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# Rule 68 Offers of Judgment

**by**

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### A. <u>The Text of Rule 68</u>

**Rule 68. Offer of Judgment**

(a) **Making an Offer; Judgment on an Accepted Offer.** More than 10 days before the trial begins, a party defending against a claim may serve on an opposing party an offer to allow judgment on specified terms, with the costs then accrued. If, within 10 days after being served, the opposing party serves written notice accepting the offer, either party may then file the offer and notice of acceptance, plus proof of service. The clerk must then enter judgment.

**(b) Unaccepted Offer.** An unaccepted offer is considered withdrawn, but it does not preclude a later offer. Evidence of an unaccepted offer is not admissible except in a proceeding to determine costs.

**(c) Offer After Liability Is Determined.** When one party's liability to another has been determined but the extent of liability remains to be determined by further proceedings, the party held liable may make an offer of judgment. It must be served within a reasonable time--but at least 10 days--before a hearing to determine the extent of liability.

**(d) Paying Costs After an Unaccepted Offer.** If the judgment that the offeree finally obtains is not more favorable than the unaccepted offer, the offeree must pay the costs incurred after the offer was made.

### B. <u>Decisions Construing Rule 68</u>

*Marek v. Chesny*, 473 **U.S.** 1, 11–12, 38 FEP Cases 124 (1985), a § 1983 case, held that defendants were not liable for the prevailing plaintiff's attorney's fees incurred after rejection of defendants' offer of judgment. The Court stated: "Congress, of course, was well aware of Rule 68 when it enacted § 1988, and included attorney's fees as part of recoverable costs. The plain language of Rule 68 and § 1988 subjects such fees to the cost-shifting provision of Rule 68. Nothing revealed in our review of the policies underlying § 1988 constitutes 'the necessary clear expression of congressional intent' required 'to exempt . . . [the] statute from the operation of' Rule 68. . . . We hold that petitioners are not liable for costs of $139,692 incurred by respondent after petitioners' offer of settlement." Justice Powell concurred. *Id.* at 12–13. Justice Rehnquist concurred. *Id.* at 13. Justice Brennan, joined by Justices Marshall and Blackmun, dissented. *Id.* at 13–51.

*Thomas v. National Football League Players Association*, 273 F.3d 1124, 1129–30, 87 FEP Cases 894 (**D.C. Cir.** 2001), affirmed the fee award for plaintiff Thomas and rejected defendant's argument that no fees should have been awarded for work performed after August 14, 1995, the date of its unaccepted $60,000 offer of judgment. The court rejected defendant's argument that the offer exceeded final recovery after subtracting prejudgment interest at the 52-week Treasury-bill rate, because the lower court used the prime rate, which is more appropriate than the T-bill rate and which would have produced a recovery in excess of $60,000. More definitively, the court held that "an unallocated offer of judgment to multiple defendants is not effective under Rule 68." *Id.* at 1130. The court held that there had to be a clear baseline for the offerees. "Because the record does not reflect that the individual plaintiffs knew the value to

each of them of the lump-sum offer, they 'simply could not have evaluated the individualized values of the offer' and 'without two precise figures to compare, the district court was in no position to resolve the lack of precision.'" *Id.* (citation omitted).

*King v. Rivas*, __ F.3d __, 2009 WL 225252 (**1st Cir.** Feb. 2, 2009) (No. 08-1557), held that a joint Rule 68 offer of all defendants to a single plaintiff, without allocation among the defendants, was a proper Rule 68 offer. Plaintiff rejected the offer and later dismissed several defendants. His ultimate recovery was lower than the amount offered, and he argued unsuccessfully that the offer was ineffective because he could not tell how much the individual remaining defendants were paying. The court discussed the split in the Circuits, and held that disallowing the offer for lack of allocation would not promote settlement, the goal of Rule 68, and would simply allow plaintiff to pick and choose which defendants with whom to settle, and to use the proceeds from some defendants to fund the litigation against the others.

*Reiter v. MTA New York City Transit Authority*, 457 F.3d 224, 98 Fair Empl.Prac.Cas. (BNA) 1032 (2d Cir. 2006), *cert. denied*, 549 **U.S.** 1211 (2007), held that an ADEA plaintiff who recovered $10,000, after rejecting an offer of judgment for $20,001, was entitled to an award of post-offer attorneys' fees and costs because the employee also obtained reinstatement, his old corner office, his assistant, and other perquisites of his old position. The court stated at 229:

> First, Reiter contends that the district court erred when it denied attorneys' fees and costs incurred after the Offer because the equitable relief he obtained, along with the $10,000 monetary award, was more favorable than the Offer. We agree. Rule 68 is a cost-shifting rule designed to encourage settlements without the burdens of additional litigation. Rule 68 provides: "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." Fed.R.Civ.P. 68. The Rule thus requires a court to compare the offer to the judgment and decide which is more favorable. The magistrate judge, undertaking that exercise, concluded that the Offer was more favorable than the judgment. The principal basis for this result was his conclusion that none of the equitable relief Judge Koeltl granted to Reiter had any significant value and that no reasonable person would value the relief more than a $10,001 cash payment. *Reiter*, 224 F.R.D. at 169. This conclusion is clearly erroneous. Its most conspicuous shortcomings are that it: (1) fails to appreciate the significance of equitable relief in civil rights litigation, and (2) draws indefensible conclusions about the worthlessness of the equitable relief Reiter obtained.

The court then turned to the valuation of the relief, and rejected the lower court's finding that the value was less than $10,000:

> Readily acknowledging the difficulties posed by a comparison of monetary and equitable relief, we are still confounded by this conclusion. As DVP Engineering, Reiter shared high-level executive responsibility for the NYCTA's major architectural and engineering projects. The budget of his department exceeded one billion dollars, eight senior executives reported directly to him, and he headed a staff of more than 900 employees. After his demotion to DVP Technical, he had no staff, no direct reports, no corner office, no Hay Points and found himself in one of the NYCTA's smallest

> departments with ten employees. The magistrate judge found these differences "of limited value" and concluded that no objective, reasonable person would prefer the more important job to a $ 10,000 cash payment. While the difference cannot be quantified with precision, we nonetheless think that the opposite is true. Reiter was a highly compensated, senior executive in one of the world's largest and most important public transportation agencies. For him, as for many who occupy such positions after long years of service, the personal satisfaction and sense of gratification and achievement derived from first being given, and then bearing, significant professional responsibilities cannot be understated. A powerful indication that such responsibilities are coveted is that Reiter spent years of litigation to regain them.
>
> We have no difficulty concluding that any senior executive worthy of the title (who is rational and who is still anxious for responsibilities) would, at a moment's notice, exchange a job with no staff, no budget, no direct reports, and a work force of ten for a job with 900 employees and eight senior direct reports in a department with a billion-dollar budget. Further, we have no difficulty opining that any such rational executive would more likely than not jump at the chance if it were priced at just $10,000-an amount totaling less than 10% of a single year's salary. In sum, while monetizing equitable relief will, in many instances, pose vexing problems (ones we leave for another time) we have little difficulty concluding that Reiter ultimately recovered more than the Offer and that, consequently, it did not cut off his entitlement to post-Offer attorneys' fees.

*Id.* at 231-32.

*Wilson v. Nomura Securities International, Inc.*, 361 F.3d 86, 93 FEP Cases 481 (**2d Cir.** 2004), reversed the lower court's award of attorneys' fees under the New York City Human Rights Law and affirmed its denial of plaintiff's motion for attorneys' fees under Title VII, because plaintiff had accepted an offer of judgment that expressly stated it was "inclusive of all costs available under all local, state or federal statutes accrued to date." *Id.* at 88. The court held that the language of the offer automatically included Title VII attorneys' fees because Title VII defines fees as part of costs. *Id.* at 89. It rejected plaintiff's argument that he was entitled to fees under the mixed-motives provision of Title VII, § 706(g)(2)(B) of the Act, 42 U.S.C. § 2000e–5(g)(2)(B), which allows the recovery of attorneys' fees and costs, because plaintiff had not made the necessary showing and damages had been recovered. *Id.* at 89–90. The court reversed the award of fees under the New York City Human Rights Law because such fees were duplicative of the Title VII fees included in the offer. *Id.* at 90–91. The court noted that when a plaintiff prevails on only one of two overlapping claims, the plaintiff may be able to recover fees for all work performed because the same work was required on both claims. It continued:

> By the same token, however, when a plaintiff prevails on two such overlapping claims, he or she is entitled to only one award of fees for the indivisible legal work performed. In the present matter, Wilson's Title VII and NYCHRL claims were factually and legally identical—i.e. involved a "common core of facts" and were "based on related legal theories" . . . . When Wilson accepted the Rule 68 Offer, he agreed that it covered his rights both to damages on all claims and to fees for the legal work performed with respect to his Title VII claim. Because the work performed on the Title VII claim was

> the same as that performed on the NYCHRL claim, Wilson's acceptance of the Offer settled all rights to fees on that work, and he is not entitled to a second recovery.

*Id.* at 91 (citation omitted). Judge Newman dissented. *Id.* at 91–93.

*Weiss v. Regal Collections*, 385 F.3d 337, 348 (**3d Cir.** 2004), reversed the dismissal for mootness of the Fair Debt Collection Practice Act plaintiff's case. Plaintiff filed the case as a class action, and defendant made a Rule 68 offer of judgment for the maximum relief plaintiff could individually recover under the Act. The lower court then dismissed the action as moot. Reversing, the court of appeals relied on the fact that defendant made its offer six weeks after plaintiff filed his Amended Complaint. It stated that Rule 68 motions do not moot a case when filed after the plaintiff has moved for class certification, and repeatedly referred to the danger that a defendant might "pick off" plaintiff after plaintiff by making Rule 68 offers as soon as they filed their claims. It continued: "Absent undue delay in filing a motion for class certification, therefore, where a defendant makes a Rule 68 offer to an individual claim that has the effect of mooting possible class relief asserted in the complaint, the appropriate course is to relate the certification motion back to the filing of the class complaint. Because in this case, no motion for class certification was made, we will direct the trial court to allow Weiss to file the appropriate motion." (Footnote omitted.)

*Le v. University of Pennsylvania*, 321 F.3d 403, 407–09, 91 FEP Cases 310 (**3d Cir.** 2003), affirmed the judgment for plaintiff, and affirmed the lower court's ruling that defendant's Rule 68 offer of judgment was valid although it was in the aggregate for all claims and both defendants, and did not break down the offer by claim or defendant, that plaintiff recovered less than the offer, that plaintiff accordingly lost the right to claim fees after the rejection of the offer, and that plaintiff was required to pay defendant's costs, other than fees, after rejection of the offer. The court explained that individual defendant Dr. Opella had an indemnity contract with defendant, and continued: "Given the single identity of the defendants, failure to apportion between the University and Dr. Opella was not fatal to the offer. A decision to the contrary could promote the addition of improper defendants so that their eventual dismissal would negate any legitimate Rule 68 offer made by the proper defendants." *Id.* at 408 (footnote omitted). The court rejected plaintiff's argument that the offer of $50,000 "plus costs" was too imprecise for the offer to be valid. *Id.* at 409. The court also held that "a defendant in a Title VII civil rights suit can never recover its attorneys' fees under Rule 68, because the triggering event of that rule alters the potential costs that are 'properly awardable' to a defendant under § 1988." *Id.* at 411 (footnote omitted).

*Grissom v. The Mills Corp.*, 549 F.3d 313, 28 IER Cases 781 (**4th Cir.** 2008), vacated and remanded the fee award, but held that an accepted Rule 68 offer of $130,000 plus fees and costs, reduced to judgment, established that plaintiff was the "prevailing party" and was entitled to a fee award. The court rejected defendant's argument that this was not enough to satisfy the requirements of *Buckhannon Bd. & Care Home, Inc. v. West Virginia Dept. of Health & Human Resources*, 532 **U.S.** 598 (2001). The court also held that plaintiff's entitlement to fees only covered time expended as of the date of the offer.

*Sandoz v. Cingular Wireless LLC*, 553 F.3d 913, 920-21, 14 Wage & Hour Cas.2d (BNA) 577 (**5th Cir.** 2008), affirmed the lower court's denial of defendant's motion to dismiss—on the

ground that plaintiff represented only herself in an FLSA collective action where defendant served its individual Rule 68 offer prior to her filing of a certification motion—and held:

> The proper course, therefore, is to hold that when a FLSA plaintiff files a timely motion for certification of a collective action, that motion relates back to the date the plaintiff filed the initial complaint, particularly when one of the defendant's first actions is to make a Rule 68 offer of judgment. If the court ultimately grants the motion to certify, then the Rule 68 offer to the individual plaintiff would not fully satisfy the claims of everyone in the collective action; if the court denies the motion to certify, then the Rule 68 offer of judgment renders the individual plaintiff's claims moot.

(Footnote omitted.) The court held that there was a question whether plaintiff's motion to certify the collective action was timely where it was not filed until thirteen months after she filed the Complaint, and remanded the case for further processing. *Id.* at 922.

*Payne v. Milwaukee County*, 288 F.3d 1021, 18 IER Cases 988 (**7th Cir.** 2002), affirmed in part and reversed in part the lower court's order requiring the First Amendment plaintiff to pay defendant's post-offer costs. Before the first trial, defendant offered to pay plaintiff $37,500 for all claims, and in the alternative offered him a job within a specified pay range, and offered $18,000 to plaintiff and his attorney. The first trial ended with the entry of judgment as a matter of law for defendant. The court of appeals reversed and remanded for a new trial on the First Amendment retaliation claim. The second jury awarded $10,400. One of plaintiff's attorneys was awarded full fees for work performed up to the offer of judgment, plus costs. Another failed to file her fee petition on time. The third claimed $75,550 for post-offer work. Milwaukee County also sought recovery from plaintiff of its post-offer attorneys' fees as part of its costs. The court stated at 1024: "The twin aims of the rule, in its *ex post* application, are to compensate the defense for costs it ought not to have incurred, and to deter future plaintiffs from lightly disregarding reasonable settlement offers made with the formalities prescribed by the rule." (Citation omitted.) The court rejected plaintiff's argument that defendant waived its Rule 68 rights by failing to renew its offer after the initial judgment was partially set aside: "That is simply wrong. The Advisory Committee Notes to the 1946 amendment to the rule state that '[i]t is implicit, however, that as long as the case continues—whether there be a first, second or third trial—and the defendant makes no further offer, his first and only offer will operate to save him the costs from the time of that offer if the plaintiff ultimately obtains a judgment less than the sum offered.' See also 12 CHARLES A. WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE & PROCEDURE 2D § 3003, at 102 (2d ed. 1997)." *Id.* at 1024–25. The court rejected plaintiff's argument that, for purposes of Rule 68, he should be credited with the back pay the lower court did not award, because the amount was speculative and because plaintiff did not appeal the denial of back pay. "We thus take as final the actual verdict amount and assess the consequences for Rule 68 from that amount." *Id.* at 1025. The court held that plaintiff was not entitled to attorney's fees for services performed after rejection of the offer. *Id.* The court reversed the lower court's symmetrical-rights holding, and held that defendant was not entitled to recover its attorney's fees for services performed after rejection of the offer because the underlying statute did not give defendant a general right to recover its attorney's fees if it prevailed. *Id.* at 1025–26. The court noted that it is difficult to consider a plaintiff's claim frivolous or vexatious where the plaintiff has prevailed. *Id.* at 1027. It held that a defendant does not become a prevailing party merely because the plaintiff recovers less than it offered.

The court remanded the case for a determination of defendant's costs. *Id.*

*Kitchen v. TTX Co.*, 284 F.3d 688, 88 FEP Cases 605 (**7th Cir.** 2002), affirmed the award of $1.1 million in attorneys' fees and vacated and remanded the award of costs after plaintiffs accepted offers of judgment for $610,000. The court held that plaintiffs were entitled to fees because they received relief that was not "nuisance value," although less than defendant had earlier offered to some of the plaintiffs. The court stated that a nuisance value settlement is one for less than the costs of defense, *id.* at 692, observed that defendants made significant concessions with respect to demands for plaintiff confidentiality, and held that plaintiffs obtained significant relief in the settlement. *Id.*

*Thompson v. Southern Farm Bureau Cas. Ins. Co.*, 520 F.3d 902 (**8th Cir.** 2008) (*per curiam*), held in an automobile accident case that a Rule 68 offer of judgment for the policy limit of $100,000 that unambiguously excluded costs was invalid. The court held that it would have been valid to include costs in the offer, but that the language of the rule precluded the exclusion of costs. The court also held that an invalid Rule 68 offer could not be treated as a settlement offer not subject to the constraints of Rule 68. Judge Riley dissented.

*Brown v. Lester E. Cox Medical Centers*, 286 F.3d 1040, 1047, 12 AD Cases 1831 (**8th Cir.** 2002), affirmed the judgment on a jury verdict for the ADA plaintiff, rejecting defendant's argument that plaintiff's attorneys' fees should be limited because she rejected an offer of judgment before trial. "However, Cox's offer of judgment—$32,500 plus no more than $2,000 in court costs—fell well short of the actual judgment of $50,000 plus costs and attorney fees."

*Perkins v. U S West Communications*, 138 F.3d 336, 337–38, 76 FEP Cases 411 (**8th Cir.** 1998), held that an offer of judgment remains in effect until the expiration of ten days from the making of the offer or until the plaintiff's acceptance, whichever is earliest, notwithstanding the intervening grant of summary judgment to the defendant. As soon as he learned of the grant of summary judgment, the plaintiff faxed to counsel for the defendant his acceptance of the offer of judgment. The acceptance was three days after the offer was made. The plaintiff also filed his acceptance of the offer, and successfully moved to amend the judgment so as to comply with the terms of the offer of judgment. "By directing that the clerk shall enter judgment after proof of offer and acceptance has been filed, the explicit language of the Rule indicates that the district court possesses no discretion to alter or modify the parties' agreement.(5) Although Rule 68 is silent on the issue, many courts have held that an offer of judgment made under Rule 68 is irrevocable for the statutorily prescribed ten-day period, except for good cause." *Id.* at 338 (footnote omitted).

*Utility Automation 2000, Inc. v. Choctawhatchee Electric Cooperative, Inc.*, 298 F.3d 1238 (**11th Cir.** 2002), held that the defendant was liable for attorneys' fees as a matter of the underlying contract, when it made an offer of judgment "with costs accrued," that was accepted by plaintiff. The court stated: "The sole constraint Rule 68 places on offers of judgment is its mandate that an offer include 'costs then accrued.' This does not mean that every offer must explicitly state that it includes costs: 'If an offer recites that costs are included or specifies an amount for costs, and the plaintiff accepts the offer, the judgment will necessarily include costs; if the offer does not state that costs are included and an amount for costs is not specified, the court will be obliged by the terms of the Rule to include in its judgment an additional amount

which is in its discretion.' . . . Thus, as long as an offer does not explicitly exclude costs, it is proper under the Rule." *Id.* at 1241 (citation omitted). The court noted that "parties frequently dispute whether attorneys' fees are included" in the term "costs." *Id.* The court surveyed the decisions of other Circuits and held that, where the offer does not unambiguously cover attorneys' fees, "in the appropriate circumstances a plaintiff may be entitled to attorneys' fees under the 'costs then accrued' phrase from Rule 68 itself, and, independently, under the statute or other authority that gave rise to the suit." *Id.* at 1243. The court stated that, because the offer was silent as to fees, it was ambiguous and the ambiguity must be construed against the offeror. *Id.* at 1244.