WEST VIRGINIA CODE: §46a-5-109

§46A-5-109. Offers to settle or of judgment; damages for frivolous claims or defenses.

(a) In a private cause of action under this chapter, at any time more than 30 days after the service of a summons and complaint on a party but not less than 30 days (or 20 days if it is a counteroffer) before trial, either party may serve upon the other party, but shall not file with the court, a written offer to settle a claim under this chapter for the money specified in the offer and to enter into an agreement dismissing the claim or to allow judgment to be entered accordingly. An offer must:

(1) Be in writing and state that it is being made pursuant to this section;

(2) Identify the party or parties making the proposal and the party or parties to whom the proposal is being made;

(3) Identify with specificity the claim or claims the proposal is attempting to resolve;

(4) State with particularity any relevant conditions;

(5) State the total amount of the proposal and, if it includes attorney's fees and expenses, specify the amount offered for the fees and expenses provided that counsel for the plaintiff has provided an estimate of fees and costs to counsel for the defendant upon request;

(6) Include a certificate of service and be served by certified mail, return receipt requested, postage prepaid or by overnight delivery using a nationally recognized carrier.

(b) If a defendant makes an offer under this section which is rejected by the plaintiff, the plaintiff is not entitled to recover attorney's fees or expenses from the date of the offer through the entry of judgment if the final judgment is one of no liability or if the final judgment obtained by the plaintiff, exclusive of attorney's fees and expenses, but inclusive of actual damages, civil penalties, and any other monetary or equitable relief provided for under this chapter, is less than 75 percent of the offer: *Provided*, That if the amount of attorney's fees and expenses were not separately specified in an offer of settlement or judgment, the court may consider any award of attorney's fees and costs earned through the date of the offer in determining whether the total award exceeds 75 percent of the offer. If the judgment entered does not exceed 75 percent of the offer, the defendant may petition the court for reasonable fees and expenses incurred from the date of the offer to the entry of final judgment. Upon petition, the court may award reasonable fees and expenses if it finds that the plaintiff acted without substantial justification or without good faith in rejecting the defendant's offer. If attorney's fees and expenses were specified in the offer, the court may consider whether the defendant's offer concerning plaintiff's attorney's fees and expenses was made in bad faith when determining either party's petition for fees and expenses.

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(c) Any offer made under this section shall remain open for 14 days unless sooner withdrawn by a writing served on the offeree prior to acceptance by the offeree. A counteroffer shall be considered a rejection but may serve as an offer under subsection (a) of this section if it is denominated as an offer and meets the requirements of subsection (a) of this section. Acceptance or rejection of the offer by the offeree must be in writing and served upon the offeror. An offer that is neither withdrawn nor accepted within 14 days shall be considered rejected. The fact that an offer is made but not accepted does not preclude no more than two amended offers. If an offer is made or amended under this section, all prior offers made by that party, including any cure offer made under §46A-5-108 of this code, are null and void. Evidence of an offer is not admissible except in proceedings to enforce a settlement or to determine reasonable attorney's fees and expenses under this section.

(d) If an appeal is taken from the judgment, the court shall order payment of reasonable attorney's fees and expenses of litigation only upon order affirming the judgment, or in which the person or entity seeking attorney's fees and expenses otherwise substantially prevail on appeal.

(e) Upon motion by the prevailing party at the time that the verdict or judgment is rendered, the moving party may request that the court determine whether the opposing party presented a frivolous claim or defense. In that event, the court shall hold a separate bifurcated hearing in which the court shall make a determination of whether the frivolous claims or defenses were asserted and to award damages, if any, against the party presenting the frivolous claims or defenses. Under this subsection:

(1) Frivolous claims shall include, but are not limited to, the following:

(A) A claim, defense, or other position that lacks substantial justification or that is not made in good faith or that is made with malice or a wrongful purpose;

(B) A claim, defense, or other position with respect to which there existed such a complete absence of any justiciable issue of law or fact that it could not be reasonably believed that a court would accept the asserted claim, defense, or other position; and/or

(C) A claim, defense, or other position that was interposed for delay or harassment;

(2) Damages awarded may include reasonable attorney's fees and expenses of litigation.

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