



FORUM OF INSURANCE LAWYERS

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FOIL is an association of lawyers who act predominately or exclusively for insurers (other than legal expense insurers). The object of the association, amongst other things, is to promote the interests of insurers and insurance lawyers “by lobbying, dissemination of information, research and publishing, especially where such matters are matters of public policy and public interest.”

Part 36 of the Civil Procedure Rules: Offers to settle and payments into court

Response of the Forum of Insurance Lawyers

Question 1. Do you agree that defendants who can be assumed to be 'good for the money' should not be required to make actual payments in support of offers as provided in recent case law?

Comments: Yes – subject to issues below under question 3. We particularly highlight the benefit to disease cases where multiple insurers may be involved.

Question 2. If so, do you agree that so far as possible those categories of defendant should be defined in the rules to increase certainty for defendants making, and claimants accepting, offers unsupported by payments?

Comments: Yes

Question 3. If so, do you agree that the categories defined in the draft rule are appropriate? What other categories would you include or exclude and why?

Comments: Yes – subject to issues over definition below.

1. **Definition.** The definition of who is “good for the money” is carefully defined and limited. Unless a defendant falls within the definition the sum should be paid into court.
2. **“Government etc”** The definition of government bodies could be extended to perhaps use the European term “emanation of the state” so as to include explicitly the armed forces, public authorities and other government agencies?
3. **Limits of indemnity.** Particular caution is required where insurers have potential liability but subject to a limit of indemnity. Limits of indemnity should be stated if the claim is likely to exceed the limit. It is proposed that an insurer who wishes to avoid paying into court should file a certificate or endorsement on the Acknowledgment of Service stating the limit of indemnity if applicable. The insurer should still be able to make an offer under the new rule (so to avoid prejudice to them), but the insurers should in those circumstances be required to state in the offer how much of the offer is secured by insurance.
4. **Multiple insurers/ contributors.** Care is needed to cover situations where there are

multiple insurers contributing (or potentially so) for same named Defendant. If any one of the contributors fall outside the definition under the exemption the Defendant should still be able to make an offer under the revision so to avoid prejudice to the insurers, but the insurers should in those circumstances be required to state in the offer how much of the offer is secured by insurance.

5. In the vast majority of injury cases it is unlikely that the position is other than the defendant's offer is covered by insurance. The requirement to supply a certificate of insurance is a step too far. We suggest that (2) (b) should read *the offer is made by an insured defendant through an insurer who shall, by virtue of making the offer on the defendant's behalf, be taken to confirm that the amount will be paid by the insurer to the claimant if the claimant accepts the offer during the [relevant period] unless the insurer states otherwise in the offer.*

Question 4. Should the court be allowed to (a) extend and / or (b) abridge the time for accepting a Part 36 offer? If so, what factors or criteria would be relevant?

Comments:

The Court should have the power to both - they already do by virtue of general power to make cost orders reflecting conduct and behaviour.

However we would express caution here generally.

A part 36 payment or offer has the effect of concentrating the minds of the parties to the action and their advisers. If the Courts were to routinely extend or abridge time the positive effect in dispute resolution may be undermined. A part 36 offer forces a judgement call to "stick or twist". The 21 day limit is part and parcel of this process.

Question 5. If the court has the power to extend then should the offeror also have the right to make the offer beyond 21 days in the first instance?

Comments: Yes.

However we do not understand the comment in paragraph 31 to "*.. might assist the Court in identifying tactical offers that should not trigger cost consequences*".

By their very nature part 36 offers or payments are “tactical”. Why should this effect cost protection?

Question 6. Do you agree that the requirement to obtain the court's permission to accept a Part 36 offer out of time should no longer apply? If you disagree, please explain what purpose permission serves?

Comments:

The requirement to obtain the Court's permission **where terms have been reached between the parties** is a waste of time and costs.

Where terms have **not** been reached over costs, and the offer has not been withdrawn the Claimant should **not** be able to accept the offer without permission of the Court.

If clarity in the rules is not achieved there is scope for different approaches by practitioners depending on whether or the offer was stated to be withdrawn if not accepted inside the time stipulated. It is unclear whether it is intended that the usual cost consequences should follow a party's failure to “beat” an offer that had in fact been withdrawn.

It is important that the rules retain the clarity in the rules that emphasise that a party who decides to reject an offer does so at risk of paying all post offer costs. This weapon serves as a vital weapon to all litigants; a “sanity check” by another name.

A practical issue can be foreseen if there is latitude in the discretion for late acceptance without the usual cost penalties. Claimants may be more focussed on the evidence required to justify the non acceptance of an offer as opposed to the resolution of the claim at the earliest practicable time. Any change that encourages such conduct will increase use of court resources and undermine attempts to create an effective and cost effective dispute resolution system.

Question 7. **Should withdrawal of offers be permitted:**

- a. during the period for acceptance with the court's permission and thereafter by serving a notice of intent to withdraw ; or
- b. at any time by serving a notice to withdraw ; or

- c. at any time only with the court's permission ; or
- d. only after the end of the period for acceptance, and with the court's permission ; or
- e. only after the end of the period for acceptance , without requiring the court's permission ?

Comments: **Option A** – But it might be phrased in such a way as to guide the Courts that withdrawal inside 21 days will be very rare situations such as fraud or deceit.

Question 8. Should parties refusing an offer be required to give reasons?

Comments: No. Builds in cost and bureaucracy. If a party wants to give clarification when asked this may help settlement but to include as requirement just increases costs. We can see draft reasons becoming a “cottage industry” for counsel with carefully crafted reasons being as important as pleadings!

Question 9. Should defendants normally be entitled to (a) indemnity costs and (b) enhanced interest where a claimant fails to beat the defendant's offer at trial?

Comments: Yes – in the interests of a level playing field.

Question 10. Should Part 36 offers and notices be served or simply given?

Comments: Served – These are important documents with major implications on costs. Certainty is needed which might not be helped by disputes over when and how offers were communicated. The requirement to serve a certificate of service should be removed.

Question 11. Do you agree that the requirement to file a notice of a part 36 payment with the court should be removed?

Comments: Yes. This limits the chance the trial judge inadvertently sees the notice or becomes aware of it.

Question 12. Do you have any views on these proposals or do you have any other amendments to Part 36 that you feel are necessary? If so, please specify.

Comments:

1. **Part 36.10** Perfecting offers made prior to issue of proceedings. The time limit of 14 days is too tight and inconsistent with other time limits on service of proceedings. It is suggested that this be extended to a date not later than 28 days after service of the particulars of claim or service of the defence whichever is the sooner. The need for this change is all the more pressing if the likelihood is that the Defendants making such payments will be uninsured or non government bodies.
2. **Part 36.23.2.b.** – The seven day time limit to effect a lodgement is too short, especially if insurers are exempted. A more practical timescale is 21 days if payment is required. The Claimant is not prejudiced by this extension.
3. **Part 36.23.3.b** –The wording of this rule should match the requirements under the CRU regulations. Under the CRU regulations the compensator is required to set out in a covering letter
 - **the extent of set off,**
 - **the relevant damages against which set off takes effect,**
 - **whether set off reduces a head of loss to nil.**

This wording would serve to increase clarity on the face of the offer, particularly if the proposal (below) under 36.23.4 is adopted.

4. **Part 36.23.4** The wording of (4) should be revised. In personal injury cases the impact of CRU and / or contributory negligence is crucial in determining the benefit to the Claimant. Why should this be ignored as is the case as drafted at 36.23.4? The following wording is suggested – **36.23.4 – For the purposes of rule 36.20.1.a, a claimant fails to better a part 36 payment if he fails to recover a sum in excess of the net sum offered or paid in having deducted relevant CRU** – As currently drafted the Claimant might “beat” the part 36 offer but actually recover less after deducting for liability reduction and the additional CRU accrued since the first offer was made. The only beneficiary in this situation is not a party to the action, namely

the DWP and yet the Claimant is exempted from further cost liability.

- Day one – offer 50,000 gross -10,000 CRU,40,000 net of CRU
- After 24 months – awarded – 80,000 gross but with a reduction for contributory negligence of 20% the award prior to CRU set off is 64,000– but with CRU of 25,000 the Claimant gets 39,000
- As things stand the C has “beaten” the part 36. But in reality the Claimant has recovered less for 24 months’ work.

Part 36.5 The wording of the section will need general revision so as to encompass offers as well as payments. The provisions on CRU should set off information might be incorporated into a revised 36.5. FOIL generally feels this may be a good opportunity to revise the rules into “plain” English as they have developed with time and revision and are in some ways convoluted and unclear to anyone other than lawyers!