

HANSEN LAW FIRM, LLC

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# Qualified Settlement Offers

## Pros and Cons

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Bodily injury or property damage claims fall in only two categories; litigated to resolution (trial or dispositive motion) or settled. In order to determine which category a claims adjuster believes the claim fits, the adjuster must conduct a full investigation.

A claimant's or plaintiff's attorney's goal is to maximize the recovery through every ethical means available. This includes playing off the cost of defense to the carrier. The cost of defense card carries the most weight in the smaller claims.

The General Assembly has provided both sides to a claim a mechanism that is useful to pushing resolution of small claims. The mechanism applies to all claims. However, in reality, it has "teeth" only in the smaller claims. This mechanism is the Qualified Offer of Settlement. The Statute for the Offer provides as follows:

### **IC 34-50-1-6 Attorney's fees and costs**

Sec. 6. (a) If:

- (1) a recipient does not accept a qualified settlement offer; and
- (2) the final judgment is less favorable to the recipient than the terms of the qualified settlement offer;

the court shall award attorney's fees, costs, and expenses to the offeror upon the offeror's motion.

(b) An award of attorney's fees, costs, and expenses under this section must consist of attorney's fees at a rate of not more than one hundred dollars (\$100) per hour and other costs and expenses incurred by the offeror after the date of the qualified settlement offer. However, the award of attorney's fees, costs, and expenses may not total more than

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one thousand dollars (\$1,000).

(c) A motion for an award of attorney's fees, costs, and expenses under this section must be filed not more than thirty (30) days after entry of judgment. The motion must be accompanied by an affidavit of the offeror or the offeror's attorney establishing the amount of the attorney's fees and other costs and expenses incurred by the offeror after the date of the qualified settlement offer. The affidavit constitutes prima facie proof of the reasonableness of the amount.

(d) Where appropriate, the court may order a judgment entered against the offeror and in favor of the recipient reduced by the amount of attorney's fees, costs, and expenses awarded to the offeror under this section.

The above language is a bunch of lawyer speak for the following concept. After either side completes its full investigation and is reasonably comfortable with its evaluation, that side to the dispute will likely approach the opposing side to resolve the claim. An offer or demand (no difference) will be made.

The other side has 30 days to accept or reject the offer of settlement. If the party rejects, and does not fair better at trial, the rejecting party owes fees and expenses up to \$1000.00.

The reason this mechanism only works well in smaller cases is risk allocation. If a plaintiff believes his claim has high value (100,000+); there is little risk in an additional 1,000 in fees if he loses his claim.

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However, if the plaintiff has a claim worth 900.00 to 3000.00; then there is some teeth to the offer.

In 2004, the Indiana Court of Appeals upheld the sanctity of the award of fees and expenses, holding the award was **mandatory** not discretionary with the Court. In so holding the Court stated in pertinent part:

When the word '**shall**' appears in a statute, it is construed as mandatory rather than directory unless it appears clear from the context or the purpose of the statute that the legislature intended a different meaning. The term 'must' carries with it the same meaning." *Romine v. Gagle*, 782 N.E.2d 369, 379-80 (Ind.Ct.App.2003) (citations and internal quotation marks omitted), *trans. denied*, Shepherd points to "shall" in subsection (a) and "**must**" in subsection (b) of Indiana Code Section 34-50-1-6 and asserts that "there is nothing in the statute that permits the trial court to award less than \$1,000 when the facts require such an award." Appellant's Br. at 8. We agree. Subsection (a) requires a trial court to award attorney's fees, costs, and expenses to the offeror upon the offeror's motion. More specifically, subsection *\*1204* (b) provides that an award "**must consist of attorney's fees** at a rate of not more than one hundred dollars (\$100) per hour *and other costs and expenses incurred by the offeror* after the date of the qualified settlement offer" but may not total more than \$1,000. (Emphases added.) As the emphasized language makes clear, the trial court is required to award the attorney's fees, costs, and expenses actually incurred by the offeror. **Put another way, the trial court does not have discretion to enter a nominal award.** (Emphasis added).

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*Shepard v Carlin*, 813 NE2d 1200 (Ind. Ct. App. 2004).

In 2006, the Court of Appeals, further defined the Attorney fees portion of the settlement offer statute and found that when multiple plaintiffs are making a claim, and rejection of the offer occurs, attorneys fees are owed for each offer of settlement rejected, assuming the betterment criteria is met. Specifically the Court stated:

On February 6, 2004, Roshawn was in her vehicle, parked on a residential street. Her five children, Ebony, Ashley, Tevin, Johntrell and Jasmine, were passengers in the vehicle. Vasquez backed her vehicle out of a driveway and struck the Phillips' vehicle.

On June 16, 2004, the Phillips filed their complaint against Vasquez in the Lake Superior Court, County Division. On December 1, 2004, the Phillips made the following six qualified settlement offers to Vasquez, pursuant to Indiana Code Section 34-50-1-6:

Roshawn	\$950.00
Johntrell	\$300.00
Ebony	\$300.00
Ashley	\$200.00
Jasmine	\$200.00
Tevin	\$200.00

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Vasquez rejected the settlement offers. In pretrial proceedings, Vasquez admitted fault for the collision, but contested the claimed damages. On March 31, 2005, a bench trial was conducted. On April 20, 2005, the trial court entered a judgment awarding the following amounts:

Roshawn	\$ 2,500.00
Johntrell	\$ 500.00
Ebony	\$ 400.00
Ashley	\$ 300.00
Jasmine	\$ 300.00
Tevin	\$ 300.00

In applying the subject Statute, the Court found that the Statute applied equally to plaintiffs and defendants and awarded attorney fees to the plaintiffs for the defendants failure to do better than the offer.

In so holding, the Court stated as follows:

The qualified settlement offer statute refers in the singular to an "offer" by an "offeror." There is no mandate that offers be consolidated. The statute is not ambiguous; it thus requires no judicial interpretation. According to the plain language of the statute, an offeror who has extended an offer that is not accepted by the recipient of the offer may, upon receiving a final judgment less favorable to the recipient, request an award of attorney fees of not more than \$1,000.00.

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Here, **there were six offers extended by six offerors. Vasquez rejected each one.** Each offeror received a final judgment less favorable to Vasquez than the rejected offer. Accordingly, **each of the six plaintiffs had a statutory claim for attorney fees.** The trial court did not erroneously interpret the qualified settlement offer statute in this regard.

*Vasquez v Phillips*, 843 NE2d 61 (Ind. Ct. App. 2006).

The moral of this story is that for small claims, we should consider the Qualified Offer of Settlement to resolve claims. In addition, if we receive a qualified offer from a plaintiff, we should take the offer seriously. Nothing could be worse than a \$300.00 judgment with 1,000 in fees and expenses attached.

In addition, bulk offers of settlement should be avoided. This is because the bulk offer does not make an offer to a claimant. Where a BI claim and a loss of consortium claim has been presented, a bulk offer to claimants as one would likely not satisfy the statutory requirements of the Qualified Settlement Offer.

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**NOTES:**