Rule 68 Offer of Judgment: The Underutilized Defense Tool

by Louis B. Eble

Not surprisingly, Rule 68 is largely ignored in federal litigation. After all, the only penalty an insufficiently prevailing plaintiff normally has to pay is his or her own post-offer costs and the post-offer costs of the defendant. Because the costs available under Rule 54(d) are usually modest, defendants have little incentive to make Rule 68 offers of judgment and plaintiffs have little incentive to accept them. What is surprising, however, is that Rule 68 is also mostly ignored in civil rights and employment discrimination cases, in which a majority of the statutes include attorneys’ fees as part of recoverable costs. Under such fee-shifting statutes, defendants have the most to gain by utilizing Rule 68 and, concomitantly, plaintiffs have the most to lose by refusing an offer of judgment. As one plaintiff’s counsel opined, he is just “flat mystified” as to why defendants did not use Rule 68 more often in employment cases.

Procedure for Making a Rule 68 Offer

Rule 68 provides that up to 14 days before trial, defendants may serve a plaintiff an offer to allow judgment on specified terms, with the costs then accrued. This is a one-way street – Rule 68 does not apply to offers made by plaintiffs. If within 14 days of being served the plaintiff provides written notice accepting the offer, either party may then file the offer, notice of acceptance and proof of service. The clerk then must enter judgment. If the plaintiff does not accept the offer within 14 days, it is deemed rejected. A defendant may also submit subsequent offers, and rejected offers are not admissible except in a proceeding to determine costs. If an offer of judgment is rejected by the plaintiff and the subsequent judgment obtained by the plaintiff is less favorable than the offer of judgment, the plaintiff has to pay the defendant’s post-offer costs and forfeits reimbursement for his or her own post-offer costs.

Importantly, not all settlement offers will satisfy the requirements of Rule 68:

The critical feature of this portion of the Rule is that the offer be one that allows judgment to be taken against the defendant for both the damages caused by the challenged conduct and the costs then accrued. In other words, the drafters’ concern was not so much with the particular components of offers, but with the judgments to be allowed against defendants. (emphasis in original)

Although not technically required, it is highly recommended that the offer specifically state that it includes costs and, if applicable, attorneys’ fees. The Supreme Court has ruled that the offer does not have to expressly refer to costs as long as it does not “implicitly or explicitly provide that the judgment not include costs. …” Nevertheless, “courts may be particularly prone to interpret the language of a Rule 68 offer against the defendant that drafted it.”

For example, in Webb v. James, the defendants’ $50,000 offer of judgment was silent regarding costs and fees. After the plaintiff accepted and filed the offer, defense counsel sent a letter to plaintiff’s counsel clarifying that the $50,000 offer included plaintiff’s accrued costs and attorneys’ fees. It was too little too late. Judgment was entered against the defendant. The court viewed the offer as ambiguous and added plaintiff’s accrued costs and, pursuant to the Americans with Disabilities Act, attorneys’ fees, almost doubling the offer to $98,773.65. On the other hand, if an offer of judgment silent on costs and fees is rejected, it is highly unlikely that after a judgment a court would add costs and attorneys’ fees to an insufficient offer of judgment to make it more favorable than the judgment obtained by plaintiff.
Because it is often difficult to estimate a plaintiff’s accrued costs and attorneys’ fees at the time of making an offer, it may be prudent to “specify the amount allowed for substantive relief and leave the determination of costs for later action by the court.” This may be done by adding language to the offer such as “plus reasonable attorneys’ fees and costs incurred to date in an amount to be determined by the court.” An offer of judgment may also disclaim liability, but an offer that requires confidentiality is not a valid offer pursuant to Rule 68.

Finally, a defendant should be careful about the timing of a Rule 68 offer. In Perkins v. US West Comm, the defendant made an offer of judgment while its motion for summary judgment was pending. During the 10-day (at that time) period that the plaintiff was given to accept the offer, but before the plaintiff accepted it, the district court granted the defendant’s motion for summary judgment and dismissed the plaintiff’s complaint. After learning of the dismissal, which was still within 10 days of the Rule 68 offer, plaintiff’s counsel filed a notice of acceptance of the offer of judgment and moved to amend the judgment. The district court subsequently amended its judgment in favor of the defendant and entered judgment instead for the plaintiff. The Eighth Circuit upheld the district court’s amended judgment finding that “the plain language of Rule 68 mandates that an offer of judgment remain valid and open for acceptance for the full ten-day period outlined in the Rule despite an intervening grant of summary judgment by the district court.” Although this case may be an outlier and has not been followed by other courts, including at least one in the Sixth Circuit, its reasoning is not entirely without merit. Thus, defendants should be cautious when making a Rule 68 offer when a summary judgment motion is pending.

Fee-Shifting Statutes That Include Attorneys’ Fees as Costs

In 1985, in Marek v. Chesny, the United States Supreme Court added significant teeth to Rule 68 under statutes, such as 42 USC § 1988, that include attorneys’ fees as part of recoverable costs. As previously noted, pursuant to Rule 68, if a timely offer of judgment is not accepted by the plaintiff and the judgment obtained by the plaintiff is less favorable than the offer of judgment, not only does the plaintiff have to pay the defendant’s post-offer costs, the plaintiff forfeits reimbursement for his or her own post-offer costs. In Marek, the Supreme Court held that in statutes that define costs to include attorneys’ fees, such as most civil rights statutes including Title VII of the Civil Rights Act, the forfeited costs include all post-offer attorney fees to which a plaintiff would otherwise be entitled pursuant to the applicable statute. This dramatically changed the utility of a Rule 68 offer of judgment. Indeed, immediately after the Supreme Court’s decision, there was concern that Rule 68 would eviscerate the policies of the civil rights laws:

At the time Marek was decided, many commentators feared that Rule 68 would give civil rights defendants so much leverage that Rule 68 offers would effectively coerce premature and unfair settlements. Specifically, it was speculated that defendants in actions under statutes authorizing prevailing plaintiffs to recover fees as part of costs would routinely make early, low-ball offers of judgment; plaintiffs, fearful of forfeiting what is often the largest part of their recovery (attorneys’ fees), would feel compelled to accept many such offers without having had the opportunity to conduct sufficient discovery to evaluate with care the probability and magnitude of success; and the federal policies underlying these fee-authorization statutes would be undermined as a result.

Of course, this did not occur. For whatever reason or reasons – likely a fundamental misunderstanding of the consequences of rejecting a successful offer of judgment in fee-shifting cases – Rule 68 is largely ignored in employment litigation.

By failing to use Rule 68, defendants in many types of employment cases are losing a real tactical advantage:

In civil rights and employment discrimination cases ... a Rule 68 offer carries the greatest economic incentives. In part because of the typically long duration of these cases, and in part because of legal and practical limitations on available relief, statutory attorneys’ fees are often the largest component of an award to a prevailing plaintiff in civil rights and employment cases. Because Rule 68, after Marek, places plaintiffs’ post-offer attorneys’ fees at risk, civil rights and employment discrimination defendants have the most to gain by making a Rule 68 offer, and plaintiffs in these cases have the most to lose if they reject an offer and fail to beat it at trial.

For defendants in employment cases, Rule 68 is most effective when the chances of prevailing on a motion for summary judgment are slim or nonexistent. No one can predict what a jury will decide before trial. Eliminating post-offer attorney fees, however, can greatly reduce a defendant’s exposure. The earlier an offer of judgment is made in the litigation the greater the potential protection for the defendant and the more the plaintiff is placed at risk by rejecting an offer. This is especially true in cases – such as failure-to-promote cases – where the plaintiff’s potential substantive damages are miniscule compared to the recovery of attorneys’ fees.

On the other hand, there is almost no reason for a defendant to make a Rule 68 offer in cases in which the defendant believes it will prevail at the summary judgment stage. Even before Marek was decided, the Supreme Court

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held that Rule 68 only applies when the plaintiff prevails at trial. Furthermore, if the defendant prevails, defense costs are already reimbursable pursuant to Rule 54(d). Thus, the only reason for making a Rule 68 offer would be for an early resolution of the matter in order to avoid further litigation costs. This could be done as easily with a settlement offer without the risk of a judgment being entered.

Rule 68’s requirement that the offer be in the form of a judgment may be one of the reasons defendants have been reluctant to utilize offers of judgment, but this should not deter its use. Although there is a risk that a plaintiff may accept the offer of judgment by filing it with the court, it is minimal. Generally, even after an offer of judgment is made, plaintiffs are agreeable to entering into a confidential settlement agreement in order to obtain extra consideration in the process. Additionally, Rule 68 offers are often not timely accepted but the plaintiff reconsiders settlement at a later stage of the litigation. The possibility of the plaintiff forfeiting all post-offer attorney fees often provides tremendous leverage for the defendant at subsequent settlement negotiations. In most cases, the benefit of potentially eliminating future attorneys’ fees far outweighs the small risk that a judgment will be entered against the defendant.

Reverse Fee Shifting

In statutes that include attorneys’ fees as part of recoverable costs, there is an argument that Rule 68 requires an insufficiently prevailing plaintiff to not only forfeit his or her own attorneys’ fees but also to pay the losing defendant’s post-offer attorney fees. “Similarly, because Rule 54(d) ordinarily allows ‘costs’ to the prevailing party, one might expect that the plaintiff who loses altogether on a federal statutory claim governed by Section 1988 or by another statute authorizing fees as part of those costs might be liable to pay as part of those ‘costs’ the defendant’s attorneys’ fees, pre- as well as post-offer.”

The courts that have addressed this argument in civil rights and employment cases have rejected it. In Marek, the Supreme Court stated that only costs “properly awarded” pursuant to the applicable fee-shifting statute are to be considered as Rule 68 costs. Section 1988 provides that the court may allow a “prevailing party” reasonable attorneys’ fees as part of the costs, but it is well settled that only plaintiffs are normally entitled to an award for attorneys’ fees under the statute. In order for a defendant to receive attorney fees under § 1988, the trial court must determine that the plaintiff’s action was “frivolous, unreasonable, or without foundation.” Thus, courts have consistently found that Rule 68 does not entitle defendants to post-offer attorneys’ fees. As the Sixth Circuit recently ruled:

Defendants most certainly are entitled to their post-offer costs when Rule 68 applies. But, because attorneys’ fees are not “properly awardable” under § 1988 to a losing party like the City, the term “costs” excludes an award of attorneys’ fees in this case.

We join the First, Third, Fifth, Seventh, Eighth, and Ninth Circuits in so holding.

Put simply, it appears that Rule 68 provides no basis for reverse fee shifting. Because Rule 68 only applies when the plaintiff has prevailed, it would be difficult, if not impossible, to convince a trial court that the plaintiff’s case was “frivolous, unreasonable, or without foundation.”

Fee-Shifting Statutes That Do Not Include Attorneys’ Fees as Costs

There are fee-shifting employment statutes that do not define attorneys’ fees as a part of the costs. For example, the Age Discrimination in Employment Act (ADEA) awards fees in addition to, rather than as part of, costs. In fee-shifting statutes that do not define attorneys’ fees as costs, a successful Rule 68 offer does not automatically preclude a plaintiff from seeking post-offer attorneys’ fees. Nevertheless, a Rule 68 offer may drastically reduce the amount of post-offer attorneys’ fees that a court may deem as reasonable. The Ninth Circuit addressed this issue in a case brought pursuant to the Fair Labor Standards Act:

Although the clients, and not the attorney, are the ones to decide whether to accept a settlement offer, clients who refuse a Rule 68 offer should know that their refusal to settle the case may have a substantial adverse impact on the amount of attorney fees they may recover for services rendered after a settlement offer is rejected. Just because a plaintiff has an FLSA violation in her pocket does not give her a license to go to trial, run up the attorney fees and then recover them from the defendant.

When a plaintiff rejects a Rule 68 offer, the reasonableness of an attorney fee award under the FLSA will depend, at least in part, on the district court’s consideration of the results plaintiff obtained by going to trial compared to the Rule 68 offer. This application of Rule 68 has the salutary benefit of encouraging settlement of cases that should be settled when reasonable settlement offers are made.

Other courts have taken the same approach. As one commentator noted, defendants can curtail, if not eliminate, fee awards for post-offer work even in cases not directly affected by Rule 68.

Defendants may also potentially reduce an award of attorneys’ fees through a normal settlement offer without risking the entry of judgment through a Rule 68 offer. The Sixth Circuit recently upheld a district court’s decision to cut in half a plaintiff’s award for attorneys’ fees because he rejected a more favorable settlement offer than he received after trial. In that case, McKelvey v. Secretary of United States Army, the plaintiff brought an action pursuant to the Rehabilitation Act of 1973.
that does define attorneys’ fees as part of costs. Despite this, an offer pursuant to Rule 68 offer was never made. The plaintiff did, however, reject an unconditional offer of reinstatement and $300,000 prior to trial. After trial, an appeal and remand, the plaintiff eventually received reinstatement and $60,000.

In upholding the trial court’s reduction of fees, the Sixth Circuit noted that “there is no conflict between the Rule [68] and the statute. Rule 68 requires fee reductions in some settings after a formal offer of judgment; the fee statute permits fee reductions for all manner of reasons, including if a prevailing party could have won more had he settled the case.”

Obviously, in cases in which attorney fees are defined as costs a Rule 68 offer is superior to a normal settlement offer because it cuts off all post-offer attorneys’ fees as a matter of law. Under statutes such as the ADEA, which provide for attorneys’ fees in addition to costs, a normal settlement offer may provide the same protection as a Rule 68 offer without the risk of a judgment being entered. Despite this, defendants may still want to proceed with a Rule 68 offer because it is likely that most courts would view a formal Rule 68 offer with more gravitas. Most settlement offers are highly conditional, addressing many issues—such as releases, confidentiality, hiring eligibility, etc.—that are not addressed in an offer of judgment. Moreover, settlement offers do not provide for an entry of judgment. Thus, with an informal settlement offer, it is easier for a plaintiff to argue that rejection was reasonable because the offer did not provide all the relief that plaintiff sought and/or had too many conditions to make it acceptable.

Conclusion

Rule 68 provides significant leverage to defendants in many types of employment discrimination cases. The potential ability to eliminate a plaintiff’s post-offer attorneys’ fees is a significant advantage for the defendant. Furthermore, a rejected offer of judgment often provides tremendous leverage for the defendant in subsequent negotiations. The earlier a reasonable offer of judgment can be made, the greater potential protection to the defendant. While there are pitfalls to avoid, a carefully crafted Rule 68 offer is a tool that defense counsel should more often consider utilizing.

Footnotes
1. FRCP 54(d)(1) provides in relevant part: “Costs Other Than Attorney’s Fees. Unless a federal statute, these rules, or a court order provides otherwise, costs – other than attorney’s fees – should be allowed to the prevailing party.”
4. FRCP 68.
9. Id. at 620-623.
11. Id.
13. Id. at 339.
16. 241 FRD at 334.
17. Id. at 336.
19. 241 FRD at 343.
21. 42 USCA § 1988(b).
24. 29 USC § 626(b) (2005).
27. McKelvey v. Secretary of United States Army, 768 F3d 491, 494 (CA 6, 2014).
28. Id. at 496.

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