

Rule 68 Offers of Judgment in Personal Injury: Responding, Countering or Rejecting

THURSDAY, JUNE 28, 2018

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

Today's faculty features:

David S. Fried, Atty, **Fried & Bonder**, Atlanta

James R. Doyle, Partner, **Lewis Brisbois Bisgaard & Smith**, Charleston, W.Va & Atlanta

The audio portion of the conference may be accessed via the telephone or by using your computer's speakers. Please refer to the instructions emailed to registrants for additional information. If you have any questions, please contact **Customer Service at 1-800-926-7926 ext. 1.**

Tips for Optimal Quality

FOR LIVE EVENT ONLY

Sound Quality

If you are listening via your computer speakers, please note that the quality of your sound will vary depending on the speed and quality of your internet connection.

If the sound quality is not satisfactory, you may listen via the phone: dial **1-866-869-6667** and enter your PIN when prompted. Otherwise, please **send us a chat** or e-mail sound@straffordpub.com immediately so we can address the problem.

If you dialed in and have any difficulties during the call, press *0 for assistance.

Viewing Quality

To maximize your screen, press the F11 key on your keyboard. To exit full screen, press the F11 key again.

Continuing Education Credits

FOR LIVE EVENT ONLY

In order for us to process your continuing education credit, you must confirm your participation in this webinar by completing and submitting the Attendance Affirmation/Evaluation after the webinar.

A link to the Attendance Affirmation/Evaluation will be in the thank you email that you will receive immediately following the program.

For additional information about continuing education, call us at 1-800-926-7926 ext. 2.

If you have not printed the conference materials for this program, please complete the following steps:

- Click on the ^ symbol next to “Conference Materials” in the middle of the left-hand column on your screen.
- Click on the tab labeled “Handouts” that appears, and there you will see a PDF of the slides for today's program.
- Double click on the PDF and a separate page will open.
- Print the slides by clicking on the printer icon.

Rule 68.



A PRIMER ON OFFERS OF JUDGMENT FROM A PLAINTIFF'S PERSPECTIVE

DAVID S. FRIED
DFRIED@FRIEDBONDER.COM

JAMES R. DOYLE
JAMES.DOYLE@LEWISBRISBOIS.COM

Rule 68. Offer of Judgment.

6

- **(a) Making an Offer; Judgment on an Accepted Offer.** At least 14 days before the date set for trial, 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 14 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 14 days--before the date set for 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.

A Tool For Defendants

7

- The express language of Rule 68(a) permits offers of judgment only by litigants “defending against a claim.” This means that, under the Federal Rules, a plaintiff cannot serve an offer of judgement on a defendant.
- A plaintiff facing a counterclaim may make an offer of judgment because it is “defending against” a cause of action.

Timing and Form

8

- To be effective under Rule 68, an offer of judgment must be served “at least 14 days before the date set for trial...”
- The offer must be served, which implicitly requires that the offer be in writing.
 - An oral offer of judgment is invalid and will not trigger the cost-shifting provisions of Rule 68.
- Courts apply principles of contract law when interpreting Rule 68 offers of judgment. Any ambiguities will be construed against the defendant as the drafting party.

No Magic Words, but...

9

- There are no magic words that must be included in an offer of judgment, but Rule 68 requires that the offer be specific enough “to allow judgment on specified terms, with costs then accrued.” Accordingly, the offer must set forth the relief to be provided to the plaintiff (whether monetary or otherwise) with some degree of precision.
- “Lump sum” offers of judgment are permissible under Rule 68 as long as costs are not excluded from the offer.

What Happens During the 14 days?

10

- For the most part, an offer of judgment is irrevocable during the 14-day acceptance period.
 - Some limited exceptions that might allow an offer to be revoked: *Cesar v. Rubie's Costume Co.*, 219 F.R.D. 257, 259 (E.D.N.Y. 2004); *Fischer v. Stolaruk Corp.*, 110 F.R.D. 74, 76 (E.D. Mich. 1986).
- A plaintiff who wishes to accept an offer of judgment must provide written notice to the opposing party.
 - Plaintiff must accept the offer in its entirety or it will be considered rejected.
 - An offer of judgment is not filed with the Court unless/until it is accepted.

The Risk to Plaintiff

11

- If a plaintiff rejects an offer of judgment that turns out to be more than the amount recovered at trial, the plaintiff cannot recover its attorney fees incurred after the date of the offer.
- The risk of losing the right to recover attorney fees, combined with the possibility of having to pay both parties' costs, serves as an incentive for a plaintiff to accept and offer of judgment

Are Fees Costs?

12

- In *Marek v. Chesney*, 473 U.S. 1, 11 (1985), the Supreme Court determined that Rule 68 “costs” include attorney fees only if the governing statute defines attorney fees as part of “costs.”
- Thus, for purposes of Rule 68, it is especially important to determine whether the underlying statute defines attorney fees as part of recoverable “costs” or enumerates the recovery of attorney fees separately from “costs.”

Are Fees Costs?

13

- The fee-shifting provision of most civil rights legislation award attorney fees as part of costs:
 - Title VII of the Civil Rights Act
 - The Rehabilitation Act
 - All civil rights actions brought under the fee-shifting provision of 42 U.S.C § 1988, such as section 1981 racial discrimination claims

So, Back to the Language

- The offer should expressly state that it is inclusive of costs and attorney fees.
 - ✦ **Example:** “This shall be the total amount to be paid by Defendant on account of any liability claimed in this action, including all costs, expenses, and attorney fees accrued. Plaintiff’s acceptance will resolve all of the claims in this action.”
- If the offer simply refers to the plaintiff’s “costs,” it may be deemed to not include attorney fees, especially if the applicable statute does not include attorney fees as part of costs

Scrutinize the Offer

15

- Though no magic words necessary, is it specific enough?
- Is the timing adequate?
- Does the offer include costs?
- Does the offer expressly address costs?
- Does the offer address attorneys fees?
- Does it dispose of all issues in the case?
- Has Defendant **AGREED** in the offer to take a judgment?
- Is the amount offered adequate?

Not Just Lump Sum: Look For These Offers

16

- Lump sum –single dollar amount including damages, costs (which must include attorneys fees if applicable) and interest accrued to date. Plaintiff must determine if amount would exceed total judgment at trial.
- Lump sum damages only – specified dollar amount for damages and interest with costs to be determined by the court.
- Itemized – specified amount for damages and interest plus a specified amount for costs.

How Cost-Shifting Works

17

Defendant makes an offer – Plaintiff goes to trial

- **Defendant wins:** Defendant takes nothing because plaintiff did not obtain favorable judgment. *Delta Air Lines v. August*, 450 U.S. 346, 352 (1981)
- **Plaintiff wins and exceeds offer:** Plaintiff recovers costs from date suit commenced
- **Plaintiff wins but is under offer:**
 - Defendant awarded costs from date of offer
 - Plaintiff awarded costs from suit commencement (because prevailing party) up to date of offer, but forfeits post-offer costs

Strategic Considerations

18

- Analyze Offer – Written communication to client followed by in person discussion of risks.
- Is it valid per the requirements, timing, and language?
- Is it ADEQUATE?
- How important is a judgment? Acceptance means a judgment is entered against Defendant. Judgments are public—most settlements are not. Does this have any weight with Plaintiff?

How Can Plaintiff Leverage an Offer of Judgment?

19

- First assess RISK.
- Has your state enacted its own rules on Offers of Judgment?
- Some states allow two-way offers
 - Alaska, Arizona, California, Colorado, Connecticut, Florida, Georgia, Hawaii, Louisiana, Maryland, Michigan, Minnesota, Nevada, New Jersey, New Mexico, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Wisconsin, and Wyoming
- Some states allow Offers of Settlement in addition or in place of Offers of Judgment
 - Colorado, Florida, Georgia, Hawaii, Minnesota, New Mexico, North Dakota, Texas, and Utah.
- Ten states have expanded definitions of “costs.” Five states explicitly include attorneys’ fees under costs
 - Alaska, Florida, Michigan, New Jersey, and Texas.

Practical Responses

20

- Most academics do not feel the intent of the Rule—to promote settlement—has been realized.
- If the offer is rejected, make a counter.
 - Defendant has anchored one side of the negotiation with the Rule 68 Offer.
 - Multiple Offers are OK – don't be surprised by another Offer down the line.
- If your state allows, you can Counter a Rule 68 Offer with a state sanctioned Plaintiff's Offer.
- If the offer is invalid, let it lapse – do not give Defendant an opportunity to draft a proper one.