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Offers of Settlement in Business-to-Business Cases

By: Andrew Goldwasser

Introduction

Attention business litigators: You need to be aware of House Bill 225, proposed as R.C. 2307.31. House Bill 225 is fee-shifting legislation in business versus business cases. It is intended to create a procedure for settling civil actions between businesses and other organizations through offers of settlement. The legislation - if and when it is signed into law - will have a dramatic impact on the manner in which business torts are handled.

Summary of House Bill 225

A. What is House Bill 225?

House Bill 225 is fee-shifting legislation. It provides a mechanism to shift the fees and costs of litigation to the opposing side, if that side refused a written settlement offer and was awarded an amount less than the original settlement offer at trial. The Bill was introduced by Representative Jim Butler, a former business litigator at Thompson Hine and now Chairman of the House Judiciary Committee.

B. Does House Bill 225 (R.C. 2301.31) Apply to All Types of Cases?

No. Once enacted, R.C. 2301.31 will apply only to litigation between entities. An "entity" is defined to include: (1) a for-profit or non-profit organization; (2) a business trust, real estate investment trust, limited liability company, limited partnership or limited partnership association; or (3) a bank, savings bank, or savings and loan association.

C. How Does 2301.31 Work?

At any time more than 30 days after the service of a summons and complaint, any party that is an entity may serve on any opposing party that is an entity a written offer to settle a civil action. The offer must be writing and needs to include all of the following:

1. A statement that the offer is being made pursuant to section 2307.31 of the Revised Code;
2. The identity of the party or parties making the offer and the party or parties to whom the offer is being made;
3. An identification of the claim or claims the offer is attempting to resolve;
4. Any conditions upon which the offer is being made;

5. The total amount of the offer;
6. The amount proposed to settle a claim for punitive damages, if any; and
7. Whether the offer includes attorney's fees or other expenses and whether attorney's fees or other expenses are part of the legal claim.

D. What Constitutes a Rejection of a Settlement Offer Under 2307.31?

An offer made under Section 2307.31 of the Revised Code shall remain open for 30 days. An offer that is neither withdrawn nor accepted within 30 days shall be deemed rejected. A counter-offer also counts as a rejection, but it may serve as an offer under 2307.31 if it is specifically denominated as such. The acceptance or rejection of a settlement offer must be in writing.

E. Is the Settlement Offer Admissible?

No. Evidence of a settlement offer under 2307.31 is not admissible except in proceedings to enforce a settlement or to determine the reasonable attorney's fees and costs under the statute.

F. What is the Effect of a Rejected Settlement Offer?

If a plaintiff rejects the settlement offer, and if the final judgment is one of no liability or for an amount that is less than seventy-five percent of the offer, the defendant may recover reasonable attorney's fees and expenses from the date of the rejection of the offer through the entry of judgment.

If a defendant rejects an offer of settlement made by the plaintiff, and the plaintiff recovers a final judgment in an amount greater than one hundred twenty-five percent of the offer, the plaintiff may recover reasonable attorney's fees and expenses from the date of the rejection of the offer through the entry of judgment.

Once the judgment is final (i.e., all appeals exhausted), a party whose settlement offer was rejected may apply to the Court for an Order requiring payment of attorney's fees and expenses. At that point, the Court will determine whether the offer was made in accordance with 2307.31 and, if so, "shall" order the payment of reasonable attorney's fees and expenses.

G. Are There Any Defenses?

Yes. The Court may deny an application for fees and expenses if the Court determines that the offer was not made in good faith or if the party making the application asserted a frivolous claim or defense. If the Court denies the application for attorney's fees and expenses, it is required to set forth the basis for the denial in the order denying the application.

H. Can the Prevailing Party Bring a Separate Claim After Judgment?

Yes. House Bill 225 provides that if a party makes a settlement offer under 2307.31 and the offeree rejects the offer, the offeror has a cause of action against the offeree for attorney's fees and expenses. Any such actions need to be brought within one year after the cause of action accrues, which is defined as the final, non-appealable entry of judgment. It is an affirmative defense to an action brought under 2307.31 that the offeror did not make the offer in good faith or that the offeror asserted a frivolous claim or defense in the action to which the offer was made.

Conclusion

House Bill 225, once signed into law, will have a significant impact on virtually every facet of a business versus business case. Business litigators need to be aware of this legislation. Updates to follow.

Authored By:

Andy Goldwasser
Ciano & Goldwasser, LLP