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CASE QUESTIONS RETROACTIVITY OF CHANGE TO OFFER-OF-JUDGMENT RULE

By: Michael Booth

Most court rule amendments take effect quietly and painlessly, but a change in New Jersey's offer-of-judgment rule after trial but before verdict in business dispute may end up costing the victorious plaintiff an award of counsel fees.

The trial judge and an appeals court have held that an amendment to Rule 4:58-2, which took effect Sept. 1, 2004, should apply retroactively to an offer of judgment made about a year earlier in the case, *Romagnola v. Gillespie*, A-57-07.

At the state Supreme Court on Monday, the plaintiff's lawyer called the result a manifest injustice, especially since the parties had been waiting almost six months for a verdict in the bench trial when the rule amendment took hold.

"The rules of the game changed after the game was played," said Thomas Scrivo, of Morristown's McElroy, Deutsch, Mulvaney & Carpenter.

The case sprang from a business merger that went sour. Richard Gillespie purchased Richard Romagnola's advertising agency, absorbed it into his own and hired Romagnola under a salary/incentive compensation plan. Gillespie then sold his agency to the Interpublic Group of Companies Inc., without getting Romagnola's consent as the original asset-purchase agreement required. The second deal deflated Romagnola's compensation. The relationship deteriorated and Gillespie fired him, leading Romagnola to sue Gillespie and Interpublic for breach of contract.

In March 2002, prior to trial in Somerset County, Romagnola served an offer of judgment of $1,165,000, which the defendants did not accept within the 90-day limit of R. 4:58-1. A bench trial before Superior Court Judge Julia Marino began Oct. 21, 2003, and ended March 24, 2004. She reserved decision.

While the ruling was pending, the Court adopted an amendment to R. 4:58-1, which took effect Sept. 1 of that year. Whereas the rule had allowed recovery of attorneys' fees and interest if the defendant rejected an offer and the plaintiff ultimately won at trial a judgment at least as favorable as the offer rejected, the amended rule required that the judgment be at least 120 percent of the original offer.

On Sept. 24, 2004, Marino awarded Romagnola $1,315,909 - well above his pre-trial offer but $82,091 short of the 120 percent mark.

Marino retroactively applied the amended R. 4:58-2, finding that when there are changes to procedural rules, the rule in effect on the date a judgment or order is entered should govern.

The Appellate Division agreed. "When a rule is amended, every party in pending litigation is potentially affected one way or another; some parties receive a procedural or substantive benefit, others suffer a concomitant detriment," wrote Judges Howard Kestin, Harvey Weissbard and Ronald Graves per curiam. "A straightforward application of time-of-decision principles has the merit, in all events, of holding all parties to the same external standard."

On Monday, Scrivo argued to the Court that notwithstanding the general doctrine of retroactivity of procedural rule changes, imposing the new rule on parties that have already completed their cases was fundamentally unfair.

Justice Barry Albin said the bar was on notice in June 2004 that the amendment would become effective on Sept. 1. "Were you getting nervous?"

No, said Scrivo, adding, "We viewed the issue as one of fundamental fairness, that judge would apply the rules as they were when the game was played."

Justice Roberto Rivera-Soto restated the issue: "Should you be visited by the failure of the trial court to render a decision for six months? If it had been five months you would not be here."

"That's correct," replied Scrivo.

Justice Barry Albin asked whether the plaintiff would have adjusted his offer of judgment downward had he known he would be subject to the amended rule.

Scrivo said that was a possibility but said that after a certain point - that is, the end of presentation of evidence and the conclusion of post-trial motions - it would not have mattered. "We don't have any history of [considering a change in the offer of judgment] because no action could be taken then," he said.

Craig Hilliard, the attorney for Gillespie and Interpublic, said the Court changes rules frequently and lawyers are supposed to keep abreast.

"Those are the rules of the game," said Hilliard, of Lawrenceville's Stark & Stark. "They know the rules can be changed at any time. That is the risk they take" when rejecting an offer. He noted that in March 2003, the defendants made an offer of judgment to pay $900,000, which Romagnola did not act on.

"Our rules also permit relaxation," Justice Jaynee LaVecchia noted.

"It's the time-of-decision rule that governs," Hilliard countered.

Hilliard said the manifest-injustice doctrine that Scrivo invoked was meant to apply to changes in laws. "The Court has never applied manifest injustice to a rule" and should not do so now, he said.

"Why not?" Albin asked.

Hilliard said he was not suggesting that the Court should never do so, just that it should not be done here.

"Why not?" Justice Virginia Long repeated.

"Because the ruling [denying the request for counsel fees] was not unfair," said Hilliard. "Any reliance on the old rule never changing is unreasonable."