Strategies for the Early Resolution of Claims: timing is everything in getting to early settlement

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ON THE AGENDA…

1. Various procedural devices that can be used to secure early pre-trial settlement:
   i. Request to Admit
   ii. Mediation
   iii. Pierringer and Mary Carter agreements
   iv. Offers to Settle

2. Which ones to use in the circumstances, and when to use them.

INTRODUCTION

Fact: Over 95% of cases settle before trial.

A trial is rarely the best means of resolving a dispute because:

- it's expensive
- litigation is slow, painful, and disruptive
- the outcome is often unpredictable – you win cases that you think you might lose, and you lose cases that you expect to win

So, what can be done to settle a case prior to trial?

REQUEST TO ADMIT (Rule 51)

- A Request to Admit forces the opposing party to admit:
    1. the truth of a particular fact, or
    2. the authenticity of a specific document

- Very underutilized: A Request is almost always used immediately before trial, but it can be used at any time during litigation, and as many times as you like.

How it works…

- A party serves on an adverse party a Request to Admit document, identifying the fact or document to be admitted.
- The adverse party must respond within 20 days.
- If there is no response, the adverse party is deemed to admit the truth of the fact, or the authenticity of the document unless she provides a good reason for not responding.
- If the adverse party fails to properly respond, and the moving party is forced to waste time and money proving truth or authenticity at trial, the trial judge can take it into account when awarding costs.

Timing and Benefits

- A Request to Admit should be served as soon as a significant issue in the case can be proved by the available evidence.
- The Request has a lot of potential:
    a) it can greatly reduce oral discovery and trial time by incrementally reducing outstanding issues as the litigation proceeds; and
    b) a party can move for judgment on an admission, therefore avoiding a trial altogether.

MEDIATION

- Mediation provides an ideal opportunity to settle, but only if the time is right.
- Various factors to think about in terms of timing:
  - Is mediation premature: is there sufficient evidence available, or will discoveries be necessary to get critical information?
  - Have the other parties got an appetite to settle?
  - Are there any facts that would make your client's case worse if the other parties became aware of them? Is your case going to get worse with age?
  - Can there be an effective settlement without expert's reports?
  - Are there any coverage or credibility issues that could preclude settlement?

PIERRINGER AGREEMENT[1]

- A partial settlement agreement, used in multi-party litigation.
- One or more of the defendants settles with the plaintiff and then withdraws from the litigation.
- The plaintiff then continues to pursue the non-settling defendants ("NSD").

1. *Aecon Buildings v. Brampton (City)*, 2010 ONCA 868.

How it works…

- The settling defendant ("SD") agrees to pay a fixed amount to the plaintiff in final settlement.
- In return, the plaintiff dismisses the action against the SD and agrees to:

  a) pursue the NSDs for only their several liability (i.e. each NSD will now be responsible for only its own liability); and

  b) indemnify the SD for any crossclaims of the NSDs for costs.

- The SD will often seek a bar order from the court, which will bar any future crossclaims, and will remove the risk of the plaintiff's indemnity being unreliable.

Result: The SD is out of the litigation entirely.

Timing

- The best time to consider entering into a Pierringer agreement:

  when a defendant can accurately assess her potential exposure at trial, and the plaintiff essentially agrees with that assessment, and is willing to let the defendant buy her way out of the litigation, before trial, for a specific amount.

Pierringers can be risky

- The SD may have overestimated her exposure, and paid too much to the plaintiff. Any overpayment would be credited to the amount assessed against the NSDs at trial - the plaintiff is not allowed to benefit from a windfall.
- If the SD doesn't pay enough (in other words, if liability is assessed against the SD higher at trial), the plaintiff cannot recoup any shortfall from the NSDs because they are now liable for only their several liability.[2]
- So, before entering into a Pierringer agreement, both the plaintiff and the SD must have accurately predicted both liability and damages.

Disclosure

- The existence of a Pierringer agreement has to be disclosed to the NSDs, as soon as practicable.
- But its terms do not have to be disclosed (barring exceptional circumstances) – settlement privilege.[2]
- In particular, the amount of the settlement does not have to be disclosed.
- **Significance:** Makes it challenging for a NSD to later negotiate a pre-trial settlement because the amount already contributed by the SD is kept secret.
- **Lesson for a potential NSD:** Think carefully about being left out of a Pierringer agreement – harder to settle later.

2. *Sable Offshore Energy Inc. v. Ameron International Corp.*, 2011 NSCA 121, [2013] 2 S.C.R. 623.

MARY CARTER AGREEMENT[3]

- Another type of partial settlement agreement used in multi-party litigation.
- The SD agrees to pay a maximum, fixed amount to the plaintiff - the plaintiff is guaranteed a specific minimum amount.
- The plaintiff agrees to pursue the NSDs for only their several liability.

3. *Booth v. Mary Carter Paint Co*., 202 So.2d 8 (Fla Dist Ct App 1967).

How it works…

- Unlike the Pierringer agreement, the SD remains in the lawsuit and helps the plaintiff at trial to maximise her recovery.
- If the plaintiff and the SD are sufficiently successful at trial, the SD's promised maximum contribution will be reduced proportionately, or the SD may avoid contribution entirely.
- Conversely, if the NSDs succeed at trial, the SD may have to pay costs to the NSDs.
- A Mary Carter agreement is more risky than a Pierringer agreement, but there is a chance of greater reward.

OFFER TO SETTLE

Abraham Lincoln once said:

> *Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser – in fees, expenses, and waste of time. As a peacemaker the lawyer has a superior opportunity of being a good man [or woman!]. There will still be business enough.*[4]

4. Abraham Lincoln (1809-1865), U.S. President. Excerpt from notes for a law lecture, 1 July 1850. *Collected Works of Abraham Lincoln*, Vol. 2, p. 81, Rutgers University Press (1953, 1990).

Offer to Settle

- An offer to settle is a very powerful tool if used correctly and at the right time.
- Essentially, there are two types of offer:
    1. Rule 49 offer – governed by the *Rules of Civil Procedure*
    2. Common-law offer – governed by the law of contract
- They work in slightly different ways, but they can co-exist.

Rule 49 Offer

The Rule 49 offer encourages parties to make and accept reasonable settlement offers by imposing adverse cost consequences on those parties who take unreasonable positions about the merits of their case, and refuse to settle when they should.

How it works…

- If a plaintiff serves an offer, which is not accepted by the defendant, and the plaintiff beats the offer at trial (i.e. the award at trial is higher than the offer), she will be awarded partial indemnity costs (about 60%) to the date of service of the offer, and substantial indemnity costs (about 90%) to the end of trial.

- If a defendant makes an offer, and the plaintiff fails to beat the offer at trial, the plaintiff will be awarded partial indemnity costs up to the date of service of the offer. From that date to the end of trial, the defendant will be awarded partial indemnity costs.

Offer to Contribute

- Where two or more defendants are alleged to be jointly and severally liable to the plaintiff, a defendant may serve on a co-defendant(s) an offer to contribute toward settlement.

- The same rules apply as to an offer to settle.

Criteria

To be considered a Rule 49 offer:

1. it must be in writing
2. the terms must be certain, clear, and able to be compared to a judgment (it should not be an all-inclusive offer), so that the trial judge can determine whether the offer has been beaten at trial
3. it must be effectively delivered
4. it can be served at any time after the start of litigation, but it must be served at least seven days before the commencement of the hearing
5. it must not be withdrawn, or cannot expire, before the commencement of the hearing

Acceptance

- Acceptance of a Rule 49 offer must be unconditional and clear.
- **Important to note:** Even if the offeree rejects it, or makes a counter-offer, the offer will remain open for acceptance, so long as it has not been previously withdrawn by the offeror, or the court has not disposed of the claim.
- In other words, a Rule 49 offer carries a risk of acceptance – only the offeror can cancel it.
- The offeror's counsel must keep track of all outstanding Rule 49 offers, and should withdraw them as soon as the offeror no longer wants them to be considered for acceptance.

Withdrawal

- Withdrawal must be clear and in writing.
- Alternatively, the offer can contain an expiry clause – to expire on a specified date.
- If the offeror makes a subsequent, less favourable Rule 49 offer to the offeree, without withdrawing the first, there will be an implicit withdrawal of the first offer (otherwise, there would have been no point in making the subsequent offer).
- If the subsequent offer is more favourable to the offeree, the case law is unclear. However, it shouldn't matter because the offeree would be unlikely to accept the first, less favourable offer anyway.

Common-law Offer to Settle

Unlike the Rule 49 offer:

- the common-law offer is governed by common-law principles of contract.
- It can be made and withdrawn orally.
- It can also be made before litigation has been commenced.
- It is usually time-limited – it does not have to remain open until after the commencement of the proceeding.
- A subsequent offer will serve as a withdrawal of any previous offers.
- An offeree's rejection will also serve as a withdrawal.

Disadvantage: It does not attract the cost consequences of a Rule 49 offer.

Concurrent Offers

A party can use a Rule 49 offer and a common-law offer concurrently.

> **Example:** Immediately before lengthy discoveries, the offeror makes a Rule 49 offer.
>
> At the same time, the offeror makes a more attractive, time-limited offer (open until the commencement of discoveries), while leaving the Rule 49 offer in place.
>
> **Result:** The costs protection of the Rule 49 offer remains in place while the more attractive, once-in-a-lifetime, common-law offer puts increased pressure on the offeree to accept it quickly.

So, using offers concurrently can provide the best of both worlds.

One more thing about withdrawal of offers…

My own rule is **to withdraw, in writing, <u>any offer</u>** – Rule 49 or common-law - that I no longer want to be considered for acceptance.

Reason: A common-law offer may unintentionally have been written in the form of a Rule 49 offer, so it could be sitting out there, with the risk of acceptance.

With little effort, a formal withdrawal of an offer, in writing, would avoid any dispute regarding enforcement.

When should an Offer be made?

Here are some examples:

1. immediately before litigation is commenced (common-law offer only) – it gets the parties focused early on the real merits and risks of the case
2. immediately after litigation is commenced
3. before a major step in the litigation – documentary discovery, examinations, motion for summary judgment etc.
4. immediately after a major step – if the party's liability position changes (for better or worse), or if liability is clarified
5. after mediation – if a party made an offer at mediation, which was rejected, she may want to formalize it in writing

The ‘Hard Sell’

An offer has to be ‘sold’ to the offeree, so be persuasive! The covering letter should include:

1. how the amount of the offer was arrived at
2. all the elements of compromise
3. any key evidence that demonstrates the attractiveness of the offer
4. the reasonableness of the offer: the benefits of accepting it, and the risks of rejecting it
5. (Rule 49 offer): the reasons why the offer would likely beat any future judgment, such that the offeree should settle now in order to avoid having to pay costs at the end of trial

Note: The offer and the letter will be handed up to the judge at the end of trial, so consider the letter as written submissions.

Judicial Discretion

- Although the 7-day service rule for a Rule 49 offer is strictly enforced, a court has the discretion to disregard any technical breach of Rule 49 in order to award costs (Rule 49.10).

- Also, the court may, in its discretion, take into account any offer made in writing (including a common-law offer), the date the offer was made, and the terms of the offer (Rule 49.13).

ON A FINAL NOTE…

- Generally, take seriously Abe Lincoln's sage advice, and think settlement not trial.
- Be imaginative: two or more settlement devices can be used concurrently.
- Keep an eye on the ball, so that you can immediately recognize and seize an opportunity to settle once it presents itself.
- Remember: Litigation is a moving target, so it's all in the timing!

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