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Feature and Column
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"PAY OR PLAY" OFFERS OF JUDGMENT: ARE THEY APPLICABLE TO ARBITRATION PROCEEDINGS?

Many overzealous defense attorneys are attempting to turn the tables on unsuspecting claimants by making formal offers of judgment under various state's offer of judgment statutes. This tactic is designed to make the claimant jittery, as these statutes generally impose certain penalties on the recipient of the offer, such as attorney's fees or costs, if the ultimate judgment entered is less than the amount of the rejected offer. The applicability of such offers to an arbitration action, however, is doubtful.

The simple answer to the applicability of an offer of judgment statute can be found in the language of each individual statute. Some states, such as New Jersey, have statutes which address the types of proceedings, including certain arbitration actions, in which an offer of judgment is applicable. *See Elrac, Inc. v. Britto*, 775 A. 2d 547, 549 (N.J. Super. A.D.. 2001). In the majority of states, however, the offer of judgment statutes do not address their applicability to an arbitration, and thus an analysis of the statutory language is necessary.

While the case law on this issue is sparse, several courts have concluded that, where a statute is silent on the issue, statutory offers of judgment apply solely to civil actions actually litigated to judgment in court. For example, in *Nunno v. Wixner*, 778 A. 2d 145 (Conn. 2001), the Supreme Court of Connecticut held that the state's offer of judgment statute did not apply to a judgment rendered as a result of a mandatory arbitration. In *Nunno*, the action was initially brought in state court seeking damages for a motor vehicle collision. The plaintiff filed an offer of judgment for $19,000 pursuant to Connecticut's offer of judgment statute.[1] The defendant rejected the offer. The court then referred the case to a mandatory arbitration program for cases below a $50,000 threshold. Under the mandatory arbitration statute, the decision of the arbitrator becomes a judgment of the court if no appeal is taken by way of a demand for a trial de novo. After a hearing, the arbitrator awarded the plaintiff $21,945. The plaintiff then sought from the court an award of interest on the judgment under the offer of judgment statute because the arbitration award exceeded the amount of the rejected offer. The court denied the motion and the Connecticut Supreme Court affirmed the denial.

The Connecticut Supreme Court rejected the plaintiff's argument that the offer of judgment statute applied because the arbitration proceeding was part of an initial civil court action. Because the statute was silent on the issue, the court determined that the use of the terms "after trial" in the offer of judgment statute required that there be a trial and not merely an arbitration proceeding for the statute to apply. The court went on to distinguish the characteristics of a trial versus those of an arbitration proceeding and concluded that the court-mandated arbitration proceeding did not constitute a trial for purposes, of the offer of judgment statute. The *Nunno* court reasoned that despite the legislature's awareness that arbitration decisions can become judgments of a court, there was no reference to arbitrations in the offer of judgment statute. Accordingly, the statute did not apply to an arbitration award.

The argument that a confirmation of an award in court can lead to a "judgment," thus invoking an offer of judgement statute, has been rejected by at least one state court. In *Lane v. Williams*, 621 N.W. 2d 922, the Wisconsin Court of Appeals reversed a lower court award of costs under Wisconsin's offer of judgment ***56** statute. In *Lane*, the insured brought a claim against his automobile insurance carrier in court. The court action was stayed upon the motion of the insurance carrier to compel arbitration under its policy which provided for arbitration of coverage issues. The policy additionally provided that the arbitration costs be "shared equally" and stated that the "local court rules governing procedures and evidence will apply." Prior to the arbitration, the insured made a $45,000 offer of judgment to the insurer which was rejected.[2] An arbitration award

was entered in excess of the offer of judgment. The insured then sought confirmation of the award in the circuit court, as well as a judgment awarding double costs and interest under Wisconsin's offer of judgment statute. The circuit court ruled that the insured was entitled to double costs under the offer of judgment statute. The appellate court reversed this ruling.

In its decision, the Wisconsin appellate court first addressed whether the insured was entitled to costs under Wisconsin's general prevailing party statute. The Court rejected this argument holding that the mere fact that the action began and ended in the circuit court, did not render the action litigated instead of arbitrated. In its opinion, the court reiterated an earlier holding in *Finkenbinder v. State Farm Mutual Auto Insurance Co.*, 572 N.W. 2d 501 (Wisc. Ct. App. 1997), which denied prevailing party costs after an arbitration was confirmed and concluded "it is not the beginning and the end point of action that are dispositive; rather, the determining factor is whether the action was the subject of a litigated trial court proceeding." Under this same rationale, the appellate court denied the application of the offer of judgment statute stating that because the offer of judgment statute requires a written offer "at least twenty days before trial" it did not apply, because liability was determined through arbitration rather than a trial.

Similarly, the Supreme Court of Alaska has held that penalties provided by its own offer of judgment statute, patterned on Fed. R. Civ. P. 68, the Federal Offer of Judgment Rule,[3] are inapplicable to an arbitration. In *Mackie v. Chizmar*, 965 P. 2d 1202 (Alaska 1998), the initial claim was brought in state court seeking damages for emotional distress for a misdiagnosis of a patient as HIV positive. Prior to the trial, the defendant physician made a $25,000 offer of judgment. The plaintiff rejected the offer and, following a jury trial, the judge entered a directed verdict against the plaintiff ruling that she had not shown any physical injury. The verdict was appealed, and the appellate court reversed and remanded the case back to the trial court for further proceedings. On remand, the parties entered into an alternative dispute resolution ("ADR") stipulation, which allowed the trial judge to decide the case based upon a review of the record, to be supplemented by depositions and the parties' oral argument. Following the ADR procedure, the judge found for the plaintiff and awarded $15,000 in damages. Because the judge awarded less than the offer of judgment, the physician moved for attorney's fees and costs, as provided for by Alaska's offer of judgment statute. The trial court denied his request, holding the offer of judgment statute inapplicable.

On appeal, the Supreme Court of Alaska agreed. It held that "[t]he parties' decision to resolve their dispute through an alternative to trial ... invalidated [the physician's] offer in this case." 965 P. 2d at 1204. The court relied on the language of the statute which stated that an offer of judgment may be made "[a]t any time more than 10 days before the *trial* begins." It reasoned that, because the parties signed the ADR stipulation which stated that they were adopting the ADR process "in lieu of the regular trial," they chose to settle their dispute outside of the traditional litigation process and thus were not subject to the offer of judgment statute. The court went on to state that if the parties wished to preserve their rights under the offer of judgment statute when resorting to an alternative dispute resolution procedure, they must explicitly reserve its applicability in their ADR agreement.

The above cases make plain that the use of the word "trial" in a state offer of judgment statute renders the statute inapplicable to an arbitration proceeding.[4] Applying this rationale to a typical arbitration clause in a brokerage firm contract, it appears that offers of judgment are not binding. Many brokerage firm arbitration clauses contain the following language:

> • ARBITRATION IS FINAL AND BINDING ON THE PARTIES.
>
> • THE PARTIES ARE WAIVING THEIR RIGHT TO SEEK ***57** REMEDIES IN COURT, INCLUDING THE RIGHT TO JURY TRIAL.

In executing contracts containing this language, the parties to a securities arbitration waive their rights to a "trial" and instead agree to be bound by the decision of arbitrators. Securities arbitrations are governed by the NASD and NYSE rules where the decision makers are not judges, pre-hearing discovery is limited, and where the formalities regarding evidence and procedure present in a court "trial" are absent at a final hearing. *See In Republic Steel Corp. v. Maddox*, 379 U.S. 650, 664 (1965) (Black, J. dissenting); *McDonald v. West Branch*, 466 U.S. 284, 291 (1984). Since the arbitration process clearly is not a "civil action" in which there is a "trial," as is required by most offer of judgment statutes, those statutes should be found by most courts to be inapplicable in the context of securities arbitrations.

Footnotes

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1	Connecticut's Offer of Judgment Statute, General Statute §52-192 a. states, in pertinent part: "(a) After commencement of any civil action based upon a contract or seeking the recovery of money damages, whether or not other relief is sought, the plaintiff may before trial file with the clerk of the court a written 'offer of judgment' ...."
2	The offer of judgment statute, Wisc. Stat. §807.01(3) provides, in pertinent part: After issue is joined but at least 20 days before trial, the plaintiff may serve upon the defendant a written offer of settlement ....
3	Fed. R. Civ. P. 68 provides, in pertinent part, that: At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against the defending party for the money or property or to the effect specified in the offer, with the costs then accrued .... If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after making the offer.
4	Other state offer of judgment statutes contain even clearer language limiting the applicability of the statute to actions filed in court. For example, Florida's offer of judgment statute applies "[i]n any civil action filed in the courts of this state ...." Fla. Stat. §768.79 (2002).

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