney’s fees or giving a right thereto, which reflects a substantial policy of the state should be followed.’ (Citing *Aleyska Pipeline Serv. Co. v. Wilderness*, 421 U.S. 240, at 259 n. 31, 95 S.Ct. 1612 (1975)).

A related inquiry to the question of whether state or federal offer of judgment law applies to state claims filed in federal court is the question as to the offer of settlement law to apply when the substantive law of another state applies. May the Texas’ offer of settlement fee shifting statute be utilized in a case arising in another state, but litigated in Texas when that case is controlled by that other state’s substantive law? In addressing this conceptual issue, a Federal intermediate appellate court concluded that choice of law considerations, where laws of different states or nations are involved, implicate public policy decisions and applied the state law where the action was filed.⁵⁴ Specifically, the Court held that Florida’s offer of judgment statute should be utilized in a case arising in Tennessee, but litigated in Florida under Tennessee substantive law, thereby upholding the legislative intent to reduce litigation through fee shifting incentives. A federal appellate court, relying upon the decision, withdrew its earlier opinion to the contrary and held that “Florida’s offer of judgment statute is applicable to cases that are tried in the State of Florida even though the substantive law that governs the case is that of another state.”⁵⁵

Preemption may preclude the application of state offer of judgment statutes. It has been held that when a federal statute provides for limitation of attorney’s fees and costs, the preemption doctrine may preclude the application of a state fee shifting statute that would allow for the

recovery of enhanced attorneys’ fees.⁵⁶ For example, it has been held the application of a state offer of judgment scheme conflicts with federal maritime common law that a prevailing party is generally not entitled to an award of attorney’s fees.⁵⁷

The court, in applying a “reverse *Erie*” analysis, reasoned that the application of a state offer of judgment practice allowing recovery of attorney’s fees “would frustrate the need for uniformity in the admiralty jurisdiction and is preempted by federal maritime common law.”⁵⁸

APPENDIX A HB4 — Chapter 42, *Civil Practices and Remedies Code*

ARTICLE 2. SETTLEMENT

SECTION 2.01. Subtitle C, Title 2, *Civil Practice and Remedies Code*, is amended by adding Chapter 42 to read as follows:

CHAPTER 42. SETTLEMENT

SECTION 42.001. DEFINITIONS. In this chapter:

- (1) “Claim” means a request, including a counterclaim, cross-claim, or third-party claim, to recover monetary damages.
- (2) “Claimant” means a person making a claim.
- (3) “Defendant” means a person from whom a claimant seeks recovery on a claim, including a counterdefendant, cross-defendant, or third-party defendant.
- (4) “Governmental unit” means the state, a unit of state government, or a political subdivision of this state.
- (5) “Litigation costs” means money actually spent and obligations actually incurred that are directly related to the case in which a settlement offer is made. The term includes:
 - (A) court costs;
 - (B) reasonable fees for not more than two testifying expert witnesses; and
 - (C) reasonable attorney’s fees.
- (6) “Settlement offer” means an offer to settle or compromise a claim made in compliance with this chapter.

SECTION 42.002. APPLICABILITY AND EFFECT.

- (a) The settlement procedures provided in this chapter apply only to claims for monetary relief.
- (b) This chapter does not apply to:
 - (1) a class action;
 - (2) a shareholder’s derivative action;
 - (3) an action by or against a governmental unit;
 - (4) an action brought under the Family Code;
 - (5) an action to collect workers’ compensation benefits under Subtitle A, Title 5, Labor Code; or
 - (6) an action filed in a justice of the peace court.
- (c) This chapter does not apply until a defendant files a declaration that the settlement procedure allowed by this chapter is available in the action. If there is more than one defendant, the settlement procedure allowed by this chapter is available only in relation to the defendant that filed the declaration and to the parties that make or receive offers of settlement in relation to that defendant.
- (d) This chapter does not limit or affect the ability

of any person to:

- (1) make an offer to settle or compromise a claim that does not comply with this chapter; or
 - (2) offer to settle or compromise a claim to which this chapter does not apply.
- (e) An offer to settle or compromise that is not made under this chapter or an offer to settle or compromise made in an action to which this chapter does not apply does not entitle the offering party to recover litigation costs under this chapter.

SECTION 42.003. MAKING SETTLEMENT OFFER.

A settlement offer must:

- (1) be in writing;
- (2) state that it is made under this chapter;
- (3) state the terms by which the claims may be settled;
- (4) state a deadline by which the settlement offer must be accepted; and
- (5) be served on all parties to whom the settlement offer is made.

SECTION 42.004. AWARDING LITIGATION COSTS.

- (a) If a settlement offer is made and rejected and the judgment to be rendered will be significantly less favorable to the rejecting party than was the settlement offer, the offering party shall recover litigation costs from the rejecting party.
- (b) A judgment will be significantly less favorable to the rejecting party than is the settlement offer if:
- (1) the rejecting party is a claimant and the award will be less than 80 percent of the rejected offer; or
 - (2) the rejecting party is a defendant and the award will be more than 120 percent of the rejected offer.
- (c) The litigation costs that may be recovered by the offering party under this section are limited to those litigation costs incurred by the offering party after the date the rejecting party rejected the settlement offer.
- (d) The litigation costs that may be awarded under this chapter may not be greater than an amount computed by:
- (1) determining the sum of:
 - (A) 50 percent of the economic damages to be awarded to the claimant in the judgment;
 - (B) 100 percent of the noneconomic damages to be awarded to the claimant in the judgment; and
 - (C) 100 percent of the exemplary or additional damages to be awarded to the claimant in the judgment; and
 - (2) subtracting from the amount determined under Subdivision (1) the amount of any statutory or contractual liens in connection with the occurrences or incidents giving rise to the claim.
- (e) If a claimant or defendant is entitled to recover fees and costs under another law, that claimant or defendant may not recover litigation costs in addition to the fees and costs recoverable under the other law.
- (f) If a claimant or defendant is entitled to recover fees and costs under another law, the court must not include fees and costs incurred by that claimant or defendant after the date of rejection of the settlement offer when calculating the amount of the judgment to be rendered under Subsection (a).

- (g) If litigation costs are to be awarded against a claimant, those litigation costs shall be awarded to the defendant in the judgment as an offset against the claimant's recovery from that defendant.

SECTION 42.005. SUPREME COURT TO MAKE RULES.

- (a) The supreme court shall promulgate rules implementing this chapter. The rules must be limited to settlement offers made under this chapter. The rules must be in effect on January 1, 2004.
- (b) The rules promulgated by the supreme court must provide:
- (1) the date by which a defendant or defendants must file the declaration required by Section 42.002(c);
 - (2) the date before which a party may not make a settlement offer;
 - (3) the date after which a party may not make a settlement offer; and
 - (4) procedures for:
 - (A) making an initial settlement offer;
 - (B) making successive settlement offers;
 - (C) withdrawing a settlement offer;
 - (D) accepting a settlement offer;
 - (E) rejecting a settlement offer; and
 - (F) modifying the deadline for making, withdrawing, accepting, or rejecting a settlement offer.
 - (c) The rules promulgated by the supreme court must address actions in which there are multiple parties and must provide that if the offering party joins another party or designates a responsible third party after making the settlement offer, the party to whom the settlement offer was made may declare the offer void.
 - (d) The rules promulgated by the supreme court may:
 - (1) designate other actions to which the settlement procedure of this chapter does not apply; and
 - (2) address other matters considered necessary by the supreme court to the implementation of this chapter.

SECTION 2.02. The changes in law provided by this article apply only to an action filed on or after January 1, 2004.

APPENDIX B

Draft Proposal — Supreme Court Advisory Committee, July 2003

RULE 167. OFFER OF SETTLEMENT; AWARD OF LITIGATION COSTS ⁵⁹

167.1 DEFINITIONS.

- (a) When used in this rule, the following definitions apply:
- (1) "Claim" means a request, including a counterclaim, cross-claim, or third-party claim, to recover monetary damages.
 - (2) "Claimant" means a person making a claim.
 - (3) "Defendant" means a person from whom a

claimant seeks recovery on a claim, including a counterdefendant, cross-defendant, or third-party defendant.

(4) "Governmental unit" means the state, a unit of state government, or a political subdivision of this state.

(5) "Litigation costs" means money actually spent and obligations actually incurred that are directly related to the case in which a settlement offer is made.⁶⁰ The term includes:

(A) court costs⁶¹;

(B) reasonable fees for not more than two

testifying expert witnesses; and

(C) reasonable attorney's fees.⁶²

(6) "Settlement offer" means an offer to settle or compromise a claim made in compliance with Chapter 42 of the Civil Practices & Remedies Code and this rule.

167.2 APPLICABILITY AND EFFECT.

(a) The settlement procedures provided in this rule apply only to claims for monetary relief.

(b) This rule does not apply to:

(1) a class action;

(2) a shareholder's derivative action;

(3) an action by or against a governmental unit;

(4) an action brought under the Family Code;

(5) an action to collect workers' compensation benefits under Subtitle A, Title 5, Labor Code, or,

(6) an action filed in a justice of the peace court.⁶³

(c) This rule does not apply until a defendant⁶⁴ files a declaration that the settlement procedure allowed by Chapter 42 of the Civil Practices & Remedies Code and this rule is available in the action. If there is more than one defendant, the settlement procedure allowed by this rule is available only in relation to the defendant that filed the declaration and to the parties that make or receive offers of settlement in relation to that defendant. Such a declaration must be filed no later than 45 days before the date the case is set for a conventional trial on the merits.

(d) This rule does not limit or affect the ability of any person to:

(1) make an offer to settle or compromise a claim that does not comply with this rule; or

(2) offer to settle or compromise a claim to which this rule does not apply.

(e) An offer to settle or compromise that is not made in compliance with Chapter 42 and Rule 167.3 or an offer to settle or compromise made in an action to which this rule does not apply does not entitle the offering party to recover litigation costs under this rule.

167.3 MAKING SETTLEMENT OFFER.

(a) A settlement offer must:

(1) be in writing;

(2) state that it is made under this rule and Chapter 42 of the Civil Practices and

Remedies Code;

(3) State the terms by which the claims may be settled and must offer to settle all monetary claims between the defendant and claimant.⁶⁵ The offer must state whether the offer to settle includes or excludes costs or interest accrued up to the date of the offer, without the necessity of specifying an amount.⁶⁶

(4) State the settlement offer per claimant and per defendant, except that if a claimant alleges that one defendant is vicariously liable for the conduct of another defendant then a combined offer may be made by or to those defendants.

(5) State that payment will take place within 30 days of acceptance of the offer or approval by the court when approval of a settlement is required.⁶⁷

(6) State a deadline by which the settlement offer must be accepted which must be a date at least 14 days after the offer is served.⁶⁸

(7) Be served on all parties to whom the settlement offer is made. The offer of settlement shall not be filed with the court, until the offer is accepted or in connection with a motion to recover litigation costs under this Rule.

(8) State that the offer includes a request for the following release and dismissal, if applicable:

"Claimant agrees to release, acquit, and forever discharge the defendant from any and all claims and demands for monetary damages directly or indirectly arising from or in connection with this lawsuit, including all claims currently on file and all claims which could have been filed relating to the matters asserted in this lawsuit. The monetary claims will be terminated by dismissal with prejudice."⁶⁹

(9) Version A:

State that the offer includes a request for the following indemnity provision, if applicable: "Claimant agrees to indemnify the defendant from any and all claims and demands for monetary damages, including attorneys' fees, brought by, through, or under claimant."

Version B:

Include a request for an indemnity provision where applicable.

Version C: (Unnecessary if A or B is adopted.)

If there are any statutory or contractual liens on the claimant's cause of action, the settling defendant may condition the settlement on a release [or indemnity] of the settling defendant by the lien holder(s). If the claimant accepts the monetary offer, the claimant has 30 days to obtain the release(s) [or indemnity].⁷⁰ Failure to

obtain the release(s) [or indemnity] is deemed a rejection of the offer and may subject the claimant to the award of litigation costs.⁷¹

Version D: (Unnecessary if A or B is adopted.)

“If there are any statutory or contractual liens on the claimants cause of action, the settling defendant may condition the settlement on the claimant’s providing indemnity. The condition regarding indemnity must be in the form prescribed in subsection (___) [Version A].”

(10) Any condition added to a settlement offer, other than as provided in this section, will prevent the application of the award of litigation costs.

167.4 TIME LIMITATIONS ON MAKING OFFER.

(a) *Requirements.* The offer must:

(1) be made after a declaration is timely filed by a defendant, and,

(A) for cases governed by

(i) Rule 190.2, more than thirty days after the appearance in the case of the offeror or offeree, whichever is later;⁷²

(ii) Rule 190.3 or Rule 190.4, more than ninety days after the appearance in the case of the offeror or offeree, whichever is later; and,

(B) no less than thirty days before the date the case is set for a conventional trial on the merits⁷³, or if in response to a prior offer, within seven days of the prior offer, whichever is later.⁷⁴

167.5 SUCCESSIVE OFFERS. A party may make an offer after having made or rejected a prior offer. A rejection of an⁷⁵ offer that exceeds an offeror’s prior offers, if any, is subject to imposition of litigation costs under this rule.

167.6 MODIFICATION OF TIME LIMITS. The court may modify any of the time limits proscribed by this Rule by written order entered before trial for good cause shown upon the motion of any party or on its own initiative.⁷⁶

167.7 WITHDRAWAL OF OFFER. An offer can be withdrawn before it is accepted. Withdrawal is effective when written notice of the withdrawal is served on the offeree.⁷⁷ Once an unaccepted offer has been withdrawn, it cannot be accepted or be the basis for imposing litigation costs under this rule.

167.8 ACCEPTANCE OF OFFER. An offer that has not been withdrawn can be accepted only by written notice served on the offeror by the acceptance date. When an offer is accepted, the offeror or offeree may file the offer and acceptance along with a motion for judgment.⁷⁸

⁷⁸ Under Rule 167.3(a)(5),

“the settlement offer must state that payment will take place within 30 days of acceptance of the offer.

” Technically, then, payment in satisfaction of an accepted offer may precede judgment, particularly when non-economic claims remain to be litigated. Alternative:

“When an offer is accepted, the offeror or offeree may file the offer and acceptance along with a motion for enforcement of an award of litigation costs.”

167.9 REJECTION OF OFFER. An offer may be rejected by

written notice served on the offeror by the acceptance date, or by failure to respond on or before the acceptance date; which is deemed to be a rejection.

167.10 OFFEREE MAY DECLARE OFFER VOID UNDER CERTAIN CIRCUMSTANCES. In actions involving multiple parties, if the offering party joins another party or designates a responsible third party after making the settlement offer, the party to whom the settlement offer was made may declare the offer void.⁷⁹

167.11 AWARDING LITIGATION COSTS.

(a) If a settlement offer is made and rejected⁸⁰ and the judgment⁸¹ that would otherwise be rendered on a monetary claim before setoff will be significantly less favorable to the rejecting party than was the settlement offer, the offering party shall recover litigation costs from the rejecting party.

(b) A judgment will be significantly less favorable to the rejecting party than is the settlement offer if:

(1) the rejecting party is a claimant and the award on the monetary claim or claims will be less than 80 percent of the rejected offer;⁸²

(2) the rejecting party is a defendant and the award on the monetary claim or claims will be more than 120 percent of the rejected offer.

(3) The rejecting party is a defendant and the award on the monetary claim or claims would have been more than 120 percent of the rejected offer, but for the imposition of statutory caps on the monetary damages.

(c) The litigation costs that may be recovered by the offering party under this section are limited to those litigation costs incurred⁸³ by the offering party,⁸⁴ after the date the rejecting party rejected the settlement offer up until the date the judgment is signed.⁸⁵

(d) The litigation costs that may be awarded under this rule⁸⁶ may not be greater than an amount computed by:

(1) determining the sum of:

(A) 50 percent of the economic damages⁸⁷ to be awarded to the claimant in the judgment;

(B) 100 percent of the noneconomic damages⁸⁸ to be awarded to the claimant in the judgment; and

(C) 100 percent of the exemplary⁸⁹ or additional damages to be awarded to the claimant in the judgment; and

(2) subtracting from the amount determined under Subdivision (1) the amount of any statutory or contractual liens in connection with the occurrences or incidents giving rise to the claim.⁹⁰

(e) If a claimant or defendant is entitled to recover fees and costs under another law, that claimant or defendant may not recover litigation costs in addition to the fees and costs recoverable under the other law.⁹¹

(f) If a claimant or defendant is entitled to recover fees and costs under another law, the court must not include fees and costs incurred by that claimant or defendant after the date of rejection of the

settlement offer when calculating the amount of the judgment to be rendered under Subsection (a).

(g) If litigation costs are to be awarded against a claimant, those litigation costs shall be awarded to the defendant in the judgment as an offset against the claimant's recovery from that defendant.

(h) When litigation costs are to be awarded against a party, the party is entitled to conduct discovery in relation to the reasonableness of those costs.⁹²

167.12 HEARING REQUIRED. The court, after a hearing at which the affected parties may present evidence, shall impose litigation costs as required by this rule.

167.13 EVIDENCE NOT ADMISSIBLE. Evidence relating to an offer made under this rule is not admissible except for purposes of enforcing a settlement agreement or obtaining litigation costs. The provisions of this rule may not be made known to the jury by any means.

167.14 OTHER DISPUTE RESOLUTION MECHANISMS NOT AFFECTED. This rule does not apply to any offer made in a mediation or arbitration proceeding and should not affect other alternative dispute resolution mechanisms. The rule does not apply to or preclude offers of settlement that do not comply with the rule.

Footnotes

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1. Technically, "loser pay" is not completely new to Texas. See Gregory E. Maggs & Michael D. Weiss, *Progress on Attorney's Fees: Expanding The Loser Pay Rules in Texas*, 30 HOUS. L. REV. 1915, 1936 (1994) citing Texas statutes that provide for fee shifting in discrete causes of action. HB 4 expands fee shifting to all civil cases, except those few causes of actions exempted.

2. See www.stcl.edu for a sampling of state provisions providing for offers of judgment/settlement schemes, at the faculty page of Professor Elaine Carlson.

3. FED. R. CIV. P. 68.

4. It has been reported that twenty-eight states (including a majority of the federal replica jurisdictions), plus the District of Columbia, have provisions identical or substantially similar to Federal Rule 68. Another thirteen states have provisions which depart from the Federal Rule in significant ways, while nine states apparently have no provision at all. See Solimine & Pacheco, *State Court Regulation of Offers of Judgment and its Lessons For Federal Practice*, 13 OHIO ST. J. DISPUTE RESOLUTION 51, 64 (1997).

5. Rowe & Vidmar, *Empirical Research on Offers of Settlement: A Preliminary Report*, 51 *Law & Contemporary Problems* 13, 13-14, (Autumn 1988).

6. See Gary M. Pappas & Joye B. Walford, *Proposals for Settlement: More Traps for the Unwary*, 76 FLA. B. J. 69 (Dec. 2002); David L. Kian, *The 1996 Amendments To Florida Rule of Civil Procedure 1.442: Reconciling a Decade of Confusion*, 71 FLA. B. J. 32 (Aug. 1997).

7. Sherman, "From Loser Pays to Modified Offer of Judgment Rules: Reconciling Incentives To Settle With Access to Justice," 76 TEX. L. REV. 1863, 1863 (1998).

8. The "American Rule" was adopted early in the jurisprudence

of our country. See *Arcambel v. Wiseman*, 3 U.S. (3 Dall.) 306 (1796); John Leubsdorf, "Toward A History of the American Rule on Attorney Fee Recovery," 47 *LAW & CONTEMPORARY PROBLEMS* 9 (1984).

9. Sherman, "From Loser Pays to Modified Offer of Judgment Rules: Reconciling Incentives To Settle With Access to Justice," 76 TEX. L. REV. 1863 (1998).

10. William W Schwarzer, *Fee-Shifting Offers of Judgment—An Approach to Reducing the Cost of Litigation*, *Judicature*, Oct.-Nov. 1992, at 147, 149-150.

11. TEX. R. CIV. P., Chapter 10.

12. See, e.g., TEX. R. CIV. P., Chapter 38.

13. The state adoptions are both by rule and by statute. See Appendix A at 13 OHIO ST. J. ON DISP. RESOL. 79 for a listing of state provisions.

14. Thomas D. Rowe, *The Legal Theory of Attorney Fee-Shifting: A Critical Overview*, 1982 *Duke L.J.* 651 (1982).

15. See Committee on Federal Rules of Civil Procedure, to the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, *Submitting Proposals for Amendment of the Federal Rules of Civil Procedure* (Aug. 1984), reprinted in 102 *FR.D.* 423, 423-24 (1984).

16. William W Schwarzer, *Fee-Shifting Offers of Judgment—An Approach to Reducing the Cost of Litigation*, *Judicature*, Oct.-Nov. 1992, at 147.

17. See Solimine & Pacheco, *State Court Regulation of Offers of Judgment and Its Lessons For Federal Practice*, 13 *Ohio St. J. Dispute Resolution* 51, 64 (1997).

18. Wright, Miller & Marcus, *Federal Practice & Procedure* 2d, 1§ 3001 (West Publishing, 2001).

19. Fisher, *Federal Rule 68, A Defendant's Subtle Weapon: Its Use and Pitfalls*, 14 *DePaul Bus. L. J.* 89, 90 (Fall 2001): "Commentators claim that Rule 68 is not often utilized. More likely, its use is underreported. A Rule 68 offer that is not accepted will not be filed with the court. Thus, no reliable mechanism exists for counting the frequency of Rule 68 offers.

In addition, a defendant may prefer to settle privately even though it has made a Rule 68 offer. The plaintiff usually loses nothing by settling privately and may gain additional concessions from the defendant, such as additional money for a confidentiality provision. In such situations, the parties will settle privately, outside the scope of Rule 68. While this will not be reported as a "successful" Rule 68 offer, the application of the rule was nonetheless an important force driving the settlement."

20. Sherman, *From Loser Pays to Modified Offer of Judgment Rules: Reconciling Incentives To Settle With Access to Justice*, 76 TEX. L. REV. 1863 (1998).

21. *Ashland Chemical Inc. v. Barco Inc.*, 123 F.3d 261, 268 (5th Cir. Sept. 1997).

22. James M. McCown, *Civil Procedure Survey*, 30 *Tex. Tech L. Rev.* 475, 504 (1999).

23. See March 1, 2002 Correspondence from Professor Elaine Carlson to Texas Supreme Court Advisory Committee Members, Section III, at www.jw.com/scac under "Publications."

24. See Transcript of June 19, 2003 Supreme Court Advisory Committee debate (discussing TEX. GOV'T CODE ANN. § 22.004).

25. See Parness, *Choices About Attorney-Fee Shifting Laws: Further Substance/Procedure Problems Under Erie and Elsewhere* 40 *U. PITT. L. REV.* 393 (1988).

26. Merenstein, "More Proposals To Amend Rule 68: Time To Sink the Ship Once and For All," 184 *FR.D.* 145 (1999).

27. William W Schwarzer, *Fee-Shifting Offers of Judgment*

—An Approach to Reducing the Cost of Litigation, *Judicature*, Oct.-Nov. 1992, at 147, 148-49.

28. Merenstein, "More Proposals To Amend Rule 68: Time To Sink the Ship Once and For All," 184 F.R.D. 145,165 (1999).

29. Merenstein, "More Proposals To Amend Rule 68: Time To Sink the Ship Once and For All," 184 F.R.D. 145,165 (1999).

30. The DTPA has its own remedies for the refusal to settle. See TEX. BUS. & COM. CODE §§17.505-.5052.

31. Simon, "The New Meaning of Rule 68: Marek v. Chesney and Beyond", 14 N.Y.U. REV. L. & SOC. CHANGE 475 (1986).

32. Various proposals differ greatly over this start time. The point of the rule is to encourage early evaluations of cases, but often some discovery is needed. The party with less information to start with may be unduly pressured by a quick offer.

33. Trial commences when the first witness is called to testify.

34. While the purpose of the rule is to encourage early evaluation of cases, it can be anticipated that often settlement discussions will be more serious very close to trial. Even if the only savings were trial expenses, the purpose of the rule would be served.

35. See Thomas L. Cabbage III, *Federal Rule 68 Offers of Judgment and Equitable Relief: Where Angels Fear to Tread*, 70 TEX. L. REV. 465 (1991) for a discussion of the problems entailed in applying offer of judgment schemes to equitable relief.

36. It may not be possible to obtain a release from a lien holder, particularly when a governmental agency is involved. (Medicaid or Social Security.) Accordingly, it is argued that either a release or indemnity should suffice to satisfy the requirements of Rule 167.3(a)(9), even when a release is sought. The argument against including indemnity as a method of satisfying Rule 167.3(a)(9) is that the trial court is required to compare an offer with an award to determine if fee shifting should take place. Satellite litigation over the language of the indemnity agreement would place the trial court in a tenuous position in determining whether to impose litigation costs. An alternative may be to require proof of payment to the lien holder.

37. If a plaintiff is willing to settle for the amount offered by the defendant but is unable to obtain the agreement of the worker's comp carrier to the settlement, should the claimant be required to pay litigation costs? As the carrier is not a party to the suit, would the trial court have any authority to order the carrier to pay litigation costs?

38. It should be noted, here and elsewhere, that services is ordinarily effective upon the sender's completion of the prescribed process and does not await receipt.

39. Imposing costs for the rejection of the last offer that exceeds all prior offers is intended to encourage parties to arrive at a realistic offer sooner than later. While it might be argued that imposing costs only for the rejection of a party's last offer would not seem to encourage plaintiffs to make lower offers earlier, the fact that plaintiffs can only recover costs if the judgment is at least 120% of their highest offer provides a strong incentive for plaintiffs not to make their highest offer unrealistically high. Additionally, the dynamics of settlement negotiations usually serve to discourage ever-increasing offers from plaintiffs. Awarding costs only from the time of the highest offer should encourage defendants to make higher offers earlier, when expenses can be avoided. But the issue is not a simple one.

40. Once designated, regardless of whether the plaintiff chooses to formally join the responsible third party, their percentage of responsibility is submitted to the jury, and the damages to

the plaintiff reduced by that percentage.

41. Sherman, "From Loser Pays to Modified Offer of Judgment Rules: Reconciling Incentives To Settle With Access to Justice," 76 TEX. L. REV. 1863 (1998).

42. See Allen & Ellis, "What are Taxable Costs in Texas?," 36

HOUSTON LAWYER 14, October 1998.

43. For example, hospital liens that attach to a patient's right of action against a third party for negligently causing personal injuries for which the patient is treated.

See Chapter 55 of the Texas Property Code.

See also Karen L. Neal,

"Ten Basic Facts to Know-The Texas Hospital Lien Statute" 61 TEX. B. J. 428 (1998).

44. The trial court, under the rejected proposal, could deny the imposition of avoidable litigation expenses if it:

(A) would unjustly punish or unjustly reward unfair, strategic conduct rather than a good faith attempt to reach a settlement,

(B) would not further the purpose of this rule in promoting reasonable settlements and avoiding the expense to the public and to the parties of unnecessary litigation, or (C) would otherwise include an amount the trial court determines is unreasonable or unnecessary.

45. TEX. R. CIV. P. 329b.

46. *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938).

47. *Hanna v. Plumer*, 380 U.S. 460, 471, 85 S.Ct. 1136, 1143-44, 14 L.Ed. 8 (1965).

48. *De Rebollo v. The Miami Heat Assoc., Inc.*, 137 F.3d 56, 65 (1st Cir. 1998).

49. *De Rebollo v. The Miami Heat Assoc., Inc.*, 137 F.3d 56, 65 (1st Cir. 1998).

50. *Id.* at page 66. See also *Aceves v. Allstate Ins. Co.*, 68 F.3d 1160, 11667-68 (9th Cir. 1995) applying federal law on expert witness fee compensation in diversity action notwithstanding similar California offer of judgment law when California law conflicted allowing reasonable fees.)

51. *S.A. Healy Co. v. Milwaukee Metro. Sewage Dist.*, 60 F.3d 305, 310 (7th Cir. 1995), cert. denied 116 S.Ct. 566, 516 U.S. 1010, 133 L.Ed.2d 491; *Garcia v. Wal-Mart Stores, Inc.*, 209 F.3d 1170 (10th Cir. 2000).

52. See dictum *Gasperini v. Center for Humanities, Inc.*, 116 S.Ct. 2211, 2219, n. 7, 518 U.S. 415, 135 L.Ed.2d 659 (1996).

53. *MRO Communications, Inc. v. AT&T*, 197 F.3d 1276 (9th Cir. 1999).

54. *BDO Seidman v. British Car Auctions*, 502 So.2d 366, 368 (Fla. 4th Dist. Court of Appeals 2001).

55. *McMahan v. Toto*, 311 F.3d 1077, 1081 (11th Cir. 2002).

56. *Tai-Pan, Inc. v. Keith Marine, Inc.*, 1997 WL 714898 (M.D. Fla. 1997); *Garan Inc. v. M/V Aivik*, 907 F.Supp. 397 (S.D. Fla. 1995).

57. *Id.*

58. *Garan Inc. v. M/V Aivik*, 907 F.Supp. 397, 401 (S.D. Fla. 1995).

59. More of the purpose and intended operation of this rule can be explained in comments as was done, for example, in the discovery rules changes.

60. Recommended for inclusion as a comment to the rule: In determining the reasonableness of litigation costs the trial court may consider, in addition to other factors, the extent the costs and fees were reasonably related to the actions of the rejecting party and the claims that were the subject of the offer.

61. Is this limited to taxable court costs? Among the factors the trial court should consider in determining the reasonableness of attorney's fees the trial court should

consider, are those factors set forth in *Arthur Anderson v. Perry*, 945 S.W.2d 812 (Tex. 1997): (1) whether the attorney's fee was a contingent fee or an hourly fee, (2) the total number of hours worked, (3) the novelty or difficulty of the claims and defense presented, (4) the extent to which employment in this case precluded employment in other matters, and (5) whether any of the fees charged in the case were for time or expenses incurred in prosecution of a prior lawsuit as well as the constraints set forth in Disciplinary Rule of Professional Conduct § 1.04.

62. Recommend for inclusion as a comment to the rule:

Among the factors the trial court should consider in determining the reasonableness of attorney's fees the trial court should consider, are those factors set forth in *Arthur Anderson v. Perry*, 945 S.W. 2d 812 (Tex. 1997): (1) whether the attorney's fee was a contingent fee or an hourly fee, (2) the total numbers of hours worked, (3) the novelty or difficulty of the claims and defense presented, (4) the extent to which employment in this case precluded employment in other matters, and (5) whether any of the fees charged in the case were for time or expenses incurred in prosecution of a prior lawsuit as well as the constraints set forth in Disciplinary Rule of Professional Conduct § 1.04.

63. Actions filed in justice court includes small claim proceedings.

64. Any "defendant" may file the declaration to put fee shifting in play. As defined by the rule, a defendant is "a person from whom a claimant seeks recovery on a claim, including a counterdefendant, cross-defendant or third party defendant."

65. So, for example, an offer by a defendant to settle only its counterclaim but not the claims made the basis of the Plaintiff's suit, would be inadequate to qualify as a fee shifting offer under this rule.

66. An alternative: "It is deemed that any offer to settle made under this rule is for the stated monetary terms and in addition for costs and interest that has accrued up to the date of the offer."

67. For example, a settlement made as to a minor.

68. The offeror may elect to leave an offer open for a period longer than 14 days.

69. It has been suggested by a sub-committee member that in some circumstances, indemnification must be required to fully resolve the case and would advocate this alternative to subsection (8): "The offer may include a requirement that the offeree execute settlement papers containing appropriate release and indemnification provisions."

70. It may not be possible to obtain a release from a lien holder, particularly when a governmental agency is involved. (Medicaid or Social Security.) Accordingly, it is argued that either a release or indemnity should suffice to satisfy the requirements of Rule 167.3(a)(9), even when a release is sought. The argument against including indemnity as a method of satisfying Rule 167.3(a)(9) is that the trial court is required to compare an offer with an award to determine if fee shifting should take place. Satellite litigation over the language of the indemnity agreement would place the trial court in a tenuous position in determining whether to impose litigation costs. An alternative may be to require proof of payment to the lien holder.

71. If a plaintiff is willing to settle for the amount offered by the defendant but is unable to obtain the agreement of the worker's comp carrier to the settlement, should the claimant be required to pay litigation costs? As the carrier is not a party to the suit, would the trial court have any authority to order the carrier to pay litigation costs?

72. Various proposals differ greatly over this start time. The point of the rule is to encourage early evaluations of cases, but often some discovery as to the merits of the case is needed. The party with less information to start with may be unduly pressured by a quick offer.

73. The Committee has previously approved the following comment: "Trial commences when the first witness is called to testify." This may or may not occur on the day of the trial setting. The committee may wish to reconsider whether the addition of this comment is prudent, as the litigants would likely prefer a date certain to compute this time period.

74. While the purpose of the rule is to encourage early evaluation of cases, it can be anticipated that often settlement discussions will be more serious very close to trial. Even if the only savings were trial expenses, the purpose of the rule would be served.

75. Imposing costs for the rejection of the best last offer that exceeds all prior offers is intended to encourage parties to arrive at a realistic offer sooner than later. While it might be argued that imposing costs only for the rejection of a party's last offer would not seem to encourage plaintiffs to make lower offers earlier, the fact that plaintiffs can only recover costs if the judgment is at least 120% of their highest offer provides a strong incentive for plaintiffs not to make their highest offer unrealistically high. Additionally, the dynamics of settlement negotiations usually serve to discourage ever increasing offers from plaintiffs. Awarding costs only from the time of the highest offer should encourage defendants to make higher offers earlier, when expenses can be avoided. But the issue is not a simple one.

76. While it is improper to file an offer to settle with the court before acceptance, the declaration required by Rule 167.2(c) is filed with the court, so the court will be aware of the fee shifting potential.

77. It should be noted, here and elsewhere, that service is ordinarily effective upon the sender's completion of the prescribed process and does not await receipt.

78. Under Rule 167.3(a)(5), "the settlement offer must state that payment will take place within 30 days of acceptance of the offer." Technically, then, payment in satisfaction of an accepted offer may precede judgment, particularly when noneconomic claims remain to be litigated. Alternative: "When an offer is accepted, the offeror or offeree may file the offer and acceptance along with a motion for enforcement of an award of litigation costs."

79. The Committee has voted to carry forward the statutory language verbatim and to leave to case law development the proper interpretation of this provision within the context of legislative intent. Queries for case law development: Can the offeree declare the offer void after acceptance? Should there be a time limit? The outside time limit for a defendant to designate a responsible third party (HB4 amends Ch. 33, CPRC 33.004(a)):

"The motion must be filed on or before the 60th day before the trial date unless the court finds good cause to allow the motion to be filed at a later date." Joinder of parties is subject to a more liberal time frame. How will a party that has fully settled its claim be aware of the designation of the RTP or joinder of additional parties?

80. The failure of the trial court or an ad litem to approve a settlement made in relation to a minor is not a rejection, for purposes of imposing litigation costs. [An alternative to this comment is to exempt minors from the operation of this rule, recognizing a child should not be penalized with litigation costs for a settlement that the ad litem or trial judge does not approve].

81. In determining whether a judgment is significantly less favorable to the rejecting party, the court must consider any modifications to the judgment, including the granting of a judgment n.o.v.

82. In determining whether a party that rejected an offer has obtained a significantly less favorable judgment, the trial court should not consider litigation costs, but rather should compare the amount of the offer to settle the monetary claim or claims with the amount of the award on the monetary claim or claims.

83. Should "incurred" be defined? Are attorney's fees incurred at the billable rate or some lesser rate that the firm has contracted to accept from an insurer, for example?

84. So, for example, when multiple parties are incurred, the attorney's fees that might be shifted should be segregated as to the offeree against whom the fees are sought.

85. The rule must specify the time frame after which litigation costs are not to be shifted. For example, appellate costs and attorneys fees will not be shifted under this proposed rule.

86. Apparently this cap applies to both Plaintiffs and Defendants, so that Defendant's liability for fees shifted are capped by the Plaintiff's recovery. Thus, if a take-nothing judgment is entered, no fee shifting will occur.

87. "Economic damages" include "compensatory damages intended to compensate a claimant for actual economic or pecuniary loss." CPRC 41.001(4).

88. "Noneconomic damages" are defined as "damages awarded for the purposes of compensating a claimant for physical pain and suffering, mental or emotional pain or anguish, loss of consortium, disfigurement, physical impairment, loss of companionship and society inconvenience, loss of enjoyment of life, injury to reputation and all other nonpecuniary losses of any kind other than exemplary damages. CPRC 41.001(12).

89. "Exemplary damages" means "any damages awarded as a penalty or by way of punishment but not for compensatory purposes." CPRC 41.001(5).

90. What would this include? Hospital liens-Chapter 55 Texas Property Code? See Karen L. Neal, *Ten Basic Facts to Know—The Texas Hospital Lien Statute*, 61 TEX. B. J. 428 (1998). Would the attorney's have a lien?

91. Thus, for example, if attorney's fees are recoverable under "another law," double recovery under Rule 167 is not available.

92. It is necessary that the rules expressly address the propriety of discovery in relation to fee shifting. Technically, existing discovery rules are inadequate to support discovery in regards to fee shifting: discovery periods will be closed so the pre-trial discovery rules will not support discovery, and this is not discovery after rendition of judgment to aid in the enforcement of the judgment that would implicate Rule 621a. Accordingly discovery in relation to the imposition of litigation costs should be expressly provided for in the rule.