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New Jersey Supreme Court Affirms Judgment in Case Involving an Offer of Judgment and a High-Low Agreement

By: Benjamin A. Hooper, Esq.

In a unanimous decision, the New Jersey Supreme Court ruled that high-low agreements are deemed contracts and that, unless expressly reserved, a plaintiff cannot seek an award of fees and costs under the offer of judgment rule, R.4:58. Serico v. Rothberg, M.D., (A-69-16) (079041)

The plaintiff's claim arose from Dr. Rothberg's alleged negligence in diagnosing Mr. Serico's colon cancer. Before trial, in April 2014, plaintiff served defendant with an offer of judgment to settle the case for \$750,000, but warned that if the offer was refused plaintiff would seek "all reasonable litigation expenses including costs, interest, and attorney's fees in accordance with Rule 4:58." At the trial, in October 2015, following the conclusion of the evidence, and while the jury was deliberating, the parties entered into a high-low agreement on the record. The "low" was \$300,000 and the "high" was \$1,000,000. Neither party mentioned Rule 4:58, nor did they explicitly waive or preserve rights pursuant to the Rule. The jury awarded plaintiff a total amount of \$6,000,000, and the Court entered judgment for \$1,000,000, as specified by the high-low agreement. Plaintiff filed a motion for post-judgment relief in which Serico requested litigation expenses, including attorney's fees pursuant to Rule 4:58-2. Serico argued that the \$1,000,000 judgment implicated the Rule's fees and costs provisions, which are triggered when an offer of judgment is refused and the resulting verdict amount equals or exceeds 120% of the offer, as in this particular instance.

The trial court denied the motion for fees and costs. On appeal the Appellate Division affirmed the trial court's decision in a published opinion. Serico v. Rothberg, 448 N.J. Super. 604 (App. Div. 2017). The appellate panel determined that Serico could not recover any amount beyond the high because the high-low agreement was a contract, and should be enforced as written. In this instance the plaintiff did not expressly preserve the right to seek the fees and costs under the rule. The New Jersey Supreme Court granted plaintiff's petition for Certification.

Florham Park

220 Park Avenue
Florham Park, NJ 07932
(973) 539-1000

Paramus

115 West Century Road
Suite 100
Paramus, NJ 07652
(201) 262-1600

Sparta

351 Sparta Avenue
Sparta, NJ 07871
(973) 295-3670

New York

116 West 23rd Street
Suite 500
New York, NY 10011
(212) 386-7628

The New Jersey Supreme Court opinion analyzed whether the high-low agreement between the parties waived plaintiff's right to seek litigation expenses under the offer of judgment rule. The Court scrutinized the high-low agreement at issue in the case under the rule of contract interpretation. The Court determined that the purpose of the high-low agreement was to mitigate the inherent risk to the parties of an unfavorable jury verdict. The plain language of the agreement was silent on the issue of the Rule 4:58 penalties. In exploring the verbal record, the Court emphasized that the parties intended the \$1,000,000 to be the maximum recovery, and that it was anticipated that the agreement would replace any prior agreement. Therefore, although the judgment triggered penalties associated with a qualifying offer of judgment, the settlement through the high-low agreement superseded and extinguished the offer of judgment. The Court stated that only an explicit preservation of a right to Rule 4:58 expenses would have enabled the plaintiff to pursue them when entering into the high-low. In its conclusion the Court noted that "[a] crucial aspect of any high-low agreement is finality; both parties benefit from the strict and explicit limitation of financial exposure that such agreements provide."

As a matter of policy, the decision benefits all litigants. High-low agreements assist both plaintiff and defendant to mitigate the risk of an unfavorable jury verdict. Justice Fernandez-Vina, who authored the opinion on behalf of the Supreme Court, at oral argument, captured the essence of the high-low agreement with a baseball analogy: The purpose of the high-low agreement is to prevent the plaintiff from striking out but also to protect the defense from giving up a home run.

Schenck Price Smith & King, LLP represented the defendant-respondent before the Appellate Division and New Jersey Supreme Court. For more information contact Benjamin A. Hooper, Esq. or Peter A. Marra, Esq.

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