#006

UNION COUNTY BAR ASSOCIATION

"Serving the Law and Public Since 1902"
Union County Courthouse, First Floor
2 Broad Street
Elizabeth, NJ 07207-3478
(908) 354-5984
Fax (908) 354-8222

February 23, 2016

Honorable Glenn A. Grant, J.A.D.
Acting Administrative Director of the Courts
Comments: Final Offer Arbitration Pilot Proposal
Hughes Justice Complex
P.O. Box 037
Trenton, NJ 08625-0037

Dear Judge Grant:

As you know, Union County is one of the four counties designated to participate in the Final Offer Arbitration Pilot Program. The Officers of the Union County Bar Association have reviewed the proposal and wish to provide the following commentary.

While pre-trial resolution and the reduction of litigation are always laudable goals, the proposal by the Supreme Court Arbitration Advisory Committee (SCAAC) regarding the "Final Offer Arbitration" (FOA) program will not achieve those objectives. The reasons why FOA will not work can be traced back to fundamental differences between the pilot program and its source material.

SCAAC utilizes the baseball salary arbitration (BSA) practices as its model. However, the most significant difference between the two is that baseball arbitration is binding, whereas FOA is not. That reason alone demonstrates that FOA will not only be unsuccessful, but counterproductive as well.

BSA is effective, precisely because both sides know that the award will be binding. Therefore, both sides have an extremely strong financial interest to present an offer that an arbitrator will not find to be unreasonable, knowing that if one side does so, the arbitrator will award the opposing offer which will then be binding.

Under FOA, there is no such incentive to prevent one or more sides from presenting unreasonable or unrealistic offers. Moreover, such an offer may not necessarily be unreasonable. While one party may feel very strongly about its position, an arbitrator may not view it the same way. Under FOA, that party will then lose, as the opposing offer must automatically be accepted. The inherent

UNION COUNTY BAR ASSOCIATION

"Serving the Law and Public Since 1902"
Union County Courthouse, First Floor
2 Broad Street
Elizabeth, NJ 07207-3478
(908) 354-5984
Fax (908) 354-8222

problem under FOA is that there will always be a winning party and a losing party, virtually guaranteeing that a trial will be required.

Indeed, it is not difficult to conceive that FOA will increase de novo filings to virtually 100%. It is acknowledged that the parameters of the pilot program do not encompass automobile negligence cases. However, it is not inconceivable to imagine that would one day it would be expanded to do so. Court statistics from January 2010 to December 2010 documented that there were 459 de novo requests filed out of 563 automobile negligence arbitrations, which results in a rate of 81.5%. As noted, with assured winners and losers, that rate will only increase.

Expansion to automobile negligence will have other ramifications. Therein, a defendant by law is entitled to assert a verbal threshold defense if available. However, it is essentially guaranteed that such a position will be routinely rejected at FOA, thereby depriving a party of a lawfully valid defense, and again rendering a trial de novo a certainty.

FOA also has an unintended consequence implicating the Rules of Professional Conduct. Under FOA, an attorney is required to submit a written final offer to the Court at the time of arbitration. Normally, offers are rarely final and are subject to modification at any time. However, under FOA, this offer is supposed to be final. If an offer changes after FOA, that could be construed as a technical violation of the Rules of Professional Conduct, as an attorney has violated the duty of candor to the tribunal by making a false statement. Similarly, the parties are under an obligation to negotiate in good faith. Representing an offer as a final offer when it is not also could technically be considered a violation of that duty, which could then have the unintended consequence of opening the floodgates and actually promoting additional bad faith litigation.

Another consideration is that BSA is limited only to salary disputes, which are easily quantifiable and readily ascertainable. FOA would involve issues of non-liquidated damages, such as pain and suffering and loss of enjoyment of life, which are fair less easy to calculate and requires a far more detailed analysis than merely reviewing such statistics as runs batted in, home runs, or strike outs. It is this uncertainty that would render FOA an ineffective method of resolution.

The current arbitration procedures are not perfect, but when they are followed correctly, the arbitration award has far ranging value. A properly conducted arbitration can assist the parties in realizing the true worth of the case. It

UNION COUNTY BAR ASSOCIATION

"Serving the Law and Public Since 1902"
Union County Courthouse, First Floor
2 Broad Street
Elizabeth, NJ 07207-3478
(908) 354-5984
Fax (908) 354-8222

also plays prominent roles at settlement conferences and at pre-trial conferences, which then often result in resolution before a jury trial is required.

Under the present system, the arbitrator has the ability to independently assess the value of a claim, and then determine what a fair resolution could be. This implicates not only damages, but liability as well, which would also be problematic under FOA, particularly if liability could be an absolute bar to recovery. Removing discretion will only force the arbitrator to choose one side of the over, rather than evaluate all the factors before reaching an independent resolution. Such action could only result in prolonging the litigation and mandating a jury trial.

For these reasons, the Officers of the Union County Bar Association unanimously urge that the SCAAC FOA pilot program not be adopted. Thank you for your consideration of this matter.

Respectfully,

Frederic J. Regenye
Secretary
Union County Bar Association

cc: Honorable Karen M. Cassidy, A.J.S.C.