

**Rule 238. Damages for Delay in Actions for Bodily Injury, Death or Property Damage**

(a)(1) \*\*\*

(2) Damages for delay shall be awarded for the period of time

[(i) in an action commenced before August 1, 1989, from the date the plaintiff first filed a complaint or from a date one year after the accrual of the cause of action, whichever is later, up to the date of the award, verdict or decision; or

(ii) in an action commenced on or after August 1, 1989,] from a date one year after the date original process was first served in the action up to the date of the award, verdict or decision.

(3) \*\*\*

(b)(1) The period of time for which damages for delay shall be calculated under subdivision (a)(2) shall exclude the period of time, if any,

[(1) after which the defendant has made a written offer of

(i) settlement in a specified sum with prompt cash payment to the plaintiff, or

(ii) a structured settlement underwritten by a financially responsible entity,

and continued that offer in effect for at least ninety days or until commencement of trial, whichever first occurs, which offer was not accepted and the plaintiff did not recover by award, verdict or decision, exclusive of damages for delay, more than 125 percent of either the specified sum or the actual cost of the structured settlement plus any cash payment to the plaintiff; or]

(i) after the defendant made a written offer which complied with the requirements of subdivision (b)(2), provided that the plaintiff obtained a recovery which did not exceed the amount described in subdivision (b)(3), or

[(2)] (ii) during which the plaintiff caused delay of the trial.

NOTE: This rule does not preclude the suspension of damages for delay as a pre-trial sanction under Discovery Rule 4019.

In additional defendant proceedings, the additional defendant will be considered the defendant, for purposes of this subdivision, and the plaintiff will be considered either the original defendant if liability over is claimed, or the original plaintiff if direct liability is claimed, or both if both forms of liability are claimed.

(2) The written offer of settlement required by subdivision (b)(1)(i) shall contain an express clause continuing the offer in effect for at least ninety days or until commencement of trial, whichever occurs first, and shall either

(i) be in a specified sum with prompt cash payment, or

(ii) contain a structured settlement plus any cash payment. An offer that includes a structured settlement shall disclose the terms of payment underwritten by a financially responsible entity, the identity of the underwriter and the cost.

NOTE: The offer of the cost of the structured settlement and any cash payment must remain open for ninety days. The cost of the entire structured settlement must remain the same while the terms of the payment may vary and have to be recalculated at the time of acceptance due to market fluctuation over the ninety-day period during which the offer must remain open.

(3) The plaintiff's recovery required by subdivision (b)(1)(i), whether by award, verdict or decision, exclusive of damages for delay, shall not be more than 125 percent of either the specified sum or the cost of the structured settlement plus any cash payment to the plaintiff.

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## Explanatory Comment

### Subdivision (a)(2)

Prior to the present amendment, the subdivision differentiated between cases commenced before and after August 1, 1989. With the passage of time, there now remain few cases, if any, commenced prior to that date. The amendment to subdivision (a)(2) streamlines the provision by eliminating paragraph (i) referring to these cases. Paragraph (ii) formerly governing cases commenced after August 1, 1989 continues as subdivision (a)(2).

### Subdivision (b)

The revision to subdivision (b) of Rule 238 restructures the former provision and incorporates the requirements set forth by the Superior Court In *Sonlin v. Abington Memorial Hospital*, 748 A.2d 213 (2000).

Prior to the present amendment, subdivision (b) contained several complex concepts in one paragraph. For clarity, the amended subdivision is divided into three paragraphs.

New paragraph (1) states the basis for excluding time periods from the calculation of delay damages, i.e., a written offer of settlement not accepted and delay caused by the plaintiff. In defining the offer, paragraph (1)(i) incorporates by reference the detailed provisions of new paragraph (2) relating to the offer and new paragraph (3) relating to the plaintiff's recovery. Paragraph (1)(ii) retains without change the language of former subdivision (b)(2) relating to periods of time "during which the plaintiff caused delay of the trial."

New paragraph (2) incorporates into the rule three requirements imposed by the *Sonlin* case to bring an offer of settlement within the exclusion of that rule from the calculation of delay damages. The first requirement is that a written offer of settlement, whether cash or structured, must, in the words of the *Sonlin* case, contain "a clause expressly validating the offer for 90 days...." This requirement carries out the intention

of the rule which presently requires that an offer be in writing and that it be continued “in effect for at least ninety days or until commencement of trial, whichever first occurs....”

In the case of an offer of a structured settlement, *Sonlin* adds two additional requirements: the identity of the underwriter and the cost of the entire structured settlement. New paragraph (2) of the rule adds a third requirement: "the terms of payment underwritten by a financially responsible entity."

A note added to paragraph (2) recognizes that most entities underwriting a structured settlement annuity cannot commit to the exact payment terms of a structured settlement for the entire ninety-day period required under the rule because the payment is often dependent on the financial market which may fluctuate over the period of the offer. Variations in the amount of the payment due to market forces shall not invalidate the offer for purposes of this rule and thus repeated modifications of the offer are not required.

Paragraph (3) continues without change the provision of former subdivision (b) that an offer is valid to toll the running of delay damages only if the plaintiff does not recover “more than 125 percent of either the specified sum or the cost of the structured settlement plus any cash payment to the plaintiff.”

**By the Civil Procedural**

Rules Committee

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Chair