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Summer 2008

Qualified Litigation Attorneys

2008 LEGISLATIVE UPDATE

By Matthew P. Bandt

The 2008 legislative session closed a day early at midnight on Sunday, May 18. The session brought some significant changes for the insurance industry.

BAD FAITH CLAIMS

The most talked about legislation among civil attorneys from the 2008 session is Chapter 604.18 entitled "Insurance Standard of Conduct". It creates a statutory cause of action against insurance providers for claims allegedly denied in bad faith. The bill takes effect August 1, 2008 and will apply to causes of action occurring on or after that date.

There are two elements to proving a denial in bad faith. First, the absence of a reasonable basis for denying benefits. Second, the insurer must have known there was no reasonable basis for denial or acted in reckless disregard of there being no reasonable basis.

Upon a showing of bad faith, in addition to attorney fees, the court may award damages of up to one-half of the verdict that are in excess of an amount offered by the insurer at least ten days before trial, or $250,000, whichever is less. Attorney fees may not exceed $100,000 and are limited to fees actually incurred in the process of establishing the insurer's liability. The fees must be separately accounted for by the insured's attorney and not be duplicative of fees otherwise incurred in pursuit of the insured's claim. Even upon a showing of bad faith, the court does not have to award fees and damages. It may do so at its discretion.

Pursuant to Subdivision 1(a), Chapter 604.18 does not apply to "provisions… obligating an insurer to defend an insured, reimburse an insured's defense expenses, provide for any other type of defense obligation, or provide indemnification for judgments or settlements." Subdivision 1(a) further excludes specific types of insurance, such as workers' compensation. Pursuant to Subdivision 1(b), the legislation does not apply to persons or entities claiming a third-party beneficiary status under an insurance policy.

35W VICTIMS COMPENSATION FUND

Pursuant to Minn. Stat. § 3.736, state and municipal tort liability is limited to $1,000,000 for claims arising out of a single occurrence. The 2008 legislative session amended the statute to exclude from the cap payments made to survivors of the 35W bridge collapse. Instead, the amendment provides a $400,000 cap for each survivor. In addition, a survivor is entitled to a supplemental benefit, if $400,000 will not cover the survivor's medical expenses, loss of income, future earning capacity, or other financial support.

The amendment required the chief justice to create a three person panel to consider claims, make offers of settlement, and enter into settlement agreements with the survivors on behalf of the state. The chief justice appointed three personal injury attorneys to the panel: Susan Holden, Steven Kirsch, and Michael Tewksbury. They have until February 28, 2009 to make offers to the bridge victims. The victims have forty-five days to accept or decline. If victims decline, their claims will be limited by the $1,000,000 cap for claims arising out of a single occurrence.

WORKERS' COMPENSATION

The 2008 legislative session includes two major changes to Workers' Compensation benefits. First, the maximum weekly compensation rate will be changed from $750.00 to $850.00.

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THE NEW RULE 68 - IS IT AN EFFECTIVE TOOL FOR LITIGATORS?

By Marlene S. Garvis and Jamie Becker-Finn

Changes to Rule 68 Offer

Up until July 1, 2008, the Rule 68 Offer of Judgment or Settlement ("Rule 68 Offer") was fairly straight-forward. It provided that any party could make an offer to the other side to: (1) allow the court to enter judgment for a specified amount against it or (2) accept or pay a specified amount of money. The Rule 68 Offer could include costs and disbursements accrued up until the time of the offer, as well as other relief, and could be made at any time prior to ten days before trial. Once the Offer was made, it was irrevocable for ten days. If it was not accepted within ten days, the Rule 68 Offer was considered withdrawn.

If the Offer was accepted, then one of the parties had to file a notice of acceptance, and judgment would be entered by the court administrator. Multiple offers could be made. Offers not accepted were not admissible, except in proceedings to determine costs and disbursements. Importantly, in a case where an offeree had previously not accepted a Rule 68 Offer, if the final judgment entered was not more favorable to the offeree than the Offer, then the offeree had to pay the offeror's costs and disbursements.

New Rule 68 Offer of Judgment or Settlement

But, now much of that has changed. In February, the Minnesota Supreme Court adopted its advisory committee's recommendations to modify Rule 68, and the new Rule 68 Offer went into effect on July 1, 2008. It contains extensive changes, with new language replacing almost all of the previous text, and the changes apply to "all actions or proceedings pending on or commenced on or after" July 1.

The stated purposes of the changes in the Rule 68 Offer were to further encourage settlements, to add certainty about how the rule operates, and to remove potential surprises to parties making and receiving Rule 68 offers. Whether theses purposes will be realized is unknown. This article will highlight some of the significant content and the implications for use (or misuse) during litigation. It is important to note that the Rule 68 Offer is now broken down into four rules, 68.01, 68.02, 68.03, and 68.04.

Rule 68.01- The Offer

Under **68.01(a)**, as in the previous rule, an Offer may be made any time more than 10 days before the beginning of trial. It also includes two categories of offers: "damages-only" and "total-obligation."

Rule 68.01(c) defines "damages-only" as an Offer that does not include applicable prejudgment interest, costs and disbursements, or attorney fees accrued up until the time of the offer. By contrast, **68.01(d)** defines "total-obligation" as an Offer that includes "then-accrued applicable prejudgment interest, costs and disbursements, and applicable attorney fees." If an Offer does not specifically state that it is a "total-obligation" offer, then it is considered to be "damages-only." And **68.01(b)** simply states that offers made under the rule must specifically refer to Rule 68.

Under **68.01(f)**, an Offer made does not have to be filed unless it is accepted. And **68.01(e)** expressly provides that even when one party's liability has already been determined by verdict, order, or judgment, a Rule 68 Offer can still be made by the party adjudged liable *if the amount or extent of liability still needs to be determined* by an additional hearing or trial. But, per **68.01(e)** an Offer must be made not less than 10 days before the beginning of the proceeding that will determine the extent of liability.

Rule 68.02-Acceptance or Rejection of Offer

Like the previous Rule 68 Offer, **68.02(a)** provides that the Offer is irrevocable for 10 days after being made, and acceptance must be made by serving written notice within 10 days of being served. Under **68.02(b)**, if the accepted Offer is a "total-obligation" Offer, then judgment will be entered for the amount of the Offer. But, if the accepted Offer is a "damages-only" Offer, the court will determine the applicable prejudgment interest, plaintiff-offeree's costs and disbursements, and attorney fees accrued up until the time of the Offer, and that amount will be added to the judgment.

And per **68.02(c)**, when the accepted Offer is for settlement, the settled claims will be dismissed once a stipulation of dismissal stating that all agreement terms have been satisfied is filed or an order of the court implementing the agreement terms is filed.

Rule 68.03-Effect of Unaccepted Offer

The obligations pertaining to costs and disbursements differ depending upon whether the offeror is the *defendant* or the *plaintiff*. Per **68.03(b)(1)**, if the *defendant* is the offeror and prevails or the relief granted to the plaintiff is less favorable than the defendant's Offer, then the plaintiff (1) must pay the defendant's costs and disbursements that have been *incurred after service of the offer* and (2) shall not recover its costs and disbursements that were incurred after service of the Offer. Applicable attorney fees available to the plaintiff are not affected.

Per **68.03(b)(2)**, if the *plaintiff* is the offeror and the relief awarded to the defendant is less favorable than the offer, then the defendant must pay (1) the costs and disbursements to which the plaintiff is entitled under Rule 54.04 and (2) an amount equal to the plaintiff's costs and disbursements *incurred after service of the offer*. These payments do not affect applicable attorney fees available to the plaintiff. But, **68.03(b)(3)** gives courts the ability to reduce the amount of an obligation, if necessary, to eliminate undue hardship or inequity.

The provisions of **68.03** are the most controversial changes in the Rule 68 Offer. Unlike the previous rule, under this rule, the plaintiffs are no longer exposed to pay for all of the defendants' costs and disbursements that have been incurred in the event that the plaintiffs reject a better offer than the verdict. And, the plaintiffs will continue to be able to recover their costs and disbursements up to the time of the rejected better offer ("double costs").

Rule 68.04-Applicable Attorney Fees & Prejudgment Interest

This rule defines "Applicable Attorney Fees" **(68.04(a))** and "Applicable Prejudgment

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ALERT: New JLO Document Preservation Letter

Recently, the Federal Rules of Civil Procedure (FRCP) were updated to specifically include electronically stored information, also known as ESI. Under the FRCP, parties involved in or facing impending federal litigation have a clear duty now to preserve ESI, along with other documents and information that may be relevant or relate to the litigation. JLO attorneys litigating in state as well as federal court have taken notice of the FRCP changes.

What is ESI? ESI is a broad term that encompasses information that can be stored in an electronic format on a computer or other data-storage device. Some common examples of ESI include email, documents created by a word processor such as Microsoft Word, or documents that are scanned and saved to a computer or central database.

What about state courts? Although the Minnesota Rules of Civil Procedure (MRCP) have not been updated to specifically include ESI, more and more discovery issues in state courts have included ESI. And, parties in state-court litigation are now regularly requesting ESI in their requests for documents. While it is likely that our supreme court will probably amend the rules to include ESI, even under the current MRCP, ESI is discoverable and needs to be preserved like any paper document.

What if information is lost or destroyed? The answer to this question is left up to the court. In both the state and federal courts, the judge or magistrate who oversees the discovery issues in a case has wide discretion to sanction a party who loses or destroys discoverable information, regardless if it is accidental or intentional. In fact, the court has discretion to sanction the party, the party's attorney, or both. Sanctions can include monetary sanctions as well as attorney fees; adverse inferences favorable to the party requesting discovery; or even dismissal or judgment.

What are the duties of clients and their attorneys? It is clear that clients must preserve discoverable information as soon as they have knowledge of a likely or impending lawsuit, and attorneys must inform their clients of the duty to preserve discoverable information. Most often, attorneys send their clients a "litigation hold" letter outlining the documents that must be saved and the steps that must be taken to preserve all discoverable information. Attorneys must also periodically monitor their client's compliance with the litigation hold. Now this duty extends to including ESI.

The new document preservation letter. To meet the changing landscape surrounding the discovery of ESI, in light of rapidly evolving technology, JLO has redrafted its document retention and litigation hold letter that we send to our clients. It informs clients of their duty to preserve all documents that may be relevant or relate to the litigation, specifically including ESI. Our JLO attorneys, together with clients, will develop specific document preservation strategies that successfully apply the rules of discovery to the litigation situations at issue.

Any questions about a document preservation letter that you receive should be directed to the JLO attorney who sent it to you.
By Mark K. Hellie

Rule 68 *continued from page 2*

Interest" **(68.04(b))**. Of significance is that both definitions emphasize that the Rule 68 Offer does not create a right to attorney fees not provided for elsewhere "under applicable substantive law."

Will the Rule 68 Changes be Effective?

Proponents of the changes to the Rule 68 Offer assert that the new rule will better meet the goal of encouraging settlement, and that plaintiffs will now be more inclined to use the rule. Opponents, however, argue that the changes are unfair to the defendants by allowing the plaintiffs the potential to collect double costs under Rule 68.03(b)(2). Opponents also believe the new rule is unfair because the hardship exception will likely favor the plaintiffs over the defendants.

It would not be surprising to see that Rule 68 Offers are served with a summons and complaint. As **68.03(b)(2)** allows the plaintiffs to get "double costs" from the moment that the Offer is rejected, making the Rule 68 Offer early can essentially set up the defendants to pay the "double costs" in almost every case. This threat to defendants will likely not encourage settlement; rather it may force them to settle cases that should be taken to trial.

There is controversy and unrest about the new Rule 68 Offer, especially among defense attorneys. Thus, whether it will be an effective tool for litigators: to encourage settlement, add certainty to the Rule's operation, and remove the element of surprise . . . only time will tell.•

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Second, the cap on temporary total disability benefits will increase from 104 to 130 weeks. In addition, the legislation extended the time frame to request retraining from 156 to 208 weeks of temporary total or temporary partial disability benefits paid. These changes will apply to all injuries occurring on or after October 1, 2008.

Starting October 1, 2008, the maximum hourly rate for qualified rehabilitation consultants (QRCs) will increase from $88.06 to $91.00 and the maximum hourly rate for QRC interns will be $81.00.

For all out of state treatment provided after April 30, 2008, medical providers must now be paid at the rate the provider would receive under the workers' compensation law where the treatment was provided. This provision applies to all dates of injury.

The legislature amended Minn. Stat. 176.245 to permit the Department of Labor and Industry to audit records and files to determine whether appropriate benefits have been paid.

Lastly, the legislature passed new legislation apportioning $4.9 million from the worker's compensation assigned risk plan to fund the University of Minnesota Taconite Worker's Lung Health Study. •

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If you have any questions about the subject matter of the articles in this newsletter, please feel free to contact the authors.

Coming in the Fall 2008 Issue...

Products Liability

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