As a member of the trial bar, when was the last time you served — or were served with — an offer to confess judgment, not under Okla. Stat. tit. 12, §§1100 or 1101.1, but rather under §1106? If you’re like most of us, your answer is either “Huh?” or “Never!” However, as any Oklahoma attorney trying any of a range of civil lawsuits can attest, there are few more potent weapons in the defense arsenal than a well-timed, precisely calibrated offer (or offers) of judgment. At a single stroke, the risk of all further costs in the action (including, in many instances, attorneys’ fees) is thrown onto the plaintiff, often generating sufficient uncertainty so as to lead to the immediate conclusion of the litigation. However, the curious fact is that since well before statehood, with very few exceptions, the Oklahoma defense bar has “left a weapon unused” in the litigation arsenal. That weapon, an offer to confess judgment in part under Okla. Stat. tit. 12, §1106, could quite possibly have assured “an easy victory.”

Section 1106 has been part of Oklahoma law since before statehood. The unused place on the shelf to which §1106 is consigned appears to be the result of a fundamental misunderstanding regarding the statute’s meaning and operation. When viewed as a device for terminating the entire litigation without trial, rather than simply eliminating one or more claims from a trial which may proceed in any event, the proper function of the statute becomes clear. Section 1106 permits a defendant to limit the judgment it will suffer to not only the offered sum, but also to the specified claim, thus permitting it — among other things — to refuse to suffer judgment as to other claims it deems to be frivolous. In this fashion, the real potential of this 19th-century device for discouraging frivolous claims in litigation — a timely and highly relevant concern — can be realized.

GIVING MEANING TO THE STATUTE

A §1106 Offer Is Designed to Terminate the Litigation In Its Entirety, Not Simply Thin Out the Claims and Issues For Trial.

With respect to offers of judgment in Oklahoma, it has been stated that “there are several
offer of judgment statutes, and under what circumstances a particular statute should be used can be very confusing.” Andrea Cutter, Navigating the Offer of Judgment Quagmire, 82 O.B.A.J. 367 (2/12/11). In particular, offers under §1106 have proven most confusing and therefore seldom used. In one leading civil procedure treatise, §1106 is omitted entirely from the list of offers of judgment available in Oklahoma in favor of its better-known (and more frequently used) cousins, including Okla. Stat. tit. 12, §§940(B), 1101 and 1101.1 and Okla. Stat. tit. 36, §3629(B).

Moreover, even when recognized, §1106 has proven difficult to decipher. For instance, an argument can be made that based upon the caption of the statute (“Offer to confess judgment in part”) and body (“*** may offer in court to confess judgment for part of the amount claimed, or part of the causes involved in the action ***”), the purpose of §1106 is to authorize a ‘partial offer of judgment,’ that is, an offer of judgment directed to less than all of the claims in the action which, if accepted, will leave the remaining claims in the action for resolution at trial. Under this view, the interface between §1106 and its cousin, §1101, “is that §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,” with the function of a §1106 offer of judgment being simply to eliminate one or more claims or damage demands from a trial which will go forward on the remaining claims or damage demands, in any event. Leah Marie Thomas, Practice and Procedures: A Guide to Oklahoma’s Offer of Judgment Statutes, 54 Okla.L.Rev. 149, 159 (2001) (hereinafter, “guide”) (footnotes omitted).

However, this raises a critical question: If §1106 is to be construed as giving the defending party a method for eliminating one of two or more claims prior to trial and then proceeding to try the remainder, what happens if the offer is rejected? The answer is problematic:

“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.” A court could interpret this language to mean that if the defendant offers to confess judg-

ment 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.”

Guide, at 161 (emphasis added). This would seem to inject an element of unfairness: A plaintiff who rejects an offer of judgment as to one of its claims has not been given the opportunity to resolve its other claims by the offer, yet is punished for proceeding to trial on the other claims — if unsuccessful — by being forced to pay all the defendant’s costs.

Another problem arising under this interpretation of §1106 is, what amount must be compared with the partial offer of judgment? To determine whether a defendant whose offer was rejected 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 $5,000 and the plaintiff rejects the offer. At trial, the jury awards $3,000 for emotional distress and $3,000 for false imprisonment, a total judgment of $6,000. The defendant moves for costs under §1106 contending that the damages award for the emotional distress ($3,000) was less than the offer of judgment ($5,000). It is unclear whether the defendant will prevail or whether a court will compare the total judgment for emotional distress and false imprisonment ($6,000) to the partial offer of judgment ($5,000). If a court chooses the latter, the defendant will not be entitled to costs under this example.”

Guide, at 161 (emphasis added)

In the face of such seeming difficulties, some analysts have concluded that the statute may ultimately perform no useful function whatsoever:

“Due to the myriad of problems created under §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
...§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...

offer of judgment, then the defendant’s desires will not have been fulfilled and the effects of §1106 are virtually useless. Thus, the defendant should consider making a §1101 offer of judgment, if its §1106 offer of judgment is rejected.”


However, the seeming anomalies associated with the §1106 offer of judgment are resolved, and §1106 takes its legitimate and powerful place in the defendant’s arsenal of offer of judgment devices, when it is understood that a §1106 offer of judgment is not intended simply to eliminate one of several claims from a trial which will go forward whether the offer is accepted or not, but rather, it is intended to end the litigation in its entirety based upon entry of the judgment offered. This conclusion is support on multiple grounds.

First, the statute provides that the option presented to the plaintiff is to accept or refuse the offer “in full of his demands against the defendant in the action.” Okla. Stat. tit. 12, §1106. If plaintiff rejects the offer to confess and fails to recover more at trial, it must pay “all the costs of the defendant incurred after the offer,” not — insofar as the terms of §1106 indicate — just those incurred in connection with the causes specified in the offer. It has been suggested that there is an element of unfairness in punishing a plaintiff with the payment of all a defendant’s costs for rejecting an offer of judgment going to only one of several claims, if the purpose of the offer is just to eliminate the one claim from the trial of the action. However, no such unfairness arises when the purpose of the offer is to terminate the entire litigation and all claims therein based upon entry of the judgment offered, that is, judgment upon the claim and in the sum specified.10

Second, authority from other jurisdictions supports the argument that an offer under §1106 is designed to end the litigation. As stated by the Kentucky Court of Appeals in a case construing a statute identical to §1106,

“[s]uch right was not affected by the offer of the defendant to confess judgment. That offer was conditioned on its acceptance by the plaintiff in full of his demands. An offer to confess judgment under §640 of the Civil Code of Practice is designed to end the litigation.”

Martin v. Provident Life & Accident Ins. Co., 242 Ky. 667, 47 S.W.2d 524, 527 (1932) (emphasis added).11 The object of such an offer is not to narrow down the issues for trial, but rather to narrow down the cause for incurring further expense in the litigation. See Carpenter v. Kent, 11 Ohio St. 554, 558, 1860 WL 96 at *3 (Ohio). See also In re: Estate of Redpath, 224 Neb. 845, 402 N.W.2d 648, 651-652 (Neb. 1987) (an offer under Neb. Rev. Stat. 25-906, identical to §1106, is made in an effort to resolve the entire lawsuit, and does not permit the plaintiff to both accept the offer and proceed to litigate whether it is entitled to more).

Finally, the conclusion urged herein serves the long-recognized purpose of offer of judgment statutes. Oklahoma’s §1106 allows an alternative to those situations where the result of the traditional rule under English statutory law — that a successful plaintiff is entitled to payment of all costs by defendant — is contrary to the purpose of that rule, that is, to penalize with costs the party responsible for the unnecessary trial. This problem can arise when a defendant contests, not the right, but rather the amount of recovery, and is forced to bear the costs when the plaintiff has demanded too much. As stated in Carpenter v. Kent, supra, construing a statute identical to §1106 (§498 of the former Ohio Code of Civil Procedure):

“The statutes of England, however, at an early period, subjected the failing suitor in all litigations at law, to pay the costs of the adversary party; and such has been the general legislation upon the subject in this country. But the reason of the rule was not always realized in the result of litigation between the parties under the application of this general rule, that the party against whom judgment was finally rendered, should also be adjudged to pay all costs. It not unfrequently happened that the debtor, or party delinquent, for one hundred, was
sued for two hundred dollars, and an expensive litigation ensued; not as to the right of recovery, but as to the amount of the recovery. And in such cases, under the operation of the general rule, although the verdict of the jury was for the amount admitted by the defendant, he was, contrary to the reason of the rule, adjudged, under it, to pay the expense of the litigation, and all costs were taxed against him, as an incident of the judgment.

By the code of civil procedure, the rule in this State, in all actions for the recovery of money, was sought to be qualified in this particular, so as to render it consonant to the reason of the rule, ***.

Carpenter, 1860 WL 96 at **2 and 3, 11 Ohio St. at 557-59.12

While Carpenter addressed the problem arising where a defendant who contests the amount of recovery, but not the right, is forced to bear the costs where the plaintiff has demanded too much, it is submitted that the very same problem confronts the defendant sued by a plaintiff who seeks damages for both a meritorious and a non-meritorious claim. Absent the statute, if the plaintiff recovered on the valid claim, he was entitled to collect all the costs of the action, even though defendant prevailed on the invalid claim. Section 1106 permits a defendant sued for too much — whether due to an excessive demand, or the coupling of a valid claim with an invalid claim — to offer to confess judgment for the true amount owed, thereby shifting the costs arising from unwarranted continuation of the litigation upon the plaintiff. Correcting such abuses requires the conclusion that the acceptance of a §1106 offer ends the litigation.

**CONCLUSION**

Properly construed, §1106 fulfills a unique role in an Oklahoma defendant’s offer of judgment arsenal by permitting the defendant to recognize that one of several claims against it is meritorious and to offer to suffer judgment on the meritorious claim only, for the sum submitted. This conclusion finds support in both the text of the statute and in cases construing similar statutory provisions in other jurisdictions. It recognizes that the defendant is offering not only to pay plaintiff a sum of money, but also to suffer judgment to be entered against it. It makes sense, from a policy standpoint, to permit the defendant to limit its offer to suffer judgment to the claim or claims it deems viable and non-frivolous. This 19th-century notion resonates strongly in the ongoing debate regarding how best to discourage frivolous litigation. By permitting an offer to be made going to part of the amount claimed or part of the causes in the action, §1106 thus serves a purpose different from that of §1101. In addition, it permits a defendant to make its offer of judgment without opening itself to the danger of counter-offers of judgment from the plaintiff, such as are available under §1101.1. Offers of judgment under §1106 need no longer be “a weapon unused.”

Author’s note: The authors wish to express their appreciation for the encouragement and assistance of their colleague, the late Douglas M. Todd, J.D.

1. Okla. Stat. tit. 12, §1106 provides:
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, and 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.

2. 1B Charles W. Adams and David J. Boudreau, Vernon’s Okla. Forms 2D, Ch. 7D.

3. Okla. Stat. tit. 12, §940(B) provides:
B. Provided that, the defendant in such action [any civil action to recover damages for the negligent or willful injury to property] 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 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 an amount different as the defendant’s offer, then the plaintiff shall incur their own attorney’s fees, court costs and interest. 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.

4. Okla. Stat. tit. 12, §1101 provides in part:
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 accepts the offer and gives 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 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 at 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.
The minimum requirements of a §1101 offer are: 1) a formal offer to confess judgment; 2) in writing, with a copy served on opposing counsel; and 3) giving plaintiff five days to accept or reject. Bullard v. Grisham Constr. Co., 1983 OK 21, §§, 660 P.2d 1045, 1047.

5. Okla. Stat. tit. 12, §1101.1 provides in part:

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 §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 attorney fees otherwise recoverable unless it expressly provides otherwise. 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. ***

3. In the event the plaintiff rejects the offer(s) of judgment and the judgment awarded the plaintiff 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 attorney fees incurred by that defendant from the date of filing of the final offer of judgment until the date of the verdict. ***

4. In the event a defendant rejects the counteroffer(s) of judgment and the judgment awarded to the plaintiff is greater than the final offer of judgment, then the plaintiff filing the offer of judgment shall be entitled to recover reasonable litigation costs and reasonable attorney 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), or where the defendant makes an offer of judgment more than One Hundred Thousand Dollars ($100,000.00). Any offer of judgment may preclude 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 §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. ***

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.

3. If no offer of judgment or counteroffer of judgment is accepted and the judgment awarded the plaintiff is less than one or more offers of judgment, the defendant shall be entitled to reasonable litigation costs and reasonable attorney fees incurred by the defendant with respect to the action or the claim or claims included in the offer of judgment 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 is greater than one or more counteroffers of judgment, the plaintiff shall be entitled to recover the reasonable litigation costs and reasonable attorney 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. ***

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


6. It shall be the duty of the insurer, receiving a proof of loss, to submit a written offer of settlement or rejection of the claim to the insured within ninety (90) days of receipt of that proof of loss. Upon a judgment rendered to either party, costs and attorney fees shall be allowable to the prevailing party. For purposes of this section, the prevailing party is the insurer in those cases where judgment does not exceed written offer of settlement. In all other judgments the insured shall be the prevailing party. If the insured is the prevailing party, the court in rendering judgment shall add interest on the verdict at the rate of (15%) per year from the date the loss was payable pursuant to the provisions of the contract to the date of the verdict. This provision shall not apply to uninsured motorist coverage.

7. The conclusion that a §1101 offer of judgment reaches all demands and denials in the subject “action for the recovery of money only” while a §1106 offer can extend to “part of the amount claimed, or part of the causes involved in the action” is, in our view, entirely supported by the text of the statutes. We recognize that an Oklahoma Court of Appeals case, Maltos v. Bison Federal Credit Union, 1994 OK CIV APP 83, 879 P.2d 1254, 1257, stated, in dictum and without citation of authority, that a §1101 offer could be directed at less than all of the claims in an action, leaving the remaining claims to be litigated further. However, this case has not been cited further and, in our view, is unsupported by the case. See also Oklahoma Civil Procedure, J.D. Bullard, 82215, §1002 Offer of Judgment, pp. 10-12 to 10-13 (“Judgment entered on an offer of judgment encompasses all causes of action pending at the time of the offer, so that attorney’s fees should be awarded if any cause asserted would permit their recovery. Defendant cannot analyze the various theories presented in an attempt to show that attorney’s fees would have been unrecoverable on some of them ***,” and “[t] does not appear that this problem can be avoided by specifying that the offer relates only to causes of action on which no attorney’s fee would be awardable”, citing, inter alia, Maltos); and the Guide, 54 Okla. L. Rev. at 160 (“The difference between sections §1106 and §1101.1 instead of §1101.1 instead of §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”).

8. Under our interpretation of §1106, infra, the answer to the hypothetical is that the defendant’s $5,000 offer of judgment, albeit directed at the emotional distress claim, must be compared with the combined total of the $3,000 award for emotional distress and the $3,000 award for false imprisonment. Properly construed, the $3,000 offer under §1106 was based upon the premise that the false imprisonment claim was without merit and would not result in any jury award at all. The combined $6,000 jury award in the hypothetical thus defeats the offer of judgment.
confession of judgment in full of his demands; or, having had reasonable notice that the offer would be made, of its amount, and of the time of making it, 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 amount to which the plaintiff is entitled, nor be given in evidence upon the trial.

See also Tyler v. Hamilton, 108 Ky. 120, 55 S.W. 920, 921 (1900).

12. Section 498 of the former Ohio Code of Civil Procedure provided:

After an action for the recovery of money is brought, the defendant may offer in court to confess judgment for part of the cause 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 an admission of the cause of action, or amount to which the plaintiff is entitled, nor be given in evidence on the trial.

See also Tyler v. Hamilton, 108 Ky. 120, 55 S.W. 920, 921 (1900).


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