Another Tool in the Toolbox: The Uses and Limitations of Offers of Judgment

by David Price

As liability carriers continue adopting claims-handling practices that exploit the "economics of litigation" to frustrate plaintiff attorneys from accepting and aggressively pursuing the adjudication of certain types of claims, it is important that advocates for injured people look for opportunities to reset the economic calculus. It is vitally important that we continue to file suit and take cases with moderate injuries to trial, and that we actively look for ways to cost effectively build and present those cases, and to transfer or increase the costs of litigation to the defense. In state court, the Offer of Judgement can be a useful tool in state court for transferring costs to the opposing party, even in cases with moderate damages, when employed early in the case. Like many tools, the Offer of Judgment is not as useful when not appropriately employed.

The Offer of Judgment is a procedural vehicle codified in S.C. Code Ann. § 15-35-400 and Rule 68 of the *South Carolina Rules of Civil Procedure*, which provide that any party to a civil action may file, no later than twenty (20) days before the trial date, a written Offer of Judgment signed by the party or its attorney, offering to either take judgment in the offeror's favor, or to allow judgment to be taken against the offeror, for a specific sum stated in the Offer. Within twenty (20) days after service of the offer or at least ten (10) days before trial, whichever date is earlier, the offeree or his attorney may file a written acceptance of the offer of judgment, at which point the court shall immediately issue the judgment and the clerk shall immediately enter the judgment as provided in the Offer. If the Offer of Judgment is not accepted within twenty (20) days of notice or ten (10) days of trial, it is deemed rejected. If the Offer of Judgment is not accepted and the offeror obtains a verdict at least as favorable as the rejected Offer, the offeror shall recover from the offeree (1) any administrative, filing or other court costs from the date of the offer until the entry of the judgment; and (2) if the offeror is the plaintiff, eight percent (8%) interest computed on the amount of the verdict from the date of the offer to the entry of judgment; or (3) if the offeror is the defendant, reduction from the judgment of eight percent (8%) interest computed on the amount of the verdict from the date of the offer to the entry of judgment. See S.C. Code § 15-35-400 and Rule 68, SCRCP.

In outlining above the provisions governing Offers of Judgment in state court, I have emphasized certain terms to highlight important provisions that are not perfectly understood. It is important to note that prior to enactment of the 2005 South Carolina Laws Act 32—which included numerous "tort reform" laws that limited awards of noneconomic damages, required the contemporaneous filing of expert witness affidavits to support the filing of actions alleging professional negligence, and imposed mandatory mediation prior to filing of actions alleging medical malpractice actions—South Carolina's Rule 68 mirrored Federal Rule 68, and Offers of Judgment were not available to "any party" because they could not be utilized by plaintiffs.

Following the 2005 Act and subsequent 2006 amendment of Rule 68, SCRCP, the provisions of the current State rule are substantially different from the provisions of the former State rule and from Rule 68 of the *Federal Rules of Civil Procedure*.

The extensive revisions are not only significant because they opened Offers of Judgment to use by plaintiffs, they are significant because they obviated much of the existing jurisprudence interpreting the rule. Although federal court cases regarding the application of Federal Rule 68 can be instructive, they may not actually address provisions of the current State rule. Similarly, state court cases interpreting the State rule prior to the amendment are not necessarily dispositive of provisions of the current State rule.[1] Prior to the revision, there was a paucity of cases in South Carolina addressing Offers of Judgment. Since the revision, there are no reported cases that interpret the new provisions of Rule 68, *SCRCP*.[2] A creative and thoughtful attorney may be able to exploit the uncertainty regarding certain provisions the current Rule 68, *SCRCP*, to his client's advantage.

If employed as part of plaintiff attorneys' usual processes at the beginning of a case, the Offer of Judgment is a more useful tool to plaintiffs than defendants. Plaintiff's attorneys often benefit from a more developed understanding of the value of their client's case at filing than do defendants or their attorneys or insurance carriers. Plaintiffs are therefore able to reasonably make an Offer of Judgment at the outset of a case, which maximizes the costs that the plaintiff would be entitled to recover and the amount of time the offer can generate interest. Defendants may have to engage in months of discovery before they can comfortably value the extent of their risk in a case. Before filing a prospective Offer of Judgment, consider how effective it would be to file an Offer that is so high that the plaintiff has low probability of obtaining at least as favorable a verdict at trial. The Offer also should not be so low that it would be an unacceptable result if the Offer is accepted.

When evaluating an Offer of Judgment filed by a defendant, consider the time limitation set forth in the Rule: If an Offer of Judgment is filed by a party less than twenty (20) days before trial, it is not valid. There are no consequences to the offeree for rejecting an Offer of Judgment filed the week before trial. Consider also the effect of a party's acceptance of an Offer of Judgment: It becomes a judgment. Therefore, unless the Offer of Judgment is expressly conditioned on an offeree's agreement to sign a release or other settlement document providing medical lien indemnification language, a plaintiff is under no obligation to execute anything other than a Satisfaction of Judgment upon receiving payment of the judgment.

When filing Offers of Judgment in cases with multiple defendants, take care that any Offer of Judgment is directed to specific defendants and clearly delineates the specific amounts that the plaintiff offers to accept judgment from a specific defendant. In cases where two or more defendants are jointly and severally liable, it may be sufficient to offer judgment against each defendant "jointly and severally." However, where multiple defendants may be found liable in an "either/or" capacity, such as where the specific driver is unknown and multiple defendants are sued subject to the allegation that one of them was driving, or where multiple defendants may be liable for different causes of action or injuries, it is important that separate Offers of Judgment be served as to each defendant. There have been instances where plaintiffs have obtained verdicts that were more favorable than their Offers of Judgment to multiple defendants, only to have a trial court refuse to award costs based on a failure to apportion specific amounts to each defendant.

Some final thoughts on Offers of Judgment in cases involving UIM: It is appropriate for a plaintiff to file an Offer of Judgment in a case involving UIM that offers to accept judgment against an at-fault driver in an amount to be satisfied by payment from the liability carrier and the balance from UIM (i.e., judgment in the amount of $75,000, with $25,000 to be paid by the liability carrier and $50,000 by UIM). Provided the Offer of Judgment is served on and accepted by attorneys for both the liability and UIM carrier, it would be binding. In the event the liability carrier accepts but the UIM carrier refuses to accept judgment, the UIM carrier would likely be subject to the consequences for non-acceptance.

It is not appropriate, in cases where a plaintiff has not agreed to settle an at-fault driver's excess liability for his policy limits, for the attorneys for the liability carrier and UIM carrier to make an Offer of Judgment in an amount to be satisfied by payment from the liability carrier, with the balance set-off from the plaintiff's UIM proceeds (i.e., judgment in the amount of $75,000, with $25,000 to be paid by the liability carrier and $50,000 by UIM). UIM benefits are subject to the collateral source rule, which precludes set-off of underinsured motorist benefits against a jury's damages verdict.

1 Attorneys should particularly consider this distinction when defending a plaintiff's liability for costs following rejection of an Offer of Judgment, as the seminal case regarding taxation of costs, Black v. Roche Biomedical Laboratories, 315 S.C. 223, 433 S.E.2d 21 (Ct. App. 1993), does not consider the current Rule 68, which seems to limit recovery to "any administrative, filing, or other court costs (emphasis supplied)" when awarding costs under the former Rule 68. It is possible that a plaintiff who is the "prevailing party" under Rule 54(d), SCRCP, but does not obtain a verdict at least as favorable as the Offer of Judgment, is not liable for all of the costs set forth in Roche Biomedical since costs provided by the current Rule 68, SCRCP, are more limited than Rule 54(d) and the former Rule 68. This distinction is less important when the plaintiff is entitled to costs under Rule 68, since in that scenario the plaintiff would also be the prevailing party.

2 Indeed, the Supreme Court held in an unreported opinion that acceptance of an Offer of Judgment prevents appellate review of that judgment or of intermediate orders underlying that judgment. See Williams v. Clemons, Appellate Case No. 2011-202847, 2014 WL 2535487 (Decided Jan. 8, 2014). The only reported case that touches on the current Rule 68, SCRCP, is Hueble v. South Carolina Department of Natural Resources, 416 S.C. 220, 785 S.E.2d 461 (2016), actually considers whether a party who accepts an offer of judgment pursuant to Rule 68, SCRCP, for a claim brought pursuant to 42 U.S.C. § 1983 qualifies as a prevailing party under § 1988 for purposes of attorney's fees. The Supreme Court confirmed that Rule 68 does not ordinarily include attorneys' fees. Id., at 228, 465, citing Steinert v. Lanter, 284 S.C. 65, 66, 325 S.E. 2d 532, 533 (1985). The Court found, however, in the context of § 1983 claims that acceptance of an offer of judgment confers prevailing party status under 42 U.S.C. § 1988 and so could result in an award of attorney fees under that statute. Id., at 231, 456.

See Rattenni v. Grainger, 298 S.C. 276, 379 S.E.2d 890 (1989); *see also* Pustaver v. Gooden, 350 S.C. 409, 566 S.E.2d 199 (Ct. App. 2002). In cases where a plaintiff has opted not to resolve a defendant's personal liability within the limits of his liability policy, and has elected instead to pursue a judgment in excess of the liability policy limits, it is important that the plaintiff's attorney rejects any attempt by the defendant to condition an Offer of Judgment on set-off by a plaintiff's UIM proceeds, so the plaintiff is not unfairly penalized for refusing to allow his UIM benefits to set-off the obligations of the tortfeasor.[3] In such a scenario, the plaintiff should consider filing an acceptance of the Offer that accepts judgment in the stated amount against the defendant, but expressly rejects setting off the UIM proceeds. Alternatively, the plaintiff might consider filing a motion seeking to strike the Offer, so the question whether the plaintiff risks consequences for rejecting the Offer is not left unresolved until after trial.

When employed appropriately in State court, the Offer of Judgment can be an effective, if specialized, procedural tool for plaintiffs to transfer the costs of litigation to a defendant. Plaintiff's attorneys would be well-served to consider ways to creatively incorporate the procedure into their processes. Plaintiff's attorneys would also be well-served to consider the limitations of the procedure when employed by defendants. An Offer of Judgment filed by a defendant a month prior to trial is much less effective than one filed by the plaintiff contemporaneously with the Complaint. ❖

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3 For illustration, consider the following scenarios:

1. ***$75,000 Offer of Judgment ACCEPTED***: $25,000 from At-Fault Driver + $50,000 from UIM = **$75,000 Total Recovery**.

2. ***$75,000 Offer of Judgment REJECTED***, with $70,000 VERDICT at Trial: $70,000 from At-Fault Driver + $45,000 from UIM = **$115,000 Total Recovery**.

Of the two scenarios set forth above, the scenario that results in the $115,000 total recovery is clearly a much better practical result for the plaintiff. However, if an Offer of Judgment could be conditioned on set-off by a plaintiff's UIM proceeds, then the defendant would actually be entitled to payment of costs and reduction of the judgment of eight percent interest computed on the amount of the verdict from the date of the offer.