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1990]

THE CONTINUING DEBATE OVER DELAY DAMAGES:
PENNSYLVANIA'S NEW RULE 238

I. INTRODUCTION

On November 7, 1988, after much controversy and debate, the Pennsylvania Supreme Court promulgated¹ a new Pennsylvania Rule of Civil Procedure 238 ("Rule 238") governing delay damages.² The con-

1. Under the Pennsylvania Constitution, the Pennsylvania Supreme Court has the authority to "prescribe general rules governing practice, procedure and the conduct of all courts . . . if such rules are consistent with this Constitution and neither abridge, enlarge nor modify the substantive rights of any litigant" PA. CONST. art. V, § 10(c).

2. Pennsylvania Rule of Civil Procedure 238, effective November 7, 1988, provides as follows:

- (a) (1) At the request of the plaintiff in a civil action seeking monetary relief for bodily injury, death or property damage, damages for delay shall be added to the amount of compensatory damages awarded against each defendant or additional defendant found to be liable to the plaintiff in the verdict of a jury, in the decision of the court in a nonjury trial or in the award of arbitrators appointed under section 7361 of the Judicial Code, 42 Pa.C.S. sec. 7361, and shall become part of the verdict, decision or award.
- (2) Damages for delay shall be awarded for the period of time
- (i) in an action commenced before August 1, 1989, from the date the plaintiff first filed a complaint or from a date one year after the accrual of the cause of action, whichever is later, up to the date of the award, verdict or decision; or
- (ii) in an action commenced on or after August 1, 1989, from a date one year after the date original process was first served in the action up to the date of the award, verdict or decision.
- (3) Damages for delay shall be calculated at the rate equal to the prime rate as listed in the first edition of the Wall Street Journal published for each calendar year for which the damages are awarded, plus one percent, not compounded.
- (b) The period of time for which damages for delay shall be calculated under subdivision (a)(2) shall exclude the period of time, if any,
- (1) after which the defendant has made a written offer of (i) settlement in a specified sum with prompt cash payment to the plaintiff, or (ii) a structured settlement underwritten by a financially responsible entity, and continued that offer in effect for at least ninety days or until commencement of trial, whichever first occurs, which offer was not accepted and the plaintiff did not recover by award, verdict or decision, exclusive of damages for delay, more than 125 percent of either the specified sum or the actual cost of the structured settlement plus any cash payment to the plaintiff; or
- (2) during which the plaintiff caused delay of the trial.
- (c) Not later than ten days after the verdict or notice of the decision, the plaintiff may file a written motion requesting damages for delay and setting forth the computation.

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troverly surrounding former Rule 238 centered on the constitutionality of the Rule in light of its alleged inequitable treatment of defendants. Revised Rule 238 is designed to "inject fairness into the rule and to balance that fairness with efficient judicial administration."³ This article will focus on whether the new Rule achieves these goals.

II. BACKGROUND

The original version of Rule 238⁴ was adopted on November 20,

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- (1) Within ten days after the motion is filed, the defendant may answer specifying the grounds for opposing the plaintiff's motion. The averments of the answer shall be deemed denied. If an issue of fact is raised, the court may, in its discretion, hold a hearing before entering an appropriate order.
 - (2) If the defendant does not oppose the motion, the court shall add the damages for delay to the verdict or decision.
 - (3) (i) If a motion for post-trial relief has been filed under Rule 227.1 and a motion for delay damages is opposed, a judgment may not be entered until all motions filed under Rule 227.1 and this rule have been decided.
(ii) If no motion for post-trial relief is filed within the ten-day period under Rule 227.1 but the defendant opposes the motion for delay damages, the plaintiff may enter judgment on the verdict or decision. Thereafter, upon deciding the motion for damages for delay, the court shall enter judgment for the amount of the delay damages, if any.
 - (d) [Text omitted discusses the special procedure for awarding delay damages in an arbitration hearing.]
 - (e) This rule shall not apply to
 - (1) eminent domain proceedings;
 - (2) actions in which damages for delay are allowable in absence of this rule.
 - (f) This rule shall apply to actions pending on or after the effective date of this rule in which damages for delay have not been determined.
- PA. R. CIV. P. 238, 42 PA. CONS. STAT. ANN. (Purdon Supp. 1989).
3. *Id.* explanatory comment at 11.
 4. Former Pennsylvania Rule of Civil Procedure 238 provided:
 - (a) Except as provided in subdivision (e), in an action seeking monetary relief for bodily injury, death or property damage, or any combination thereof, the court or the arbitrators . . . shall
 - (1) add to the amount of compensatory damages in the award of the arbitrators, in the verdict of a jury, or in the court's decision in a nonjury trial, damages for delay at *ten (10) percent per annum*, not compounded, which shall become part of the award, verdict or decision;
 - (2) *compute the damages for delay from the date the plaintiff filed the initial complaint in the action or from a date one year after the accrual of the cause of action, whichever is later*, up to the date of the award, verdict or decision.
 - (b) In arbitration under the Act of 1836, the amount of damages for delay shall not be included in determining whether the amount in controversy is within the jurisdiction of the arbitrators.
 - (c) Except as provided in subdivision (e), damages for delay shall be added to the award, verdict or decision against all defendants found liable, no matter when joined in the action.

1978, and became effective on April 15, 1979. The former Rule was designed to alleviate "the problem of congestion and delay in the disposition of civil actions for bodily injury, death or property damages" by providing an "incentive for early settlement."⁵

Rule 238 directed a court to add to the plaintiff's compensatory damages an award of delay damages computed at a rate of ten percent per year.⁶ Such damages were to be computed from either the date plaintiff's complaint was filed or from one year after the cause of action accrued (whichever was later) up to the date of the verdict.⁷

In effect, an award of delay damages under former Rule 238 was

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- (d) The court may, and on request of a party shall, charge the jury that if it finds for the plaintiff, it shall not award the plaintiff any damages for delay because this is a matter for the court.
 - (e) If a defendant at any time prior to trial makes a written offer of settlement in a specified sum with prompt cash payment to the plaintiff, and continues that offer in effect until commencement of trial, but the offer is not accepted and the plaintiff does not recover by award, verdict or decision, exclusive of damages for delay, more than 125 percent of the offer, the court or the arbitrators shall not award damages for delay for the period after the date the offer was made.
 - (f) [Text omitted discusses date from which damages are to be computed when the action is pending on the Rule's effective date.]
 - (g) This rule shall not apply to
 - (1) eminent domain proceedings;
 - (2) pending actions in which damages for delay are allowable in the absence of this rule.

PA. R. CIV. P. 238, 42 PA. CONS. STAT. ANN. (Purdon 1987) (emphasis added).

5. 8 Pa. Bull. 2668 (1978). The explanatory comments to Rule 238 were submitted to the Pennsylvania Supreme Court by the Civil Procedural Rules Committee (the "Committee") along with proposed Rule 238. The Committee noted that compulsory arbitration laws had helped to speed-up the disposition of smaller civil actions (*i.e.*, cases under \$10,000 in Philadelphia and Allegheny counties, and under \$5,000 in other counties). *Id.* However, there was no similar mechanism to reduce delay in larger civil actions. *Id.* After reviewing statistical surveys, the Committee determined that "in too many cases meaningful negotiations commence only after a trial date is fixed or on the courthouse steps . . ." *Id.* In addition to promoting settlements, the Committee felt that the Rule provided a necessary means for both compensating plaintiffs and penalizing defendants for long delays between commencement of an action and trial. *Id.*

Although the explanatory comments were not explicitly adopted by the Pennsylvania Supreme Court, they are useful in "disclos[ing] the problems [that] the Rule was designed to alleviate." *Berry v. Anderson*, 348 Pa. Super. 618, 623, 502 A.2d 717, 720 (1986).

6. For the relevant text of former Rule 238(a)(1), see *supra* note 4. Punitive damages are not to be included in plaintiff's judgment when calculating delay damages. *Colodonato v. Consolidated Rail Corp.*, 504 Pa. 80, 86, 470 A.2d 475, 478 (1983).

For purposes of this article, Rule 238 will be discussed only in the context of civil actions tried before a judge or jury. However, the Rule also applies in arbitration hearings. For the relevant text of new Rule 238(a)(1), see *supra* note 2.

7. For the relevant text of former Rule 238(a)(2), see *supra* note 4.

equivalent to an award of pre-judgment interest.⁸ However, former Rule 238 contained a special provision that protected the defendant from the imposition of delay damages if (1) the defendant submitted a written settlement offer prior to trial and kept the offer open until commencement of trial, (2) the plaintiff rejected defendant's offer, and (3) the plaintiff's verdict was not more than 125% of the defendant's offer.⁹ If the above conditions were met, the court could not assess delay damages for the time period after the defendant submitted his offer.¹⁰ Therefore, under former Rule 238, it was in the defendant's best interests to submit a "reasonable" and timely settlement offer in order to reduce the amount of delay damages in the event of an unsuccessful verdict at trial.¹¹

The constitutionality of former Rule 238 was first challenged in *Laudenberger v. Port Authority of Allegheny County*¹² on the following two grounds: (1) the Pennsylvania Supreme Court had exceeded its rulemaking authority by promulgating a Rule affecting litigants' substantive rights, and (2) the Rule violated the requirements of due process and equal protection under the United States and Pennsylvania Constitutions.¹³ The Pennsylvania Supreme Court upheld former Rule 238 against these objections.¹⁴ With regard to the first objection, the court found that Rule 238's main purpose was "to alleviate delay in the disposition of cases, thereby lessening congestion in the courts."¹⁵ Therefore, the Rule's promulgation fell within the supreme court's constitutional authority to regulate the administration of justice in state courts.¹⁶ The court reasoned that it had the authority to promulgate

8. See generally Note, *Automatic Assessment of Delay Damages Suspended* - Craig v. Magee Memorial Rehabilitation Center, 60 TEMP. L.Q. 389, 399-404 (1987) (history of delay damages in Pennsylvania); see also Dale v. Baltimore & O.R.R., 520 Pa. 96, 107, 552 A.2d 1037, 1042 (1989) (new Rule 238 damages referred to as "pre-judgment interest damages"). The Pennsylvania Supreme Court modeled Rule 238 after the New Jersey rule which automatically added pre-judgment interest at a rate of 12% per annum (for periods prior to January 1, 1988) to all judgments in tort actions. Insurance Fed'n v. Supreme Court, 669 F.2d 112, 114 (3d Cir. 1982); see N.J. R. Civ. P. 4:42-11(b). However, unlike Rule 238, the New Jersey rule did not permit defendants to avoid the imposition of pre-judgment interest by submitting a reasonable settlement offer. See *id.*

9. For the relevant text of former Rule 238(e), see *supra* note 4.

10. *Id.*

11. See *Berry v. Anderson*, 348 Pa. Super. 618, 623, 502 A.2d 717, 720 (1986).

12. 496 Pa. 52, 436 A.2d 147 (1981), *appeal dismissed sub nom.* *Bucheit v. Laudemberger*, 456 U.S. 940 (1982).

13. *Id.* at 55, 436 A.2d at 149.

14. *Id.*

15. *Id.* at 59, 436 A.2d at 151. The court stated that the purpose of the Rule had to be determined before the Rule could be characterized as substantive or procedural. *Id.* at 58, 436 A.2d at 150.

16. *Id.* at 67, 436 A.2d at 155. Moreover, the court held that Rule 238 ful-

Rule 238 because the Rule was primarily procedural in nature,¹⁷ even though the Rule had a "collateral effect on a substantive right."¹⁸ Rule 238's award of pre-judgment interest had the effect of enlarging a plaintiff's substantive rights, thereby abridging a defendant's rights.¹⁹ However, the court held that it could not invalidate a judicial rule merely because it touched on substantive rights, because to do so would seriously hamper the court's ability to perform its duties.²⁰ Furthermore, instead of being viewed as creating a new substantive right, delay damages could be viewed as merely "an extension of the compensatory damages necessary to make a plaintiff whole."²¹ Under this rationale, delay damages merely compensate a plaintiff for the inability to use funds during the pendency of the litigation.²²

filled the supreme court's duty to the public to "effectuate prompt, expeditious trial and settlement of cases." *Id.* at 61, 436 A.2d at 152.

17. *Id.* at 55-67, 436 A.2d at 149-55. For the relevant text of the Pennsylvania Constitution authorizing the supreme court to pass procedural rules, see *supra* note 1.

The *Laudenberger* court recognized that in the majority of states with pre-judgment interest rules, these rules were passed by the legislatures, thereby implying that the rules constituted substantive law. *Laudenberger*, 496 Pa. at 63, 436 A.2d at 153. However, instead of addressing the reasoning of these states, the court focused on New Jersey, the only state with a pre-judgment interest rule promulgated by the state supreme court. *Id.* at 63-64, 436 A.2d at 153. For a discussion of the New Jersey rule, see *supra* note 8. The court noted that the New Jersey rule had withstood a similar constitutional challenge. *Laudenberger*, 496 Pa. at 64, 436 A.2d at 153 (citing *Busik v. Levine*, 63 N.J. 351, 359-60, 307 A.2d 571, 576, *appeal dismissed*, 414 U.S. 1106 (1973)). The court found *Busik* particularly relevant because the supreme courts in New Jersey and Pennsylvania have substantially the same rule-making authority. *Id.*, 436 A.2d at 154. Furthermore, in the court's opinion, the New Jersey rule was more substantive in nature than Rule 238 because it mandated an award of interest to all successful plaintiffs in tort actions, regardless of whether the defendant had submitted a settlement offer. *Id.* at 59-60, 436 A.2d at 151. Because the New Jersey rule provided no incentive for litigants to settle early, it lacked the essential procedural aspect of Rule 238. *Id.*

18. *Laudenberger*, 496 Pa. at 67, 436 A.2d at 155. The court acknowledged that "Rule 238 embodies both procedural and substantive elements." *Id.* at 66, 436 A.2d at 155.

19. *Id.* at 65-66, 436 A.2d at 154-55.

20. *Id.* at 66-67, 436 A.2d at 155.

21. *Id.* at 66, 436 A.2d at 154.

22. *Id.* at 65-66, 436 A.2d at 154.

Following *Laudenberger* the Third Circuit held that under the *Erie* doctrine former Rule 238 was substantive in nature and, therefore, had to be applied by the federal district courts in diversity actions. *Jarvis v. Johnson*, 668 F.2d 740 (3d Cir. 1982); see generally *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938) (established broad policies for determining when state law should apply in federal diversity actions). The Third Circuit noted that for purposes of determining whether to apply state law in federal courts, the state's characterization of a rule as "substantive" or "procedural" was not controlling. *Jarvis*, 668 F.2d at 745, 747-48. Instead, the Third Circuit's decision to apply Rule 238 was based on the fact that application of the Rule was "outcome-determinative"; therefore, a failure to apply the Rule would subvert the intent of *Erie* by promoting "forum-

With regard to the second objection, the court held that former Rule 238 did not violate equal protection requirements.²³ The court found that plaintiffs and defendants are not "similarly situated"²⁴ and, therefore, distinctions could be drawn between the two so long as they were "reasonably justified."²⁵ The court reasoned that plaintiffs and defendants are not "similarly situated" because plaintiffs enter a lawsuit having already suffered an injury or loss allegedly caused by defendants' actions.²⁶ A delay in settlement of the case causes plaintiffs additional harm by preventing prompt compensation.²⁷ On the other hand, the defendants, who have not suffered any loss, are able to earn interest on the money used to compensate the plaintiffs and are able to otherwise benefit from delays in the lawsuit.²⁸

Rule 238 distinguished between plaintiffs and defendants by punishing only defendants for delays.²⁹ However, the court found this distinction constitutional because it bore a "fair and substantial relation" to the goal of encouraging defendants to settle worthy claims as expeditiously as possible.³⁰ Finally, the court held that former Rule 238 met the requirements of substantive due process. As with equal protection, the touchstone of substantive due process is whether the law in question is rationally related to a legitimate state goal, and the court had already found that the Rule "serve[d] the purpose for which it was promulgated."³¹

shopping." *Id.* at 745-46; see generally *Hanna v. Plumer*, 380 U.S. 460 (1965) (discussion of policy against "forum-shopping"); *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945) (discussion of "outcome-determinative" test). Recently, the Third Circuit decided that new Rule 238 must be applied in federal diversity actions for the reasons stated in *Jarvis. Fauber v. KEM Transp. & Equip. Co.*, 876 F.2d 327, 331-32 (3d Cir. 1989).

23. *Laudenberger*, 496 Pa. at 69, 436 A.2d at 156. The court addressed appellees' equal protection arguments under the United States and Pennsylvania Constitutions concurrently, as the two equal protection clauses were "sufficiently similar to warrant like treatment." *Id.* at 67 n.13, 436 A.2d at 155 n.13 (citing *Baltimore & O.R.R. v. Commonwealth, Dep't of Labor & Indus.*, 461 Pa. 68, 83, 334 A.2d 636, 643 (1975)). In order to meet equal protection requirements, "[a] classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.'" *Reed v. Reed*, 404 U.S. 71, 76 (1971) (quoting *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920)); see also *Laudenberger*, 496 Pa. at 68, 436 A.2d at 155.

24. *Laudenberger*, 496 Pa. at 68-69, 436 A.2d at 156.

25. *Id.* at 68, 436 A.2d at 155.

26. *Id.* at 68-69, 436 A.2d at 156.

27. *Id.* at 69, 436 A.2d at 156.

28. *Id.*

29. *Id.* at 68, 436 A.2d at 156.

30. *Id.* at 69, 436 A.2d at 156.

31. *Id.* at 70, 436 A.2d at 157. Substantive due process requires the following: "[A] law which purports to be an exercise of the police power must not be unreasonable, unduly oppressive or patently beyond the necessities of the case,

In contrast to the majority's interpretation, Justice Roberts, in his dissent, argued that "Rule 238 imposes arbitrary, unreasonable, and unequal burdens in the absence of tangible evidence that such measures will serve to accomplish the Rule's intended purpose of eliminating delay."³² Specifically, Justice Roberts identified three ways in which former Rule 238 punished defendants unfairly.³³ First, Rule 238 automatically imposed delay damages without any consideration of a defendant's good faith.³⁴ Second, the amount of delay damages awarded could depend upon when the plaintiff filed the complaint, a factor completely beyond the defendant's control.³⁵ For example, if the plaintiff filed the complaint at the time the cause of action accrued, interest would not start running until one year later.³⁶ As a result, the defendant would have one year to review the merits of the case and prepare an appropriate offer without having to worry about delay damages.³⁷ On the other hand, the plaintiff could maximize the potential award of delay damages by waiting and filing the complaint one year after the cause of action accrued.³⁸ In this situation, the defendant would be forced to immediately assess the case and submit a settlement offer to prevent pre-judgment interest from running.³⁹

Finally, Justice Roberts stated that former Rule 238 was unfair in that it only punished defendants.⁴⁰ Justice Roberts suggested that Rule 238 "should not only require defendants to make reasonable settlement offers, but also should require plaintiffs to make reasonable de-

and the means which it employs must have a real and substantial relation to the objects sought to be attained." *Id.*, 436 A.2d at 156 (quoting *Gambone v. Commonwealth*, 375 Pa. 547, 551, 101 A.2d 634, 637 (1954)).

32. *Id.* at 77, 436 A.2d at 160 (Roberts, J., dissenting). Justice Roberts also believed that the supreme court had exceeded its procedural rule-making authority by promulgating Rule 238. *Id.* at 71-78, 436 A.2d at 157-61 (Roberts, J., dissenting).

33. *Id.* at 77-78, 436 A.2d at 160 (Roberts, J., dissenting); see *Lebowitz, A Remedy for Rule 238*, 26 DUQ. L. REV. 531, 540-42 (1988).

34. *Laudenberger*, 496 Pa. at 77, 463 A.2d at 160 (Roberts, J., dissenting). To illustrate this problem, Justice Roberts described how a defendant, acting in bad faith, could deliberately submit a low settlement offer yet be fortunate enough to avoid the imposition of delay damages because the jury came in with a low verdict (*i.e.*, a verdict that was less than 125% of defendant's offer). *Id.* (Roberts, J., dissenting). However, another defendant, acting in good faith, could submit a reasonable offer yet be punished because the jury happened to come in with a high verdict. *Id.* (Roberts, J., dissenting).

35. *Id.* (Roberts, J., dissenting).

36. *Id.* (Roberts, J., dissenting).

37. *Id.* (Roberts, J., dissenting).

38. *Id.* (Roberts, J., dissenting). Under former Rule 238, delay damages were assessed either from the date the complaint was filed or from one year after the cause of action accrued, whichever was later. For the relevant text of former Rule 238(a)(2), see *supra* note 4.

39. *Laudenberger*, 496 Pa. at 77, 463 A.2d at 160 (Roberts, J., dissenting).

40. *Id.* at 78, 436 A.2d at 160 (Roberts, J., dissenting).

mands."⁴¹ Justice Roberts concluded that Rule 238 would better achieve its goal of promoting early settlements if both parties were sanctioned for acting unreasonably.⁴²

Five years later, in *Craig v. Magee Memorial Rehabilitation Center*,⁴³ the Pennsylvania Supreme Court reconsidered its holding in *Laudenberger* and suspended the mandatory imposition of delay damages against a defendant regardless of fault.⁴⁴ The *Laudenberger* court assumed that defendants always prolonged lawsuits because they profited from delays.⁴⁵ If this assumption were true, the automatic imposition of delay damages against a defendant would always be fair punishment.⁴⁶ However, in *Craig* the court was confronted with a situation where the *plaintiff*, not the defendant, caused delays during the lawsuit.⁴⁷

The court began its review of Rule 238 by noting that "[the Rule] was a bold experiment that seemed reasonable, salutary and equitable"

41. *Id.* (Roberts, J., dissenting).

42. *Id.* (Roberts, J., dissenting).

43. 512 Pa. 60, 515 A.2d 1350 (1986).

44. *Id.* at 65, 515 A.2d at 1353. In *Craig* the court was faced with the same constitutional challenges addressed in *Laudenberger*. *Id.* at 64, 515 A.2d at 1352. For a discussion of these constitutional arguments, see *supra* notes 12-27 and accompanying text. Justice Hutchinson, in his concurring opinion in *Craig*, disagreed with the court's characterization of Rule 238 as procedural. *Craig*, 512 Pa. at 66-69, 515 A.2d at 1354-55 (Hutchinson, J., concurring). In his opinion, a general rule on delay damages should be left to the legislature, and the courts should confine themselves to providing relief on a case by case basis. *Id.* at 67-68, 515 A.2d at 1354 (Hutchinson, J., concurring).

45. *Craig*, 512 Pa. at 64, 515 A.2d at 1352. The *Craig* court realized that "Rule 238 ha[d] become an uncontestable presumption that all fault lies with a defendant." *Id.* at 65, 515 A.2d at 1353. Justice Larsen felt that the majority's preoccupation with the issue of fault was misplaced. *Id.* at 70, 515 A.2d at 1356 (Larsen, J., dissenting). Under his interpretation of Rule 238, a defendant could always protect himself from the imposition of delay damages by submitting a reasonable settlement offer in a timely fashion. *Id.* at 70, 515 A.2d at 1355 (Larsen, J., dissenting). This protection would exist regardless of whether the defendant was at fault for causing delays. *Id.* at 70-71, 515 A.2d at 1356 (Larsen, J., dissenting). In his opinion, an award of delay damages was not intended to punish the defendant, instead, it was intended to fully compensate the plaintiff. *Id.* at 71, 515 A.2d at 1356 (Larsen, J., dissenting).

46. *Id.* at 64, 515 A.2d at 1352.

47. *Id.*, 515 A.2d at 1353. In May 1974 Mrs. Craig sustained a burn at Magee Memorial Rehabilitation Center ("Magee") while undergoing treatment for a decubitus ulcer on her leg. *Id.* at 63, 515 A.2d at 1352. In April 1976 Mrs. Craig brought an action against Magee and the doctor in charge of her treatment. *Id.* The case came to trial in December 1980 but, due to a mistrial, the case was not tried to completion until January 1983. *Id.* The jury found only Magee liable and awarded \$50,000 to Mrs. Craig. *Id.* at 62, 515 A.2d at 1351. Magee's best settlement offer had been \$25,000. *Id.* at 63 n.2, 515 A.2d at 1352 n.2. Because the verdict amount (\$50,000) exceeded the settlement offer (\$25,000) by more than 25%, the court awarded delay damages in the amount of \$16,450. *Id.* at 63, 515 A.2d at 1352. However, in reviewing the pre-trial record, it appeared that Mrs. Craig had been responsible for many of the postponements and continuances during pendency of the lawsuit. *Id.*

at the time it was adopted.⁴⁸ However, when faced with the *Craig* facts, the court recognized that Rule 238 could operate inequitably by penalizing the defendant without first providing a "forum to assess fault."⁴⁹

To solve this inequity, the court suspended the mandatory provisions of Rule 238 and instituted procedures for a post-judgment hearing to assess fault.⁵⁰ In determining whether to impose delay damages, the court directed judges to consider, with regard to each party, the following factors: (1) requests for continuances, (2) cooperation during discovery and (3) responsibility for delays caused by the joinder of additional parties.⁵¹ Therefore, the judge would have to look at more than just the length of time between commencement of the action and the trial verdict.⁵² The court then directed the Civil Procedural Rules Committee to begin discussions on how to amend Rule 238 in accordance with the *Craig* opinion.⁵³

On November 7, 1988, the Pennsylvania Supreme Court adopted the amendments to Rule 238 written by the Civil Procedural Rules Committee pursuant to the *Craig* decision.⁵⁴ In the explanatory comment to revised Rule 238, the drafters noted that the *Laudenberger* court established two purposes for the original Rule: (1) to reduce congestion in the courts, and (2) to motivate defendants to settle worthy claims as ex-

48. *Id.* at 64, 515 A.2d at 1352. The Rule was "reasonable" because it attempted to reduce delays in the settlement of tort actions; it was "salutary" because it penalized defendants for profiting from delays; and it was "equitable" because it compensated plaintiffs for the delay in receiving funds that were rightfully owed. *Id.*

49. *Id.* at 65, 515 A.2d at 1353. In Justice Larsen's opinion, "merely because the facts in this case are different . . . is [an] insufficient reason to suspend the operation of Rule 238 . . ." *Id.* at 72, 515 A.2d at 1357 (Larsen, J., dissenting).

50. *Id.* at 65-66, 515 A.2d at 1353. By denying the right to a hearing on the issue of fault, the *Craig* court felt that the Rule "r[a]n too tight a gauntlet through Due Process . . ." *Id.* at 65, 515 A.2d at 1353.

Under the new procedures, a plaintiff seeking delay damages would have to file a motion within five days after the verdict. *Id.* The defendant's answer would be due within five days after the filing of the plaintiff's motion. *Id.* If any factual disputes existed, the judge could hold a hearing before making his determination. *Id.* In Justice Larsen's opinion this post-trial hearing was "unnecessary and burdensome." *Id.* at 73, 515 A.2d at 1357 (Larsen, J., dissenting). Furthermore, it defeated the primary purpose of Rule 238 by prolonging litigation. *Id.* (Larsen, J., dissenting).

51. *Id.* at 66, 515 A.2d at 1353. These factors were not intended to be exclusive as the court alluded to "other pertinent factors" that might be considered. *Id.*

52. *Id.* The court held that the new procedures would only have a prospective effect. *Id.* With regard to pending cases, the new procedures would only apply if the issue of delay damages had been preserved. *Id.*

53. *Id.* For the relevant text of former Rule 238, see *supra* note 4.

54. For a discussion of the adoption of new Rule 238 and the text of new Rule 238, see *supra* notes 1-3 and accompanying text.

peditionously as possible.⁵⁵ Subsequently, the *Craig* court "introduced the concept of fault" and the defendant's right to a hearing.⁵⁶ According to the drafters, revised Rule 238 is designed "to satisfy the goals of both *Laudenberger* and *Craig*."⁵⁷ Therefore, it must encourage defendants to settle early while also providing a forum to assess fault.

New Rule 238 contains two major changes pursuant to *Craig*. First, the new Rule provides procedures, similar to those set forth in *Craig*, whereby a defendant may contest a plaintiff's request for delay damages.⁵⁸ However, the defendant will receive a formal hearing only if the judge determines that there are disputed issues of fact which warrant such a hearing.⁵⁹ Second, a defendant can prevent delay damages from being assessed where the plaintiff has caused a delay of the trial.⁶⁰ This provision is specifically addressed to defendants, such as the one in *Craig*, who were unjustly penalized under the old rule for delays caused by plaintiffs.⁶¹

Under the new Rule, the defendant can oppose the plaintiff's motion for delay damages by proving that: (1) the requisite settlement offer has been made⁶² or (2) the plaintiff caused a delay of the trial.⁶³ If the defendant establishes these elements,⁶⁴ the court will not assess damages for any time after the defendant's submission of a settlement offer, or during any time that the plaintiff was responsible for delays.

55. PA. R. CIV. P. 238, 42 PA. CONS. STAT. ANN. explanatory comment at 9 (Purdon Supp. 1989).

56. *Id.*

57. *Id.*

58. For the relevant text of Rule 238(c)(1), see *supra* note 2. For a discussion of the procedures to be followed under *Craig*, see *supra* note 44.

59. For the relevant text of Rule 238(c)(1), see *supra* note 2. The court has discretion whether to hold such a hearing. *Id.*

60. For the relevant text of Rule 238(b)(2), see *supra* note 2.

61. For a discussion of the holding in *Craig*, see *supra* notes 37-47 and accompanying text.

62. The new Rule adds a provision which permits the defendant to submit an offer in the form of a structured settlement. For the relevant text of Rule 238(b)(1)(ii), see *supra* note 2. However, the court may review the financial arrangements surrounding such an offer before approving it. PA. R. CIV. P. 238, 42 PA. CONS. STAT. ANN. explanatory comment at 10 (Purdon Supp. 1989).

63. PA. R. CIV. P. 238(b)(2), 42 PA. CONS. STAT. ANN. explanatory comment at 9 (Purdon Supp. 1989); see *Miller v. Wise Business Forms*, 381 Pa. Super. 236, 241, 553 A.2d 443, 446 (1989) (en banc). In addition, delay damages will not be assessed against an indigent defendant if the defendant's settlement offer represents all that he can afford to pay. *Berry v. Anderson*, 348 Pa. Super. 618, 627, 502 A.2d 717, 722 (1986). This holding in *Berry* applies under the new Rule. PA. R. CIV. P. 238, 42 PA. CONS. STAT. ANN. explanatory comment at 10 (Purdon Supp. 1989).

64. PA. R. CIV. P. 238, 42 PA. CONS. STAT. ANN. explanatory comment at 9 (Purdon Supp. 1989).

III. ANALYSIS

New Rule 238 corrects the primary flaw in the former Rule by eliminating the mandatory imposition of delay damages, thereby rejecting the irrebuttable presumption that defendants always cause delays in litigation.⁶⁵ By providing for a discretionary hearing, the new Rule balances the goals of *Craig* and *Laudenberger*. Rule 238's aim of alleviating congestion in the courts⁶⁶ is somewhat frustrated because a hearing on delay damages extends litigation. However, it is necessary to provide defendants with an opportunity to be heard in order to insure that defendants' due process rights are met.⁶⁷ Rule 238 balances these opposing goals by requiring a hearing only when deemed necessary by the judge.

Although the new Rule provides some relief for defendants, two main problems still exist: (1) defendants are penalized for delays when neither party is at fault, and (2) the reasonableness of plaintiffs' conduct during settlement negotiations is not considered and, therefore, plaintiffs are not subject to any sanctions for unreasonable behavior. With regard to the first criticism, revised Rule 238 partially resolves the issue of fault by excluding from the damage calculation any delay caused by the plaintiff.⁶⁸ However, the Rule fails to address a situation where neither the plaintiff nor the defendant is at fault for causing delays. In *Miller v. Wise Business Forms*,⁶⁹ the Pennsylvania Superior Court resolved this issue by holding that, under revised Rule 238, a defendant may not exclude the period of time during which neither party is at fault.⁷⁰ As a result, a defendant will be penalized for, among other things, delays resulting from administrative inefficiency such as "court calendar delay."⁷¹

65. For a discussion of this problem in *Craig*, see *supra* notes 37-43 and accompanying text.

66. For a discussion of this purpose, see *supra* note 5 and accompanying text.

67. For a discussion of the due process requirements, see *supra* note 44 and accompanying text.

68. For the relevant text of Rule 238(b)(2), see *supra* note 2.

69. 381 Pa. Super. 236, 553 A.2d 443 (1989) (en banc). For a discussion of the facts in *Miller*, see *infra* note 86.

70. *Miller*, 381 Pa. Super. at 241, 553 A.2d at 446. Because the drafters of Rule 238 only specified two circumstances during which the defendant could avoid the imposition of damages, the court inferred that they must have intended to bar any other exclusions. *Id.*; see also *Hickman v. Fruehauf Corp.*, 386 Pa. Super. 455, 563 A.2d 155 (1989) (defendant never submitted written offer; therefore, award of delay damages proper despite stipulation that neither party caused delay); *Snelsire v. Moxon*, 384 Pa. Super. 85, 557 A.2d 785 (1989) (en banc) (same); *Sherrill v. Port Auth.*, 383 Pa. Super. 104, 556 A.2d 450 (1989) (same). It is important to note that an oral offer of settlement has no effect under Rule 238. See *Miller*, 381 Pa. Super. at 240 n.3, 553 A.2d at 445 n.3.

71. *Modrick v. B.F. Goodrich Co.*, 383 Pa. Super. 498, 501, 557 A.2d 363, 364 (1989), *overruled on other grounds*, *King v. SEPTA*, 383 Pa. Super. 420, 557 A.2d 11 (1989) (en banc). In this personal injury case, the plaintiff's complaint

By punishing a defendant regardless of fault, revised Rule 238 operates in a manner contrary to that intended by the supreme court in *Craig*. This position was expressed by President Judge Cirillo of the Pennsylvania Superior Court in his dissent in *Ceresini v. Valley View Trailer Park*.⁷² Judge Cirillo stated that excluding the time that plaintiffs cause delays is only a partial solution to the “no-fault” problem as new Rule 238 still operates to punish “defendants *qua* defendants.”⁷³ In effect, Rule 238 “makes defendants culpable for the simple reason that they have chosen to defend their case.”⁷⁴

Prior to the enactment of new Rule 238, there appeared to be confusion at the trial level on how to resolve this “no-fault” issue under *Craig*. Some trial courts interpreted *Craig* narrowly by holding that it only intended to prevent defendants from being penalized for delays caused by plaintiffs.⁷⁵ Under this line of reasoning, when neither party is at fault, it is unfair to deny delay damages because plaintiffs are entitled to receive interest on their money which defendants have held dur-

was filed on November 13, 1984. *Id.* at 500, 557 A.2d at 364. The case was “placed at issue” (*i.e.*, ready for trial) on January 21, 1985; however, the case was not put on the trial list until November 1986. *Id.* at 500-01, 557 A.2d at 364. The trial began on December 4, 1986, and a verdict for plaintiff was entered on December 9, 1986 in the amount of \$66,000. *Id.* at 501, 557 A.2d at 364. Following plaintiff’s request for delay damages, the trial court awarded delay damages in the amount of \$16,783. *Id.* On appeal, defendant argued that delay damages should not have been imposed from January 21, 1985 (the time the case was initially ready for trial) to December 9, 1986 (the verdict date) because this delay was due to the trial court’s inability to schedule the case any earlier. *Id.* at 503, 557 A.2d at 365. The court rejected defendant’s argument because new Rule 238 does not provide an exclusion for administrative delays. *Id.* at 504, 557 A.2d at 366; *see also* King v. SEPTA, 383 Pa. Super. 420, 422, 557 A.2d 11, 12-13 (1989) (en banc) (award of delay damages proper even though “delay in the case was the result of the backlog of cases in the Philadelphia Court of Common Pleas”). The severity of this problem with congestion in the courts is highlighted when one considers that “eight years is the norm between the complaint and verdict in Philadelphia County” Schrock v. Albert Einstein Medical Center, 386 Pa. Super. 215, 227, 562 A.2d 875, 881 (1989) (Popovich, J., dissenting).

72. 380 Pa. Super. 416, 419-21, 552 A.2d 258, 259-60 (1988) (en banc) (Cirillo, Pres. J., dissenting), *overruled on other grounds*, King v. SEPTA, 383 Pa. Super. 420, 557 A.2d 11 (1989) (en banc).

73. *Id.* at 421, 552 A.2d at 260 (Cirillo, Pres. J., dissenting).

74. *Id.* (Cirillo, Pres. J., dissenting). This argument was also asserted in *Modrick*, where the defendant appealed an award of delay damages because the delay in the litigation was the trial court’s fault. *Modrick*, 383 Pa. Super. at 502, 557 A.2d at 364-65. According to the defendant, assessing delay damages without a showing of fault “violat[e]s the holding in *Craig* that liability by mere civil defendant status is not the law of Pennsylvania and cannot be the basis for awarding pre-judgment interest. [One] cannot be penalized for being a civil defendant in a court system” *Id.* at 503, 557 A.2d at 365.

75. *See, e.g.*, Schrock v. Albert Einstein Medical Center, 386 Pa. Super. 215, 228, 562 A.2d 875, 881 (1989) (Popovich, J., dissenting) (discussion of trial court’s reasoning under *Craig*); King v. SEPTA, 383 Pa. Super. 420, 422-23, 557 A.2d 11, 12 (1989) (en banc) (same).

ing pendency of the lawsuit.⁷⁶ In such a case delay damages are intended to fully compensate plaintiffs, not to punish defendants.⁷⁷ Other trial courts, however, felt that under *Craig* delay damages could only be imposed in those cases where it was proven that the defendant was at fault. Therefore, in a case where neither party was at fault, the defendant could not be penalized.⁷⁸

If the supreme court in *Craig* intended to prevent the assessment of delay damages only when the plaintiff is at fault, then new Rule 238 achieves this goal.⁷⁹ However, it seems that the court was more concerned with the constitutionality of assessing delay damages against an innocent defendant, regardless of the cause of the delay.⁸⁰ Under the latter interpretation, revised Rule 238 fails to fully correct the problems identified in *Craig* because in certain situations the Rule will punish de-

76. *Schrock*, 386 Pa. Super. at 228, 562 A.2d at 881 (Popovich, J., dissenting) (quoting Trial Court Opinion at 6, 7); *King*, 383 Pa. Super. at 422, 557 A.2d at 12 (quoting Trial Court Opinion at 6). Defendants are not unfairly punished because they have the ability to protect themselves by promptly submitting a reasonable settlement offer. *King*, 383 Pa. Super. at 422-23, 557 A.2d at 12. To impose delay damages only in cases where it is proven that the defendant purposefully delayed the case would "emasculate Rule 238." *Id.* at 423, 557 A.2d at 12 (quoting Trial Court Opinion at 7).

77. *Schrock*, 386 Pa. Super. at 228, 562 A.2d at 881 (Popovich, J., dissenting) (quoting Trial Court Opinion at 6).

78. For example, in *Tindal v. SEPTA*, 385 Pa. Super. 94, 560 A.2d 183 (1989) (en banc), the trial court felt that in order to comply with *Craig* it had to reduce delay damages by excluding the time during which the judge's stay order delayed the litigation. *Id.* at 100, 560 A.2d at 186. According to the trial court, delay damages could not be assessed during this time because it was an administrative delay, not caused by either party. *Id.* Due to the promulgation of new Rule 238, the superior court reversed and remanded to the trial court for application of the new Rule. *Id.* at 101, 560 A.2d at 187. The superior court also noted that new Rule 238 does not provide an exclusion for administrative delays. *Id.* For a discussion of the applicability of new Rule 238 in cases pending on appeal as of the Rule's effective date, see *infra* notes 99-107 and accompanying text.

79. In *Craig* the court noted that the circumstances were unique because it was the plaintiff who had caused the delay of trial. *Craig*, 512 Pa. at 64, 515 A.2d at 1353. For a discussion of the holding in *Craig*, see *supra* notes 37-47 and accompanying text.

80. *Craig*, 512 Pa. at 65, 515 A.2d at 1353. In *Knudsen v. Delaware County Regional Water Quality Control Auth.*, 121 Pa. Commw. 549, 551 A.2d 358, (1988) the court stated:

Although the *Craig* opinion addresses delays by both parties, its focus is upon the actions of a defendant in relation to the purposes of Rule 238. Where it is determined that the defendant has acted to delay the proceedings, the assessment of delay damages is appropriate. Conversely, where a defendant is not found to be the cause of any delays, the purposes of Rule 238 are not served and delay damages are inappropriate.

Id. at 553, 551 A.2d at 360; see also *Shellhamer v. Grey*, 359 Pa. Super. 499, 505, 519 A.2d 462, 465 (1986) (Court referred to fault as a "condition precedent to the imposition of Rule 238 delay damages."), *appeal denied*, 515 Pa. 594, 528 A.2d 603 (1987).

defendants absent a finding of fault.⁸¹

Judge Popovich has come up with a novel solution to the "no-fault" dilemma by suggesting that new Rule 238 be read in conjunction with *Craig*.⁸² Under his view, "the law as composed of both *Craig* and new Rule 238"⁸³ would bar the imposition of delay damages where neither party is at fault because the Rule embodies the holding in *Craig*.⁸⁴

The second major criticism of revised Rule 238 is that it fails to consider the effect of plaintiffs' conduct during settlement negotiations. In order to avoid the imposition of delay damages, the defendant must prove that the plaintiff caused a *delay of trial*.⁸⁵ Not just any procedural delay will suffice; instead, the defendant must satisfy the difficult burden of proving that the plaintiff's conduct directly led to a postponement of trial.⁸⁶

For example, consider a situation where the plaintiff has delayed litigation by submitting unreasonable settlement demands, thereby precluding any chance of settling the case. If the plaintiff prevails at trial, the issue is whether the defendant could avoid the imposition of delay damages by arguing that the plaintiff was responsible for preventing early settlement of the case. This issue was recently addressed in *Kukowski v. Kukowski*,⁸⁷ where the trial court refused to award delay damages because the plaintiff's excessive settlement demands may have prolonged resolution of the case.⁸⁸ In *Kukowski* the plaintiff had requested damages in the amount of \$600,000 and \$200,000, both of which seemed unreasonable in light of the \$80,000 verdict at trial.⁸⁹ The su-

81. For a discussion of cases where delay damages have been imposed regardless of fault, see *supra* notes 69-71 and accompanying text.

82. *Snelsire v. Moxon*, 384 Pa. Super. 85, 92, 557 A.2d 785, 788 (1989) (en banc) (Popovich, J., dissenting).

83. *Id.* (Popovich, J., dissenting).

84. *Id.* (Popovich, J., dissenting); see also *Shrock v. Albert Einstein Medical Center*, 386 Pa. Super. 215, 229, 562 A.2d 875, 881 (1989) (Popovich, J., dissenting).

85. For the relevant text of Rule 238(b)(2), see *supra* note 2.

86. PA. R. CIV. P. 238, 42 PA. CONS. STAT. ANN. explanatory comment at 10 (Purdon Supp. 1989). According to the comment, delays during discovery (*e.g.*, resulting from the failure to answer interrogatories or produce records on time) are not relevant unless they cause a delay in the trial. Noncompliance during discovery should be dealt with under Rule 4019, which provides for pre-trial sanctions. *Id.*; see PA. R. CIV. P. 4019, 42 PA. CONS. STAT. ANN. (Purdon 1987).

87. 385 Pa. Super. 172, 560 A.2d 222 (1989).

88. *Id.* at 181, 560 A.2d at 226-27. In this case, Mr. and Mrs. Kukowski brought a negligence action against Matt Slap Chevrolet, Inc. for injuries sustained while driving their car from the dealership lot. *Id.* at 174, 560 A.2d at 223-24. In deciding whether to award delay damages to the Kukowskis, the trial court relied upon *Craig*. *Id.* at 180, 560 A.2d at 226.

89. *Id.* at 174, 181, 560 A.2d at 224, 227. The trial court also noted that during discovery Mr. Kukowski had requested a continuance for the deposition of his expert witness, and Mrs. Kukowski had postponed her own deposition. *Id.* at 181, 560 A.2d at 227. Furthermore, Mrs. Kukowski had been uncooperative in releasing employment records requested by defense counsel. *Id.*

perior court reversed, stating that revised Rule 238 bars delay damages only if "plaintiff caused a delay of trial . . . [therefore], the trial court's emphasis on the reasonableness of Sophie Kukowski's settlement demands, while relevant under the *Craig* decision, is misplaced in light of the provisions of the new Rule 238."⁹⁰

The reason that the Pennsylvania Superior Court has refused to take into account the extent of the plaintiff's settlement demands is two-fold. First, the new Rule focuses only on whether the defendant has made a reasonable offer, and this is not contingent upon whether the plaintiff has set forth a reasonable demand.⁹¹ Second, while the plaintiff's failure to make a more conservative demand may prolong settlement, it is not considered to be a factor which causes the delay of trial.⁹²

90. *Id.*; see also *Schrock v. Albert Einstein Medical Center*, 386 Pa. Super. 215, 218, 562 A.2d 875, 876 (1989) (delay damages awarded despite lowest settlement demand of \$50,000 and verdict of only \$25,000). For a discussion of the applicability of new Rule 238 in cases pending on appeal on the Rule's effective date, see *infra* notes 99-107 and accompanying text.

91. *Schrock*, 386 Pa. Super. at 218-19, 562 A.2d at 876; *Modrick v. B.F. Goodrich Co.*, 383 Pa. Super. 498, 557 A.2d 363 (1989), *overruled on other grounds*, *King v. SEPTA*, 383 Pa. Super. 420, 557 A.2d 11 (1989) (en banc). The *Modrick* court explained this rationale as follows:

The imposition of a requirement that a plaintiff make a settlement demand upon a tortfeasor as a condition precedent to the latter's obligation to make a reasonable offer in writing and that the failure to make such demand would preclude an award of delay damages or operate as a factor in mitigation of an award would run contrary to the twin purposes of new Rule 238 which are to alleviate delay in the courts and to encourage tortfeasors to settle meritorious claims expeditiously.

Id. at 506, 557 A.2d at 367.

92. *Schrock*, 386 Pa. Super. at 219, 562 A.2d at 876. The facts in *Miller v. Wise Business Forms*, 381 Pa. Super. 236, 553 A.2d 443 (1989) (en banc), illustrate how this interpretation of the new Rule can be unfair to defendants. In this case, the plaintiff was a laborer for a general contractor. *Id.* at 237, 553 A.2d at 444. In December 1983, while repairing the defendant's (Wise's) building, the plaintiff crushed his right foot. *Id.* at 237-38, 553 A.2d at 444. On October 19, 1984, plaintiff instituted an action against Wise. *Id.* Thereafter, on three different occasions, Wise asked the plaintiff to submit a settlement demand, but the plaintiff failed to come up with a meaningful response. *Id.* Finally, on August 27, 1986, the plaintiff submitted a demand for \$750,000. *Id.* Wise responded on October 20, 1986, the trial date, with a written offer for \$25,000, which plaintiff rejected. *Id.* The jury entered a verdict for plaintiff in the amount of \$195,000. *Id.*

Relying on *Craig*, the trial court denied plaintiff's petition for delay damages. *Id.* at 240, 553 A.2d 445. The court focused on the existence of "mitigating factors" which should be considered before awarding delay damages. *Id.* In this case, the defendant was unable to formulate an earlier offer due to the plaintiff's delay in submitting a reasonable demand. *Id.* The trial court reasoned that the plaintiff's conduct was a "mitigating factor" in the delay. *Id.* Therefore, the court concluded that it would be unjust to penalize the defendant under such circumstances. *Id.* at 242, 553 A.2d at 446. The superior court found these "mitigating factors" to be irrelevant under new Rule 238. *Id.* at 241-42, 553 A.2d at 446. As a result, the superior court vacated the judgment and remanded the proceeding to the trial court for an assessment of delay damages under the new Rule. *Id.* at 242, 553 A.2d at 446.

It appears that under *Craig* a trial court could consider whether the plaintiff made a reasonable and timely settlement demand in determining whether to award delay damages.⁹³ However, under revised Rule 238, the superior court has made it clear that the plaintiff's conduct during settlement will not be a mitigating factor.⁹⁴ As a result, the new Rule is still one-sided in its punishment, as plaintiffs are not subject to sanctions for acting unreasonably.⁹⁵ In President Judge Cirillo's opinion, the Rule "remains fundamentally unfair in the context of settlement negotiations . . . [because] the burden of settlement rests upon the shoulders of the defendant."⁹⁶

Despite criticism of the new Rule, it does contain some provisions favorable to defendants. For example, under the new Rule, delay damages will not begin to run until one year after the date the complaint is served upon the defendant.⁹⁷ Therefore, a defendant will now have one year to evaluate the merits of the case and prepare an appropriate settlement offer without having delay damages imposed.⁹⁸ Due to this one-year grace period, plaintiffs will no longer be able to maximize the award of delay damages by waiting until the last minute to file their com-

93. For a discussion of the *Kukowski* trial court's application of *Craig*, see *supra* notes 82-83 and accompanying text. For a discussion of the *Miller* trial court's application of *Craig*, see *supra* note 86. *But see Schrock*, 386 Pa. Super. at 223, 562 A.2d at 883 (1989) (Cirillo, Pres. J., dissenting) (*Craig* court did not address effect of delays based on failure to reach settlement).

94. For a discussion of the superior court's interpretation of the new Rule, see *supra* notes 84-86 and accompanying text.

95. For a discussion of this similar criticism of former Rule 238 by Justice Roberts, see *supra* notes 34-36 and accompanying text.

96. *Schrock*, 386 Pa. Super. at 231, 233, 562 A.2d at 883-84 (Cirillo, Pres. J., dissenting). Judge Cirillo noted that a settlement agreement requires the cooperation of both parties. *Id.* at 233, 562 A.2d at 884 (Cirillo, Pres. J., dissenting). Therefore, a plaintiff who submits an unreasonable demand is at least partially responsible for the case going to trial. *Id.* at 234, 562 A.2d at 884 (Cirillo, Pres. J., dissenting). In this situation, it is the plaintiff's "profit motive" that prevents full compensation at settlement, yet only the defendant is penalized. *Id.* (Cirillo, Pres. J., dissenting). In his opinion, a court must consider the parties' respective fault during settlement discussions before it can assess damages against a defendant for all trial delay. *Id.* at 235-36, 562 A.2d at 885 (Cirillo, Pres. J., dissenting). A defendant should only be punished if it is determined that he delayed settlement because of a desire to obtain greater profits. *Id.* at 236, 562 A.2d at 885 (Cirillo, Pres. J., dissenting). If a court fails to consider the defendant's conduct during settlement it takes the risk of "mandating settlement in situations where settlement should perhaps not take place . . . punishing defendants for attempting to litigate their cases, and, in some instances . . . punishing them for being unable to make an acceptable settlement offer." *Id.* (Cirillo, Pres. J., dissenting).

97. Rule 238(a)(2)(ii) applies to actions commenced on or after August 1, 1989. Actions filed before August 1, 1989 are governed by Rule 238(a)(2)(i). For the relevant text of Rule 238(a)(2), see *supra* note 2.

98. PA. R. CIV. P. 238, 42 PA. CONS. STAT. ANN. explanatory comment at 10 (Purdon Supp. 1989).

plaints.⁹⁹ Consequently, defendants will no longer be penalized by this conduct which is beyond their control.¹⁰⁰

In addition, under the revised Rule, defendants are only required to keep their settlement offers open for either ninety days or until commencement of the trial, whichever is first.¹⁰¹ This is intended to provide an incentive for plaintiffs to settle cases earlier.¹⁰² Under the old Rule, there was no incentive for plaintiffs to settle early because defendants were required to keep their offers open until the trial began.¹⁰³ The new ninety-day period is intended to provide a reasonable amount of time for plaintiffs to review and to decide whether to accept an offer.¹⁰⁴

One technical issue the Pennsylvania courts have had to contend with is whether new Rule 238 should be applied in cases pending on appeal on November 7, 1988, which was the Rule's effective date. Subsection (f) of the Rule states that it "shall apply to actions pending on or after the effective date of this rule in which damages for delay have not been determined."¹⁰⁵ The superior court has interpreted "determined" in subsection (f) to mean "finally determined"; therefore, the Rule must be applied in all cases that are pending on appeal as of November 7, 1988.¹⁰⁶

99. For a discussion of Justice Robert's dissent addressing this point, see *supra* notes 31-33 and accompanying text.

100. See *supra* notes 31-33 and accompanying text.

101. For the relevant text of Rule 238(b)(1)(ii), see *supra* note 2.

102. PA. R. CIV. P. 238, 42 PA. CONS. STAT. ANN. explanatory comment at 10 (Purdon Supp. 1989).

103. For the relevant text of former Rule 238(e), see *supra* note 4.

104. PA. R. CIV. P. 238, 42 PA. CONS. STAT. ANN. explanatory comment at 10 (Purdon Supp. 1989).

105. PA. R. CIV. P. 238(f), 42 PA. CONS. STAT. ANN. According to the explanatory comment:

The purpose of this provision is to indicate that the rule applies to pending as well as future actions but not to pending actions in which the damages for delay have been determined under the provisions and procedures of the *Craig* case. Once damages for delay have been determined under *Craig*, those proceedings are final and are not to be reopened under this rule.

Id. explanatory comment at 11.

106. See *Miller v. Wise Business Forms*, 381 Pa. Super. 236, 241, 553 A.2d 443, 446 (1989) (en banc) (citing *Ceresini v. Valley View Trailer Park*, 380 Pa. Super. 416, 418-19, 552 A.2d 258, 259 (1988) (en banc), *overruled on other grounds*, *King v. SEPTA*, 383 Pa. Super. 420, 557 A.2d 11 (1989) (en banc)); see also *Staats v. Noll*, 381 Pa. Super. 162, 164-65, 553 A.2d 85, 86 (1989) (quoting *Ceresini*). But see *Slater v. Pennsylvania Power Co.*, 383 Pa. Super. 509, 517, 557 A.2d 368, 372 (1989) (majority questions application of new Rule 238 in cases pending on appeal in view of explanatory comment to Rule); *Ceresini*, 380 Pa. Super. at 421-22, 552 A.2d at 260-61 (Popovich, J., dissenting) (new Rule 238 should not be applied where trial court determined delay damages under *Craig*); *Knudsen v. Delaware County Regional Water Quality Control Auth.*, 121 Pa. Commw. 549, 554-55 n.3, 551 A.2d, 358, 360 n.3 (1988) (court refused to remand for application of new Rule 238 where trial court awarded delay damages under *Craig*).

Although the new Rule will be applied in all these pending appeals, in only certain cases will the superior court remand to the trial court for a recalculation of damages in accordance with the new Rule. For example, if a plaintiff appeals the trial court's denial of delay damages, and it is determined that the plaintiff would be entitled to such damages under the new Rule, the superior court will reverse the judgment and remand the case to the trial court for an assessment of damages under the new Rule.¹⁰⁷ However, in *King v. SEPTA*¹⁰⁸ the court held that in a case where (1) a defendant appeals an award of delay damages which would be upheld under the new Rule and (2) the plaintiff has not challenged the amount of damages awarded, the court will merely affirm the award without remanding the case for a recalculation.¹⁰⁹

Under revised Rule 238 there is a different formula for calculating delay damages.¹¹⁰ In the *King* court's opinion, where an award of delay damages is proper, and the plaintiff has not filed a separate appeal¹¹¹ challenging the computation of damages, there is no need to remand the case. Judge Cavanaugh, in his dissent, stated that he fails to understand the majority's rationale for applying the new Rule in some cases, but not others.¹¹² Judge Cavanaugh stated that "[i]f we are correct that the revised Rule 238 applies to cases where the issue has been preserved on

107. See *Miller v. Wise Business Forms*, 381 Pa. Super. 236, 553 A.2d 443 (1989)(en banc); *Staats v. Noll*, 381 Pa. Super. 162, 553 A.2d 85 (1989).

108. 383 Pa. Super. 420, 557 A.2d 11 (1989) (en banc).

109. *Id.* at 425-26, 557 A.2d at 13; see also *Snelsire v. Moxon*, 384 Pa. Super. 85, 90, 557 A.2d 785, 787-88 (1989). In *King* the defendant argued that the trial court's award of delay damages was improper because the defendant did not cause the delay. *King*, 383 Pa. Super. at 423, 557 A.2d at 13. However, the superior court rejected this argument because, under the new Rule, the only way a defendant can prevent delay damages is by either submitting a reasonable settlement offer or by proving that the plaintiff caused the delay. *Id.* at 424, 557 A.2d at 13. Since the defendant failed to do either, the award of damages was appropriate. According to the court, since (1) the defendant had no claim for relief under new Rule 238 and (2) the plaintiff did not challenge the amount of damages awarded, there was no need to remand the case to the trial court. *Id.* at 425, 557 A.2d at 13.

110. New Rule 238 provides for a floating rate of interest in contrast to the fixed 10% rate of interest under the prior Rule. For the relevant text of new Rule 238(a)(3), see *supra* note 2, and for the relevant text of former Rule 238(a)(1), see *supra* note 4.

111. *King*, 383 Pa. Super. at 425, 557 A.2d at 13 (citing *Arcidiacono v. Timeless Towns of the Americas, Inc.*, 363 Pa. Super. 528, 531 n.2, 526 A.2d 804, 806 n.2 (1987) (appellee who fails to file cross-appeal cannot argue issues not raised by appellant)). In his dissenting opinion, Judge Cavanaugh stated that the holding in *Arcidiacono* was inapposite because in the present case the sole issue on appeal was the propriety of the entire delay damage award; therefore, the plaintiff would not be raising a new issue by challenging the amount of damages. *Id.* at 427, 557 A.2d at 14 (Cavanaugh, J., dissenting).

112. *Id.* at 428, 557 A.2d at 14-15 (Cavanaugh, J., dissenting). Judge Cavanaugh believed that the majority opinion "works an unfair economic hardship to plaintiffs who have not filed meaningless cross appeals." *Id.* at 429, 557 A.2d at 15 (Cavanaugh, J., dissenting).

appeal, then there is no reason to emasculate the rule and apply it only in part.”¹¹³

IV. CONCLUSION

Revised Rule 238 is intended to treat defendants more fairly than they had been under the former Rule. In some ways this goal has been achieved. Under the new Rule, defendants will have an opportunity to be heard before delay damages will be imposed, and defendants will no longer be penalized for delays caused by plaintiffs. In addition, defendants will have one year to assess the merits of a case before delay damages will start running. On the other hand, defendants will still be punished for delays which are beyond their control, such as the delays caused by the backlog of cases in the Pennsylvania courts. Furthermore, although defendants are subject to sanctions for not acting “reasonably,” there are no similar sanctions for plaintiffs who act unreasonably. As a result, revised Rule 238 only partially resolves the problems that existed under the former Rule.

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113. *Id.* at 428, 557 A.2d at 15 (Cavanaugh, J., dissenting). Judge Cavanaugh also noted that the majority opinion conflicted with its holding in *Modrick* where, absent plaintiff's cross appeal, the court upheld an award of delay damages but remanded for a recomputation in light of the new rule. *Id.*

