“CAPPING THE RISK”- RULE 68 OFFERS OF JUDGMENT

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Background

- Rule 68 creates an incentive for plaintiffs to settle.
- Rule 68 is a tool available to any party against whom a claim is pending, including counterclaim and third party defendants
- If Plaintiffs fail to accept an offer of judgment and then fail to obtain a more favorable judgment at trial, they are barred from recovering their own costs from the time of the offer.

Rule 68(a) and (b)

- (a) 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 costs then accrued. If, within 14 days after being served, the opposing party serves written notice accepting the offer, either party may file the offer and notice of acceptance, plus proof of service. The clerk must then enter judgment.
- (b) An unaccepted offer is considered withdrawn, but it does not preclude a later offer.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 hearing to determine costs.

Rule 68(c) and (d)

- (c) 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 the liability.
- (d) 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.

The Filing of an Offer of Judgment

- The offer of judgment should only be filed with the Court after the Plaintiff accepts it.
- Both the offer of judgment and the acceptance must be in writing.
- Either party may file the offer, notice of acceptance, and proofs of service.
- The clerk will then enter the judgment.

Timing of Acceptance

- Plaintiffs have 14 days from the date the offer of judgment is made to accept it.
- F.R.C.P. 6(a) governs the computation of time to determine when the offer of judgment expires.

Timing of Acceptance – F.R.C.P. 6(a)

- "When the period is stated in days or a longer unit of time:
  - (a) Exclude the day of the event that triggers the period;
  - (b) count every day, including intermediate Saturdays, Sundays, and legal holidays; and
  - (c) include the last day of the period, but if the last day is a Saturday, Sunday or legal holiday, the period continues to run until the end of the next day that is not a Saturday, Sunday or legal holiday."

Offer of Judgment Must Include Costs/Fees

- An offer of judgment is valid as long as it does not explicitly provide that the judgment does not include costs.
- There are two reliable methods defendants can use to ensure an offer of judgment is valid.

1. The Offer of Judgment Could Contain the Exact Language of Rule 68.

- Example:
  - Offer of Judgment could state "$100,000 with costs then accrued."
    - Then, if accepted, a $100,000 judgment would be entered against the defendants; and
    - The court would determine the amount of costs incurred to date in accordance with the procedures established in Local Rule 54.3.
- Keep in mind that the language in many fee shifting statutes includes attorneys' fees in "costs."

2. Lump-Sum Offer of Judgment

- A lump sum offer is valid if it recites that costs are included or specifies an amount for costs, and the plaintiff accepts the offer, the judgment will necessarily include costs. *Marek v. Chesney*, 473 U.S. 1, 1 (1985).
- If the offer does not state that costs are included and an amount for costs is not specified, the court will use its discretion to determine an additional amount to cover costs.

2. Lump-Sum Offer of Judgment (cont.)

- The Seventh Circuit upheld a lump-sum offer of judgment for "one total sum as to all counts of the amended complaint," since the amended complaint asked for attorneys' fees in one of the counts. *Nordby v. Anchor Holding Packaging Co.*, 199 F.3d 390, 392 (7th Cir. 1999).

Examples of Lump-Sum Offers of Judgment

- Advisable lump-sum offers of judgment could offer:
  - "a total sum, including costs and fees of $500,000," or
  - "$400,000, including costs and fees of $100,000."

The Problem of Multiple Plaintiffs

- When there are multiple plaintiffs, a defendant must apportion the offer as to Plaintiffs.
- The Seventh Circuit has found offers to be invalid when they do not apportion the total amount of the offer among the plaintiffs. *Gavoni v. Dobbs House, Inc.*, 164 F.3d 1071, 1075-78 (7th Cir. 1999).

The Problem of Multiple Plaintiffs (cont.)

- Suppose Defendant makes an offer of judgment for $250,000 for each plaintiff, or the offer reads "a total sum, including costs and fees, of $500,000.00, to be split equally between each Plaintiff." What happens if Plaintiff A accepts the offer, but not Plaintiff B?
  - Plaintiff A's acceptance would be a binding acceptance for $250,000.
  - However, Plaintiff B's case would continue, and if he won, he may still recover full attorneys' fees.
- Defendants can prevent the above situation from occurring by making the offer conditional on acceptance by all plaintiffs. *Amati v. City of Woodstock*, 176 F.3d 952, 957-959 (7th Cir. 1999).

The Problem of Multiple Defendants

- An unapportioned joint offer made by multiple defendants creates the same “uncertainty” as an unapportioned offer made to multiple plaintiffs.
- An unapportioned joint offer of judgment by multiple defendants will likely not trigger Rule 68’s fee-shifting provisions.

Hypothetical Offer By Multiple Defendants

- Suppose four (4) defendants jointly offer $250,000 to each plaintiff. Plaintiff wins, but only against one defendant, and receives verdict of $200,000.
- Problem: Who was offering the $250,000?
- Did the parties intent to apportion the offer equally?
  - If so, then the guilty defendant's offer was just $62,500, and Plaintiff's verdict then exceeded the offer.

Hypothetical Offer By Multiple Defendants (Cont.)

- Or did the defendants envision another division more commensurate with their varying degrees of responsibility?
  - If so, the Seventh Circuit requires the offer of judgment to spell out the apportionment because varied constructions of the single offer only underscore its fatal problem: imprecision. *Harbor Motor Company, Inc., v. Arnell Chevrolet-Geo, Inc.*, 265 F.3d 638 (7th Cir. 2001).
- In order to make a valid offer of judgment that will cut off the running of fees, the offer must indicate how to apportion the offer as to plaintiff and as to all defendants.

Multiple Defendants

- If the offer is equally divided among plaintiffs and defendants, it is like chopping the total offer exponentially.
  - Example: If there is an offer of $500,000.00 with two plaintiffs and four defendants, an evenly divided offer would give each plaintiff $250,000.00, if that offer is evenly apportioned among the four defendants, then each defendant has only offered each plaintiff $62,500.00.

Whether Judgment is “More Favorable” Than the Offer

- If Defendants make a lump-sum offer, but Plaintiffs win at trial for an amount less than the offer, a problem could arise when determining whether the judgment obtained by Plaintiffs is actually more favorable than the offer.
- Rule 68 is not triggered if the Defendants obtain a “not guilty” verdict.

Whether Judgment is “More Favorable” Than the Offer

- Pre-offer attorney’s fees must be considered in the Rule 68 computation when the offer is of the “lump-sum” variety. *See Grosvenor v. Brienen*, 801 F.2d 944, 947 (7th Cir. 1986).

Rule 54

- Rule 54 allows a successful plaintiff to obtain “costs” as part of its judgment damages. Under 42 U.S.C. § 1988 “costs” include attorneys’ fees.
- When comparing the offer of judgment with the judgment actually obtained, the court must compare “like judgments.”
- In comparing “like judgments” the Seventh Circuit has held that pre-offer attorneys fees must be added into a “lump-sum” offer of judgment.

Hypothesis of Whether Judgment is More Favorable Than the Offer

- Defendant makes $10,000 lump-sum offer of judgment. Plaintiff wins for $5,000, but at the time the offer was made, he had $6,000 in attorney's fees.
  - The "like comparison" is not $10,000 vs. $5,000.
  - Instead, the "like comparison" is $10,000 v. $11,000 ($5,000 + $6,000 = $11,000).
- Since the amount of the offer ($10,000) is not greater than the total judgment obtained ($11,000), Rule 68's cost-shifting provision has no effect.
- Therefore, Plaintiff would be entitled to all pre-offer and post-offer costs and fees.

Solutions for Adding Attorneys Fees into the Offer

- 1. A “lump-sum” offer must be sufficiently high to account for the addition of attorneys fees into the calculus.

Solutions for Adding Attorneys Fees into the Offer

- 2. Avoid making a “lump-sum” offer of judgment.
  - Instead, offer to pay Plaintiffs a set amount, plus their attorneys fees (to be determined by the court).
- The possible detriment to this approach is that there is a potentially large, unknown variable that defendants must be willing to pay.

Solutions for Adding Attorneys Fees into the Offer

- 3. Make an offer, which specifies both the amount to pay Plaintiffs and an amount to pay for attorneys fees.
- Example: Offer “a sum of $400,000 to be split equally between the plaintiffs, plus costs and fees in the amount of $100,000.”
- The total offer would be $500,000, but if the pre-offer costs are $100,000 or less, then the Plaintiff would not be entitled to any add-ons.
- If the pre-offer costs are more than $100,000, the amount added on would be significantly lowered to the point that it would not matter.

Sample Offer of Judgment

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

JOHN DOE	)	
	)	
Plaintiff,	)	
v.	)	**No. 11 C 0000**
	)	
OFFICER SMITH	)	**Judge Dread**
	)	
Defendant	)	**Magistrate Judge Friendly**

DEFENDANT'S OFFER OF JUDGMENT PURSUANT TO RULE 68 OF THE FEDERAL RULES OF CIVIL PROCEDURE

NOW COMES Defendant, OFFICER SMITH, by and through his attorneys, Querrey & Harrow, Ltd., pursuant to Rule 68 of the Federal Rules of Civil Procedure hereby offers judgment to be taken against Officer Smith, in this cause of action, collectively in the total amount of Ten Thousand Dollars ($10,000), in return for termination of this litigation against Defendant Smith. This offer includes, but is not limited to, any costs, all attorney's fees, expenses, consulting fees, research expenses, or any other costs accrued to litigate this matter, pursuant to 42 U.S. C. § 1988.

This offer of judgment is made for the purposes specified in Rule 68 and is not to be construed either as an admission that the defendant is liable in this action or that the plaintiff has suffered any damage as a result of any alleged action, unlawful custom, policy or practice.

Respectfully submitted,
OFFICER SMITH

By: _____
One of the Attorneys for the Defendant

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Defendants Cannot Recover Their Fees

- A 1983 Defendant whose offer was more than the judgment essentially can never recover its own post-offer attorneys fees.
- 1988 only allows costs and fees to a prevailing party, but a 1983 defendant can only be the prevailing party if the suit is “frivolous” or “vexatious.”

Defendants Cannot Recover Their Fees

- Rule 68 only applies if Plaintiff wins, but if Plaintiff wins, the suit could not have been “frivolous” or “vexatious.”
- Thus, Defendants can only cut off those fees and costs they might be required to pay.

Rule 68 and Class Actions

- Case law regarding “mooting” the class involve TCPA claims
- Many decisions hold once class certification motion filed class cannot be “mooted” by Offer of Judgment in amount sought (e.g. $1,500.00 under TCPA)

Final Considerations

- Keep in mind that if a Rule 68 Offer of Judgment is accepted, the effect is a judgment against the particular entity represented.
- Therefore, meeting with and explaining the effect of the judgment to your respective clients is highly advisable.
- Upon payment of an entered judgment, it is advisable to secure a release and satisfaction to avoid any later issues involving an individual's credit history.

Final Considerations

- An accepted offer of judgment is not equivalent to a victory on the merits. *Fletcher v. City of Fort Wayne*, 162 F.2d 975, 976-77 (7th Cir. 1998).
- It is advisable to insert language that there is no admission of liability and that the offer was made to settle the claim.
- The Seventh Circuit appears to consider such language in the offer of judgment as a valid condition of acceptance.

Final Considerations

- A Rule 68 Offer of Judgment can be an effective tool in “capping the risk” of the fee-shifting reality of federal civil rights cases.