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Practice and Procedure: A Guide to Oklahoma's Offer of Judgment Statutes

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COMMENT

Practice and Procedure: A Guide to Oklahoma's Offer of Judgment Statutes

I. Introduction

In civil litigation, the defendant should consider whether making an offer of judgment to the plaintiff is in its best interest. An offer of judgment is a statutorily created judgment where the defendant offers the plaintiff a judgment against it for a specified amount.[1] An offer of judgment is essentially a settlement plus — a settlement price, plus a judgment against the defendant. This judgment has the same effect and consequences of any court-rendered judgment.[2]

Although an offer of judgment is akin to a normal settlement offer, it greatly differs in effect and in procedure. The most often asked question is, "Why would an attorney offer to have a judgment taken against her client when she can just offer to settle?" The answer is that an offer of judgment has a cost-shifting effect when the plaintiff rejects the offer and does not receive a greater judgment at trial. If the plaintiff rejects the offer of judgment and the plaintiff obtains a judgment for less than the amount the defendant offered, the plaintiff must pay the defendant's costs and in some cases attorney fees from the time of the offer. Therefore, the plaintiff may be more likely to accept an offer of judgment than a normal settlement offer, because the plaintiff does not want to create the risk of having to pay for the defendant's costs. Many considerations go into deciding whether a plaintiff should accept or reject a settlement or an offer of judgment. The offer of judgment cost-shifting risk simply adds one more incentive for the plaintiff to add to its list of reasons to accept.

Oklahoma has four statutes that govern offers of judgment;[3] however, most Oklahoma attorneys are reluctant to use them. One reason for such reluctance is that the statutory language is ambiguous. The ambiguity has resulted in uncertainty as to how to use the statutes and which statute to use. A second reason for attorneys' reluctance to use the statutes is that Oklahoma courts have provided little interpretation. This lack of judicial interpretation has also led to confusion as to how attorneys should use the statutes. A third reason is that there is a lack of written guidance beyond the statutes or cases. In fact, currently only two articles address Oklahoma's offer of judgment statutes.[4] The goal of this comment is to provide

1. *See* 12 OKLA. STAT. §§ 940, 1101, 1101.1, 1106 (1991 & Supp. 1999).
2. *Id.*
3. *Id.*
4. *See* Charles W. Adams, *Recent Developments in Oklahoma Law*, 31 TULSA L.J. 753 (1996) (documenting the changes of section 1101.1); Richard Eldridge, *The Taxing of Attorney Fees as Cost in Actions for Injury to Property*, 51 OKLA. B.J. 2800 (1980) (discussing taxes paid on attorney fees under

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guidance to Oklahoma attorneys concerning offers of judgment. This guide is intended to reduce the hesitation that Oklahoma attorney's associate with the offer of judgment statutory procedure.

This comment also addresses three procedural problems that arise from the offer of judgment statutes. First, which statute should an attorney use for her case? In answering this question, this comment examines the exact language of each statute. Since section 1101 was the first statute enacted and is the most commonly used of the four, this comment analyzes it first. The remaining statutes are examined by comparing their statutory language to the language of section 1101. As to each statutory section, the comment explains the process of using the section, when to use the section, and the effect of using the section.

The second problem this comment addresses is the proper procedure for making an offer of judgment in multiple-plaintiff cases. Third, what is the procedure for making an offer of judgment in multiple-defendant cases? Oklahoma courts have not answered these questions. However, federal courts and other state courts have addressed these problems under offer of judgment statutes that are substantially similar to title 12, section 1101 of the Oklahoma Statutes.[5] Therefore, this comment refers to federal and other states' decisions and rules to suggest how Oklahoma should address these issues. Since section 1101 is the principal offer of judgment statute in Oklahoma, this comment focuses on section 1101 when determining the procedure a lawyer should use in multiple-plaintiff and multiple-defendant cases.

Part I of this comment introduces each of the four offer of judgment statutes and discusses how to use each statue, the effect of each statute, and when to use each statute. Part II presents other jurisdictions' treatment of offers of judgment in multiple-plaintiff cases. Part III addresses the issue of how to make offers of judgment in multiple-defendant cases through the use of other jurisdictions' case law. Part IV explains why Oklahoma should and likely will follow the other jurisdictions' treatment of offers of judgment in multiple plaintiff and multiple defendant cases.

II. Which Statute Should an Attorney Use?

A. Section 1101 — General Statute

1. Procedure

The Oklahoma legislature has left section 1101[6] unchanged since it originally

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section 940).

5. 12 OKLA. STAT. § 1101 (Supp. 1999).

6. *Id.*

> Offer to allow judgment to be taken
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> The defendant, in an action for the recovery of money only, may, at any time before the trial, serve upon the plaintiff or his attorney an offer, in writing, to allow judgment to be taken against him for the sum specified therein. If the plaintiff accept the offer and give notice thereof to the defendant or his attorney, within five days after the offer was served, the offer, and an affidavit that the notice of acceptance was delivered within the time limited, may be filed by the plaintiff, or the defendant may file the acceptance, with a copy of the offer, verified by affidavit; and in either case, the offer and acceptance shall

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enacted the statute in 1910.[7] Although Oklahoma officially adopted the statute in 1910, section 1101 has been a part of the Oklahoma laws since before statehood.[8] Nothing on record shows why the Oklahoma legislature decided to adopt this particular statute.[9] In *Dulan v. Johnston*,[10] however, the Oklahoma Supreme Court stated that the recognized purpose of Oklahoma's offer of judgment statute is to promote settlement of civil litigation.[11]

Section 1101 is entitled "Offer to Allow Judgment to Be Taken."[12] The statute provides that the defendant may propose to the plaintiff that a judgment be entered against the defendant for a specified amount.[13] If the plaintiff accepts the offer and gives notice to the defendant within five days, then the plaintiff or the defendant may file the offer and acceptance with the court clerk.[14] Upon filing, the clerk will enter a judgment against the defendant obligating him to pay the plaintiff the amount specified in the offer.[15] If the plaintiff does not accept the offer within five days, the offer will be considered withdrawn.[16] Neither party can use the offer as evidence in the trial.[17] If the parties go to trial and the plaintiff obtains a judgment for less than the defendant offered, the plaintiff must pay the defendant's costs from the time of the offer.[18]

Using the procedure incorrectly can result in adverse effects for the defendant who is tendering an offer of judgment. In *Bullard v. Grisham Construction Co.*,[19] the Oklahoma Supreme Court outlined three minimum requirements that defendants must

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> be noted in the journal, and judgment shall be rendered accordingly. If the notice of acceptance be not given in the period limited, the offer shall be deemed withdrawn, and shall not be given in evidence or mentioned on the trial. If the plaintiff fails to obtain judgment for more than was offered by the defendant, he shall pay the defendant's costs from the time of the offer.

Id.

7. In *Dulan v. Johnston*, 687 P.2d 1045, 1047 (Okla. 1984), the court pointed out that the Oklahoma legislature adopted section 1101 from a Kansas statute. It is interesting to note that the Kansas Legislation has changed its statute four times. *See* 1963 Kan. Sess. Laws 60-2002 (amended by Supreme Court order of July 17, 1969); 1974 Kan. Sess. Laws 4; 1991 Kan. Sess. Laws 2. Also, Oklahoma adopted this statute from Kansas along with the remainder of the Oklahoma code of civil procedure. *See* OKLA. STAT. § 4417 (1893).

8. *See* OKLA. STAT. § 4417 (1893).

9. Oklahoma does not have an official legislative history as the federal government does. Instead, Oklahoma relies heavily on judicial interpretation. Having no legislative history becomes particularly problematic in trial where the issue of the legislative intent is critical to construing a statute. Even documents that purport to show legislative history are not official and, thus, the competency of such evidence is unreliable.

10. 687 P.2d 1045, 1047 (Okla. 1984).

11. *Id.* at 1047.

12. 12 OKLA. STAT. § 1101 (Supp. 1999).

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. 660 P.2d 1045 (Okla. 1983).

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meet in order to recover costs:[20] First, the defendant must make a formal offer of judgment.[21] Second, the offer must be in writing with a copy served on the opposing counsel.[22] Third, the plaintiff must have five days to accept or reject the offer.[23] The court did not explain the above requirements, but stated only that these three are the minimum requirements.

2. When To Use Section 1101

The statute states that defendants can use the settlement "plus" procedure in an action for the recovery of money only. In *Seitsinger v. Dockum Pontiac, Inc.*,[24] the Oklahoma Supreme Court held section 1101 inapplicable because the plaintiff sought remedies other than monetary damages.[25] The plaintiff sued seeking recision of a contract, or in the alternative, damages for breach of warranty.[26] Recision is an equitable remedy and damages are legal remedies.[27] The defendant made an offer of judgment to the plaintiff, but the opinion did not reveal the specifics of the offer of judgment.[28] After the court granted a motion for summary judgment in favor of the defendants, the defendants moved for costs pursuant to section 1101.[29] The trial court granted costs to defendants and the plaintiff appealed.[30]

On appeal, the plaintiff contended that section 1101 applies to actions only for monetary damages, thus it did not apply because the plaintiff's petition sought equitable relief and monetary damages.[31] The court agreed, citing *Blackwell, E. & S.W. Railway. Co. v. Bebout*[32] for support. In *Blackwell*, the court ruled that the offer of judgment statute did not apply because the plaintiff sought both legal and equitable remedies.[33] Based on the language of the statute and the Supreme Court's ruling, an attorney can clearly use section 1101 in any action seeking solely monetary damages, but not in an action seeking equitable relief or in an action seeking both monetary damages and equitable relief.

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20. *Id.* at 1047.
21. *Id.*
22. *Id.*
23. *Id.* In *Bullard*, the Oklahoma Supreme Court did not allow the defendant to recover costs because the defendant failed to comply with the minimum requirements of section 101. However, the court did not indicate which of the three requirements the defendant failed to meet or how the defendant failed to meet the requirements.
24. 894 P.2d 1077 (Okla. 1995).
25. *Id.* at 1082.
26. *Id.* at 1078.
27. *Id.* at 1082.
28. *Id.*
29. *Id.* at 1081.
30. *Id.*
31. *Id.* at 1082.
32. 91 P. 877 (Okla. 1907).
33. *Id.* at 882. In *Blackwell*, the court determined the applicability of section 1101's predecessor, OKLA. STAT. § 4715 (1903). The wording of the two statutes is identical.

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3. Cost, Interest, and Attorney Fees

The Oklahoma Supreme Court in *Bullard v. Grisham Construction Co.*,[34] stated that the word "costs" in section 1101 does not include attorney fees unless the underlying cause of action permits an award of attorney fees to the prevailing party. If the plaintiff accepts the offer of judgment, it is considered the prevailing party.[35] If the plaintiff rejects the offer of judgment and subsequently recovers a judgment for less than the offer of judgment, the plaintiff is still the prevailing party for purposes of recovering attorney fees.[36]

In the latter instance, however, the plaintiff may recover only those attorney fees it incurred up to the date of the offer and the defendant is entitled to recover the attorney fees it incurred after the date of the offer. Precluding the defendant from recovering attorney fees incurred before the offer of judgment promotes the purpose of the offer of judgment statute, which is to encourage settlement. For example, if the plaintiff rejects the offer, it takes the risk that it may recover less at trial and will be responsible for defendant's attorney fees after the date of the offer. An attorney making an offer of judgment should consider this rule when deciding when to make an offer of judgment. The attorney should tender the offer of judgment as soon as she has enough information to make a well calculated offer, in order to recover the greatest possible fees.

An attorney must explicitly provide in the offer of judgment what is included in the offer amount because silence indicates that the offer does not include anything but damages.[37] If the plaintiff accepts a nonspecifying offer, then the plaintiff can move for prejudgment interest per section 727(E),[38] attorney fees per section 936[39] or section 940(A),[40] and/or costs allowed to the prevailing party per sections 928 and 929.[41] Therefore, the defendant may have to pay the offer of judgment amount plus prejudgment interest, attorney fees, and/or costs. However, the defendant can avoid being subjected to the extra payment by explicitly stating that the offer of judgment includes prejudgment interest, attorney fees, and costs. If the defendant intends to include attorney fees and costs in the offer, then her attorney must explicitly write this intention into the offer.[42]

Case law illustrates the importance of stating that the offer of judgment sum includes all costs, interest, and attorney fees. For example, in *Allison v. City of El Reno*,[43] the Oklahoma Court of Appeals granted the plaintiff attorney fees pursuant

34. 660 P.2d 1045, 1047 (Okla. 1983).

35. Wieland v. Danner Auto Supply, Inc., 695 P.2d 1332, 1333-34 (Okla. 1984).

36. Van Cleave v. Kolpak Builders Co., 693 P.2d 17, 19 (Okla. Ct. App. 1983); Falkner v. Thompson, 585 P.2d 403, 407 (Okla. Ct. App. 1978).

37. Allison v. City of El Reno, 894 P.2d 1133, 1135 (Okla. Ct. App. 1995).

38. 12 OKLA. STAT. § 727(E) (Supp. 1999).

39. *Id.* § 936.

40. *Id.* § 940(A).

41. *Id.* §§ 928-929.

42. *Allison*, 894 P.2d at 1135.

43. *Id.* at 1134-35.

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to section 940(A)[44] after the plaintiff accepted the defendant's offer of judgment.[45] The court stated, "[T]he written offer was silent as to attorney fees and costs. Thus, the simple and unambiguous language of the . . . [defendant's] written offer clearly shows that attorney fees and cost were not included within the proffered judgment."[46] The court reasoned that the defendant could have included attorney fees as part of the offer of judgment amount, but it did not do so.[47] Therefore, the court concluded that the defendant had to pay attorney fees and costs pursuant to section 940(A), in addition to the amount of the offer of judgment.[48] The defendants could have eliminated this problem by writing the offer of judgment to reflect the intention of including attorney fees and costs, such as: "The defendant offers judgment to be taken against it in the amount of $2,000, including costs, interest, and attorney fees." Thus, an attorney should include the language "including costs, interest, and attorney fees," if it is the offeror's intent that such items be included in the offer.

A similar problem is illustrated in *Bohnefeld v. Haney*.[49] In *Bohnefeld*, the plaintiff sued for personal injuries.[50] The defendant made an offer of judgment in the amount of $2000.[51] The plaintiff rejected the offer and the parties proceeded to trial.[52] The jury entered a verdict for the plaintiff for $1911.75.[53] The judgment rendered after adding prejudgment interest was $2234.38.[54] The plaintiff contended that the amounts to be compared are the offer of judgment ($2000) and the court's judgment ($2234.38).[55] Thus, the plaintiff argued that the defendant was not entitled to costs because the judgment amount was more than the offer of judgment.[56] The defendant contended that it was entitled to costs because the offer of judgment ($2000) did not

44. Section 940(A) provides for attorney fees in negligent and willful damage to property cases. 12 OKLA. STAT. § 940(A) (1991). However, section 940(B) bars the plaintiff from receiving the attorney fees that section 940(A) provides when a plaintiff rejects an offer of judgment and subsequently recovers a judgment for less than the amount of the offer. For further explanation of section 940(B), see discussion *supra* Part II.B. In addition, the offer of judgment made in *Allison* was made pursuant to section 1101 because it was brought under the Governmental Tort Claims Act, 51 OKLA. STAT. §§ 151 through 172. The tort that the plaintiff was suing for was willful and negligent damage to property. However, this does not change the rule stated in *Evans v. Sitton*, 735 P.2d 334 (Okla. 1987), that offers of judgment made pursuant to willful and negligent damage to property must be made under section 940(B).

45. *Allison*, 894 P.2d at 1135.

46. *Id.*

47. *Id.*

48. *Id.*

49. 931 P.2d 90 (Okla. Ct. App. 1996).

50. *Id.* at 91.

51. *Id.* at 90.

52. *Id.*

53. *Id.* at 91.

54. *Id.*

55. *Id.*

56. *Id.*

include interest.[57] Thus, the court should compare the offer of judgment with the bare verdict ($1911.75) and award the defendant costs.[58]

The Oklahoma Court of Appeals agreed with the plaintiff.[59] It examined the legislative intent and concluded that the legislature meant judgment, not verdict, when it said "judgment" in section 1101.[60] Further, in section 727(A)(2), the legislature distinguished a verdict from a judgment.[61] Section 727(A)(2) states that "when a verdict for damages by reason of personal injuries . . . is accepted by the trial court, the court in rendering judgment shall add interest on said verdict . . . ."[62] Based on this language, the *Bohnefeld* court reasoned that if the legislature "had intended a section 1101 offer to be compared to a verdict, rather than to a judgment, it would have so stated."[63] The court concluded that the legislature knew and contemplated that a judgment would include prejudgment interest.[64] Thus, the court should compare the offer of judgment to the judgment that includes interest in determining whether the defendant is entitled to costs under section 1101.[65] The defendant, then, was not awarded costs pursuant to section 1101 because the offer of judgment ($2000) was less than the judgment ($2234.38).[66] The *Bohnefeld* case illustrates the importance of estimating the prejudgment interest when calculating the amount of the offer of judgment.

B. Section 940(B) — Offer of Judgment for Negligent or Willful Injury to Property Action

1. Procedure

Section 940(B)[67] is similar to section 1101 but applies only to negligent or willful

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57. *Id.*
58. *Id.*
59. *Id.*
60. *Id.*
61. 12 OKLA. STAT. § 727(A)(2) (1991); *see also Bohnefeld*, 931 P.2d at 91 (discussing the distinction between verdict and judgments as described by the legislature).
62. 12 OKLA. STAT. § 727(A)(2) (1991).
63. *Bohnefeld*, 931 P.2d at 91.
64. *Id.*
65. *Id.*
66. *Id.*
67. 12 OKLA. STAT. § 940(B) (1991).

> Negligent or willful injury to property — Attorney fees and costs — Offer and acceptance of judgment
>
> A. In any civil action to recover damages for the negligent or willful injury to property and any other incidental costs related to such action, the prevailing party shall be allowed reasonable attorney's fees, court costs and interest to be set by the court and to be taxed and collected as other costs of the action.
>
> B. Provided that, the defendant in such action may, not less than ten (10) days after being served with summons, serve upon the plaintiff or his attorney a written offer to allow judgment to be taken against him. If the plaintiff accepts the offer and gives notice thereof to the defendant or his attorney, within five (5) days after the offer was served, the offer, and an affidavit that the notice of acceptance was delivered within the time limited, may be filed by the plaintiff, or the defendant, verified by affidavit. The offer and

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injury to property actions. The procedure of section 940(B) is essentially the same as the procedure for a section 1101 offer of judgment. However, two differences between section 1101 and section 940 arise. The first difference is one of procedure. A defendant using section 940(B) must wait ten days after the plaintiff serves a summons before the defendant can make an offer of judgment. The second difference, discussed below, relates to recovery of attorney fees and interest.

2. When To Use Section 940(B)

A defendant can use section 940(B) "in any civil action to recover damages for the negligent or willful injury to property and any other incidental costs related to such action."[68] However, *Evans v. Sitton*[69] indicates that an attorney may not use section 1101 where the attorney can use a section 940(B) offer of judgment.[70] Further, according to *Woods Petroleum Corp. v. Delhi Gas Pipeline Corp.*,[71] section 940 applies to claims only for physical injury to tangible property.[72] The Oklahoma courts have held section 940 inapplicable to a slander of title claim,[73] a protection of trade secrets claim,[74] and a conversion of hydrocarbons claim.[75] Oklahoma courts have clearly indicated that attorneys can use section 940(B) only for the recovery of direct and incidental damages incurred from negligent or willful injury to property.

3. Attorney Fees, Costs & Interest

As stated above, section 1101 and section 940(B) are essentially the same, but differ in procedure discussed above, and in the effect and use of attorney fees. Section 1101

> acceptance shall be noted in the journal, and judgment shall be rendered accordingly. If the notice of acceptance is not given in the period limited, the offer shall be deemed withdrawn, and shall not be given in evidence or mentioned at the trial. If upon the action being adjudicated the judgment rendered is for the defendant or for the plaintiff and is for a lesser amount than the defendant's offer, then the plaintiff shall not be entitled to recover attorney's fees, court costs and interest. If the judgment rendered is for the plaintiff, and is for the same amount as the defendant's offer, then the plaintiff and defendant shall incur their own attorney's fees, court costs and interest. And if the judgment rendered is for the plaintiff, and is for a larger amount than the defendant's offer, then the plaintiff shall be entitled to recover attorney's fees, court costs and interest.

Id.

68. *Id.*

69. 735 P.2d 334 (Okla. 1987).

70. *Id.* at 336; *see also* Eldridge, *supra* note 4, at 2801 (concluding that section 1101 should never be utilized in any civil action to recover damages for negligent or willful injury to property, since such actions are within the exclusive purview of section 940). Eldridge's conclusion began with the premise that special statutes prevail over general statutes, citing *Golver Construction Co. v. Andrus*, 591 F.2d 554 (10th Cir. 1979), and *Biedleman v. Belford*, 525 P.2d 649 (Okla. 1974). *Id.*

71. 700 P.2d 1011 (Okla. 1984).

72. *Id.* at 1013.

73. Turner Roofing & Sheet Metal, Inc. v. Stapleton, 872 P.2d 926, 927 (Okla. 1994).

74. ABC Coating Co., Inc. v. J. Harris & Sons Ltd., 743 P.2d 271, 273-74 (Okla. 1987) (holding trade secrets not to be property within the meaning of section 940). *ABC Coating* did not specifically address offers of judgment pursuant to section 940(B), but instead discussed section 940(A). However, the meaning of property for section 940(A) also applies to section 940(B).

75. Pelican Prod. Corp. v. Wishbone Oil & Gas, Inc., 746 P.2d 209, 212-13 (Okla. Ct. App. 1987).

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allows a defendant's post-offer costs to shift to the plaintiff if the plaintiff rejects the offer and receives a judgment for less than the amount offered. Under section 940(B), however, a defendant's post-offer costs do not shift to the plaintiff; section 940(B) just prevents the plaintiff from recovering post-offer costs and attorney fees from the defendant.[76] The Oklahoma Supreme Court confirmed this interpretation in *Evans v. Sitton*.[77] In *Evans*, the court explicitly held that "[p]aragraph B of § 940 is merely a bar to recovery of fees and costs by the plaintiff who would otherwise be entitled to them."[78]

According to this interpretation, the statute provides three possible outcomes pursuant to offer of judgment.[79] First, section 940(B) states that if the judgment is for the plaintiff and is for an amount larger than the defendant's offer, then the plaintiff is entitled to recover attorney fees, court costs, and interest.[80] Second, section 940(B) states that if the judgment rendered at trial is for the plaintiff or the defendant and the judgment is for a lesser amount, then the plaintiff cannot recover attorney fees, court costs, or interest.[81] Third, section 940(B) specifies that if the judgment rendered is for the same amount as the defendant's offer, then the parties will pay their own attorney fees, court costs, and interest.[82]

Unlike section 1101, an attorney using section 940 may not want to include the phrase "including attorney fees, costs, and interest." In *Carson v. Specialized Concrete, Inc.*,[83] the Supreme Court of Oklahoma held that a trial court must consider [the] amount of [the] costs and attorney fees when determining if a jury verdict is lesser or greater than [the] amount of [an] offer that includes costs and attorney fees.[84] In *Carson*, the defendant made a section 940(B) offer of judgment "in the amount of $675.00 inclusive of all interest, costs and attorney fees."[85] The plaintiff rejected the offer and the jury awarded the plaintiff $639.35 in damages.[86] The plaintiffs moved for attorney fees, costs, and prejudgment interest in the amount of $1187.72 pursuant to 940(A).[87]

The trial court denied plaintiffs' motion because the judgment ($639.75) was less than the offer of judgment ($675.00). The appeals court reversed and awarded plaintiffs attorney fees, costs, and interest under section 940(B). The Supreme Court affirmed the court of appeals' ruling. The defendant argued that the court should compare the offer of judgment, which includes attorney fees, costs, and interest, to the amount of the judgment to determine whether the plaintiff should recover attorney fees

76. For a good discussion of section 940, *see* Eldridge, *supra* note 4.
77. 735 P.2d 334 (Okla. 1987).
78. *Id.* at 336.
79. *Id.* (explaining the three situations in which section 940(B) should be used).
80. 12 OKLA. STAT. § 940(B) (1991).
81. *Id.*
82. *Id.*
83. 801 P.2d 691 (Okla. 1990).
84. *Id.* at 691.
85. *Id.* at 692.
86. *Id.*
87. *Id.*

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and costs under section 940(B). The court found that under the defendant's interpretation, "a defendant can thwart the legislative intent of section 940 by offering an amount that is more than the amount claimed but less than the recovery plus the total taxable court cost."[88] The court reasoned that the legislature did not intend for this type of loophole to exist.[89] Thus, the court awarded the plaintiff attorney fees and costs under section 940(B) because the judgment plus attorney fees and costs ($1827.07) was more than the offer of judgment inclusive of the attorney fees, costs, and interest ($675.00).

After *Carson*, attorneys have two options when making offers of judgment pursuant to section 940(B). First, the attorney may make an offer of judgment with the phrase "including attorney fees, costs, and interest." The effect of including the phrase is best illustrated by example. The defendant makes an offer of judgment pursuant to section 940(B) for $10,000 including costs and attorney fees and the plaintiff rejects the offer. At trial, the jury renders a verdict for plaintiff for $5000. The plaintiff, then, moves for costs and attorney fees pursuant to section 940(A) and subsequently recovers an additional $6000. The defendant appeals the award of $6000 for costs and fees because the plaintiff received less at trial ($5000) than the offer of judgment amount ($10,000). Under section 1101, the defendant would win the appeal. However, according to the court in *Carson*, the defendant will not prevail under section 940(B). Instead, the court will compare the offer of judgment amount ($10,000) to the jury verdict ($5000) plus the costs and fees ($6000). Thus, the total judgment with costs and fees ($11,000) is more than the offer of judgment ($10,000). In this situation, the court would likely render attorney fees and costs to plaintiff. An attorney can reduce the risk of this outcome by carefully calculating the offer of judgment to reflect the likely verdict plus the reasonable attorney fees, costs, and interest. Therefore, when the court insists upon comparing the offer of judgment with the damage award plus fees, costs, and interest, the offer of judgment will have a better chance of prevailing.

Unlike section 1101, an attorney using section 940 may choose to draft the offer of judgment without the phrase "including attorney fees, costs, and interest." The likely effect of excluding such a phrase is that a court will compare the judgment amount disregarding attorney fees, costs, and interest to an offer of judgment amount that is silent to fees, costs, and interest. A court should interpret the statute so as to always require considering attorney fees, costs, and interest when determining the applicability of section 940(B), as did the Oklahoma Supreme Court in *Bohnefeld* in interpreting section 1101. However, this interpretation would seem inconsistent with the reasoning of *Carson*, which states that because the offer of judgment includes attorney fees, costs, and interest, it should be compared to the same. Conversely, then, a court could apply *Carson's* reasoning to hold that an offer exclusive of attorney fees, costs, and interest must be compared to the damage award excluding the calculation of the attorney fees, costs, and interest.

88. *Id.* at 693.

89. *Id.*

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C. Section 1106 — Partial Offer of Judgment

1. Procedure

Section 1106[90] is an offer of judgment statute that provides for a partial offer of judgment. The procedure is the same for section 1106 as it is for section 1101, except section 1106 provides that the defendant in an action for the recovery of money may offer a judgment to confess "for part of the money claimed or part of the causes involved in the claim."[91] The statute states that if a plaintiff rejects the offer and the plaintiff does not recover more than the defendant's offer of judgment at trial, then the plaintiff must pay all of the defendant's post-offer costs.[92]

2. When to Use Section 1106

Since 1941, only one case has cited section 1106.[93] That case discussed only when attorney fees are recoverable.[94] Therefore, no case law illustrates when an attorney can use section 1106. However, based on the language of the statute, it is fairly clear that a defendant may use section 1106 any time it may use section 1101, namely where the plaintiff claims monetary damages only. The difference between sections 1106 and 1101 is that section 1106 provides a mechanism for use when the defendant does not want to make an offer of judgment for the entire amount of damages or for all claims brought against it. For example, if the plaintiff sues the defendant for false imprisonment and intentional infliction of emotional distress, the defendant could offer judgment to be taken against it for the false imprisonment claim only. If the defendant felt that the plaintiff had a weak or frivolous claim for intentional infliction of emotional distress, then it may want to proceed to litigate that claim while offering a judgment for the false imprisonment claim. Section 1106 creates this possibility for the defendant.

In addition to the possibility of making an offer of judgment for only one cause of action, the statute allows the defendant to make an offer of judgment for part of the monetary damages claimed. For example, the plaintiff may seek recovery of past and future medical expenses. Section 1106 allows the defendant to make an offer of

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90. 12 OKLA. STAT. § 1106 (1991).

> Offer to confess judgment in part.
>
> After an action for the recovery of money is brought, the defendant may offer in court to confess judgment for part of the amount claimed, or part of the causes involved in the action; whereupon, if the plaintiff, being present, refuse to accept such confession of judgment in full of his demands against the defendant in the action, or, having had such notice that the offer would be made, of its amount, and of the time of making it, as the court shall deem reasonable, fail to attend, and on the trial do not recover more than was so offered to be confessed, such plaintiff shall pay all the costs of the defendant incurred after the offer. The offer shall not be deemed to be an admission of the cause of action, or the amount to which the plaintiff is entitled, nor be given in evidence upon the trial.

Id.

91. *Id.*

92. *Id.*

93. Bullard v. Grisham Constr. Co., 660 P.2d 1045 (Okla. 1983).

94. *Id.* at 1047.

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judgment for the past medical expenses and proceed to trial on the recovery of the future medical expenses.

In determining whether to use section 1106, a defendant may be wary that the mere fact of an offer of judgment for one cause of action or for part of the money damages would increase the plaintiff's chance of recovery on the remaining cause of action. This fear of increasing the plaintiff's chance of recovery is created because the defendant thinks that by allowing a judgment to be entered against it on one claim, it is admitting liability in the entire action. The Oklahoma Supreme Court, in *Johnson v. Gaines*,[95] attempting to curtail this fear, held that a plaintiff may not introduce evidence of a section 1106 offer of judgment at trial.[96] Further, the Court held that a judge instructing the jury as to the existence of the offer of judgment constitutes prejudicial error.[97] Moreover, the last line of the statute states, "[t]he offer of judgment shall not be deemed to be an admission of the cause of action, or the amount to which the plaintiff is entitled, nor be given in evidence upon the trial."[98] Therefore, using 1106 instead of 1101 is fairly safe in any circumstance where the defendant only wants to settle part of the plaintiff's claims by way of an offer of judgment.

3. Attorney Fees, Costs, and Interest

Just as section 1106 is similar to section 1101 procedurally, it is also similar to section 1101 in terms of attorney fees, costs, and interest. In *Bullard v. Grisham Construction Co.*, the Oklahoma Supreme Court held that section 1106 does not include attorney fees unless the underlying cause of action allows for the award of attorney fees to the prevailing party.[99] *Bullard* is the only case that addresses attorney fees under section 1106. However, because the court treats section 1106 in the same manner as section 1101 in every other respect, it is reasonable to believe that the same rules regarding attorney fees, costs, and interest under section 1101 are applicable to section 1106 offers of judgments as well.

The statute is not clear as to the effect of costs if the plaintiff rejects the defendant's offer of judgment and does not receive a judgment for more than the offer. The statute states that if a plaintiff rejects the offer and at trial does not recover more than the defendant offered, "such plaintiff shall pay all the costs of the defendant incurred after the offer."[100] A court could interpret this language to mean that if the defendant offers to confess judgment in part and the plaintiff rejects, then the plaintiff could be subjected to paying all of the defendants' costs on all causes of action, rather than paying costs only on the cause of action for which the offer of judgment was made. Although at first glance it does not seem fair, two reasons explain why the court may adopt this interpretation.

95. 96 P.2d 68 (Okla. 1939).
96. *Id.* at 69.
97. *Id.*
98. 12 OKLA. STAT. § 1106 (1991).
99. 660 P.2d 1045, 1047 (Okla. 1983).
100. 12 OKLA. STAT. § 1106 (1991).

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First, the language in the statute states that after the plaintiff rejects the partial offer of judgment and then recovers less than the offer of judgment, the "plaintiff shall pay *all costs* of the defendant incurred after the offer."[101] The legislature did not differentiate between the costs incurred for the cause of action that the defendant attempted to settle and the cause of action that the defendant did not attempt to settle. Thus, a court could conclude that the legislature intended to award all costs to the defendant in the above situation. Second, it may be very difficult to track costs and attorney fees incurred on solely one cause of action; and it may be impossible to track costs and attorney fees incurred on a portion of the damages. The legislature may have foreseen this dilemma when drafting the statute, thus electing to award defendant all costs incurred from the time of the offer of judgment. In sum, the effect of section 1106 creates many technical difficulties, which is likely why it is not used often.

Another problem that arises under section 1106 is that neither the statute nor the case law indicates what amount the court will compare to the partial offer of judgment. To determine whether a defendant is entitled to costs, courts could compare the amount of the offer of judgment to either the judgment on only the causes of action for which the defendant tendered the offer of judgment, or the judgment on all the causes of actions. For example, assume a plaintiff sues for emotional distress and false imprisonment. The defendant tenders an offer of judgment for the emotional distress claim in the amount of $5000 and the plaintiff rejects the offer. At trial, the jury awards $3000 for emotional distress and $3000 for false imprisonment, a total judgment of $6000. The defendant moves for costs under section 1106 contending that the damages award for the emotional distress ($3000) was less than the offer of judgment ($5000). It is unclear whether the defendant will prevail or whether a court will compare the total judgment for emotional distress and false imprisonment ($6000) to the partial offer of judgment ($5000). If a court chooses the latter, the defendant will not be entitled to costs under this example.

The latter decision, however, may be unlikely because of Oklahoma's use of general verdicts. In Oklahoma, a general verdict is ordinarily used. A general verdict is a verdict on all claims — either for the plaintiff or for the defendant.[102] Therefore, the jury would not make an award separating the emotional distress and false imprisonment claims. Instead, the jury would award a single sum, not indicating whether the award was partly for each cause of action or for only one. Consequently, an attorney should request that the judge issue a special verdict, in which the jury is required to award damages separately with respect to each claim or each item of damages.[103]

Due to the myriad of problems created under section 1106, a defendant should consider using the partial offer of judgment only when it wants to eliminate a cause of action or a type of damages. If the plaintiff accepts the partial offer of judgment, then the defendant's mission was accomplished. If the plaintiff rejects the offer of judgment, then the defendant's desires will not have been fulfilled and the effects of

101. *Id.* (emphasis added).
102. 12 OKLA. STAT. § 587 (Supp. 2000).
103. *Id.*

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section 1106 are virtually useless. Thus, the defendant should consider making a section 1101 offer of judgment, if its section 1106 offer of judgment is rejected.

D. Section 1101.1 — New Offer of Judgment Statute

1. Procedure

The Oklahoma Legislature recently enacted section 1101.1[104] pursuant to the Tort

104. 12 OKLA. STAT. § 1101.1 (Supp. 1999).

Civil actions — Offers of judgment — Counteroffers — Recovery of costs and attorneys fees

A. Actions for personal injury, wrongful death, and certain specified actions.

1. Subject to the provisions of paragraph 5 of this subsection, after a civil action is brought for the recovery of money as the result of a claim for personal injury, wrongful death, or pursuant to Chapter 21 of Title 25 or Section 5 of Title 85 of the Oklahoma Statutes, any defendant may file with the court, at any time more than ten (10) days prior to trial, an offer of judgment for a sum certain to any plaintiff with respect to the action or any claim or claims asserted in the action. An offer of judgment shall be deemed to include any costs or attorneys fees otherwise recoverable. If an offer of judgment is filed, each plaintiff to whom an offer of judgment is made shall, within ten (10) days, file:

a. a written acceptance or rejection of such offer, or

b. a counteroffer of judgment, as described in paragraph 2 of this subsection

If the plaintiff fails to file a timely response, the offer of judgment shall be deemed rejected. The fact an offer of judgment is made but not accepted or is deemed rejected does not preclude subsequent timely offers of judgment.

2. In the event a defendant files an offer of judgment, the plaintiff may, within ten (10) days, file with the court a counteroffer of judgment directed to each defendant who has filed an offer of judgment. If a counteroffer of judgment is filed, each defendant to whom the counteroffer of judgment is made shall, within ten (10) days, file a written acceptance or rejection of the counteroffer of judgment. If a defendant fails to file a timely response, the counteroffer of judgment shall be deemed rejected. The fact a counteroffer of judgment is made but not accepted or deemed rejected does not preclude subsequent counteroffers of judgment if subsequent offers of judgment are made.

3. In the event the plaintiff rejects the offer(s) of judgment and the judgment awarded the plaintiff, exclusive of any costs or attorneys fees otherwise recoverable, is less than the final offer of judgment, then the defendant filing the offer of judgment shall be entitled to recover reasonable litigation costs and reasonable attorneys fees incurred by that defendant from the date of filing of the final offer of judgment until the date of the verdict. Such costs and fees may be offset from the judgment entered against the offering defendant; provided, however, that prior to any such offset, the plaintiff's attorney may:

a. exercise any attorneys lien claimed in an amount not to exceed twenty-five percent (25%) of the judgment, and

b. recover the plaintiff's reasonable litigation costs, not to exceed an additional fifteen percent (15%) of the judgment or Five Thousand Dollars ($5,000.00), whichever is greater.

4. In the event a defendant rejects the counteroffer(s) of judgment and the judgment awarded to the plaintiff is greater than the final counteroffer of judgment, the plaintiff shall be entitled to recover reasonable litigation costs and reasonable attorneys fees incurred by the plaintiff from the date of filing of the final counteroffer of judgment until the date of the verdict. Such costs and fees may be added to the judgment entered in favor of the plaintiff.

5. The provisions of this subsection shall apply only where the plaintiff demands in a pleading or in trial proceedings more than One Hundred Thousand Dollars ($100,000.00),

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or where the defendant makes an offer of judgment more than One Hundred Thousand Dollars ($100,000.00). Any offer of judgment may precede the demand.

B. Other actions.

1. After a civil action is brought for the recovery of money or property in an action other than for personal injury, wrongful death or pursuant to Chapter 21 of Title 25 or Section 5 of Title 85 of the Oklahoma Statutes, any defendant may file with the court, at any time more than ten (10) days prior to trial, an offer of judgment for a sum certain to any plaintiff with respect to the action or any claim or claims asserted in the action. An offer of judgment shall not be deemed to include any costs and attorneys fees otherwise recoverable. If an offer of judgment is filed, the plaintiff or plaintiffs to whom the offer of judgment is made shall, within ten (10) days, file:

a. a written acceptance or rejection of the offer, or

b. a counteroffer of judgment, as described in paragraph 2 of this subsection.

If a plaintiff fails to file a timely response, the offer of judgment shall be deemed rejected. The fact an offer of judgment is made but not accepted or is deemed rejected does not preclude subsequent timely offers of judgment.

2. In the event a defendant files an offer of judgment, the plaintiff may, within ten (10) days, file with the court a counteroffer of judgment to each defendant who has filed an offer of judgment and the claim or claims which are the subject thereof. If a counteroffer of judgment is filed, each defendant to whom a counteroffer of judgment is made shall, within ten (10) days, file a written acceptance or rejection of the counteroffer of judgment. If a defendant fails to file a timely response, the counteroffer of judgment shall be deemed rejected. The fact a counteroffer of judgment is made but not accepted or is deemed rejected does not preclude subsequent counteroffers of judgment if subsequent offers of judgment are made.

3. If no offer of judgment or counteroffer of judgment is accepted and the judgment awarded the plaintiff, exclusive of any costs or attorneys fees otherwise recoverable, is less than one or more offers of judgment, the defendant shall be entitled to reasonable litigation costs and reasonable attorneys fees incurred by the defendant with respect to the action or the claim or claims included in the offer of judgment from and after the date of the first offer of judgment which is greater than the judgment until the date of the judgment. Such costs and fees may be offset from the judgment entered against the offering defendant.

4. If no offer of judgment or counteroffer of judgment is accepted and the judgment awarded the plaintiff, exclusive of any costs or attorneys fees otherwise recoverable, is greater than one or more counteroffers of judgment, the plaintiff shall be entitled to recover the reasonable litigation costs and reasonable attorneys fees incurred by the plaintiff with respect to the action or the claim or claims included in the counteroffer of judgment from and after the date of the first counteroffer of judgment which is less than the judgment until the date of the judgment. Such costs and fees may be added to the judgment entered in favor of the plaintiff.

5. An award of reasonable litigation costs and reasonable attorneys fees under paragraph 3 of this subsection shall not preclude an award under paragraph 4 of this subsection, and an award under paragraph 4 of this subsection shall not preclude an award under paragraph 3 of this subsection.

6. This subsection shall not apply to actions brought pursuant to Chapter 21 of Title 25 or Section 5 of Title 85 of the Oklahoma Statutes.

C. Evidence of an offer of judgment or a counteroffer of judgment shall not be admissible in any action or proceeding for any purpose except in proceedings to enforce a settlement arising out of an offer of judgment or counteroffer of judgment or to determine reasonable attorneys fees and reasonable litigation costs under this section.

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Reform Law.[105] Section 1101.1 is a new offer of judgment provision that allows plaintiffs to counteroffer. Three similarities arise between section 1101 and 1101.1. First, the defendant is the only party that may initiate the procedure.[106] Second, if the plaintiff rejects the offer and subsequently recovers a judgment for less than the offer made, then the defendant will be entitled to certain post-offer expenses.[107] Third, if the plaintiff rejects the offer, neither party can use the offer as evidence in the trial.[108]

Though the statutes may have some similarities, differences abound. First, section 1101.1 allows the defendant to recover his attorney fees and costs if the plaintiff recovers a judgment for less than the amount of the offer, even if the underlying causes of action are not claims upon which attorney fees are otherwise recoverable.[109] Under section 1101, a defendant is only entitled to recover costs when the underlying cause of action is one in which the prevailing party is entitled to recover attorney fees.[110] Second, under section 1101.1, a plaintiff may make a counteroffer to the defendant's offer of judgment. If the defendant does not accept the counteroffer, then the defendant may be liable for the plaintiff's attorney fees.[111] Therefore, by making a section 1101.1 offer of judgment, the defendant may endanger itself by creating more liability than it would have originally incurred. Third, under section 1101.1, the plaintiff has ten days, rather than five days, to make a counteroffer, a rejection, or an acceptance. Fourth, section 1101.1 differentiates between different kinds of actions. Subsection A of 1101.1 is concerned only with personal injury, wrongful death, discrimination, and retaliatory discharge actions while subsection B of 1101.1 covers all other types of actions.

2. When To Use Section 1101.1

The main difference between section 1101 and section 1101.1 is when attorneys may use section 1101.1. Subsection A of 1101.1 limits the use of the offer of judgment to actions involving any personal injury, wrongful death, discrimination, and

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D. This section shall apply whether or not litigation costs or attorneys fees are otherwise recoverable.

E. The provisions of this section are severable, and if any part or provision thereof shall be held void, the decision of the court shall not affect or impair any of the remaining parts or provisions thereof.

F. This section shall apply to all civil actions filed after the effective date of this act.

Id.

105. 1995 Okla. Sess. Laws 287 (amended 1995 Okla. Sess. Laws 287). For a discussion of the Tort Reform Act and section 1101, see Charles W. Adams, *Recent Developments in Oklahoma Law — Civil Procedure*, 31 TULSA L.J. 753, 754 (1996).

106. Adams, *supra* note 105, at 754.

107. *Id.* at 755.

108. *Id.* at 756.

109. *Id.*

110. *See* discussion *infra* Part II.A.3.

111. *Id.*

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retaliatory discharge. The plaintiff must seek monetary damages in excess of $100,000 or the offer must be for more than $100,000.[112]

Under section 1101.1(B), a defendant can use section 1101.1 for any civil action "brought for the recovery of *money or property* in an action other than" personal injury, wrongful death, discrimination and retaliatory discharge.[113] Under section 1101, a defendant can make an offer of judgment in actions seeking money only. Therefore, under section 1101.1, a defendant can make an offer of judgment for the recovery of property, while under section 1101, it can only tender an offer of judgment for the recovery of money.

3. Attorney Fees, Costs, and Interest

As originally enacted, section 1101.1 deemed any costs or attorney fees as included in the offer of judgment. Under this version of the statute, an attorney would not have to include the phrase "including attorney fees and costs," as she would under section 1101. However, in 1999, the legislature omitted the phrase in section 1101.1(B) that deemed attorney fees and costs included.[114] Thus, when making an offer of judgment under section 1101.1(B), the attorney may have to include the phrase "including attorney fees and costs" to prevent the plaintiff from moving for such after accepting the offer of judgment.[115]

Additionally, under section 1101.1 the legislature has provided that the court shall compare the offer of judgment amount to the judgment amount minus attorney fees or costs.[116] The statute does not leave the question open for judicial interpretation as does section 1101. However, section 1101.1 is silent as to prejudgment interest. Accordingly, the court may add the prejudgment interest to the jury verdict before comparing the offer of judgment amount to the court's judgment amount. Thus, attorneys should calculate prejudgment interest into the amount of offers of judgment made pursuant to section 1101.1.

The most important distinction between section 1101.1 and the other offer of judgment statutes is the possibility of either party recovering attorney fees where attorney fees otherwise would not be recoverable. Under section 1101.1, a plaintiff will have to pay attorney fees if it rejects the defendant's offer and receives a judgment for less than the defendant's offer. Likewise, if the defendant does not accept the plaintiff's counter-offer, and the plaintiff receives more than it offered, then the defendant must pay the plaintiff's attorney fees, regardless of whether the underlying cause of action allows for attorney fees. Therefore, the greatest risk to a defendant making an offer of judgment under section 1101.1 is that the defendant may be required to pay the plaintiff's attorney fees in a case where the plaintiff would not usually be entitled to fees. On the other hand, if a defendant is confident that its offer

112. 12 OKLA. STAT. § 1101.1(A)(5) (Supp. 1999).

113. *Id.* § 1101.1(B) (emphasis added).

114. 1999 Okla. Sess. Laws 293.

115. Note that the legislature did not omit the phrase that deemed attorney fees and costs included in section 1101.1(A), which applies to any personal injury, wrongful death, discrimination and retaliatory discharge actions. 12 OKLA. STAT. § 1101.1(B).

116. *Id.*

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is in an amount greater than the potential judgment, then the statute enables the defendant to attempt to recover its attorney fees in an otherwise nonfee case.

In sum, attorneys should take caution when using section 1101.1 since it creates the danger that either party could recover its attorney fees and litigation costs if the opposing party rejects an offer and then fails to recover more than the offer at trial. An attorney should also be certain to specify the section she is using when creating an offer of judgment so that she does not accidentally invoke section 1101.1, creating the danger presented above.

III. Offer of Judgment in Multiple-Plaintiff Cases

In a world of complex litigation, attorneys should know how to manage cases with multiple-plaintiffs. An essential step in managing complex litigation is making offers of judgment. Oklahoma has not addressed the question of how to provide an offer of judgment in a case with multiple plaintiffs. However, other jurisdictions with offer of judgment statutes substantially similar to Oklahoma's have addressed the issue.[117] From these cases, two problems develop: offers of judgment without apportionment and offers of judgment with conditional acceptance.

A. Apportionment Versus Lump-Sum Offers

A majority of courts have held that if a defendant makes an offer of judgment to multiple plaintiffs and does not apportion the settlement amount to each plaintiff, then the defendant will not be entitled to costs.[118] Therefore, a defendant must specifically state how much each plaintiff will receive from the offer. Collectively, the cases give three reasons for requiring the defendant to apportion the settlement amount in multiple plaintiff cases rather than use lump sum.[119] First, courts need to be able to easily compare the amount of the offer of judgment and the amount of the actual judgment.[120] Second, apportionment allows each plaintiff to independently evaluate the offer.[121] Third, requiring apportionment allows each plaintiff to individually accept or deny the offer of judgment.[122] These issues are discussed in depth below.

1. Court's Comparison Difficulty

Taylor v. Clark[123] illustrates the court's difficulty in comparing the value of the judgment received and the value of the offer made where more than one plaintiff is involved. In *Taylor*, the court held that the offer of judgment statute did not apply to

117. Gavoni v. Dobbs House, Inc., 164 F.3d 1071, 1077 (7th Cir. 1999); Hayes v. Xerox Corp., 718 P.2d 929 (Alaska 1986); Brinkerhoff v. Swearingen Aviation Corp., 663 P.2d 937, 943 (Alaska 1983); Meissner v. Paulson, 260 Cal. Rptr. 826, 829 (Cal. Ct. App. 1989); Hutchins v. Waters, 123 Cal. Rptr. 819, 822 (Cal. Ct. App. 1975); Randles v. Lowry, 84 Cal. Rptr. 321, 325 (Cal. Ct. App. 1970); Taylor v. Clark, 883 P.2d 569, 571 (Colo. Ct. App. 1994).

118. *Gavoni*, 164 F.3d at 1076; *Randles*, 84 Cal. Rptr. at 321; *Taylor*, 883 P.2d at 571.

119. An offer that is not apportioned is often called a lump-sum offer or a joint offer.

120. *Gavoni*, 164 F.3d at 1076; *Randles*, 84 Cal. Rptr. at 321; *Taylor*, 883 P.2d at 571.

121. *Gavoni*, 164 F.3d at 1077; *Taylor*, 883 P.2d at 571.

122. *Gavoni*, 164 F.3d at 1077.

123. 883 P.2d 569 (Colo. Ct. App. 1994).

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an offer of judgment made to two plaintiffs because the offer did not specifically apportion the settlement amount for each plaintiff.[124] Therefore, the defendant could not recover costs.[125]

In *Taylor*, the two plaintiffs sued the defendant for personal injuries suffered during an assault.[126] The defendant offered to have a judgment entered against it for a lump sum of $10,000.[127] The plaintiffs rejected the offer.[128] At trial, the first plaintiff received a judgment against the defendant for $2500 and the second plaintiff received a judgment against the defendant for $5000, for a total of $7500.[129] The trial court ruled that because the actual judgment ($7500) was less than the offer of judgment ($10,000), the court required the plaintiffs to pay the defendant's costs from the time the defendant made the offer of judgment.[130]

The plaintiffs appealed the decision, contending that Colorado's offer of judgment statute[131] did not apply because the offer was made to plaintiffs jointly and, therefore, was invalid.[132] The appellate court agreed with the plaintiffs and reversed the trial court's ruling.[133] The court held that the defendant was not entitled to costs because it did not apportion the settlement amount to each plaintiff.[134] The court stated that lump-sum offers make it difficult for the court to determine whether the first plaintiff or the second plaintiff received a less favorable judgment than the offer.[135]

For example, the first plaintiff received a judgment of $2500.[136] It is difficult for the court to compare this amount to the offer of judgment lump sum of $10,000. The defendant in offering the $10,000 could have intended for the first plaintiff to receive $2000 and the second plaintiff to receive $8000. If this were the case, then the first plaintiff's judgment would have been more favorable than defendant's offer. However, the courts do not want to speculate as to defendants' intentions in making a lump-sum

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124. *Id.* at 571.
125. *Id.*
126. *Id.* at 570.
127. *Id.*
128. *Id.*
129. *Id.*
130. *Id.*
131. The Colorado offer of judgment statute in 1993 provided as follows:

> At any time more than ten days before trial begins, a party defending against a claim may serve upon the adverse party an offer of settlement to the effect specified in his offer, with costs then accrued. If within ten days after service of the offer, the adverse party serves written notice that the offer is accepted, either party may then file the and notice of acceptance and thereupon the clerk shall enter judgment. . . . *If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree shall pay the costs incurred after making of the offer.*

COLO. REV. STAT. § 13-17-202(3) (1993) (emphasis added) (amended 1995). This statute is substantially similar to title 12, section 17 of the Oklahoma Statutes.

132. *Taylor*, 883 P.2d at 570.
133. *Id.* at 571.
134. *Id.*
135. *Id.*
136. *Id.* at 570.

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offer. Thus, the rule emerged that the defendant must allocate a specific amount to each plaintiff.

Other state courts have followed the reasoning set forth in *Taylor*. In *Randles v. Lowry*,[137] the California Appeals Court held that joint offers made to all plaintiffs "without designating how it should be divided between them," do not trigger the cost-shifting provision of the California offer of judgment statute.[138] The *Randles* court stated that lump-sum offers to multiple plaintiffs make it impossible, not just difficult, for a court to determine whether the first or the second plaintiff received a less favorable judgment than the amount offered.

In *Gavoni v. Dobbs House, Inc.*,[139] the Seventh Circuit agreed that courts need easily comparable sums.[140] The Seventh Circuit expanded the foregoing reasoning, stating that difficult comparisons can lead to appeals.[141] For example, if a court uses a lump-sum offer of judgment and decides that one plaintiff's verdict is less favorable than the offer sum, then that plaintiff will likely appeal.[142] On appeal, the plaintiff could contend that the trial court's determination was arbitrary and unfair. However, if the offer is already apportioned, the court could easily make the "more or less favorable" determination and avoid an appeal.[143] Therefore, requiring apportioned offers of judgment could prevent derivative litigation.[144]

2. Plaintiff's Comparison Difficulty

The lump-sum offer creates a similar difficulty for plaintiffs assessing the benefit of the defendant's offer compared to the likely judgment. In *Taylor*, the court stated that with a lump-sum offer, plaintiffs are not capable of "independently weighing the benefit of accepting an unspecified portion of the offer against the likelihood of receiving a less favorable judgment."[145] The facts in *Taylor* are helpful in explaining the second rationale for requiring apportionment. In *Taylor*, the defendant made a lump-sum offer to the plaintiffs. When determining whether to accept the offer, the second plaintiff may have used the following rationale: First, the second plaintiff

137. 84 Cal. Rptr. 321, 325 (Cal. Ct. App. 1970).

138. *Id.* In 1970, the California offer of judgment statute provided as follows:

> The defendant may, at any time before the trial or judgment, serve upon the plaintiff an offer to allow judgment to be taken against him for the sum or property, or to the effect therein specified. If the plaintiff accepts the offer, and give notice thereof with in five days, he may file the offer, with proof of notice of acceptance, and the clerk, or the judge where there is no clerk, must thereupon enter judgment accordingly. *If the notice of acceptance be not given, the offer is to be deemed withdrawn, and cannot be given in evidence upon the trial; and if the plaintiff fail to obtain a more favorable judgment, he cannot recover costs, but must pay the defendant's costs from the time of the offer.*

CAL. CIV. PROC. CODE § 997 (West 1992) (emphasis added) (repealed 2000).

139. 164 F.3d 1071 (7th Cir. 1999).

140. *Id.* at 1077.

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

145. Taylor v. Clark, 883 P.2d 569, 571 (Colo. Ct. App. 1994).

would project the amount it expected to receive at trial, for example $7500. Next, the second plaintiff would look at the lump-sum offer of $10,000 and assume that it would have to split the amount evenly with the first plaintiff, thereby receiving $5000 each. The second plaintiff would likely reject this lump-sum offer of judgment because it believes it would receive more at trial. However, the defendant may have intended that the second plaintiff receive $8000, rather than the $5000 assumed. In that case, the offer would be higher in value than the value the second plaintiff expected. Therefore, if the defendant would have apportioned the offer of judgment, then the second plaintiff would have accepted the offer of judgment for $8000.

By making a lump-sum offer, the defendant was assured that the plaintiffs would reject the offer and defendant would likely be entitled to costs. Anticipating that defense attorneys had developed a trap that raised the possibility of recovering costs, the courts reacted quickly and ended the trap by requiring the defendant to apportion its offer.[146]

3. Plaintiffs' Independent Acceptance

In 1999, the Seventh Circuit reviewed the question of whether defendants may make joint offers of judgment to multiple plaintiffs. Like the state cases that had addressed the issue, the Seventh Circuit answered in the negative. In *Gavoni v. Dobbs*,[147] the court stated that requiring a defendant to apportion its offer of judgment amount to each plaintiff promotes settling civil litigation.[148] The court reasoned that each agreement made will stimulate further negotiations with nonsettling plaintiffs because as each plaintiff accepts, the share of post-offer costs becomes greater for the nonsettling plaintiffs.[149] Thus, the apportionment requirement furthers the purpose of the statute, which is to promote settlement of civil litigation.[150]

In *Gavoni*, three plaintiffs sued the defendant for personal injuries. The defendant made a joint offer of judgment to the plaintiffs for $10,000 "to be divided among all three plaintiffs, with costs then accrued."[151] The plaintiffs rejected the offer.[152] At trial, the jury awarded the first plaintiff and the second plaintiff $2000 each.[153] The jury awarded the third plaintiff $2500.[154] The total damages awarded to all plaintiffs was $6500.[155]

The defendant moved for costs pursuant to Federal Rule of Civil Procedure 68.[156]

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146. *Gavoni*, 164 F.3d at 1076; Randles v. Lowry, 84 Cal. Rptr. 321, 325 (Cal. Ct. App. 1970); *Taylor*, 883 P.2d at 571.

147. 164 F.3d 1071 (7th Cir. 1999).

148. *Id.* at 1077.

149. *Id.*

150. *Id.*

151. *Id.* at 1074.

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

156. Offers of judgment in federal court are governed by FED. R. CIV. P. 68, which provides:

> At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against

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The trial court denied the motion.[157] The defendant appealed the trial court's decision contending that the total amount that the plaintiffs received ($6500) was less than the unapportioned amount offered ($10,000); thus triggering the cost-shifting provision of rule 68.[158] The appeals court disagreed, finding that the defendant must make apportioned offers of judgment.[159] The court stated that requiring apportioned offers would promote individual acceptance.[160]

Using the facts of *Gavoni* to create an example makes the court's reasoning more clear. When a defendant initially makes an offer of judgment, each plaintiff estimates the risk involved as one-third of the defendant's post-offer costs. If one plaintiff accepts the offer, then the risk for the other two plaintiffs becomes one-half of the defendant's post-offer costs. Therefore, as each plaintiff accepts the offer, the stakes rise for the remaining plaintiffs, thereby encouraging them to settle as well so that they do not face the possibility of paying for 100% of the defendant's costs. Therefore, requiring apportioned offers of judgment promotes the settlement of civil litigation.

B. Conditional Settlements

Courts have also held that if the settlement is conditioned on all plaintiffs accepting, then the offer of judgment is void. In *Hutchins v. Waters*,[161] the California Court of Appeals reasoned that it "is in public interest that the offer of judgment give each [plaintiff] the opportunity to accept and consummate the offer made [to] him."[162] Therefore, the court ruled that the defendant was not entitled to costs because the offer of judgment contained a conditional acceptance provision.[163]

The court found that in offering a judgment, the defendant must make an unconditional settlement.[164] Offers of judgment that require conditional acceptance do not indicate the defendant's willingness to accept. Instead, conditional acceptance offers indicate that the defendant is attempting to create a trap, similar to the trap used by defense attorneys explained above. Namely, the defendant is abusing the offer of

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> the defending party for the money or property or to the effect specified in the offer, with costs then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer of notice of acceptance together with proof of service thereof then thereupon the clerk shall enter judgment. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs. *If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer.* (emphasis added).

Id. This federal statute is substantially similar to an Oklahoma offer of judgment statute. *Compare* FED. R. CIV. P. 68 *with* 12 OKLA STAT. § 1101 (Supp. 1999).

157. *Gavoni*, 164 F.3d at 1074.
158. *Id.* at 1074, 1077.
159. *Id.* at 1077.
160. *Id.*
161. 123 Cal. Rptr. 819 (Cal. Ct. App. 1975).
162. *Id.* at 822.
163. *Id.*
164. *Id.* at 821.

judgment procedure in order to receive costs that normally would not be available to it. Thus, the rule emerges that the court will not allow conditional offers of judgment.

The Alaska Supreme Court adopted the holding from *Gavoni* in *Hayes v. Xerox Corp.*[165] The court stated that requiring plaintiffs to conditionally accept is an unjust requirement. Articulately, the court said that "one plaintiff might think his or her offer is fair while the other may not and it would not only be unfair to require joint acceptance but [it] would also frustrate the chances of settlement which is the purpose behind" offer of judgment statutes.[166]

In *Meisner v. Paulson*,[167] a California appellate court held that "only an offer made to a single plaintiff, without need for allocation or acceptance by other plaintiffs, qualifies as a valid offer."[168] This holding conflicts with other California cases, which state that a defendant can make a joint offer of judgment if the amount is apportioned for each plaintiff.[169]

The distinction between this holding and the majority view is not obvious. However, the distinction is important. The court in *Meisner* required the defendant to write an offer of judgment to each plaintiff on separate pieces of paper.[170] The majority of the cases state that the defendant can make offers of judgment on one piece of paper addressed to all the plaintiffs as long as the offer apportions the amount to each plaintiff and does not require conditional acceptance.[171] The *Meisner* court takes the requirement one step further than the majority, eliminating the need for the apportionment and individual acceptance rules by not allowing the defendant to make an offer of judgment to multiple plaintiffs in one document.[172] Attorneys must note that the courts may eventually follow *Meisner*.

C. Application

If Oklahoma follows the case law set forth,[173] then two rules emerge for Oklahoma lawyers making offers of judgment in multiple-plaintiff cases. First, making an offer to each plaintiff individually is the safest way to avoid denial of the defendant's costs if the plaintiffs reject the offer of judgment. In the alternative, a lawyer may make a joint offer of judgment to all the plaintiffs as long as the defendant apportions the settlement amount to each plaintiff individually. Second, lawyers should not include statements of conditional acceptance in the offer of judgment. If a lawyer elects to include statements of conditional acceptance, she runs the risk of the court denying the defendant's motion for costs.

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165. 718 P.2d 929 (Alaska 1986).

166. *Id.* at 937. The Court was applying FED. R. CIV. P. 68 to the case. FED. R. CIV. P. 68 is virtually identical to title 12, section 1101 of the Oklahoma Statutes. *See supra* note 156.

167. 260 Cal. Rptr. 826 (Cal. Ct. App. 1989).

168. *Id.* at 829.

169. Randles v. Lowry, 84 Cal. Rptr. 321, 325 (Cal. Ct. App. 1970).

170. *Meisner*, 260 Cal. Rptr. at 829.

171. Gavoni v. Dobbs House, Inc., 164 F.3d 1071, 1076 (7th Cir. 1999); *Randles*, 84 Cal. Rptr. at 325; Taylor v. Clark, 883 P.2d 569, 571 (Colo. Ct. App. 1994).

172. *Meisner*, 260 Cal. Rptr. at 829.

173. Whether Oklahoma will adopt the case law is discussed in depth in Part IV of this comment.

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IV. Offer of Judgment in Multiple-Defendant Cases

Oklahoma courts have not addressed the issue of how to make an offer of judgment in cases involving more than one defendant. However, one federal case and at least three state courts have addressed the question.[174] Whether it is better to make an offer of judgment individually or jointly with the other co-defendants depends primarily on whether the defendants in the case are jointly and severally liable. Therefore, this article analyzes how Oklahoma attorneys should make an offer of judgment under these terms. This section addresses three problems. The first problem deals with the situation in which the defendants are jointly and severally liable. The second problem arises where the defendants are severally liable. The third problem arising in offers of judgment with multiple defendants involves settlements between one of the defendants and the plaintiff. The fourth section, then, analyzes the case law presented in sections A through C and presents suggestions on how lawyers should create offers of judgment in multiple defendant cases.

A. Defendants Who Are Jointly and Severally Liable

In cases where the defendants are jointly and severally liable, each defendant is responsible for the entire amount of the judgment entered against it.[175] Thus, courts have held that defendants either should make a joint offer for the entire amount, or if only one defendant makes an offer of judgment, that defendant should make the offer for a sufficient amount to cover all of the damages.

Gilbert v. City of Caldwell[176] is a case involving jointly and severally liable defendants who made an offer of judgment pursuant to Federal Rule of Civil Procedure 68.[177] In *Gilbert*, the first defendant made an offer of judgment for $7500 and the second defendant made an offer of judgment for $2500, jointly delivered to the plaintiff's counsel.[178] The plaintiff rejected both offers.[179] Following trial, the first defendant was found liable individually for $4989 in damages.[180] Both defendants were found jointly and severally liable for $2000 in damages.[181] The trial court awarded the plaintiff $874 in pre-offer costs. Thus, the first defendant was liable either individually or jointly, for the entire amount of the $7863 damages award.[182] The plaintiff claimed it was entitled to recover its post-offer costs because the first defendant was adjudged liable for an amount slightly greater than its individual offer

174. Johnston v. Penrod Drilling Co., 803 F.2d 867 (5th Cir. 1986); Gilbert v. City of Caldwell, 732 P.2d 355 (Idaho Ct. App. 1987); Denil v. Integrity Mut. Ins. Co., 401 N.W.2d 13 (Wis. Ct. App. 1986); Thornburg v. Pursell, 476 So. 2d 323 (Fla. App. 1985).

175. RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT LIAB. § 10 (2000).

176. 732 P.2d 355 (Idaho Ct. App. 1987).

177. FED. R. CIV. P. 68.

178. *Gilbert*, 732 P.2d at 367.

179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.*

of $7500.[183] The first defendant countered that if the plaintiff had accepted both offers, it would have been in a more favorable position than it ultimately was.[184]

The court agreed with the plaintiff, reasoning that each defendant could rely only on its own offer of judgment and that a defendant should not be allowed to rely on the offers of the other defendants.[185] The court further reasoned that interpreting the statute this way would "forward the rule's policy of encouraging fair and reasonable settlement offers by each party."[186] The court held that the offer of judgment rule should be read to test the offer and the recovery from each party independently and "[o]nly if its own offer exceeded its individual liability can the particular defendant be said to have made a fair offer."[187] Therefore, the plaintiff was entitled to recover post-offer costs because the first defendant was held liable for more than the $7500 it offered and, thus, the plaintiff's "position after trial was more favorable than if [the first defendant's] offer had been accepted."[188]

In a footnote, the court pointed out that its result would have been different in a case where the defendants expressly made a joint offer.[189] The effect of the defendants' drafting the offer of judgment collectively would have made the total amount of the offer $9000. The plaintiff's judgment only amounted to $7863; thus, the judgment would have been less favorable to the plaintiff. With such facts, the court indicated that it would have allowed defendant to recover because it could have easily compared the collective offer with the judgments rendered.

Under a similar set of facts, the Florida Court of Appeals agreed with the *Gilbert* court. In *Thornburg v. Pursell*,[190] the court held that it would be inequitable to allow the trial court to treat offers collectively for the purpose of awarding or denying costs.[191] In *Thornburg*, the plaintiffs brought a personal injury action against several defendants.[192] One defendant made an offer of judgment for $1500 in 1982 and the other defendants made an offer of judgment for $500 in 1981.[193] The plaintiffs rejected the offers.[194] Upon trial, the jury awarded plaintiffs $2000 in damages.[195] Plaintiffs filed a motion to tax costs against the defendants.[196] Using the Florida offer of judgment statute,[197] the court denied plaintiffs' motion on the ground that the

183. *Id.* at 368.
184. *Id.*
185. *Id.*
186. *Id.*
187. *Id.*
188. *Id.*
189. *Id.* at 368 n.1.
190. 476 So. 2d 323 (Fla. Dist. Ct. App. 1985).
191. *Id.* at 325.
192. *Id.* at 324.
193. *Id.* at 324-25.
194. *Id.* at 325.
195. *Id.*
196. *Id.*
197. Florida Rule of Civil Procedure 1.442 is virtually identical to title 12, section 1101 of the Oklahoma Statutes. The Florida rule provides in pertinent part as follows:

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plaintiffs' recovery was not more favorable than the defendants' collective offers of judgment, totaling $9000.[198]

On appeal, the court reversed, finding that the two offers of judgment could not be aggregated. Therefore, the judgment rendered to the plaintiffs was more than either of the offers of judgment.[199] The court pointed out that the plaintiffs did not have the opportunity to consider offers collectively because they were made at different times and because the statute mandated that each offer of judgment was withdrawn if not accepted within ten days.[200] Since all the defendants, save one, made an offer in 1981 and one defendant made its offer in 1982, it was impossible for the plaintiffs to consider the offers made together because the earlier offer had expired before the later offer was made.[201]

The court stated:

> The effect of an offer of settlement is determined by its precise terms as formulated by the offeror. The offers in this case were not made simultaneously, and neither offer indicated it was to be joined with the other. . . . We note that, had either of the offers equaled $2,000, the amount of the judgment finally obtained, the offeror would have been entitled to recover costs.[202]

Therefore, the court concluded that plaintiffs were entitled to costs because it would not add the amounts of the two offers and compare the aggregate sum to the judgment rendered.[203]

B. Defendants Who Are Severally Liable

In cases where the defendants are severally liable, each defendant is responsible for only its share of the damages. In this situation, courts have held that the defendants must make separate offers. The analysis of this issue set forth in *Denil v. Integrity Mutual Insurance Co.*[204] is very useful.

In *Denil*, the plaintiff brought suit against four defendants for personal injuries incurred in a car accident.[205] The four defendants made a joint offer of judgment of $2500.[206] The plaintiff rejected the offer.[207] At trial, the jury awarded the plaintiff

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> An offer not accepted shall be deemed withdrawn and evidence of it is not admissible except in a proceeding to determine costs. *If the judgment finally obtained by the adverse party is not more favorable than the offer, the must pay the costs incurred after the making of the offer.* The fact that an offer is made but not accepted does not preclude a subsequent offer.

FLA. STAT. ANN. §1.442 (West 1985) (emphasis added). The last sentence is different from title 12, section 1101 of the Oklahoma Statutes.

198. *Thornburg*, 476 So. 2d at 325.
199. *Id.* at 324.
200. *Id* at 325.
201. *Id.*
202. *Id.* at 325 (citations omitted).
203. *Id.*
204. 401 N.W.2d 13 (Wis. Ct. App. 1986).
205. *Id.* at 14.
206. *Id.*

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$1960.85 in damages.[208] The trial court granted the defendants their costs because the defendants' joint offer of judgment exceeded the plaintiff's damage award.[209]

On appeal, the plaintiff contended that the trial court erred in granting the defendants their costs, asserting that a joint offer of judgment by multiple defendants is ineffective to invoke the cost-shifting under the offer of judgment statute.[210] The court held that defendants who are jointly and severally liable may make joint offers, but defendants who are severally liable must make separate offers.[211] The court reasoned that if it were to allow defendants who are severally liable to make joint offers, the statute's purpose would be defeated in the same way as would joint offers to multiple plaintiffs.[212] "When presented with such an offer, a plaintiff is denied an opportunity to separately evaluate each defendant's offer of admitted liability and to settle the plaintiff's claim with that defendant."[213]

The court affirmed the trial court's judgment because the defendants were found to be jointly and severally liable.[214] Thus, their joint offer was valid and within the purview of the offer of judgment statute.[215] However, under the court's reasoning the outcome would have been different if the defendants had been severally liable. The court indicated that if the trial court had found the defendants severally liable, then the joint offer would not have been valid. Therefore, the severally liable defendants would not have been entitled to post-offer costs.

C. One Defendant Settles

What happens to the offer of judgment amount when a plaintiff rejects an offer made by multiple defendants and subsequently settles with one of the defendants? Not many courts have addressed this problem, though the Fifth Circuit reviewed the issue in *Johnston v. Penrod Drilling Co.*.[216]

In *Johnston*, the plaintiff sued two defendants for personal injuries.[217] Pursuant to Federal Rule of Civil Procedure 68,[218] the defendants made an unapportioned joint offer of judgment for $7500.[219] Plaintiff rejected the offer.[220] Plaintiff later settled with the first defendant for $3500 and proceeded to trial solely against the second

207. *Id.*
208. *Id.*
209. *Id.*
210. *Id.* at 15.
211. *Id.* at 16.
212. *Id.*
213. *Id.* at 17.
214. *Id.*
215. *Id.*
216. 803 F.2d 867 (5th Cir. 1986).
217. *Id.* at 869.
218. FED. R. CIV. P. 68.
219. *Johnston*, 803 F.2d. at 869.
220. *Id.*

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defendant.[221] After trial, the jury awarded plaintiff damages of $6526.80 and all costs of the proceedings.[222]

The second defendant moved to amend the judgment, contending that the plaintiff was not entitled to costs because he declined defendants' offer of judgment.[223] In response, the plaintiff argued that if Rule 68 applies, then the amount received in judgment should include the $3500 he received in settlement from the first defendant because that was the "true measure of recovery."[224] So plaintiff argued that the court should add $6526.80 and $3500 and compare the total ($10,026.80) to the offer of judgment amount ($7500). The second defendant argued that the court should not consider the settlement received from a third party because the rule only addresses sums received by judgment.[225] The second defendant was arguing that the court should only compare the $6526.80 to the $7500. The district court agreed with the second defendant and modified its judgment to assess costs against the plaintiff.[226]

On appeal by the plaintiff, the Fifth Circuit Court of Appeals reversed.[227] The court said that Rule 68 applies to joint offers of judgment made to a plaintiff by a number of defendants.[228] However, the rule did not apply where the plaintiff settled with one of the defendants because the offer of judgment no longer represented the amount for all the defendants.[229] The court stated that it would not add or subtract for the benefit of the plaintiff or the defendant.[230] Rather it would be better for the remaining defendants to make a new offer of judgment once one of the defendants settled out.[231] In its reasoning, the court again reinforced the purpose of promoting settlement.[232]

D. Analysis

1. Joint and Several Rule

The courts' holdings in *Gilbert v. City of Caldwell*[233] and *Thornburg v. Pursell*[234] reflect the danger of defendants making individual offers of judgment where their liability is joint and several. Thus, lawyers who are creating offers of judgment in multiple-defendant cases should consider the following two rules.

First, multiple defendants should try to make a joint offer of judgment for the full amount of the damages. For example, a plaintiff sues three defendants. If the

221. *Id.*
222. *Id.*
223. *Id.*
224. *Id.* at 870.
225. *Id.*
226. *Id.*
227. *Id.*
228. *Id.*
229. *Id.*
230. *Id.*
231. *Id.* at 871.
232. *Id.*
233. 732 P.2d 355 (Idaho Ct. App. 1987).
234. 476 So. 2d 323 (Fla. Dist. Ct. App. 1985).

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defendants are certain that they will be found jointly and severally liable and that an offer of judgment for $10,000 will likely be lower than the actual judgment amount, then the defendants, collectively, should make an offer of judgment for the entire $10,000.

Second, if one defendant must make an individual offer of judgment, but his co-defendants refuse to join in the offer, then the offer amount would have to exceed the entire judgment ultimately obtained by the plaintiffs — not simply the single defendant's proportionate share of the ultimate judgment. Therefore, in the example above if plaintiff recovered $10,000 jointly and severally from the defendants, then an individual offer of judgment would have to be over $10,000. The defendant who made the individual offer of judgment would only recover post-offer costs if his offer of judgment was for more than the total judgment amount.

What if the plaintiff accepted the offer made by a single defendant who is jointly and severally liable with others? In this situation, the individual defendant would be liable for the entire amount. But, if the defendant proceeded to trial with the rest of the defendants, he may not have to pay the amount alone.[235] The individual defendant may be entitled to contribution from the offer of judgment, but this is not likely. However, if the defendant proceeds to trial with the other defendants and subsequently becomes responsible for the entire amount, the defendant cannot sue the other defendants for contribution.[236]

2. Severally Liable Rule

The court's holding in *Denil v. Integrity Mutual Insurance*[237] indicates that lawyers should treat cases with severally liable defendants differently than cases with jointly and severally liable plaintiffs. In cases with severally liable defendants, each defendant should make individual offers of judgment for its calculated share of the damages. For example, if the plaintiff sues three defendants for $10,000 and the defendants are severally liable, then each defendant should make an offer of judgment for an individual amount. The first, second, and third defendants could offer $5000, $4000, and $9000 respectably. If the plaintiff rejects the offers, then at trial the amount designated for each defendant will be easily comparable. If the plaintiff receives a judgment of $3000 against the first defendant, the court will immediately know that the first defendant is entitled to costs because the actual judgment ($3000) is less than the offer of judgment ($5000).

3. Settlement of One Defendant

The rule in *Johnston v. Penrod Drilling Co.*[238] indicates that if one defendant settles after multiple-defendants make a joint offer of judgment, then the remaining

235. 12 OKLA. STAT. § 832 (Supp. 1995). Contribution among joint tortfeasors is beyond the scope of this article.

236. RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT LIAB. § 23 (2000).

237. 401 N.W.2d 13 (Wis. Ct. App. 1986).

238. 803 F.2d 867 (5th Cir. 1986).

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nonsettling defendants should make a new offer of judgment.[239] For example, a plaintiff sues three defendants and all three make a joint offer of judgment for $10,000. The plaintiff rejects the offer. Before the trial, the first defendant privately settles with the plaintiff for $2000. At trial, the plaintiff recovers $9000 against the second and third defendants. The second and third defendants move for costs pursuant to section 1101 because the judgment ($7000) is less than the offer of judgment ($10,000). The court will deny the defendants' motion for costs because the joint offer is no longer applicable because when one defendant privately settles, the offer of judgment no longer represents a true offer by all the defendants together.

To avoid the inapplicability of the statute due to one defendant privately settling, the remaining defendants should make a new offer of judgment, subtracting the amount that they consider to be the first defendant's portion. For example, the second and third defendants could have made a new offer of judgment for $8000 (the original offer of judgment amount of $10,000 minus the first defendant's settlement price of $2000). If the second and third defendant would have taken this step, then they would be entitled to costs because the judgment rendered ($7000) was less than the second amount offered ($8000).

V. Analysis

Oklahoma will likely follow the reasoning and rules promulgated by the cases above for two reasons. First, all the statutes discussed are virtually identical to Oklahoma's offer of judgment statute. Second, in *Dulan v. Johnston*,[240] the Supreme Court of Oklahoma stated that the recognized purpose of Oklahoma's offer of judgment statute is to promote settlement in civil litigation. This is the same as the other states' purposes for enacting the offer of judgment statutes. The cases above all begin with the premise that the purpose of offers of judgment is to promote settlement. When Oklahoma addresses the issue, it will be starting with the same premise. Therefore, the Oklahoma Supreme Court will likely adhere to the reasoning promulgated by the courts above.

Oklahoma courts should adopt concrete rules as have other jurisdictions for five reasons. First, and most importantly, it will further the purpose of the statute in promoting settlement of civil litigation. Second, the rules will reduce the inherent ambiguity present in the statutory language. Third, the rules will help prevent derivative litigation. Fourth, the court will be allowing each individual plaintiff or defendant to make easy comparisons and independent acceptance. Fifth, setting rules to govern the procedure of the offer of judgment statutes will encourage beneficial use of the statutes.

VI. Conclusion

Ultimately, an attorney should know how to address three common trouble areas in the offer of judgment procedure. First, an attorney should know which statute to use

239. *Id.* at 871.

240. 687 P.2d 1045, 1047 (Okla. 1984).

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for her offer of judgment. Oklahoma attorneys should use section 1101 in an action for the recovery of money only. A lawyer should use section 940 for actions to recover damages for the negligent or willful injury to property and any other incidental costs related to such action. The statute only applies to claims for physical injury to tangible property. An attorney should use section 1106 any time that she would use section 1101, but in the situation where the defendant does not want to make an offer of judgment for the entire amount of damages or all actions brought against it.

A lawyer may use section 1101.1 in two situations. First, section 1101.1 can be used for any action for the recovery for personal injury, wrongful death, discrimination, and retaliatory discharge when the plaintiff seeks monetary damages in excess of $100,000 or the offer of judgment is for $100,000 or more. Second, an attorney can use section 1101.1 for any civil action "brought for the recovery of money or property in an action other than" personal injury, wrongful death, discrimination and retaliatory discharge.[241] However, due to the additional risks created by the new statute, the attorney should carefully consider whether using section 1101.1 rather than section 1101 is in her client's best interest.

The second practice tip an attorney should glean from this comment comes when making an offer of judgment in a multiple-plaintiff case. Making an offer to each plaintiff individually is the safest way to avoid denial of defendant's costs after the plaintiffs reject an offer of judgment. In the alternative, a defendant may make a joint offer of judgment to all the plaintiffs as long as the defendant apportions the settlement amount to each plaintiff individually. Another rule is that defendants should not include statements in the offer of judgment that condition the triggering of the cost-shifting provision on the acceptance by both plaintiffs. If a defendant elects to include statements of conditional acceptance, it runs the risk of the court denying the defendant's motion for costs.

Third, an attorney should know how to make an offer of judgment in cases with multiple defendants, or at least know the likely consequences of making joint or separate offers of judgment in tort liability cases. In cases where the defendants are jointly and severally liable, multiple defendants should try to make a joint offer of judgment for the full amount of the damages. If one defendant must make an individual offer of judgment, then the amount offered needs to exceed the judgment ultimately obtained by the plaintiffs — not simply the single defendant's proportionate share of the ultimate judgment. In cases with severally liable defendants, each defendant should make individual offers of judgment for its calculated share of the damages. Attorneys should not include statements of conditional acceptance in joint offers of judgment made by multiple defendants.

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241. 12 OKLA. STAT. § 1101.1 (1991 & Supp. 1999).

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