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Client Alert

Litigation

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New Jersey Supreme Court Reinforces the Need for Specificity in Settlement Agreements

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What You Need To Know:

- **The New Jersey Supreme Court recently determined that a plaintiff was not entitled to attorneys' fees, because the parties' settlement agreement failed to address New Jersey Court Rule 4:58, which addresses the process and consequences of making a pretrial offer of judgment, and allows parties to recover litigation costs (including attorneys' fees) in certain circumstances.**
- **When settling a case, litigants should avoid form settlement agreements and ensure that the agreement not only is carefully tailored to the facts and circumstances of the case, but also, if necessary, addresses the applicable state statute regarding offers of judgment.**
- **Parties must draft a contract that clearly and fully explains their expectations in settling the case.**

Last week, the New Jersey Supreme Court determined that the terms of a settlement agreement foreclosed a plaintiff's ability to recover litigation costs, including attorneys' fees, under New Jersey Court Rule 4:58, which addresses the process and consequence of making a pretrial offer of judgment. Specifically, if a prevailing party refuses an offer of judgment under the rule but obtains a money judgment that is 120 percent or more of the offer at trial, that party is entitled to litigation costs (including attorneys' fees) incurred after the nonacceptance. But on the other hand, if the prevailing party is awarded monetary damages that are 80 percent or less of the unaccepted offer of judgement, the offeror is entitled to its litigation expenses incurred after the nonacceptance. Making a further settlement offer, however, constitutes a withdrawal of all previous offers made by that party. Offers of judgment should never be made or taken lightly, as the party making the offer of judgment opens the door for an award of attorneys' fees that may not have otherwise been available to either party.

In *Serico v. Rothberg,* the New Jersey Supreme Court foreclosed the plaintiff's ability to receive attorneys' fees under Rule 4:58-2 as a result of imprecise contract drafting. Before trial, Serico served Rothberg with an offer of judgment of $750,000, pursuant to Rule 4:58. Rothberg declined the offer, and the case proceeded to trial. During jury deliberations, the parties entered into a high-low agreement. Under the terms of the agreement, if the jury returned a no-cause verdict, Serico would still get $300,000; if the jury awarded Serico monetary damages between $300,000 and $1 million, Serico was entitled to the exact amount of the jury award; and if the jury awarded Serico monetary damages in excess of $1 million, her recovery would be capped at $1 million. Critically, the parties' agreement did not mention Serico's prior offer of judgment, nor did either party explicitly waive or preserve their rights under Rule 4:58. At the conclusion of trial, the jury awarded Serico damages of $6 million. In accordance with the high-low agreement, the court entered judgment in Serico's favor in the amount of $1 million. Serico then moved for litigation expenses, including attorneys' fees, pursuant to Rule 4:58-2, because the jury award was more than 120 percent of the prejudgment offer that Serico had refused. The trial court, however, denied Serico's motion for expenses, and the Appellate Division affirmed this decision.

The New Jersey Supreme Court agreed. The Court determined that the high-low agreement was a "further offer" under Rule 4:58-1. As a result, the high-low agreement superseded and waived the prior offer of judgment. Consequently, Rule 4:58 no longer applied. The Court continued by explaining that high-low agreements are contracts, and therefore are subject to rules of contract interpretation. The high-low agreement at issue in Serico set a hard limit for recovery at $1 million, and was silent as to the issue of Rule 4:58 expenses. As a result, the Court determined that the plaintiff was not entitled to any additional compensation over $1 million. Had Serico wanted to preserve her right to attorneys' fees under Rule 4:58, she needed to explicitly reserve this right in the high-low agreement.

Other states, including New York (CPLR 3220) and California (CCP § 998), have similar statutes that allow parties to recover certain costs if an offer of judgment is rejected. Because each state statute raises specific pitfalls, *Serico* demonstrates that practitioners must be cognizant of Rule 4:58 in New Jersey, or its counterpart if litigating a case elsewhere. But ultimately, *Serico* reiterates the importance of careful drafting when entering into a settlement agreement. Parties and their counsel must be sure to draft a contract that clearly and fully explains the parties' expectations in entering into a settlement. Using form settlement agreements that are not tailored to the facts and circumstances of each case may have unintended consequences.

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