

Statutory Offers of Settlement – The New Amendment Guts the Original Intent.

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Abstract

This article outlines the history and purposes of the statutory offer of settlement, the new changes and implications for litigants. The article also discusses whether the legislative amendments change recent case law interpreting the former version of the statute.

Purpose

In 1990, the Colorado General Assembly enacted the statutory offer of settlement statute.¹ The purpose was to encourage the settlement of litigation by requiring a party who rejects a reasonable settlement offer to pay the offering party's post-offer costs in the event that the rejecting party fails to recover more than the amount of the settlement offer.²

One effect of the statute prior to the amendment enacted by the General Assembly in 2008 was to modify the general rule that the prevailing party recovers costs from the losing party.³ Colorado Appellate Courts repeatedly held that trial courts are not permitted to award costs to the prevailing party when that party rejected a settlement offer and recovered less at trial.⁴

The testimony before the House and Senate Judiciary Committees of the General Assembly reflects that the overriding purpose of the 2008 amendment is to alter the original purpose of the law. Now, a plaintiff who rejects a reasonable settlement offer and recovers less than that offer at trial can still recover pre-offer costs if the plaintiff is the "prevailing party."⁵

"Prevailing Party"

Generally, the "prevailing party" is the party that succeeds on a significant issue and achieves some of the benefits sought in the lawsuit.⁶ When multiple parties prevail in part, the Court has discretion to determine which party prevailed and can even determine that each party prevailed in part and should pay its own costs.⁷ When multiple claims are at issue in a case, the number of claims upon which a party prevailed does not determine whether they are the "prevailing party" for purposes of a costs award.⁸ When one of multiple claims is a breach of contract action, the "prevailing party" is the one who prevailed on liability on that claim even if it did not prevail on related tort claims.⁹

The trial court is required to make a detailed record of findings when considering whether parties are entitled to costs when multiple claims are brought and each party prevailed in part.¹⁰ The trial court must consider the relative strengths and weaknesses of the claims, the significance of

each party's successes in the overall context of the litigation, and the time devoted to each claim.¹¹

Comparison of Offer to Judgment

Prior to the 2008 amendment, the Court of Appeals held that for purposes of comparison of an offer of settlement to the judgment, when the offer is silent as to costs, the Court will not add pre-offer costs to the judgment for comparison to the offer.¹² This is consistent with the Court of Appeal's prior ruling that the offer and judgment must be treated in a like manner.¹³ In *Rubio v. Ferris*¹⁴, the offer at issue included "all costs and interest accrued to date." Thus, when the Court was comparing the amount of the offer to the judgment in order to determine if the party making the offer was entitled to costs under the statute, the Court added prejudgment interest and costs incurred before the offer to the judgment.¹⁵

The statutory changes do not affect these rulings by the Court of Appeals. The only provision regarding comparison of the offer to the final judgment in the current version of the statute provides that the Court shall not consider interest accrued after the offer of settlement.¹⁶ The statute is silent with respect to costs. Thus, the language of the offer will determine how the Court compares the offer to the judgment.

Drafting

Generally, the Court does not require specific formality when making an offer of settlement under the statute.¹⁷ An offer must give the offerree an opportunity to assess whether to accept or it will be deemed invalid.¹⁸ In *Weeks v. City of Colorado Springs*¹⁹, the Court of Appeals refused to award costs to a defendant who made a statutory offer of settlement to multiple plaintiffs because each individual plaintiff could not assess its individual offer. A defendant making an offer of settlement to a class of plaintiffs must apportion the offer.²⁰ A plaintiff must apportion an offer of settlement between defendants or it will be deemed invalid.²¹

The Court has not ruled on whether multiple defendants can make a valid offer of settlement to a single plaintiff. However, the validity may depend upon the type of claims involved. For example, a person charged with primary liability for a tort could probably make a valid settlement offer along with a person or entity charged solely with a claim for vicarious liability. The individual plaintiff would be able to assess the offer and the Court would be able to assess whether each defendant beat the offer after a jury verdict.

A statutory offer of settlement must be served more than 14 days prior to trial.²² Service of an offer of settlement under the statute does not include the additional three days for mailing or electronic service because a specific statute controls over the general Rules of Civil Procedure governing service.²³ An offeror can withdraw the offer by written withdrawal served on the offerree.²⁴

A statutory offer of settlement cannot contain non-monetary conditions, such as confidentiality.²⁵ In *Martin v. Minard*²⁶, the Court of Appeals held that such conditions made the offer invalid under the statute because the statute provided that upon acceptance of an offer either party could submit the offer and acceptance to the Court and the clerk would enter judgment. In *Tallitsch v. Child Support Services, Inc.*²⁷, the Court declared a statutory offer of settlement invalid due to a

condition requiring the proceeds of the settlement for unfair debt practices claims to apply to back child support. The Court of Appeals recently held that a statutory offer of settlement requiring a release “relinquishing all existing and future claims related to the Project giving rise to the litigation” was not a valid offer of settlement under the statute.²⁸ The Court stated that acceptance of an offer of settlement only releases the claims pled in the litigation. Thus, requiring a general release invalidated the offer for purposes of the statute.²⁹

The language of an offer of settlement determines how the Court will make the comparison. An offer of settlement that includes the language “all claims” includes attorneys’ fees and costs recoverable under the Colorado Consumer Protection Act.³⁰ An offer of settlement that includes the language “including all costs and interest to date” will cause the Court to add prejudgment interest and costs incurred up to the date of the offer to the judgment before the comparison. However, language in an offer that includes “all claims” and is silent regarding costs will benefit the party making the offer when it comes to the comparison because the Court will not add the offeror’s pre-offer costs to the judgment.³¹

Costs In Addition to an Accepted Offer

Under a prior version of the statute, the Court allowed a plaintiff to recover costs after an offer of settlement was accepted.³² That version of the statute required a statutory offer of settlement to be made “with costs then accrued.”³³ The offer at issue included the language “\$30,000 exclusive of any costs of this action or interest accrued.”³⁴ The Court held that the offering party intended to make a valid offer under the statute and because the offer did not specifically exclude costs, it was still valid under the statute and not voidable.³⁵ However, the Court overruled the trial court’s decision not to allow costs to the offeree on top of the \$30,000 offered because the statute specifically provided that the offer must be made with costs then accrued. The Court construed the language in the offer to provide for \$30,000 “apart or separate from costs.”³⁶ Thus, the Court amended the judgment to include the costs claimed by the accepting party.³⁷

Currently, the statute does not require an offer to be made “with costs then accrued.” The statute does not require the clerk of the Court to enter a judgment upon acceptance of an offer. Thus, no mechanism exists by which a party accepting a statutory offer of settlement could claim costs in addition to the accepted offer of settlement.

Conclusion

The General Assembly changed the original intent of the statutory offer of settlement by its recent amendment. The plaintiff can recover pre-offer costs even if he fails to beat a reasonable offer as long as he is the prevailing party in the litigation. The defendant can still recover his actual costs after an offer of settlement that the plaintiff fails to beat. However, the result of the amendment is to discourage defendants from making offers late in a case and to encourage plaintiffs to refuse reasonable offers of settlement because they have nothing to lose.

¹ C.R.S. § 13-17-202 (1990).

² *Weeks v. City of Colorado Springs*, 928 P.2d 1346, 1349 (Colo. App. 1996).

³ See C.R.S. §§ 13-16-104 and 105 and C.R.C.P. 54(b).

⁴ See *Centric-Jones v. Hufnagel*, 848 P.2d 942 (Colo. 1993) (holding pursuant to the statute the court is not permitted to award costs to the prevailing party when that party rejected settlement offer and recovered less at trial);

Askew v. Gerace, 851 P.2d 199 (Colo. App. 1992) (holding pursuant to statute prevailing party not entitled to costs where he had rejected settlement offer and recovered less at trial); *Aberle v. Clark*, 916 P.2d 564 (Colo. App. 1995) (award of costs to prevailing party was error where prevailing party rejected settlement offer that was less than amount recovered at trial); *Bennett v. Hickman*, 992 P.2d 670 (Colo. App. 2000) (holding 1995 amendments to statute did not change law precluding award of costs to prevailing party when recovery is less than amount of rejected offer of settlement).

⁵ C.R.S. § 13-17-202(1)(a)(II)(2008).

⁶ *Mackall v. Jalisco Intern, Inc.*, 28 P.3d 975, 976-77 (Colo. App. 2001).

⁷ C.R.S. § 13-16-109; *Husband v. Colorado Mountain Cellars, Inc.*, 867 P.2d 57 (Colo. App. 1993); cert. den.

⁸ *Grynberg v. Agri Tech, Inc.*, 985 P.2d 59 (Colo. App. 1999), aff'd, 10 P.3d 1267 (Colo. 2000).

⁹ See *Mackall v. Jalisco Intern, Inc.*, 28 P.3d 975 (Colo. App. 2001) (where the plaintiff brought claims for plaintiff asserted claims against defendant for breach of contract, breach of implied covenant of good faith and fair dealing, promissory estoppel, willful breach of contract, misrepresentation, quantum meruit, tortious interference with prospective economic relations, and defamation. In its counterclaim, defendant asserted six separate claims against plaintiff. Before trial, the court entered summary judgment in favor of defendant on plaintiff's defamation claim, and plaintiff voluntarily dismissed her claims for breach of implied covenant, promissory estoppel, and quantum meruit. At the close of plaintiff's case-in-chief, the court granted defendant's motion for a directed verdict on plaintiff's claims for fraud and tortious interference with contractual relations. Plaintiff's two remaining claims, for breach of contract and willful breach of contract, were submitted to the jury, which awarded damages on the breach of contract claim. Defendant did not prevail on any of its counterclaims.).

¹⁰ *Hall v. Frankel*, 190 P.3d 852 (Colo. App. 2008).

¹¹ *Id.*

¹² *Novak v. Craven*, 193 P.3d 1115, 1121 (Colo. App. 2008).

¹³ *Rubio v. Farris*, 51 P.3d 992, 994-95 (Colo. App. 2002).

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ C.R.S. § 13-17-202(2) (2008).

¹⁷ *Dillen v. Healthone, LLC*, 108 P.3d 297 (Colo. App. 2004), cert. granted, 04SC692, 2005 WL 333678 (February 14, 2005)

¹⁸ *Weeks v. City of Colorado Springs*, 928 P.2d 1346 (Colo. App. 1996).

¹⁹ *Id.*

²⁰ *Antolovich v. Brown Group Retail, LLC*, 183 P.3d 582 (Colo. App. 2007).

²¹ *Winkler v. Rocky Mountain Conference of United Methodist Church*, 923 P.2d 152 (Colo. App. 1995).

²² C.R.S. § 13-17-202(1)(a)(I)(II) (2008).

²³ *Montoya v. Connolly's Towing, Inc.*, 2008 WL 1902500 (2008).

²⁴ C.R.S. § 13-17-202(1)(a)(V) (2008).

²⁵ *Martin v. Minard*, 862 P.2d 1014, 1019 (Colo. App. 1993).

²⁶ *Id.*

²⁷ 926 P.2d 143, 148 (Colo. App. 1996).

²⁸ *URS Group, Inc. v. Tetra Tech FW, Inc.*, 181 P.3d 380, 392-93 (Colo. App. 2008).

²⁹ *Id.*

³⁰ *Bumbal v. Smith*, 165 P.3d 844, 847 (Colo. App. 2007).

³¹ See *Hall v. Frankel*, 190 P.3d 852 (Colo. App. 2008) and *Novak v. Craven*, 193 P.3d 1115 (Colo. App. 2008).

³² See *Carpentier v. Berg*, 829 P.2d 507 (Colo. App. 1992).

³³ *Id.*

³⁴ *Id.* at 501.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*