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RULE 37B AND THE UNCERTAIN FUTURE OF FORMAL OFFERS TO SETTLE



In recent years, a useful tactic available to defence counsel to pressure plaintiffs to settle their claims has been to advance a formal Offer to Settle under Rule 37 of the British Columbia Supreme Court Rules. A party who failed to accept an Offer *and* who then failed to “beat” the Offer at trial could be penalized in costs, including in some cases paying double costs from the date of the Offer. However, the replacement of Rule 37 with a new Rule 37B as of July 1, 2008, has eliminated the ability of insurance defence counsel to rely with any confidence on formal Offers to provide such leverage.

BACKGROUND

By way of context, the system of formal Offers to Settle under Rule 37 was designed to encourage early settlement. Under that Rule, any party was permitted to deliver an Offer to Settle to any other party. The offering party would be rewarded by way of costs if the recipient did not accept the Offer before trial and the recipient ultimately obtained less at trial than the formal Offer to Settle. Judicial discretion was supposed to be limited; for the formal Offer to effectively encourage settlement, litigants needed to be able to predict whether cost consequences would flow from their Offers.

Rule 37B removes that certainty, replacing it with a very wide judicial discretion to award or withhold costs as seems fit to the Judge. The new Rule provides that any party may make an Offer to Settle by delivering a letter to all parties that simply reserves the right to bring the Offer to the attention of the Court in relation to costs after all other issues have been resolved. The Court can then decide to deprive a party of some or all of the costs that it might otherwise have been entitled to, or award the party double costs for all or some of the steps taken in the litigation after the Offer was made. To guide this discretion, the Court *may* take into consideration whether the Offer “ought reasonably to have been accepted”, either when it was made or at a later time; the relationship between the terms of the Offer and the final judgment of the Court; the “relative financial circumstances of the parties”; and any other factor the Court considers appropriate.

Accordingly, instead of a victorious litigant “automatically” being awarded or deprived of their costs, the Offer to Settle is reduced to *merely a factor* to be considered by the court in exercising its discretion to adjust a costs awards. In effect, whether costs are awarded or not will be solely within the discretion of a Judge even when the judgment awarded to the Plaintiff is less than the formal Offer to Settle.

PRACTICAL IMPLICATIONS FOR INSURERS

The new settlement offer procedure under Rule 37B wipes away at a stroke many of the complexities that had grown up around the previous Rule 37, which never provided as much certainty as it had promised. For example, offers in multi-party proceedings often failed to deliver the desired costs consequences, due to technicalities and confusing caselaw interpreting the Rule. However, the new Rule could easily lead to new confusion, as the effect of Offers to Settle will have to be argued in every case, each on its own circumstances. The simplicity of the new Rule also leaves many questions unanswered. Will parties during discovery be entitled to examine each other on their relative financial status, to be used in relation to costs arguments, for example? The Rule is silent on such issues.

What is even more troubling about Rule 37B from the standpoint of the insurance industry is that the Trial Judge may consider “any other factor” it considers appropriate, specifically including the “relative financial circumstances of the parties”. It is hard to imagine circumstances where the “relative financial circumstances” of an insurance company will not be greater than those of most, if not all, plaintiffs. The proposed amendments to Rules will place insurers at a clear disadvantage. The ability to use formal Offers to Settle as a lever to settle will be seriously undermined.

The BC Justice Review Task Force is presently considering wholesale revisions to the Rules of Court. The most recent draft revisions recommended by the Task Force reproduce Rule 37B unchanged from its current form. Our firm intends to make clear to the Task Force our objections to Rule 37B, and press for its amendment in future revisions to the Rules.

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