

Practitioner's Handy Guide to Rule 68 Offers of Judgment: Defense Counsel's Sword

Offers of judgment can be used to expedite settlements and control fees and expenses. But the offers require thorough and complete draftsmanship

By Georgia A. Staton

DEFENSE counsel shouldn't overlook Rule 68 of the Federal Rules of Civil Procedure, which outlines the procedure for making offers of judgment, a good weapon for defense counsel. The purpose of Rule 68 is to encourage settlement and avoid further litigation. It states:

At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against the defending party for the money or property or to the effect specified in the offer, with costs then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the clerk shall enter judgment. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs. If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer. The fact that an offer is made but not accepted does not preclude a subsequent offer. When the liability of one party to another has been determined by verdict or order or judgment, but the amount or extent of the liability remains to be determined by further proceedings, the party adjudged liable may make an offer of judgment, which shall have the same effect as an offer made before trial if it is served within a reasonable time not less than 10 days prior to the commencement of hearings to determine the amount or extent of liability.

IADC member Georgia A. Staton, a member (partner) in Jones, Skelton & Hochuli, P.L.C., Phoenix, has had wide experience in litigation and has taught trial practice skills. She holds B.A. (1971) and J.D. (1974) degrees from the University of Kansas.

The author acknowledges the assistance of Rachel Love, an associate at Jones, Skelton & Hochuli. She is a graduate of Arizona State University (B.A. 1996, J.D. 1999).

The rule requires both parties to litigation to evaluate the risks and costs and to balance them against the likelihood of success on trial on the merits. The evaluation becomes more tricky, as illustrated by the U.S. Supreme Court's decision in *Marek v. Chesny*,¹ when attorneys' fees become a component of such an offer, as they do in actions brought under the Civil Rights Act, 42 U.S.C. § 1989, by virtue of 42 U.S.C. § 1988, and the offer becomes even more important than in other litigation.

The effect of an offer of judgment in civil rights cases is a cost-shifting provision designed to encourage settlement by forcing plaintiffs to weigh the risk of incurring post-offer costs and fees they may not be able to recover, even if they are successful on their basic claims. Because attorneys' fees are included as costs of a federal civil rights action under 42 U.S.C. § 1988, the cost-shifting provision of Rule 68 applies to limit a prevailing plaintiff's recovery of fees if the plaintiff rejects an offer that exceeds the damages award.

In *Marek*, the Supreme Court made it clear that the term "costs" in a Rule 68

1. 473 U.S. 1 (1985).

offer includes attorneys' fees awardable under 42 U.S.C. § 1988. If an offer provides that costs are included or specifies an amount for costs and the plaintiff accepts the offer, then the judgment includes costs. If the offer is silent on the issue of costs, the court must include costs under the terms of Rule 68 in any judgment awarded. In short, a defendant making an offer of judgment that has an attorneys' fees component under 42 U.S.C. § 1988 must take into account that attorneys' fees will be added as "costs" under Rule 68.

RULE 68 OFFERS

A. Careful Drafting

Because the effects of a Rule 68 offer can be significant to both parties, careful drafting is in order. In *Erdman v. Cochise County*,² a defendant learned the effects of inartful drafting the hard way. The question was whether a Rule 68 offer of judgment may be withdrawn after acceptance based on the offeror's failure to recognize that "costs" in actions under 42 U.S.C. § 1983 automatically include attorneys' fees under 42 U.S.C. § 1988. The Rule 68 offer was simple: "The City of Douglas, pursuant to Rule 68, Fed. R. Civ. P., offers to allow judgment to be taken against the City of Douglas for the sum of \$7,500 with costs now accrued."

The question was: What does "with costs" mean? The city alleged that the phrase "with costs" was intended to mean "including costs" rather than "plus costs". It argued that its inartful drafting constituted grounds for rescission since the opposing party should have realized that the offer was misleadingly drafted. But the Ninth Circuit rejected this argument, stating that a settlement agreement is analyzed in the same manner as any contract—that is, ambiguities are construed against the drafter. The result was that the city was bound by the letter of its offer and was required to pay plaintiff reasonable attorneys' fees in addition to the \$7,500 amount contained in its offer.

B. Timing

Rule 68 specifically provides that an offer may be made at any time more than 10 days before the trial begins. The question becomes: Is it 10 calendar days, or does Rule 6(c), which excludes intervening weekends and holidays, apply to Rule 68 offers? In *Polk v. Montgomery County*,³ the federal district court in Maryland was required to decide this specific issue. It determined that the 10-day limitation is covered by the Rule 6 exclusions. In short, in order to comply with Rule 6, a Rule 68 offer must take into account that intermediate Saturdays, Sundays and holidays are excluded in the computation period. If service is accomplished by mail, moreover, there is a question whether the offeree must be given an additional three days mailing time under Rule 6(e) within which to respond to the offer. To be on the safe side, the three days should be added into any service of offer of judgment so as not to jeopardize an offer.

C. Communicating

Rule 68 requires that the offer be "served" on the adverse party. Service therefore contemplates a written document; a telephone call or some other type of oral communication is insufficient. Service on the adverse party should be done in a manner provided for under Rule 5(b).⁴

D. Revocability

Once service is perfected, may a Rule 68 offer be revoked during the 10-day time period? This topic was explored at length in an article in the *George Washington Law Review* in 1996.⁵ The article con-

2. 926 F.2d 877 (9th Cir. 1991).

3. 130 F.R.D. 40 (D. Md. 1990).

4. CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE, CIVIL § 3002 (1973).

5. *Exploring the Possibility of Revoking a Rule 68 Offer of Judgment*, 65 GEO. WASHINGTON L. REV. June-August (1996). See also Lesley S. Bonney, Robert J. Tribeck & James S. Wrona, *Rule 68: Awakening a Sleeping Giant*, 65 GEO. WASHINGTON L. REV. 379 (1997).

cluded that revocation was not permitted during the 10-day pendency of the offer of judgment.

First, the rule provides that if notice of acceptance is served on the offeror within the 10-day period and the acceptance is filed with the court, the court “shall” enter judgment. According to the author, this language suggests that the clerk has no option to take into account a revocation by the offeror. Second, the article contends that the rule’s 10-day deadline is gratuitous if the offeror could cancel the offer prior to acceptance. Simply put, there would be no need to set a timeline within the rule if the offeror could choose when to terminate the offer on its own accord.⁶

E. Acceptance

May a Rule 68 offer to multiple plaintiffs be made contingent on acceptance by all the plaintiffs?

A number of cases have addressed this issue, and there is no clear line of authority among the circuits. For example, in *Lang v. Gates*,⁷ the offer was \$600,000 to husband-and-wife plaintiffs, Cheri and Henry Lang. The offer stated: “Acceptance by less than both plaintiffs shall be deemed a rejection of this offer.”

Nine months later the trial court approved a settlement between the parties in the precise amount of \$600,000, plus attorneys’ fees to be determined at a later date. The Langs’ attorney then filed a motion for attorney’s fees in excess of \$1.2 million. The trial court significantly reduced the fees and further stated that the attorney was not entitled to recover attorneys’ fees incurred after the defendant’s Rule 68 offer.

The first question before the Ninth Circuit was whether the defendant’s offer requiring the acceptance of both parties qualified under Rule 68. The court con-

cluded that an offer requiring unanimous acceptance was appropriate under Rule 68, stating that conditional offers have long been recognized as valid under contract principles and citing Section 29 of the Restatement (Second) of Contracts. The court found that there was no reason to depart from basic contract principles in a situation dealing with a Rule 68 offer.

The court also noted that allowing plaintiffs to accept or reject joint offers individually might encourage multiple plaintiffs to hedge their bets by collusively having at least one party accept the offer and at least one party decline, so they could both benefit if the judgment is greater than the offer and they could both avoid incurring costs and losing attorneys’ fees if it is less. While the court noted that there was no collusion factually established in the case, they detected a curious pattern of vote switching between the Langs. Apparently Cheri and Henry at various times had taken diametrically opposed positions with respect to the Rule 68 offer. While the court had no facts, it did not believe it unreasonable to conclude that the Langs were attempting to position each other in such a way to avoid the potential consequences of rejecting the offer.

The court found no reason why a defense offer conditioned on joint acceptance by both plaintiffs should not qualify for Rule 68 treatment.

In *Tocwish v. Jablon*,⁸ a federal district court in Illinois was asked to decide whether an offer of judgment conditioned on the plaintiffs’ unanimous acceptance was valid. The court stated that, as the did the *Lang* court, that plaintiffs may abuse Rule 68 by acting collusively, but that so too may a defendant use unanimous acceptance to the defendant’s tactical advantage. For example, a defendant facing multiple plaintiffs would simply offer all but one plaintiff a reasonable offer and make the remaining plaintiff an unacceptable offer. By conditioning acceptance of the judgment on the plaintiffs’ unanimous agreement, a defendant could ensure that at least

6. See also *Richardson v. Nat’l R.R. Passenger Corp.*, 49 F.3d 763, 765 (D.C. Cir 1995).

7. 36 F.3d 73 (9th Cir. 1994).

8. 183 F.R.D. 239 (N.D. Ill. 1998).

one of the plaintiffs would refuse. This refusal would subject all of them, including those who are willing to accept the offer to the rule's penalty provision.

Given the tactical advantages which can be used by either side in requiring unanimous acceptance of a Rule 68 offer, the court determined that the most judicially expedient position was simply to invalidate the offer for purposes of invoking Rule 68 penalty provisions. The *Tocwish* court stated that invalidation is easier to administer and discourages both sides from engaging in such strategies. The court then rewrote the defendant's offer of judgment to read that failure of all of the plaintiffs to accept it renders it not rejected but void.

F. Settlements

The second question faced by the *Lang* court was whether the term "judgment," as used in Rule 68, includes the termination of litigation pursuant to settlement. The Ninth Circuit held that it did. The court noted that the primary purpose of Rule 68 was to encourage settlements and that the rule should be construed with that principle in mind. Applying Rule 68 to cases resolved by settlement fulfills the purpose of encouraging the parties to settle.

Failing to allow settlements to fall within Rule 68, the court stated, would allow plaintiff's counsel to encourage rejection of a Rule 68 offer, prolong settlement negotiations while accumulating fees, then have the client accept the same offer or one of lesser value at a later date, all the while the attorney earning significantly more in fees through the delay, although the plaintiff would gain nothing. Such a result contradicted the intent of Rule 68, the court said. Post-offer attorneys' fees were properly denied in this case, which was resolved by settlement.

RULE 68 OFFERS IN TITLE VII CASES

What is the effect of a Rule 68 offer of judgment in a mixed motives discrimina-

tion case brought under Title VII of the Civil Rights Act? Two cases discuss this interesting issue.

In *Shepard v. Riverview Nursing Center Inc.*,⁹ the plaintiff filed a gender discrimination claim against Riverview under Title VII, 42 U.S.C. § 2000(e)(k), alleging that she was laid off because of her pregnancy. Five weeks after the suit was filed, Riverview tendered a \$5,000 settlement offer, which was rejected. The jury was given interrogatories and asked to determine whether Shepard's pregnancy was a "motivating factor" in the decision to discharge her. The court then asked the jury to decide whether, even if discrimination had been a motivating factor, Riverview would have discharged Shepard in any case for non-discriminatory reasons. The jury answered both questions in the affirmative, finding that discrimination had motivated Riverview's decision but that Shepard would have been laid off for legitimate reasons.

Before the Civil Rights Act of 1991, such a finding would have insulated Riverview from liability. Following the act, however, a plaintiff is eligible for limited recovery in such situations—declaratory relief, certain types of injunctive relief and attorneys' fees and costs as provided in 42 U.S.C. § 2000(e)(5)(g)(2)(B). Based on the jury's findings, Shepard then filed the motion requesting attorneys' fees of \$40,000 plus costs. Riverview challenged the fee request, arguing that under *Farrar v. Hobby*¹⁰ a civil rights plaintiff who prevails as a technical matter but who receives only nominal damages should not be able to recover attorneys' fees. The district court disagreed, reasoning that *Farrar* was based on 42 U.S.C. § 1988, whereas Shepard's request arose under 42 U.S.C. § 2000(e)-5(g)(2)(B).

Riverview also challenged the fee award under Rule 68, which requires plaintiffs

9. 88 F.3d 1332 (4th Cir. 1996).

10. 506 U.S. 103 (1992).

who reject an offer to pay their own post-offer “costs” if the offer turns out to be more favorable than the ultimate recovery. Riverview asserted that its settlement offer of \$5,000 exceeded Shepard’s recovery and that the \$40,000 attorneys’ fees award should be reduced by the amount of fees attributable to the post-offer services. Again, the district court disagreed, ruling that under the language of 42 U.S.C. § 2000(e)-5(g)(2)(B) attorneys’ fees are not part of the post-offer “costs” subject to Rule 68.

The district court concluded that an award of attorneys’ fees was mandatory in a mixed motive case and that *Farrar* was inapplicable.

But the Fourth Circuit disagreed, deciding that the award of fees in a discrimination case under 42 U.S.C. § 2000(e)-5(g)(2)(B) is discretionary and that concerns of proportionality play a part in the analysis. The court also held that the logic expressed in *Farrar* also applied in this case and that analyses under both 42 U.S.C. § 1988 and § 2000(e)-5(g)(2)(B) require similar inquiry. The court therefore vacated and remanded for the district court to consider the relationship between the fees and the degree of the plaintiff’s success.

The district court also disagreed with Riverview’s position that under Rule 68, Shepard should be forced to bear the costs of attorneys’ fees that accrued after the date of the \$5,000 offer of judgment. While the Fourth Circuit did not believe that Rule 68 applied to the award of attorneys’ fees in cases brought under 42 U.S.C. § 2000(e)-5(g)(2)(B), it nevertheless held that a trial court may consider a plaintiff’s rejection of a settlement offer as one of the several factors generally informing its discretionary inquiry under that statute.

In refusing to apply Rule 68 to a claim brought under 42 U.S.C. § 2000(e)-

5(g)(2)(B), the court of appeals noted that in that section the statute allows for recovery of “attorneys’ fees and costs,” expressly distinguishing attorneys’ fees from “costs.” The court noted that Congress was aware that it was deviating from the language in 42 U.S.C. § 1988 and that under *Marek*, the Rule 68 implications depend on the precise wording of the fee-enabling statute. This congressional recognition, coupled with *Marek*’s emphasis on the exact language of the particular attorneys’ fees provision, made it clear to the court that fees granted under 42 U.S.C. § 2000(e)-5(g)(2)(B) are not part of “costs” subject to Rule 68.

In *Gudenkauf v. Stauffer Communications Inc.*,¹¹ the same situation existed. A jury found that Stauffer had fired the plaintiff in part because of her pregnancy, but that she would have been terminated in any event. The district court stated that a verdict for a plaintiff in a mixed motive Title VII case constitutes a victory on a significant legal issue and that a plaintiff who prevails under 42 U.S.C. § 2000(e)(2)(M) ordinarily should be awarded attorneys’ fees in all but special circumstances. The trial court refused to reduce the fee award based on the employee’s rejection of the employer’s pre-trial settlement offer, but it did reduce the amount of the fee by 50 percent based on an assessment of the degree of the employee’s overall success on her mixed motive claim.

The 10th Circuit agreed with the trial court and rejected Stauffer’s position that no fee should be awarded because Gudenkauf received, at most, a nominal or moral victory. The court asserted that Title VII statutory purposes are undermined when employers are not sanctioned for discriminatory conduct and victims receive no redress. In a mixed motive case in which the legal motive predominates, the court continued, the plaintiff never recovers monetary damages on a successful claim and often injunctive relief is not appropriate. A fee award is the only form of redress avail-

11. 158 F.3d 1074 (10th Cir. 1998).

able to make the victim whole for vindicating society's interest in a discrimination-free workplace.

The 10th Circuit agreed with the trial court in its refusal to deny a reduction of the plaintiff's request for attorneys' fees based on the settlement offer. It noted that subsection (g)(2)(B) of Title VII added in 1991 provides that a court may award attorneys' fees and costs. This distinction is significant, the court stated, because it showed that Congress' decision to separate costs and fees was deliberate and intended to further Title VII goals.

CONDITIONAL RULE 68 OFFERS

May a defendant make a Rule 68 offer of judgment conditioned on a provision that the defendants not pay any part of the prevailing party's fees or costs?

The answer appears to be that such a provision is appropriate under certain circumstances. In *Evans v. Jeff D.*,¹² the State of Idaho was sued on behalf of a class of children who alleged that educational programs and healthcare services provided to them were deficient under various federal and state statutes. Injunctive relief and an award of costs and attorneys' fees, but no money damages, were sought.

The case was settled by a consent decree that granted prospective relief to the plaintiff class, providing much broader injunctive relief than could have been obtained had the parties proceeded to trial. The settlement, however, was conditioned on the defendants not paying any part of the prevailing party's fees or costs.

Counsel for the class accepted the offer on behalf of his client, but later he contended in a motion seeking costs and attorneys' fees that the offer had exploited his ethical duty to his clients—that is, that he was “forced” by the offer to accept it although it required a waiver of attorneys' fees. The plaintiff class was represented by a public interest law firm, so the plaintiffs had no personal liability for fees. Rejecting the argument, the U.S. Supreme Court

stated that the attorney was not faced with an ethical dilemma because he was under no ethical obligation to seek a statutory fee award.

The basic question presented by *Evans* was whether the district court was required to disapprove the stipulation to settle the civil rights class action when the offered relief equaled or exceeded the probable outcome at trial but was expressly conditioned on waiver of statutory eligibility for attorneys' fees. The Supreme Court held that the district court did not abuse its discretion by approving the fee waiver. The Court stated that a general prohibition against negotiated waiver of attorneys' fees in exchange for a settlement on the merits would impede, rather than advance, vindication of civil rights, at least in some cases, by reducing the attractiveness of settlement. In *Evans*, the court held, the record did not support assertions that the state's conditioning its Rule 68 offer on a waiver of the attorneys' fees was a vindictive effort to deter attorneys from representing plaintiffs in civil rights suits against the state.

Evans enables defendants in civil rights cases to offer settlement under Rule 68 in which the plaintiffs waive attorneys' fees for which they have no personal liability. By waiving their attorneys' rights to recover attorneys' fees, plaintiffs may be able to achieve an attractive settlement. This situation has been said to deter lawyers to take cases in reliance on statutory sources for fees. Several bar associations responded to the decision in *Evans* by adopting ethics opinions insisting that a defense lawyer violates professional ethics rules by making a settlement contingent on the plaintiff's lawyer waiving or limiting rights to a statutory fee.¹³

12. 475 U.S. 717 (1985).

13. For a listing, see Edward S. Sherman, *From “Loser Pays” to Modified Offer of Judgment Rules: Reconciling Incentives to Settle with Access to Justice*, 76 TEX. L. REV. 1863, 1879 n.93 (1998).