13-CV-C

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REPLY TO: TOMS RIVER

Our File

February 22, 2013

Committee Rules Practice and Procedure
Administrative Office of the United States Courts
1 Columbus Circle N.E.
Washington, DC 20544

RE: Rule 68 Offer of Judgment

Dear Committee Member:

I request that the Committee consider a change to the Offer of Judgment Rule 68 currently in effect. I submit to you that the current Rule, as it is currently constituted, is extremely one-sided and favors the defendant over the plaintiffs. I respectfully draw the Committee's attention to the New Jersey Court Rule 4:58 Offer of Judgment, which is attached. Under the New Jersey Rule, either party has the right to file an Offer of Judgment.

Why is the Federal Rule only available to the defendants? What policy reason precludes the plaintiff from utilizing this very effective mechanism? I found, in my practice, that the New Jersey Offer of Judgment is very effective in forcing the defendant to take a realistic view of the value of a case, weighing the consequences of their failure to accept a reasonable offer.

Respectfully submitted,

James J. Curry, Jr.

JJC/tv
Enclosure

accepted prior to verdict. See Granduke v. Lembesis, 256 N.J. Super. 546 (App. Div. 1992).

RULE 4:58. OFFER OF JUDGMENT

4:58-1. Time and Manner of Making and Accepting Offer

a. Except in a matrimonial action, any party may, at any time more than 20 days before the actual trial date, serve on any adverse party, without prejudice, and file with the court, an offer to take a monetary judgment in the offeror's favor, or as the case may be, to allow judgment to be taken against the offeror, for a sum stated therein (including costs). The offer shall not be effective unless, at the time the offer is extended, the relief sought by the parties in the case is exclusively monetary in nature.

b. If at any time on or prior to the 10th day before the actual trial date the offer is accepted, the offeree shall serve on the offeror and file a notice of acceptance with the court. The making of a further offer shall constitute a withdrawal of all previous offers made by that party. An offer shall not, however, be deemed withdrawn upon the making of a counter-offer by an adverse party but shall remain open until accepted or withdrawn as is herein provided. If the offer is not accepted on or prior to the 10th day before the actual trial date or within 90 days of its service, whichever period first expires, it shall be deemed withdrawn and evidence thereof shall not be admissible except in a proceeding after the trial to fix costs, interest, and attorney's fee. The fact that an offer is not accepted does not preclude a further offer within the time herein prescribed in the same or another amount or as specified therein.

Note: Source—R.R. 4:73. Amended July 7, 1971 to be effective September 13, 1971; amended July 13, 1994 to be effective September 1, 1994; amended June 28, 1996 to be effective September 1, 1996; amended July 10, 1998 to be effective September 1, 1998; text allocated to paragraphs (a) and (b), and paragraphs (a) and (b) amended July 27, 2006 to be effective September 1, 2006.

4:58-2. Consequences of Non-Acceptance of Claimant's Offer

(a) If the offer of a claimant is not accepted and the claimant obtains a money judgment, in an amount that is 120% of the offer or more, excluding allowable prejudgment interest and counsel fees, the claimant shall be allowed, in addition to costs of suit: (1) all reasonable litigation expenses incurred following non-acceptance; (2) prejudgment interest of eight percent on the amount of any money recovery from the date of the offer or the date of completion of discovery, whichever is later, but only to the extent that such prejudgment interest exceeds the interest prescribed by R. 4:42-11(b), which also shall be allowable; and (3) a reasonable attorney's fee for such subsequent services as are compelled by the non-acceptance.

(b) No allowances shall be granted pursuant to paragraph (a) if they would impose undue hardship. If undue hardship can be eliminated by reducing the allowance to a lower sum, the court shall reduce the amount of the allowance accordingly.

Note: Amended July 7, 1971 to be effective September 13, 1971; amended July 14, 1972 to be effective September 5, 1972; amended July 17, 1975 to be effective September 8, 1975; amended July 13, 1994 to be effective September 1, 1994; amended July 5, 2000 to be effective September 5, 2000; amended July 28, 2004 to be effective September 1, 2004; text amended and designated as paragraph (a), new paragraph (b) adopted July 27, 2006 to be effective September 1, 2006; paragraph (a) amended July 23, 2010 to be effective September 1, 2010.

4:58-3. Consequences of Non-Acceptance of Offer of Party Not a Claimant

(a) If the offer of a party other than the claimant is not accepted, and the claimant obtains a monetary judgment that is favorable to the offeror as defined by this rule, the offeror shall be allowed, in addition to costs of suit, the allowances as prescribed by R. 4:58-2, which shall constitute a prior charge on the judgment.

(b) A favorable determination qualifying for allowances under this rule is a money judgment in an amount, excluding allowable prejudgment interest and counsel fees, that is 80% of the offer or less.

(c) No allowances shall be granted if (1) the claimant's claim is dismissed, (2) a no-cause verdict is returned, (3) only nominal damages are awarded, (4) a fee allowance would conflict with the policies underlying a fee-shifting statute or rule of court, or (5) an allowance would impose undue hardship. If, however, undue hardship can be eliminated by reducing the allowance to a lower sum, the court shall reduce the amount of the allowance accordingly.

Note: Source—R.R. 4:73; amended July 13, 1994 to be effective September 1, 1994; amended July 5, 2000 to be effective September 5, 2000; amended July 28, 2004 to be effective September 1, 2004; text allocated into paragraphs (a), (b), (c), and paragraphs (a), (b), (c) amended July 27, 2006 to be effective September 1, 2006.

4:58-4. Multiple Claims; Multiple Parties

(a) Multiple Plaintiffs. If a party joins as plaintiff for the purpose of asserting a per quod claim, the claimants may make a single unallocated offer.

(b) Multiple Defendants. If there are multiple defendants against whom a joint and several judgment is sought, and one of the defendants offers in response less than a pro rata share, that defendant shall, for purposes of the allowances under R. 4:58-2 and -3, be deemed not to have accepted the claimant's offer. If, however, the offer of a single defendant, whether or not intended as the offer of a pro rated share, is at least as favorable to the offeree as the determination of total damages to which the offeree is entitled, the single offering defendant shall be entitled to the allowances prescribed in R. 4:58-3, provided, however, that the single defendant's offer is at least 80% of the total damages determined.

(c) Multiple Claims. If a claimant asserts multiple claims for relief or if a counterclaim has been asserted against the claimant, the claimant's offer shall include all claims made by or against that claimant. If a party not originally a claimant asserts a counterclaim, that party's offer shall also include all claims by and against that party.

Note: Adopted July 5, 2000 to be effective September 5, 2000; caption amended, former text redesignated as paragraph (b) and amended, and new paragraphs (a) and (c) adopted July 28, 2004 to be effective September 1, 2004.

4:58-5. New Trial

If an action is required to be retried, a party who made a rejected offer of judgment in the original trial may, within 10 days after the fixing of the first date for the retrial, serve the actual notice on the offeree that the offer then made is renewed and, if the offeror prevails, the renewed offer will be effective as of the date of the original offer. If the offeror elects not to so renew the original offer, a new offer may be made under this rule, which will be effective as of the date of the new offer.

Note: Former R. 4:58-5 redesignated as R. 4:58-6, and new R. 4:58-5 caption and text adopted July 23, 2010 to be effective September 1, 2010.

4:58-6. Application for Fee; Limitations

Applications for allowances pursuant to R. 4:58 shall be made in accordance with the provisions of R. 4:42-9(b) within 20 days after entry of final judgment. A party who is awarded counsel fees, costs, or interest as a prevailing party pursuant to a fee-shifting statute, rule of court, contractual provision, or decisional law shall not be allowed to recover duplicative fees, costs, or interest under this rule.

Note: Adopted July 27, 2006 as R. 4:58-5 to be effective September 1, 2006; redesignated as R. 4:58-6 July 23, 2010 to be effective September 1, 2010.

COMMENT

History and Analysis of Rule Amendments: See Online Edition

1. General Principles; 2004/2006 Amendments.
2. Operation of the Rules.
3. Applicability.
4. Eligibility of Offers.
5. Fee Shifting.
6. Multiple Parties.
   6.1. Multiple defendants.
   6.2. Multiple claimants.
   6.3. Crossclaims.
7. Application for fee; procedure.

1. General Principles; 2004/2006 Amendments. Inducement to settlement has remained the fundamental purpose of the rule as it has evolved. See, e.g., Best v. C & M Door Controls, Inc., 200 N.J. 348, 356 (2009); Firefreeze v. Brennan & Assoc., 347 N.J. Super. 435, 441 (App. Div. 2002); Sovereign Bank v. United Nat'l Bank, 359 N.J. Super. 534, 542 (App. Div.), certif. den. 177 N.J. 489 (2003); McMahon v. New Jersey Mfrs. Ins., 364 N.J. Super. 188, 192 (App. Div. 2003); Palmer v. Kovacs, 385 N.J. Super. 419, 425 (App. Div.), certif. den. 188 N.J. 356 (2006). And see Wiese v. Dedhia, 188 N.J. 587, 593 (2006).

Nevertheless the complexity of the rule through its various permutations continued to engender considerable confusion respecting its application, and as use of the rule became more widespread, it appeared that there were interpretive problems, including the consequences and effect of fee-shifting, whether by statute, rule or contract. That is to say, if the prevailing plaintiff is entitled to a fee because of a fee-shifting statute, rule or contract, but the losing party was entitled to a fee under this rule, having made an unaccepted offer in an adequate amount, the question arises as to how to reconcile the apparent conflict in award of fees. Moreover, there was growing concern that the rule was being used not primarily as a settlement device but rather to effect fee-shifting in cases where neither a rule nor a statute provided for attorney-fee allowances, that is, to move away from the American rule and towards the English rule discussed in History and Analysis of Rule Amendments Comment 1 on R. 4:42-9. Accordingly, the Civil Practice Committee again studied the rule during the 2002-2004 rule cycle, and while the study was not then completed, interim recommendations to simplify application and construction of the rule were made and adopted effective September 2004. The study was completed during the 2004-2006 cycle. Although a minority of the Civil Practice Committee was of the view that the offer of judgment rule created more problems than it solved and should therefore be deleted, the majority proposed additional amendments designed to address remaining problems, and these recommendations were accepted by the Supreme Court.

As a result of the 2004 recommendations, the major change made by the September 2004 amendment was the elimination of the former dichotomy

between liquidated and unliquidated damages in respect of the so-called margin of error. See, e.g., Sema v. Automall 46 Inc., 384 N.J. Super. 145, 153 (App. Div. 2006). That is, in all cases, the application of the rule is triggered only if the claimant obtains a recovery of less than 80% of the non-claimant's offer, and if the offeror is the claimant, he must obtain a recovery of 120% or more of the offer before the non-claimant is liable for fees. In addition, the former requirement of R. 4:58-3 that a claimant obtain a verdict of at least $750 in order for the offeror to qualify for a fee allowance was eliminated in favor of the provision that fees are not allowable against the claimant if the action is dismissed, a no-cause verdict is returned, or only nominal damages are awarded. The 2004 amendments also provide that for purposes of comparison of the offer with the recovery, prejudgment interest and attorney's fees otherwise allowable are disregarded. This provision accords with the holding in Lobel v. Trump Plaza Hotel & Casino, 335 N.J. Super. 319 (App. Div. 2000). See also Sema v. Automall 46 Inc., 384 N.J. Super. at 154. The amendments further provide that the additional eight percent prejudgment interest calculated from the date of the offer (or date of the completion of discovery) to the date of recovery is allowable only to the extent it exceeds prejudgment interest allowable by R. 4:42-11(b). Finally, the 2004 rule requires the application for the allowances permitted thereby to be made in accordance with R. 4:42-9(b) within 20 days after entry of final judgment.

The September 2006 amendments addressed these additional problems. The first derives from the difficulty of comparing an offer with a judgment actually rendered where non-monetary relief is sought, in full or in part, and is granted. Accordingly, R. 4:58-1 was amended to permit an effective offer to be made only if, when it is made, the relief sought is exclusively monetary. Thus, illustratively, if both an injunction and money damages are sought, a valid offer cannot be made. If, however, the injunctive count of the complaint is dismissed leaving only the monetary relief request, a valid offer may then be made. The second issue addressed by the September 2006 amendments is the amelioration of the English-rule aspect of the offer of judgment rule by the inclusion of a hardship exception. Thus R. 4:58-2 was amended to add a paragraph (b), which authorizes the court to withhold an allowance where there has been non-acceptance of a claimant's offer if an allowance would result in undue hardship or, alternatively, to reduce the amount of the allowance if a reduction will eliminate the hardship. With respect to the consequences of a non-claimant's rejection of the offer as provided by R. 4:58-3, the rule had provided that there would be no fee allowance if the claim was dismissed, a no-cause verdict returned or only nominal damages awarded. The September 2006 amendment added to this list the same hardship provision added to R. 4:58-2 as well as a fifth exception, namely, that a fee allowance would conflict with the policies underlying a fee-shifting statute or rule of court. This fifth exception is intended to deal with the fee-shifting problem where denial of a full fee to the prevailing party would be inconsistent with the policy of the fee-shifting statute involved. See further Comment 5 infra. Finally, by the adoption of 4:58-5, the 2006 amendments prohibit the award of duplicative fees, interest or costs. Although as a procedural rule, this amendment eliminating the liquidated-unliquidated damages distinction is subject to the time of decision rule, the Supreme Court relaxed the rule pursuant to R. 1:1-2 so as to preserve the distinction where the offer was made and the case fully tried before the rule change, the amendment having become effective during the period between completion of trial and the court's decision. Romagnola v. Gillespie, Inc., 194 N.J. 596 (2008). But see Best v. C & M Door Controls, 402 N.J. Super. 229, 240-242

(App. Div. 2008), aff'd in part, rev'd in part on other grds 200 N.J. 348 (2009), applying the 2006 amended rule where the jury verdict was returned before the amendment date but counsel did not seek fees until after. See also Kas Oriental Rugs, Inc. v. Ellman, 407 N.J. Super. 538, 551-552 (App. Div.), certif. den. 200 N.J. 476 (2009), applying the 2006 amendment to reverse the trial court's allowance of fees under the pre-2006 version of the rule where the amendment became effective while the judgment was pending appeal.

2. Operation of the Rules. Essentially, the rules provide that any party to any action, other than a matrimonial action, in which exclusively monetary damages are sought, including both liquidated and unliquidated damages, may, at any time not later than 20 days prior to the actual trial date serve upon the opposing party an offer to allow judgment in a specific amount or of a specific nature to be taken against him if he is defending against a claim or to be entered in his favor if he is asserting a claim. If, however, both non-monetary damages and monetary damages are sought, a valid offer cannot be made unless and until the non-monetary claim is dismissed.

The party to whom the offer is made has until the tenth day prior to the actual trial date or 90 days after service of the offer, whichever period first expires, to accept the offer. If the offer is accepted within the applicable time period, then none of the penalties of the rule applies. Estate of Okhotnitskaya v. Lezameta, 400 N.J. Super. 340, 348 (Law Div. 2007) (the 90-day period cannot be foreshortened by the offeror's intervening motion to confirm an arbitration award minus the amount of the offer). If it is not so accepted, it is deemed withdrawn and is inadmissible for any purpose except the fixing of allowances after trial. The "actual trial date" has been construed as the actual date of the first trial where the first trial ended in a mistrial and the verdict in the second trial was set aside, necessitating a third trial. Thus, an offer made prior to the first trial was deemed to be, for purposes of sanctions under the rule, still viable at the conclusion of the third trial. Negron v. Melchiorre, Inc., 389 N.J. Super. 70, 90, 94-96 (App. Div. 2006), certif. den. 190 N.J. 256 (2007). The question raised by the decision, particularly in view of the substantial financial consequences, is whether the offeree reasonably assumed that the offer made before the first trial terminated with its conclusion. See R. 4:58-5 now detailing the effect of a new trial on a previously tendered offer of judgment. See further 2010 Report of the Supreme Court Civil Practice Committee available online.

A counter-offer will not affect the viability of the original offer, which remains open until accepted or withdrawn. Moreover, a second offer by the offeror will not negate the fee-shifting consequences of the original unaccepted offer, and hence the date of the first offer will control the fixing of interest and attorney's fees. Palmer v. Kovacs, 385 N.J. Super. 419, 427 (App. Div.), certif. den. 188 N.J. 356 (2006).

As to the application of the rule's provisions that a fee will not be allowed when the cause of action by the rejecting party is dismissed in its entirety, see Kas Oriental Rugs, Inc. v. Ellman, 407 N.J. Super. 538, 556-558 (App. Div.), certif. den. 200 N.J. 476 (2009), precluding a fee allowance when a rejected offer of judgment did not distinguish between claims and the rejecting claimant prevailed on one claim. As to the application of the rule that precludes a fee when nominal damages are awarded, see Reid v. Finch, 425 N.J. Super. 196, 203-204 (Law Div. 2011), rejecting plaintiff's argument that trial expenses should be deducted in determining whether an award is nominal.

The rejection of the offer does not preclude the offering party from subsequently submitting the same or a different offer within the prescribed time. In the absence of a subsequent offer, a rejecting offeree will be subject to the consequences provided for by R. 4:58-2 and R. 4:58-3 on the basis of the rejected offer.

The consequences of non-acceptance are spelled out in R. 4:58-2 (consequences of non-claimant's rejection) and R. 4:58-3 (consequences of claimant's rejection). Both rules provide that if the judgment is within a 20 percent margin of error, the party whose offer was rejected is entitled to attorney's fees and actual litigation expenses incurred after the date of non-acceptance unless a stated exception of the rule applies. See, illustratively, Sovereign Bank v. United Nat'l Bank, 359 N.J. Super. 534, 542 (App. Div.), certif. den. 177 N.J. 489 (2003). In calculating the amount of the judgment, the question of whether to include a prevailing party's entitled court costs was raised but not answered in Kas Oriental Rugs, Inc. v. Ellman, 407 N.J. Super. 538, 554 (App. Div.), certif. den. 200 N.J. 476 (2009). R. 4:58-2 further provides that if a money judgment is entered in favor of a claimant in an amount at least equal to 120 percent of his rejected offer, the claimant is also entitled to eight percent interest on the judgment calculated from the date of the offer or the date of the completion of discovery, whichever is later, but only to the extent it exceeds prejudgment interest allowable by R. 4:42-11(b). The purpose of the stipulation of the later of these dates, i.e., the date of the order or the date of completion of discovery, is obviously designed to afford the defending party a reasonable opportunity to make his own evaluation of the reasonableness of the offer in terms of the probable financial worth of the claim. See also Malick v. Seaview Lincoln Mercury, 398 N.J. Super. 182, 189-190 (App. Div. 2008) (whether a high-low agreement preserving the right to attorney's fees under the offer of judgment rule also preserved the right to 8 percent prejudgment interest is a matter of contract interpretation). The amount of the fee is to be fixed by the court upon consideration of the relevant circumstances. It is, moreover, clear that a fee allowance under the rule is mandatory if its terms are met, subject only to the exceptions set forth in R. 4:58-2(b) and R. 4:58-3(c). See Wiese v. Dedhia, 188 N.J. 587, 592-593 (2006). See also Reid v. Finch, 425 N.J. Super. 196, 206-207 (Law Div. 2011)(considering undue hardship in reducing the costs). Included within the mandatory fee allowance are fees for appellate services incurred by a litigant-respondent entitled to a fee for trial services.

With respect to the withholding of a fee under the offer of judgment rule because allowance of a fee would conflict with the policy of a fee-shifting statute, see Best v. C & M Door Controls, Inc., 200 N.J. 348 (2009), holding that the policy of a fee-shifting statute would be violated by enforcement of the offer of judgment rule if the statute does not allow a fee to a prevailing defendant or allows it only under limited circumstances not present in the case before the court. Thus, an award may not be made to a defendant under the Prevailing Wage Act or, unless plaintiff acted without basis in law or fact and the employer was vindicated, under the Conscientious Employee protection Act (CEPA). Nevertheless the reasonableness of the defendant's offer of judgment may be taken into account in calculating the attorney's fee award under the shifting statute. Best v. C & M Door Controls, Inc., 200 N.J. at 360-361. It has also been held that the fee-shifting provisions of Sales Representatives' Rights Act (SRRA), N.J.S. 2A:61A-2, trump the offer of judgment rule. Kas Oriental Rugs, Inc. v. Ellman, 407 N.J. Super. 538, 559-560 (App. Div.), certif. den. 200 N.J. 476 (2009).

R. 4:58 does not mandate the acceptance by the offeree of an offer of judgment. Thus, a court cannot compel an offeree to accept such an offer. See Hoehn v. Barrett, 338 N.J. Super. 365, 372-373 (App. Div. 2001).

For purposes of determining which party prevails under this rule, it is the actual verdict that is compared to the offer. See Gonzalez v. Safe & Sound Security, 185 N.J. 100, 123-125 (2005), so holding where the defendant had wanted the offer compared to its liability as limited by a bankruptcy court.

Clearly, any fee allowed under this rule must be reasonable, must comport with R. 4:42-9(b) and must be supported by adequate findings of the trial judge based on the proofs. See Best v. C & M Door Controls, Inc., 200 N.J. 348, 360-361 (2009); Kas Oriental Rugs, Inc. v. Ellman, 407 N.J. Super. 538, 561-562 (App. Div.), certif. den. 200 N.J. 476 (2009).

3. Applicability. The rule is applicable to the Unsatisfied Claim and Judgment Fund. See Crudup v. Marrero, 57 N.J. 353 (1971). Cf. Boyd v. Marini, 132 N.J. Super. 324 (App. Div. 1975). It is also expressly applicable to arbitration proceedings pursuant to R. 4:21A. See R. 4:21A-3 and Comment thereon. See also Elrac, Inc. v. Britto, 341 N.J. Super. 400, 404 (App. Div. 2001). It has also been held to be applicable to marital torts, which are deemed not to constitute matrimonial actions for purposes of the rule. See Borchert v. Borchert, 361 N.J. Super. 175, 182-183 (Ch. Div. 2002).

If the claimant is an insured suing his own carrier for UIM benefits, he is entitled to the benefit of the rule if his offer is not accepted even if the addition of attorney's fees and costs to the compensatory damage award will result in an overall recovery exceeding the policy limits. McMahon v. New Jersey Mfrs. Ins., 364 N.J. Super. 188, 193 (App. Div. 2003).

Attorneys who appear pro se have been held entitled to the benefit of the rule if an offer of judgment made by them meeting the terms of the rule for an allowance has been declined by the offeree. See Brach, Eichler, P.C. v. Ezekwo, 345 N.J. Super. 1, 17-18 (App. Div. 2001).

The rule has, however, been held inapplicable to condemnation actions tried in the Law Division. Casino Reinvest. Dev. Auth. v. Marks, 332 N.J. Super. 509, 513-515 (App. Div.), certif. den. 165 N.J. 607 (2000). Nor does it apply to actions in the Special Civil Part. See Bandler v. Maurice, 352 N.J. Super. 158, 165 (App. Div. 2002).

4. Eligibility of Offers. An offer of no-cause for action is not an offer within the intendment of the rule. See Essex Bank v. Capital Resources Corp., 179 N.J. Super. 523 (App. Div.), certif. den. 88 N.J. 495 (1981).

Although the attorney's fee rule had originally been drawn in mandatory terms, R. 4:58-2 and 4:58-3 now provide for a hardship exception for both claimants and non-claimants and additional exceptions for claimants. Compare R. 4:21A-6(c)(5), authorizing the court to relieve an obligated party on a trial de novo of the expenses thereof in the event of substantial economic hardship.

While a party need not consider an offer to settle the full amount of all claims, the rule does apply to those claims surviving after partial summary judgment. City of Cape May v. Coldren, 329 N.J. Super. 1, 10-11 (App. Div. 2000).

5. Fee Shifting. The offer of judgment rule does not explicitly require that the offer be made in good faith and for the purpose of effecting a settlement of the controversy. Nor does it explicitly state that in order to be entitled to the benefits of the rule, the offeror must make an offer that is neither token nor nominal. It had been held, however, that a token or nominal offer would not satisfy the requirements of the rule since it would constitute fee-shifting in derogation of the

American rule and defeat the purpose of the rule, namely, to encourage settlement. See Frigon v. DBA Holdings, Inc., 346 N.J. Super. 352 (App. Div. 2002). R. 4:58-3 was amended to so provide. See further Comment 1 supra.

While there has apparently been no reported decision dealing with the problem of a defendant making a successful offer of judgment to a plaintiff who is in any event entitled to attorney's fees because of a statute, rule, or contract, the question was adverted to by Patock Const. v. GVK Enters., 372 N.J. Super. 380 (App. Div. 2004), certif. den. 182 N.J. 629 (2005), involving attorney fees pursuant to N.J.S. 2A:44A-15 for a willfully overstated construction lien. The court held that defendant was entitled to attorney's fees under both the statute and the offer of judgment rule provided, however, that the total did not exceed the actual value of the services rendered in defending the action. That holding accords with the current R. 4:58-5, which prohibits duplicate fees, interest or costs.

The fee-shifting problem vis-à-vis an offer of judgment is addressed by R. 4:58-3, which authorizes the court to withhold a fee allowance to the non-claimant if allowing such a fee would conflict with the policies underlying a fee-shifting statute or rule of court. See further Comment 2 on this rule.

6. Multiple Parties.

6.1. Multiple defendants. The intention of R. 4:58-4 is to permit the claimant to deal exclusively in terms of the total judgment rather than to require him to accept pro rata shares from individual defendants. Since each defendant's ultimate monetary responsibility depends upon the number of defendants ultimately held liable, the claimant is thereby spared the risk, for example, of having to accept one-half of his offer from one of two defendants only to find himself with a no-cause verdict against the other. Thus the rule specifically intends that the claimant need only state the total amount of the judgment he seeks and no individual defendant's offer to pay a pro rata share thereof shall be deemed an acceptance thereof. Similarly, an offer made by a single defendant to the claimant to pay a specific amount as his pro rata share should not be considered as an offer within the intendment of this rule such as will result in binding the claimant to the consequences stated in R. 4:58-3. See Schettino v. Roizman Development, 310 N.J. Super. 159, 167-168 (App. Div. 1998), aff'd 158 N.J. 476 (1999), accepting this proposition and holding that since defendant's offer there could not be deemed a total offer, attorney's fees were improvidently granted. See also Debrango v. Summit Bancorp., 328 N.J. Super. 219, 225-226 (App. Div. 2000); Wiese v. Dedhia, 354 N.J. Super. 256, 263 (App. Div. 2002).

If a defendant, however, either as offeror or offeree, does offer to pay a pro rata share which is no less than his obligation as determined after trial (or in an unliquidated case, at least 80 per cent thereof), it may well be inequitable to charge him with the financial consequences of R. 4:58-2. In such circumstances, the court may, presumably, consider all pro rata offers by the defendants in fixing both the amount of the award to be made to the successful party, and more significantly, the shares thereof to be made by the adverse parties. While the Supreme Court in Schettino, supra, endorsed the Comment's analysis in respect of multiple defendants, it referred the matter for further consideration to the Civil Practice Committee. The Committee recommended and the Supreme Court concurred that the basic scheme should remain unchanged with, however, one modification, namely that if a single defendant makes an offer that turns out to meet the requirement of the rule vis-a-vis total damages to which the offeror is determined to be entitled, whether or not intended as a pro rata share, the conditions for imposition of sanctions as to that defendant will be deemed to have been met. The

rule has, however, been construed to require that all defendants participate in the offer. Hence in a case where two of three defendants made individual offers totaling more than plaintiff's recovery, the consequences of the rule were held not to apply. See Cripps v. DiGregorio, 361 N.J. Super. 190, 194-195 (App. Div. 2003). See also Finderne Mgmt. Co. v. Barrett, 402 N.J. Super. 546, 581-582 (App. Div. 2008), certif. den. 199 N.J. 542 (2009)(individual offers made after aggregate offer was turned down constituted withdrawal of aggregate offer imposing no obligation of acceptance on plaintiff).

6.2. Multiple claimants. Although the September 2000 revision of the rule addressed multiple defendants, it did not deal with multiple plaintiffs and, more particularly, spouses, one of whom is joined only to assert a per quod claim. There being no conflict between them, it has been held that a single lump sum offer may be made on behalf of both plaintiffs in that circumstance. See Wiese v. Dedhia, 354 N.J. Super. 256, 264-265 (App. Div. 2002), whose holding in this regard was approved by Wiese v. Dedhia, 188 N.J. 587, 590 (2006). The September 2004 amendment expressly so provided. The 2004 amendment also requires that where there are multiple claims for affirmative relief or the assertion of a counterclaim, the claimant's offer includes all claims made by and against him.

6.3. Crossclaims. Where there are counterclaims and crossclaims, a party may make an offer intended to settle all claims. See Firefreeze v. Brennan & Assoc., 347 N.J. Super. 435, 441-442 (App. Div. 2002).

7. Application for fee; procedure. R. 4:58-5 requires the fee application to be made in accordance with R. 4:42-9(b) within 20 days following entry of the final judgment and prohibits the award of duplicative fees, interest or costs. The date of entry of final judgment is the date the judgment is entered on the civil docket. Reid v. Finch, 425 N.J. Super. 196, 202-203 (Law Div. 2011).

RULE 4:59. PROCESS TO ENFORCE JUDGMENTS

4:59-1. Execution

(a) In General. Process to enforce a judgment or order for the payment of money and process to collect costs allowed by a judgment or order, shall be a writ of execution, except if the court otherwise orders or if in the case of a capias ad satisfaciendum the law otherwise provides. Unless the court otherwise orders, the writ of execution shall be in the form prescribed by Appendix XII-D and Appendix XII-E, as appropriate, to these rules. Except with respect to writs issued out of the Special Civil Part, the amount of the debt, damages, and costs actually due and to be raised by the writ, together with interest from the date of the judgment, shall be endorsed thereon by the party at whose instance it shall be issued before its delivery to the sheriff or other officer. The endorsement shall explain in detail the method by which interest has been calculated, taking into account all partial payments made by the defendant. Except with respect to writs issued out of the Special Civil Part, the judgment creditor shall serve a copy of the fully endorsed writ, personally or by ordinary mail, on the judgment debtor after a levy on the debtor's property has been made by the sheriff or other officer and in no case less than 10 days prior to turnover of the debtor's property to the creditor pursuant to the writ. Unless the court otherwise orders, every writ of execution shall be directed to a sheriff and shall be returnable within 24 months after the date of its issuance, except that in case of a sale, the sheriff shall make return of the writ and pay to the clerk any remaining surplus within 30 days after the sale, and except that a capias ad satisfaciendum shall