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Prevailing Party Costs & the Rule 68 Weapon

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PREVAILING PARTY COSTS AND THE RULE 68 WEAPON

I. Prevailing Party Costs (10 minutes)

A. What is this?

Rule 54 of the Federal Rules of Civil Procedure provides:
"***Costs Other Than Attorney's Fees.*** Unless a federal statues, these rules, or a court order provides otherwise, costs—other than attorney's fees—should be allowed to the prevailing party."

B. *What does this application look like, when is it made, and to whom is it made?*

Samples (included in materials)
14 days after entry of judgment
Made to the Judgment Clerk not the judge typically

C. *What can I get?*

Fairly limited in EDNY/SDNY
Check Local Rule
What used at trial
Trial transcripts if ordered by court
(*Scott v. NYC*, 11-CV-03846 (JBW)(RER)(EDNY 2013)(Rep. & Recom.)

D. *Many plaintiffs will never pay this and are virtually judgment proof, so why should I care?*

Future lawsuits/frequent flyers
Appeals
Settlement negotiation tool

II. RULE 68 (40 minutes)

A. ***What is this?***

- Rule 68 of the Federal Rules of Civil Procedure states, in relevant part, as follows: "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." Fed. R. Civ. P. 68(a).

- It is settled law that if a Rule 68 offer of judgment is intended to include costs in the offered sum, it should expressly state that intent. *Marek v. Chesny*, 473 U.S. 1, 6 ("[i]f the [Rule 68] offer does not state that costs are included and an amount for costs is not specified, the court will be obligated by the terms of the Rule to include in its judgment an additional amount which in its discretion, it determines to be sufficient to cover the costs").

- Rule 68 provides that the offeror is to pay the costs of the accepting party: "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." *Marek*, 473 U.S. at 6 (emphasis original). In the context of § 1983 actions, the Supreme Court has held that "costs," as referred to in Rule 68, include attorneys' fees. *See Barbour v. City of White Plains,* 788 F. Supp. 2d 216, 221 (S.D.N.Y. 2011)(*quoting Marek,* 473 U.S. at 8-12.)

- An offer made pursuant to Rule 68 is an offer to allow the offeree/plaintiff to take judgment against the offeror/defendant for a definite and finite amount of money plus the reasonable costs and attorneys' fees accrued at the time the offer is made.

    - Principles of contract law are applied to test the validity of any offer.

B. How does it work?

- The Rule 68 offer is made by hand delivering a copy to your adversary at which point plaintiff has 14 days to accept the terms of the offer before it expires.

- If accepted, plaintiff can file the offer with the Court and it becomes a judgment against the offeror which must be paid. Often a plaintiff accepts the Rule 68 Offer and the parties then negotiate a Stipulation of Settlement for the value of the Rule 68 Offer plus reasonable attorneys' fees – a global settlement is preferable as there is no judgment entered.

- **In the event the plaintiff rejects the offer, the litigation proceeds. If plaintiff ultimately prevails at trial, but is awarded an amount less than the amount of the Rule 68, plaintiff's attorneys' fees are equal to only that which had been accrued up to the date of the Rule 68 offer regardless of how much work may have been done after that date.**

- **AND… the offeree "must pay the costs incurred after the offer is made."**

  Costs to the offeror
  Much more expansive than Rule 54

- **HOWEVER, if complete defense verdict: only prevailing party costs**
  Delta Air Lines, Inc., v. August, 450 U.S. 346 (1981)

C. <u>What are the mechanics?</u>

- <u>Served/not filed</u>

  unaccepted offer not evidence
  tell judge or not, say in negotiations?

- <u>How much should it be?</u>

  Generally, the offer should be enough so that the defendant is reasonably protected in the event the plaintiff prevails at trial.

  Jurors normally return verdicts in whole numbers (for example, $650.00 $50,000; $250,000.00). Make your offer for one dollar more than you think a jury would likely award (for example, $651.00; $5,001.00; $250,001.00)

- <u>When should you serve it?</u>

  Rule of thumb: As soon as possible/waiting can be dangerous

  Example:

  - You receive $30,000 in global authority and authority for a $20,001 Rule 68. You attempt to negotiate, but negotiations stall and discovery proceeds. Your adversary responds to discovery requests, files several discovery motions regarding disputes between the parties and appears at several conferences with the Court including a settlement conference. Ultimately, your offer of $30,000 global is rejected. At this point, discovery is closing and depositions of the parties must proceed so you finally issue your Rule 68 Offer of $20,001 in advance of depositions. Plaintiff accepts the offer and then you receive a bill for reasonable

attorneys' fees which total $50,000 due to the extensive discovery that was done. As a result, you end up settling the case for approximately $70,000 total. Had you issued the Rule 68 early on in the litigation, it may have been rejected, but either way, the defendant would have been protected and you could have used the offer as leverage in future negotiations.

- Who is Protected?

  The onus is on the defendant to make sure that the Rule 68 offer is unambiguously made by a party defending against a claim and must be capable of comparison to the judgment ultimately obtained.
  Stancyzk v. City of New York, 752 F.3d 273, 283 (2d Cir. 2014) (included in materials).

  In *Stancyzk,* the Rule 68 Offer was upheld as valid since even though it allowed the Plaintiff to take judgment *only* against the City of New York, and the verdict was ultimately *only* rendered against the defendant police officers, the City of New York and all of the defendant officers were included in the Corporation Counsel's signature block.

- What happens if accepted?

  Entry of Judgment
  Global Settlement

  Whenever a Rule 68 is accepted, your first move should be to try and convert the amount of the offer into a global amount which also accounts for attorneys' fees. For example, if a plaintiff accepts a Rule 68 of $5,001, you can settle the matter globally for $10,000 total rather than having to negotiate fees assuming the attorneys' fees roughly equate to the additional amount. The reason this is important is because negotiating attorneys' fees can be an extremely tedious and difficult process.

- Some random things

  Plaintiff assigning claim for Fees and Costs to plaintiff counsel
  Discovery

D. What are some strategies?

Cut off fees and obtain costs
One of the few weapons in the arsenal to stop fee churning
Provoke settlement negotiations

E. Questions