

# Texas' New Offer of Settlement Rule

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# Background

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- ✦ The offer of settlement concept originated as an alternative to a pure “loser pays” system
  - ✦ Loser pays – prevailing party’s costs are shifted to loser
  - ✦ Offer of settlement – costs are shifted against party who refuses to settle where, in light of the ultimate case outcome, that refusal proves to be vexatious or unreasonable
- ✦ In effect replicates the economic incentives of loser pays but ties cost-shifting to case outcome relative to settlement offer rather than who wins or loses

# Background *(cont.)*

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- ✦ An offer of settlement mechanism has been proposed during several recent legislative sessions
- ✦ Was incorporated into HB 4

# Overview

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- ✦ Adds a new Chapter 42, CPRC
- ✦ Chapter 42, in turn, charged the Texas Supreme Court to promulgate implementing rules
  - See Misc. Docket No. 03-9160
  - Adds new TRCP 167
- ✦ TRCP 167 applies to cases filed on or after January 1, 2004
- ✦ Court may make further revisions in advance of January 1

# Chapter 42

## Settlement Procedure

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### **Basic Features**

- ✦ Only applies to claims for monetary relief (Sec. 42.002)
- ✦ Procedures do not apply to:
  - ◆ **Class Action**
  - ◆ **Shareholder Derivative Action**
  - ◆ **Action brought by or against a government unit**
  - ◆ **Action under the Family Code**
  - ◆ **Workers Comp or Labor Actions**
  - ◆ **Action before a Justice of the Peace or small claims court**



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## “Two-Step” Triggering Process

- ✦ **Step One: DEFENDANT must invoke Chapter 42 by filing a declaration “opting in” to procedure. Plaintiff cannot initiate**
- ✦ **“Defendant” includes a counter-defendant, cross-defendant, or 3<sup>rd</sup> party defendant**
- ✦ **Step Two: Either Plaintiff or Defendant can then make offer triggering potential cost shifting.**

# Basic Features *(cont)*

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- ✦ **In multi-party cases, the “procedure” set forth in Chapter 42 only relates to Defendants who invoke the procedure and the Plaintiff.**
- ✦ **A Defendant who has not invoked the procedure may not have it triggered against him by a Plaintiff, even if the Plaintiff has had the procedure invoked by another party (Sec. 42.002 (c))**



# Elements of an offer made pursuant to Chapter 42

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- ✦ Offer must be in writing
- ✦ Must state that the offer is made pursuant to Chapter 42 and TRCP 167
- ✦ State the terms by which the claims may be settled
- ✦ State a deadline by which the settlement offer must be accepted
- ✦ Be served on all parties to whom the offer is made
- ✦ See 42.003

# Basic features *(cont.)*



- ✦ Does not impact settlement negotiations not made under or in compliance with Offer of Settlement rule

# Conditions of offer

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- ✦ An offer may be made subject to reasonable conditions including the execution of appropriate releases, indemnities and other documents
- ✦ A condition to which no such objection is made is presumed to have been reasonable
- ✦ Rejection of an offer made subject to a condition determined by the trial court to have been unreasonable cannot be the basis for an award of litigation costs under this rule

# Awarding Litigation Costs

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- ✦ Costs are awarded if an offer is made and rejected, and the judgment is significantly “less favorable” than the rejected offer
- ✦ Less favorable to CLAIMANT means judgment less than 80% of offer rejected by Claimant
- ✦ Less favorable to DEFENDANT means judgment more than 120% of offer rejected by Defendant
- ✦ See Sec. 42.004

# Calculation Modifiers

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- ✦ Costs awarded cannot be greater than amount computed by determining the sum of:
  - ✦ 50% of economic damages
  - ✦ 100% of non-economic damages
  - ✦ 100% of exemplary damages
  - ✦ Subtract dollar value of Statutory, constitutional or Contractual liens
  - ✦ Awarded as an offset against claimant's recovery
    - i.e., no cost shifting if plaintiff does not recover

# New TRCP 167

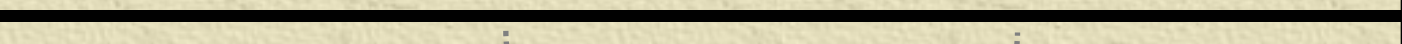
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- ✦ The declaration must be filed no later than 45 days before the case is set for conventional trial on the merits
- ✦ State that it is made under Rule 167 and Chapter 42 of the Texas Civil Practice and Remedies Code



60 days

14 days



Appearance of  
Offeror or  
Offeree

Period for  
Making Offer

Trial  
Date

# An offer may not be made:

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- ✦ Before a defendant's declaration is filed
- ✦ Within 60 days after the appearance in the case of the offeror or offeree, whichever is later
- ✦ Within 14 days before the date the case is set for a conventional trial on the merits except that an offer may be made within that period if it is in response to and within seven days of a prior offer.



# Withdrawal, Acceptance, Rejection of an Offer of Settlement

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- ✦ Withdrawal – may be withdrawn before it is accepted, if withdrawal is in writing
- ✦ Acceptance – can be accepted only by written notice served on the offeror by the deadline stated in the offer
- ✦ Rejection – if not withdrawn or accepted, the offer is rejected, or it may be rejected by written notice as with Acceptance