



OFFERS OF JUDGMENT IN NEVADA: BEST FRIEND OR WORST ENEMY?

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In Nevada, offers of judgment are an important tool to protect parties' interests and resolve litigation.¹ Additionally, offers of judgment serve an important function where parties may not otherwise have a basis to recover attorney fees. While the premise seems simple enough, to obtain a more favorable judgment than the offer of judgment made to the opposing party, offers of judgment are complicated. NRS 17.115 and NRCP 68 provide the guiding provisions for making or rejecting offers of judgment.² Despite the several amendments to this statute and court rule over the years, there are numerous cases decided by the Nevada Supreme Court that clarify and give meaning to the language governing offers of judgment, which is sometimes not readily apparent. Because of the complexity of offers of judgment, it is certain that the Supreme Court will continue to clarify the various provisions governing offers of judgment. Having a working knowledge of the Supreme Court's treatment of offers of judgment is of utmost importance, especially when the litigation involves a high dollar value and there are no other means to recover attorney fees.

When thought through and issued properly, the offer of judgment can be a best friend and the means to recovering attorney fees. On the other hand, the failure to abide by guidelines for preparing and issuing an offer of judgment can make the offer of judgment a worst enemy and possibly render it invalid. This article addresses some of the major guidelines to follow in preparing and issuing offers of judgment in Nevada.

I. DRAFTING THE OFFER OF JUDGMENT

Joint Offers of Judgment

A joint, unapportioned offer of judgment is an offer that involves either multiple plaintiffs or multiple defendants (or both), issuing or receiving an offer of judgment. The general rule is that joint, unapportioned offers of judgment are invalid.³ The reasoning behind this rule is that an individual party cannot adequately weigh the risks and benefits of either rejecting or accepting a joint, unapportioned offer without knowing the individual amount.⁴ However, the stated exceptions are that joint,

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unapportioned offers are valid, whether issued by plaintiff or defendant, if

- (1) there is a single common theory of liability or recovery of damages;
- (2) the liability or recovery of damages of one or more of the parties is entirely derivative of the liability of the remaining parties;
- (3) the liability or recovery of damages is entirely derivative of an act or injury to another person; or
- (4) the same person or entity is authorized to decide whether to settle the claims.⁵

Because of the possibility that a joint offer of judgment may be invalid if it is unapportioned, joint offers of judgment may be apportioned, meaning that each party to which an offer is made is assigned a specific amount.⁶ When making a joint, apportioned offer of judgment, there is also an option to make the acceptance of the individual offers contingent upon the other parties also accepting their separate offers of judgment, without invalidating the offer of judgment.⁷ Of course, if it would be futile to remove only some of the parties from the litigation, it makes sense to require all parties to accept the offer of judgment.

Include or Exclude Prejudgment Interest and Costs?

Many offers of judgment are silent as to the payment of prejudgment interest and costs. Does it really matter whether these items are separately addressed in an offer of judgment? The short answer is yes. When an offer of judgment is silent as to prejudgment interest, the presumption is that the offer includes prejudgment interest.⁸ In other words, the party accepting an offer of judgment that is silent on prejudgment interest cannot both accept the offer of judgment and later move the court for an award of prejudgment interest. Obviously, if an offer of judgment expressly excludes an award of prejudgment interest, the accepting party would be able to both accept the offer of judgment and move the court for a separate award of prejudgment interest.

With regard to costs, the same rule applies. An offer that expressly provides for a separate recovery of costs, or is silent as to costs, will permit the accepting party to both accept the judgment and move the court for an award of

costs.⁹ A party accepting an offer of judgment cannot recover costs when the offer of judgment specifically precludes a separate award of costs.¹⁰ These distinctions of interest and costs will become important when determining the validity of an offer of judgment and whether a more favorable judgment was obtained.

Include or Exclude Attorney Fees?

Because the Supreme Court has specifically addressed including or excluding prejudgment interest and costs in an offer of judgment, should the offer of judgment also include a similar treatment of attorney fees? When attorney fees are recovered as a cost of litigation, as opposed to special damages, attorney fees are typically not added to the judgment to determine whether a more favorable judgment is obtained.¹¹ As the Supreme Court reasoned, it would be circular to include the very attorney fees being sought as part of the judgment for determining whether

the judgment is more favorable than the offer of judgment.¹² Of course, if there were some grounds independent of an offer of judgment to recover attorney fees, the same presumptions that correspond to costs and interest should also apply to attorney fees.

Construction Defect Cases

In order to be valid, offers of judgment in residential construction defect cases that are governed by NRS Chapter 40 must include all the damages to which a construction defect claimant is entitled to recover under NRS 40.655.¹³ So, the offer of judgment should either enumerate or reference the damages in NRS 40.655 to which a claimant is entitled to recovery, which include:

- (1) reasonable attorney fees;
- (2) cost of repairs;
- (3) reduction in market value of residence;
- (4) loss of use of residence;
- (5) reasonable value of damaged property;
- (6) expert costs; and
- (7) interest.

Because offers of judgment in construction defect cases must be drafted with these various components, they become more difficult to compare when deciding whether a more favorable judgment was obtained.

II. SERVING THE OFFER OF JUDGMENT

Timing to Serve the Offer of Judgment

NRS 17.115(1) and NRCP 68(a) both clearly state that an offer of judgment must be served at least 10 days prior to trial. However, Nevada case law clarifies that an offer of judgment can be served 10 days before different phases of bifurcated trials.¹⁴ But, comparing the judgment obtained with the offer of judgment amount cannot be a simple mathematical comparison. Instead, the court must consider the factors set forth in *Beattie v. Thomas*, which include:

- (1) whether the plaintiff's claim was brought in good faith;¹⁵
- (2) whether the defendants' offer of judgment was reasonable and in good faith in both its timing and amount;
- (3) whether the plaintiff's decision to reject the offer and proceed to trial was grossly unreasonable or in bad faith; and
- (4) whether the fees sought by the offeror are reasonable and justified in amount.¹⁶

So, while an offer of judgment can be served at any time at least 10 days prior to trial, the offer cannot be served too soon or in an unreasonable amount.

Manner of Serving the Offer of Judgment

NRCP 5(b) sets forth the manner in which service of any litigation document can be served. In a recent case, the Nevada Supreme Court clarified that a faxed offer of judgment was invalid because the parties had not executed a written consent to be served by electronic means, even though the offer of judgment was actually received.¹⁷ The Supreme Court reasoned that the faxed offer of judgment was invalid because NRS 17.115 and NRCP 68 require an offer of judgment to be served in compliance with the methods allowed by NRCP 5.

III. DETERMINING THE VALIDITY OF THE OFFER OF JUDGMENT

Attorney Fees Included to Determine More Favorable Judgment?

As discussed, attorney fees that are requested as a cost of litigation are not added to the judgment for purposes of determining whether a more favorable judgment was obtained to invoke the offer of judgment penalty provisions.¹⁸ Of course, attorney fees that are proven as special damages will form a component of the damages awarded to the prevailing party.¹⁹ However, the difficulty in determining whether to add attorney fees lies in the unique language of some statutes. For example, in *Albios v. Horizon Communities, Inc.*, the Supreme Court treated a post-judgment motion for attorney fees as special damages based upon the unique language of NRS 40.655 as it applies to residential construction defect cases.²⁰ The Supreme Court reasoned that the attorney fees were proximately caused by the construction defects and, thus, took on the nature of special damages. But, since the statute required the attorney fees to be determined by the court, a post-judgment motion was sufficient.

In comparing the offer of judgment to the judgment eventually received, these additional attorney fees treated as special damages were added to the judgment. So, when dealing with residential construction defect cases governed by NRS Chapter 40, attorney fees needed to be calculated as being potentially part of the principal judgment

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to determine an appropriate amount of the offer of judgment. The legislature may enact or the Supreme Court may interpret other statutes in this manner which changes the offer of judgment analysis.

Pre-Offer Costs and Pre-Offer Interest

A party that obtains a judgment has the opportunity to compare his or her own offer of judgment to see if the judgment was more favorable than the offer. If the judgment falls short of the amount of the offer of judgment, the analysis is not over. If the offer of judgment was either silent or specifically included prejudgment interest with the offer, the pre-offer amount of prejudgment interest will be added to the judgment for purposes of determining whether there was a more favorable judgment.²¹ This same rule of comparison applies to pre-offer costs if the costs were either included in the offer of judgment or the offer is silent.²² Once the pre-offer costs and pre-offer prejudgment interest are added to the judgment, if available, an accurate determination can then be made whether the judgment is more favorable than the offer. Of course, the addition of these pre-offer amounts is only for comparison, and they do not permanently increase the judgment amount.²³ Unfortunately, this analysis allowing the addition of pre-offer amounts only applies to a party actually recovering a judgment.

Proper Person Offers of Judgment

Nothing in NRS 17.115 or NRCPC 68 prohibits a proper person from issuing an offer of judgment. However, the Supreme Court has stated that proper persons cannot recover attorney fees, as non-attorneys, for their time and efforts litigating cases.²⁴ But, the Supreme Court recently clarified that it would be absurd to require a proper person to retain an attorney only for the purposes of issuing an offer of judgment, without being able to take advantage of the legislature's intent to allow offers of judgment to settle cases.²⁵ So, a proper person can validly issue an offer of judgment, but the recoverable attorney fees must be incurred by an independent licensed attorney and not the proper person, even if the proper person is an attorney.

Successive Offers of Judgment

As a particular litigation case develops, there are often junctures where it makes sense to make settlement offers. Even if an offer of judgment was issued earlier in the case, the development of the case may motivate parties to consider a higher or lower settlement offer. However, unless parties want to waive the application of the offer of judgment penalty provisions for the period between two offers of judgment, the subsequent settlement offers should not be memorialized into formal offers of judgment. Instead, the settlement offers should remain only as settlement offers. The Supreme Court recently declared that a successive offer of judgment will completely extinguish all prior offers of judgment.²⁶

District Court Judgment vs. Supreme Court Judgment

Because NRCPC 54(d) requires motions for attorney fees to be filed within 20 days after service of notice of entry of judgment, there is a necessary comparison between the offer of judgment and the judgment entered by the District Court. However, if there is an appeal and the Supreme Court alters the judgment in any way, there needs to be a second comparison before the District Court in a post-appeal proceeding. In this proceeding, the District Court is authorized to re-examine which party obtained a more favorable judgment based upon the changed amount of the judgment.²⁷ The District Court is also authorized to award attorney fees for the entire period from the offer of judgment, through the appeal, until the final entry of judgment.²⁸

Overriding Effect of Offer of Judgment on Other Means to Recover Attorney Fees

For parties that reject offers of judgment, NRS 17.115(4) and NRCPC 68(f) apply the fee-shifting provisions to the parties that have assumed that risk. Because there is risk involved in rejecting an offer of judgment, it would be unfair to allow a party that obtains a less favorable judgment than the opposing party's offer, to recover attorney fees on some other legal basis. In recognizing this underlying policy, the Supreme Court has stated that a party faced with the offer of judgment penalty provisions cannot recover any attorney fees based upon some other statute. Otherwise, the entire policy of the offer of judgment would be thwarted.²⁹

IV. CONCLUSION

A valid and successful offer of judgment serves an important purpose in litigation, either to settle lawsuits or impose attorney fees and other penalties upon the unsuccessful party. When drafted, served and determined to be valid, the offer of judgment fulfills the underlying policy. However, the failure to properly draft, serve or determine as valid, can nullify the offer of judgment and make it meaningless. Familiarity with not only the text of NRS 17.115 and NRCPC 68 but also the Supreme Court's interpretation of offers of judgment will give parties an advantage in carrying out the entire purpose of offers of judgment.

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- 1 *Dillard Dep't Stores, Inc. v. Beckwith*, 115 Nev. 372, 381, 989 P.2d 882, 888 (1999).
- 2 While there are some differences in the text of NRS 17.115 and NRCP 68, the Nevada Supreme Court has construed these provisions in harmony with each other. See *McCrary v. Bianco*, 122 Nev. 102, 131 P.3d 573 (2006).
- 3 *Parodi v. Budetti*, 115 Nev. 236, 984 P.2d 172 (1999).
- 4 *Id.*
- 5 NRS 17.115(9); NRCP 68(c).
- 6 NRS 17.115(6)&(7); NRCP 68(c).
- 7 *Id.*
- 8 *State Drywall v. Rhodes Design & Dev.*, 122 Nev. 111, 119, 127 P.3d 1082, 1087 (2006); *Albios v. Horizon Communities, Inc.*, 122 Nev. 409, 426, 132 P.3d 1022, 1033 (2006); *McCrary v. Bianco*, 122 Nev. 102, 110 n. 16, 131 P.3d 573, 578 n. 16 (2006).
- 9 NRS 17.115(2)(b); NRCP 68(g).
- 0 *Id.*
- 1 *Bowyer v. Taack*, 107 Nev. 625, 817 P.2d 1176 (1991).
- 2 *Id.*
- 3 NRS 40.650(4).
- 4 *Allianz v. Gagnon*, 109 Nev. 990, 860 P.2d 720 (1993).
- 5 This first factor only applies when the defendant is the offering party. Otherwise, if the plaintiff is the offering party, the court should consider whether the defendant's defenses or claims were brought in good faith. See *Yamaha Motor Co. v. Arnoult*, 114 Nev. 233, 955 P.2d 661 (1998).
- 6 99 Nev. 579, 668 P.2d 268 (1983). In considering the reasonableness of attorney fees under any legal basis, the Nevada Supreme Court has also consistently held that the factors set forth in *Brunzell v. Golden Gate National Bank*, 85 Nev. 345, 455 P.2d 31 (1969) must be analyzed.
- 7 *Quinlan v. Camden USA, Inc.*, 126 Nev. Adv. Op. No. 30 (July 29, 2010).
- 8 *Bowyer*.
- 9 *Horgan v. Felton*, 170 P.3d 982 (Nev. 2007).
- 20 132 P.3d at 1035-36.
- 2 *Albios*, 132 P.3d at 1033.
- 22 *Id.*
- 23 *Id.*
- 24 *Sellers v. Dist. Ct.*, 119 Nev. 256, 71 P.3d 495 (2003).
- 25 *In re Estate of Miller*, 216 P.3d 239 (Nev. 2009).
- 26 *Albios*, 132 P.3d at 1032-33.
- 27 *In re Estate of Miller; Tipton v. Heeren*, 109 Nev. 920, 859 P.2d 465 (1993).
- 28 *Id.*

OFFERS OF JUDGEMENT TEST – 1 Hour CLE Credit

Questions: Answer True or False.

1. In Nevada, all joint, unapportioned offers of judgment are invalid.
True or False
2. When an offer of judgment is silent as to prejudgment interest, it is presumed that the offer includes prejudgment interest.
True or False
3. A faxed offer of judgment will be treated as valid, even when the parties have not consented in writing to service by electronic means, so long as the party actually receives the offer of judgment.
True or False
4. Offers of judgment served in construction defect cases governed by NRS Chapter 40 are valid based upon ordinary rules of construing offers of judgment and do not require any special language.
True or False
5. Attorney fees requested in a post-judgment proceeding under NRS 40.655 for residential construction defect matters are treated as part of the principal judgment for purposes of comparing it with an offer of judgment.
True or False
6. A party recovering a judgment can add pre-offer interest and pre-offer costs to the judgment for purposes of comparison with the offer of judgment if prejudgment interest and costs were specifically excluded from the offer of judgment.
True or False
7. A proper person can validly issue an offer of judgment but cannot recover attorney fees for his or her own time, even if the proper person is an attorney.
True or False
8. A successive offer of judgment completely extinguishes all prior offers of judgment issued by that same party.
True or False
9. Following a decision rendered by the Supreme Court, a District Court has the ability to re-examine an offer of judgment post-appeal to determine whether either party obtained a more favorable judgment than any offer of judgment validly issued in the case.
True or False
10. When a party fails to beat an opposing party's offer of judgment, and the penalty provisions of NRS 17.115 and NRCP 68 apply, the party can still look to other legal grounds for recovering attorney fees.
True or False

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