Negligence Law Section

Negligence Law Section Quarterly

Fall 2018

The Power of an Offer of Judgement Under MCR 2.405

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The Michigan Offer of Judgment Rule (MCR 2.405) is a powerful tool for encouraging a rapid, fair settlement of personal injury and settlement claims. When opposing parties use the rule to make offers and counteroffers, the party whose offer is furthest from the ultimate judgment is typically required to pay the more accurate party's attorney fees. This creates a powerful incentive for the parties to concentrate on correctly estimating the case's true value and to reach an early and fair settlement. Why don't courts and parties use this tool more often? Here are some suggestions for a few modest revisions to turn the rule into a more powerful complement to the case evaluation process.

Michigan Court Rule 2.405 articulates Michigan's version of the offer of judgment rule. Like its federal counterpart, Fed.R.Civ.P. 68, the rule allows a party to serve a settlement proposal (commonly in the form of a pleading) on the opposing party. If, within the time specified in the rule, the opponent accepts the proposal, one of the parties may file the offer and notice of acceptance with the court and the case is settled.[1] Under both the Michigan and the federal rules, an opposing party that fails to accept the offer risks having to pay the offering party's court costs, but there the similarities end.

Under MCR 2.405(A)(6), unlike Fed.R.Civ.P. 68, the offering party may also recover reasonable attorney fees. An offer under the federal rule can be made only by the party defending a claim, not by the claimant, while MCR 2.405(B) allows either the claiming party or the defending party to make an offer. MCR 2.405(A)(2) creates a specific procedure for opposing (or adversary) party to make a counteroffer, a provision that is missing from Fed.R.Civ.P. 68. If the adversary fails to counteroffer, only the offering party can recover costs and attorney fees. But if the adversary counters, costs and attorney fees are awarded to whichever party the judgment favors. And, again unlike Fed.R.Civ.P. 68, MCR 2.405(A)(1) permits an offer of judgment only for a

[1] *Compare* MCR 2.405(C)(giving the opposing party 21 days to accept or reject the offer and requiring the opposing party to file the offer and notice of acceptance if the opposing party accepts the offer) with Fed.R.Civ.P. 68(a)(giving the opposing party 14 days to serve a response on the offeror and permitting either party to file the original offer and the notice of acceptance if the opposing party accepts the offer).

sum certain. The federal rule permits the offeror to propose any terms to settle the case, including stipulating to a judgment based in part or in whole on equitable relief.

MCR 2.405(A) and (D) promulgate a calibrated formula, also not found in Fed.R.Civ.P. 68, to carefully balance each party's obligations to pay its opponent's attorney fees. Assuming that the adverse party counteroffers, MCR 2.405(D) awards costs, interest, and (in most cases) attorney fees if the "adjusted verdict" is more favorable to one of the parties than the "average offer." Under MCR 2.405(A)(5), the "adjusted verdict" is determined by taking the "verdict" and adding statutory interest and costs from the filing of the complaint through the date of the first offer. For purposes of the rule, "verdict" includes not only the decision of a jury, but a judgment of the court after a non-jury trial and a judgment resulting from the court ruling on a motion after the offer is rejected.[2] As a result, MCR 2.405 applies in virtually all cases that the court decides on the merits after the offer is rejected.

Under MCR 2.405(A)(3), the "average offer" is the average of the offer and counteroffer, or, if there is no counteroffer, the offer itself. If the adjusted verdict is more favorable to the offeror than the average offer, the offeror is entitled under MCR 2.405(D)(1) to its "actual costs." If the adversary makes a counteroffer within 21 days of being served with the offer and if the adjusted verdict is more favorable to the offeror's opponent than the average offer, the adversary is entitled under MCR 2.405(D)(2) to its "actual costs." MCR 2.405(A)(6) defines "actual costs" as "the costs and fees taxable in a civil action and a reasonable attorney fee for services necessitated by the failure to stipulate to the entry of judgment."

As a result, this rule is a much more powerful tool for encouraging settlement than its federal counterpart. First, MCR 2.405 can be used by either side, not just by the defendant. Second, MCR 2.405 awards attorney fees when a final judgment is more favorable to an offering or counteroffering party. Although MCR 2.405(D)(3) allows the trial court to deny the prevailing party attorney fees "in the interest of justice," the Michigan Court of Appeals has consistently held that, except in the rarest of cases, the court abuses its discretion if it refuses to award attorney fees.[3] By requiring courts to award attorney fees in all but rare circumstances, MCR 2.405 places significantly more pressure on the parties to take offers of judgment seriously and to settle cases when they can.

Third, the "average offer" feature makes this rule much more useful in promoting settlement, at least when the opposing party makes a counteroffer. As any practicing attorney knows, no

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[2] *See* MCR 2.405(A)(4).

[3] *See, e.g., Butzer v. Camelot Hall Convalescent Centre, Inc. (After Remand)*, 201 Mich.App. 275, 278-79 (1993); *Luidens v. 63rd District Court*, 219 Mich.App. 24, 35 (1996). The Court of Appeals has articulated only two circumstances that justify the trial court denying attorney fees under MCR 2.405: (1) when the offeror is gaming the system; (2) when the case involves a legal issue of first impression or an issue of public interest that ought to be litigated to a conclusion on the merits. *See Id*., 219 Mich.App. at 34-35. *Cf. Anderson v. Progressive Marathon Ins. Co.*, 322 Mich.App. 76, 93-95 (2017) (recognizing but limiting the first impression/ public interest exception). Although the Court of Appeals has held that the trial court must determine on a case-by-case basis whether to award attorney fees under MCR 2.405, the Court of Appeals has also held that the trial court should "routinely enforce[]" MCR 2.and grant attorney fees. *See Sanders v. Monical Machinery Co*, 163 Mich.App. 689, 692-93 (1987); *Stamp v. Hagerman*, 181 Mich.App. 332, 339 (1989); *Anderson*, 322 Mich.App. at 94.

plaintiff or defendant opens a negotiation by disclosing how much that party thinks the case is actually worth. If the party thinks that settlement is possible, it will begin with a number that it thinks will encourage the other side to negotiate seriously and signal to its adversary that it too is serious. The opening bid, then, will be designed to suggest that the offeror is serious about settlement but will not be the final number at which the offeror is willing to settle.

The problem with the federal rule is that is shifts costs only when the ultimate judgment is at least as favorable to the offeror as the offer. That puts the offeror in an awkward position. Whatever number the offeror puts in its offer to settle, the opposing party will interpret it as the offeror's current negotiating position, and the opposing party is likely to conclude that the settlement value of the case is significantly more favorable to the opponent. But if the offering party, knowing how the offer of settlement will be perceived, proposes a number more consistent with an opening bid than a final settlement, the adversary will treat it as an unrealistic demand that no court or jury would be likely to award the offeror. An offer that the adversary perceives as unrealistic is unlikely to increase the pressure on the adversary to settle.

By contrast, MCR 2.405 allows an offeror to use the offer as a standard opening bid. As long as the initial offer is realistic enough to induce a counteroffer, the offeror will be entitled to costs and attorney fees if the ultimate judgement is more favorable than the average of the offer and counteroffer. Likewise, the opposing party is entitled to costs and attorney fees if the ultimate judgment is more favorable to it than the average of the offer and counteroffer. MCR 2.405 thus rewards the party that comes closest to estimating the true value of the case without having to disclose its estimate upfront. It also places significant pressure on both parties to continue to evaluate their positions throughout the case to ensure that their position is closest to the final outcome. The Michigan rule gives both sides a powerful incentive, once an offer and counteroffer have been made, to update their offers and counteroffers as discovery and motion practice shift and shape the factual and legal contours of the case.

So why isn't MCR 2.405 used more frequently? The answer stems from three sources: (1) a 1997 amendment to MCR 2.405(E) to prevent conflict with the case evaluation process; (2) a weakness in the definition of "average offer"; and (3) an ambiguity about which attorney fees are recoverable under MCR 2.405. Fortunately, all of these defects are easy to fix.

First, the Supreme Court amended the rule in 1997 to prevent MCR 2.405 from being used to game the case evaluation system in MCR 2.403 and 2.404. At the time, it was possible for party that rejected a case evaluation to simply make an offer of judgment under MCR 2.405 that was more favorable than the case evaluation. Given how the rule was then written, that maneuver allowed the rejecting party to claim attorney fees if the ultimate judgment was more favorable than its post-case evaluation offer of judgment. By making an offer after the case evaluation, the rejecting party could reduce the risk of rejecting the case evaluation and pressure its opponent to abandon the case evaluation and accept a less favorable settlement.

To end this gamesmanship, the Supreme Court unfortunately revised MCR 2.405(E) to negate all offers and counteroffers under MCR 2.405 unless the case evaluation is not unanimous. Since

the case evaluation rules entitle the prevailing party to attorney fees starting only from the date that the case evaluation is handed down, this rule change has the effect of wiping most of the pressure that an early MCR 2.405 offer puts on the opponent to negotiate in good faith. But the rule could be modified slightly either to negate only MCR 2.405 offers that are made after the case evaluation is served on the parties, or to negate the effect of offers or counteroffers made by a party that rejects the case evaluation. Either way, a revised rule could eliminate using MCR 2.405 to game the case evaluation system without undermining the incentive to use MCR 2.405 to promote settlement.

Second, the definition of "average offer" should be strengthened. Currently, the "average offer" is the average of the offer and counteroffer. But if there is no counteroffer, "average offer" is defined as the offer itself. This allows the opposing side to game the system by refusing to counteroffer. Under the current system, any counteroffer the adversary makes under MCR 2.405 increases the range of judgments that entitle the offeror to costs and attorney fees. For example, if a plaintiff offers to settle for $100,000 and there is no counteroffer, the plaintiff collects attorney fees only when the ultimate judgment is more than $100,000. But if the defendant counteroffers $60,000, the plaintiff is entitled to attorney fees on any judgment that exceeds $80,000. "Average offer" should be redefined to mean one-half the offer if the offer seeks payment from the adversary, and some high multiple of the offer (say, five times the offer) if the offeror proposes to make a payment to the adversary. In the example given above, this would change the average offer, if there is no counteroffer, from $100,000 to $50,000 and give the defendant an incentive to make a counteroffer. Modifying the rule to give the adversary a strong incentive to counteroffer will encourage the parties to use MCR 2.405 more frequently to initiate serious settlement efforts.

Third, MCR 2.405(A)(6) defines "actual costs" as including only those attorney fees "necessitated by the failure to stipulate to the entry of judgment." In other words, only the attorney fees incurred after the offer or counteroffer is rejected are recoverable.[4] While this makes sense from a broad policy perspective, it introduces an unfortunate ambiguity that makes the rule less potent. Because it is not clear whether the prevailing party can recover attorney fees dating to rejection its original offer/counteroffer or only its most recent offer/counteroffer, this rule discourages follow-up offers and counteroffers. The definition of "actual costs" should be revised to include all attorney fees dating to the rejection of the prevailing party's initial offer or counteroffer in order to encourage both parties to modify their positions as warranted by developments in the case. As the parties shift their positions, they will invariably draw closer together to decrease the risk that their opponents may be awarded attorney fees and increase the possibility that they could recover their attorney fees. As opposing parties draw closer together, the likelihood of settlement should increase.

With a few modest modifications, MCR 2.405 would be transformed into a more powerful tool to encourage early settlement of cases. Courts could also increase the power of MCR 2.405 by integrating it more fully into the initial scheduling order and/or pretrial conference procedures.

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[4] *See Sanders*, 163 Mich.App. at 694; 2 Longhofer, Mich. Ct. Rules Prac., Text § 2405.5 (6th Ed. 2018)

The trial court could, for instance, ask the parties whether they are prepared to make offers under MCR 2.405 and perhaps even set deadlines for the parties to exchange offers and counteroffers under MCR 2.405. With these few steps, MCR 2.405 would become an excellent complement to case evaluation, which tends to be used more frequently late in the case after the parties have completed discovery.

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