

WASHINGTON CASE UPDATE

Including Costs in Settlement Offers May Cost You

case in point...

From the desk of Kyle D. Riley: Washington's Mandatory Arbitration Rules require that a party that fails to improve its position after requesting a trial de novo following an arbitration award must pay the prevailing party's attorney fees. If a party serves an offer of compromise before trial, the offer replaces the arbitration award as the number to beat at trial. But how does a court evaluate a vague or confusing settlement offer when determining whether a party's position was improved? Read on to find out.

Claims Pointer: In this personal injury case arising out of a car accident, the Washington Supreme Court held that settlement offers will be interpreted as an ordinary person would understand them. This case is a reminder to all litigants to make clear and comprehensible settlement offers, particularly after a trial de novo has been requested following arbitration.

Nelson v. Erickson, No. 92489-9, Washington Supreme Court (August 18, 2016)

Jess Nelson ("Nelson") sued Michael Erickson ("Erickson") for personal injuries after a car accident. At mandatory arbitration, the arbitrator awarded Nelson \$44,923, including \$1,522 for attorney fees and costs. Erickson was dissatisfied and decided to go to trial. Nelson, hoping to avoid trial, presented an offer of compromise for "\$26,000 plus taxable costs incurred at arbitration." Erickson did not respond to the settlement offer.

At trial, the jury awarded Nelson \$24,167. The judge added an additional \$3,000 for future noneconomic damages on Nelson's motion, bringing the total award to \$27,167. Nelson then moved for attorney fees under Washington's Mandatory Arbitration Rules on the grounds that Erickson failed to improve his position at trial. According to Nelson, the settlement offer was for \$26,000, and because the trial award was for \$27,167, Erickson's position was not improved. The trial judge agreed, awarding Nelson \$59,908 in attorney fees and \$4,488 in costs.

Erickson appealed, arguing that the settlement offer was actually for \$26,000 plus the known arbitration costs of \$1,522, for a total of \$27,522. Because the total offer was higher than the award at trial, Erickson did improve his position at trial and was not liable for attorney fees.

Under Washington law, if a party requests trial de novo after mandatory arbitration and does not improve his or her position at trial, the other party is entitled to attorney fees. Where a party offers to settle prior to trial, the settlement offer replaces the arbitration award when determining whether the party who requested trial improved his or her position. The issue in this case was how to characterize Nelson's settlement offer—for a flat \$26,000, or for the total value, including arbitration costs, of \$27,522.

Prior Washington case law on this matter relied on two principles in ascertaining the true value of a settlement offer that includes costs: first, parties generally cannot include costs in their settlement offers; and second, courts determine the amount of a settlement offer by reading the offer as an ordinary person would. Because these principles would conflict on the facts of this case, the Washington Supreme Court was tasked with determining which principle would prevail.

Nelson argued that Erickson should have known the settlement offer was only for \$26,000 because Washington law prohibited including costs in an offer. The Court pointed out that if Nelson wanted to settle for \$26,000, he could have made an offer for \$26,000. As a matter of fairness, the Court rejected Nelson's position that he had no right to make the offer he did and that Erickson was responsible for identifying the flaw in the offer. Why would



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Nelson have made an offer he had no right to make? The Court determined Nelson was either intentionally or negligently making a confusing offer, and he could not be rewarded for making a confusing offer that he later argued was improper.

Ultimately, the Court read the offer as an ordinary person would—\$26,000 plus the known arbitration costs of \$1,522—to provide an incentive for parties to avoid making confusing settlement offers. The Court explained that it sought to discourage parties both from including costs in their offers and from making vague or confusing offers. Parties will be held to the total settlement amount in their offer, and offers will not be dissected by the courts after the fact.

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