

IN THE SUPREME COURT OF TEXAS

Misc. Docket No. 11- 9182

AMENDED ORDER ADOPTING AMENDMENTS TO TEXAS RULE OF CIVIL PROCEDURE 167

ORDERED that:

1. This Order vacates and supersedes the Order dated August 31, 2011, in Misc. Docket No. 11-9175. This Order clarifies that the rule amendments adopted by this Order apply only to cases commenced on or after September 1, 2011.

2. In accordance with the Act of May 25, 2011, 82nd Leg., R.S., ch. 203 (HB 274), effective September 1, 2011, amending sections 42.003 and 42.004 of the Texas Civil Practice and Remedies Code, the Supreme Court of Texas amends Rule 167 of the Texas Rules of Civil Procedure as follows, effective immediately.

3. The Clerk is directed to:

- a. file a copy of this Order with the Secretary of State;
- b. cause a copy of this Order to be mailed to each registered member of the State Bar of Texas by publication in the *Texas Bar Journal*;
- c. send a copy of this Order to each elected member of the Legislature; and
- d. submit a copy of the Order for publication in the *Texas Register*.

4. These amendments may be changed in response to comments received on or before November 1, 2011. Any interested party may submit written comments directed to Marisa Secco, Rules Attorney, at P.O. Box 12248, Austin, TX 78711, or marisa.secco@txcourts.gov.

Dated: September 9, 2011.

Wallace B. Jefferson

Wallace B. Jefferson, Chief Justice

Nathan L. Hecht

Nathan L. Hecht, Justice

Dale Wainwright

Dale Wainwright, Justice

David M. Medina

David M. Medina, Justice

Paul W. Green

Paul W. Green, Justice

Phil Johnson

Phil Johnson, Justice

Don R. Willett

Don R. Willett, Justice

Eva M. Guzman

Eva M. Guzman, Justice

Debra H. Lehrmann

Debra H. Lehrmann, Justice

RULE 167. OFFER OF SETTLEMENT; AWARD OF LITIGATION COSTS

167.1 Generally. Certain litigation costs may be awarded against a party who rejects an offer made substantially in accordance with this rule to settle a claim for monetary damages—including a counterclaim, crossclaim, or third-party claim—except in:

- (a) a class action;
- (b) a shareholder's derivative action;
- (c) an action by or against the State, a unit of state government, or a political subdivision of the State;
- (d) an action brought under the Family Code;
- (e) an action to collect workers' compensation benefits under title 5, subtitle A of the Labor Code; or
- (f) an action filed in a justice of the peace court or small claims court.

167.2 Settlement Offer.

- (a) *Defendant's declaration a prerequisite; deadline.* A settlement offer under this rule may not be made until a defendant—a party against whom a claim for monetary damages is made—files a declaration invoking this rule. When a defendant files such a declaration, an offer or offers may be made under this rule to settle only those claims by and against that defendant. The declaration must be filed no later than 45 days before the case is set for conventional trial on the merits.
- (b) *Requirements of an offer.* A settlement offer must:
 - (1) be in writing;
 - (2) state that it is made under Rule 167 and Chapter 42 of the Texas Civil Practice and Remedies Code;
 - (3) identify the party or parties making the offer and the party or parties to whom the offer is made;

- (4) state the terms by which all monetary claims—including any attorney fees, interest, and costs that would be recoverable up to the time of the offer—between the offeror or offerors on the one hand and the offeree or offerees on the other may be settled;
 - (5) state a deadline—no sooner than 14 days after the offer is served—by which the offer must be accepted;
 - (6) be served on all parties to whom the offer is made.
- (c) *Conditions of offer.* An offer may be made subject to reasonable conditions, including the execution of appropriate releases, indemnities, and other documents. An offeree may object to a condition by written notice served on the offeror before the deadline stated in the offer. A condition to which no such objection is made is presumed to have been reasonable. Rejection of an offer made subject to a condition determined by the trial court to have been unreasonable cannot be the basis for an award of litigation costs under this rule.
- (d) *Non-monetary and excepted claims not included.* An offer must not include non-monetary claims and other claims to which this rule does not apply.
- (e) *Time limitations.* An offer may not be made:
- (1) before a defendant's declaration is filed;
 - (2) within 60 days after the appearance in the case of the offeror or offeree, whichever is later;
 - (3) within 14 days before the date the case is set for a conventional trial on the merits, except that an offer may be made within that period if it is in response to, and within seven days of, a prior offer.
- (f) *Successive offers.* A party may make an offer after having made or rejected a prior offer. A rejection of an offer is subject to imposition of litigation costs under this rule only if the offer is more favorable to the offeree than any prior offer.

167.3 Withdrawal, Acceptance, and Rejection of Offer.

- (a) *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. Once an unaccepted offer has been withdrawn, it cannot be accepted or be the basis for awarding litigation costs under this rule.

- (b) *Acceptance of offer.* An offer that has not been withdrawn can be accepted only by written notice served on the offeror by the deadline stated in the offer. When an offer is accepted, the offeror or offeree may file the offer and acceptance and may move the court to enforce the settlement.
- (c) *Rejection of offer.* An offer that is not withdrawn or accepted is rejected. An offer may also be rejected by written notice served on the offeror by the deadline stated in the offer.
- (d) *Objection to offer made before an offeror's joinder or designation of responsible third party.* An offer made before an offeror joins another party or designates a responsible third party may not be the basis for awarding litigation costs under this rule against an offeree who files an objection to the offer within 15 days after service of the offeror's pleading or designation.

167.4 Awarding Litigation Costs.

- (a) *Generally.* If a settlement offer made under this rule is rejected, and the judgment to be awarded on the monetary claims covered by the offer is significantly less favorable to the offeree than was the offer, the court must award the offeror litigation costs against the offeree from the time the offer was rejected to the time of judgment.
- (b) *"Significantly less favorable" defined.* A judgment award on monetary claims is significantly less favorable than an offer to settle those claims if:
 - (1) the offeree is a claimant and the judgment would be less than 80 percent of the offer; or
 - (2) the offeree is a defendant and the judgment would be more than 120 percent of the offer.
- (c) *Litigation costs.* Litigation costs are the expenditures actually made and the obligations actually incurred—directly in relation to the claims covered by a settlement offer under this rule—for the following:
 - (1) court costs;
 - (2) reasonable deposition costs, in cases filed on or after September 1, 2011;
 - (3) reasonable fees for not more than two testifying expert witnesses; and

~~(43)~~ reasonable attorney fees.

(d) *Limits on litigation costs.*

(1) In cases filed before September 1, 2011, the litigation costs that may be awarded under this rule must not exceed the following amount:

~~(A)(1)~~ the sum of the noneconomic damages, the exemplary or additional damages, and one-half of the economic damages to be awarded to the claimant in the judgment; minus

~~(B)(2)~~ the amount of any statutory or contractual liens in connection with the occurrences or incidents giving rise to the claim.

(2) In cases filed on or after September 1, 2011, the litigation costs that may be awarded to any party under this rule must not exceed the total amount that the claimant recovers or would recover before adding an award of litigation costs under this rule in favor of the claimant or subtracting as an offset an award of litigation costs under this rule in favor of the defendant.

(e) *No double recovery permitted.* A party who is entitled to recover attorney fees and costs under another law may not recover those same attorney fees and costs as litigation costs under this rule.

(f) *Limitation on attorney fees and costs recovered by a party against whom litigation costs are awarded.* A party against whom litigation costs are awarded may not recover attorney fees and costs under another law incurred after the date the party rejected the settlement offer made the basis of the award.

(g) *Litigation costs to be awarded to defendant as a setoff.* Litigation costs awarded to a defendant must be made a setoff to the claimant's judgment against the defendant.

167.5 Procedures.

(a) *Modification of time limits.* On motion, and for good cause shown, the court may—by written order made before commencement of trial on the merits—modify the time limits for filing a declaration under Rule 167.2(a) or for making an offer.

(b) *Discovery permitted.* On motion, and for good cause shown, a party against whom litigation costs are to be awarded may conduct discovery to ascertain the reasonableness of the costs requested. If the court determines

the costs to be reasonable, it must order the party requesting discovery to pay all attorney fees and expenses incurred by other parties in responding to such discovery.

- (c) *Hearing required.* The court must, upon request, conduct a hearing on a request for an award of litigation costs, at which the affected parties may present evidence.

167.6 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.

167.7 Other Settlement Offers Not Affected. This rule does not apply to any offer made in a mediation or arbitration proceeding. A settlement offer not made in compliance with this rule, or a settlement offer not made under this rule, or made in an action to which this rule does not apply, cannot be the basis for awarding litigation costs under this rule as to any party. This rule does not limit or affect a party's right to make a settlement offer that does not comply with this rule, or in an action to which this rule does not apply.