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PRESIDENT
Paul A. O'Connor, III
O'Connor Parsons Lane & Noble, LLC
435 East Broad Street
Westfield, New Jersey 07090
(908) 928-9200
(908) 928-9232 Fax
paul@lawnj.net

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P.O. Box 184
West Allenhurst, NJ 07711
Telephone (732) 517-1337
Fax (732) 531-0397
e-mail: gwbtanj@aol.com
www.tanj.org
Executive Director
Ginny Whipple Berkner

February 24, 2016

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, New Jersey 08625-0037

Dear Judge Grant:

Please accept this letter in response to the Supreme Court Arbitration Advisory Committee's invitation for comments relative to the Proposal for Final Offer Arbitration Pilot Program.

The Trial Attorneys of New Jersey (TANJ) is a statewide organization made up of members of the plaintiff and defense bar, as well as former members of the judiciary. At the core of TANJ's mission is the preservation of the right to trial by jury, a fundamental and inviolate right that is integral to the proper functioning of our judicial system. Nevertheless, TANJ is mindful of the need for effective alternative dispute resolution mechanisms and applauds the Committee's efforts in attempting to improve upon the system currently in place. However, for the reasons expressed herein, TANJ cannot support the proposed Pilot Program.

The Supreme Court Arbitration Advisory Committee has proposed a Pilot Program utilizing Final Offer Arbitration (commonly referred to as Baseball Arbitration). The Pilot Program provides for participants to exchange settlement offers beginning two weeks before the scheduled arbitration date. The Final Offer from each party is submitted to the Arbitrator on the day of the scheduled arbitration. The parties then present their cases to the Arbitrator in the same manner as under the current non-binding arbitration procedure. Following the presentation, the Arbitrator selects one of the Final Offers submitted by the parties as the award. The theory behind the "Final Offer" process is that it fosters settlement by providing participants with an incentive to compromise and make a more reasonable Final Offer to induce the Arbitrator to select that party's proposed offer. Unlike Baseball Arbitration which is binding, however, the Pilot Program award is non-binding. Thus, either party can reject the award and file a request for a trial *de novo*.

The proposed Pilot Program is to be conducted for a two year period in four counties: Burlington, Mercer, Middlesex, and Union. The proposal provides that 25% of the non-auto personal injury cases in the four counties participate in the Final Offer Arbitration Program.

In recommending the proposed Pilot Program, the Advisory Committee sets forth the perceived advantages of FOA. Namely, the Committee contends that "it fosters settlements before the arbitration hearing [because] parties are incentivized to make reasonable offers and demands because the parties know that unreasonable offer or demand has less chance of being selected for the award by the arbitrator". While this mechanism no doubt provides an incentive to make reasonable offers in the context of binding arbitration, it is less likely to have the same effect in the context of non-binding arbitration where either party may elect a trial *de novo*.

Moreover, the Committee fails to mention the disadvantages in not allowing a neutral party to actually "call" the value of the case. The requirement that the arbitrator select one of the participants' Final Offers instead of issuing an award based upon the exercise of the arbitrator's independent judgment gives the decision-making process a capricious quality that lacks the solemnity appropriate to deciding litigated matters. The use of Final Offer Arbitration will diminish the credibility of the courts, erode the integrity of the judicial system and undermine the public's confidence in the manner in which civil matters are decided.

The application of Final Offer Arbitration to personal injury matters as contemplated by the Pilot Program is of particular concern. For a significant number of the litigants in these matters, it is their only contact with the judicial system. The use of what is commonly known as "Baseball Arbitration" conveys the impression to these litigants that the judicial system is relying upon an arbitrary procedure to determine the outcome of matters which may have a profound effect on their lives. This runs the risk of undermining the confidence of civil litigants in the attorneys who appear on their behalf, the courts and the judicial system as a whole.

Further, any award issued by the arbitrator simply reflects their belief that one party's offer/ demand was a more accurate reflection of the value of the case. However, under the proposed system neither party will actually know what the arbitrator concluded was the "true" value of the case. In turn, the most important component of arbitration (e.g., allowing a neutral party to value a case) will be lost.

Thus, although cognizant of the need for effective alternative dispute resolution mechanisms, TANJ is concerned that the Final Offer Arbitration Pilot Program will have a negative impact on the public's perception of the justice system which will outweigh any benefit to be gained by encouraging litigants to engage in more reasonable settlement negotiations.

Respectfully Submitted,

PAUL A. O'CONNOR
Trial Attorneys of New Jersey, President

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