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Defending the Defenders – Police Liability Litigation

"Capping the Risk"

Rule 68 Offers of Judgment in §1983 Litigation: An Overview

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INTRODUCTION

It is a typical Friday evening rush hour on a downtown train platform in a large municipality, crowded with commuters trying to get home for dinner. Police receive a call about two suspicious-looking young men causing a disturbance on the platform. Officers Baker, Charlie, and Delta respond and arrive at the scene to investigate. As they approach, one of the individuals, Felix Friend, sees the officers and begins to hurriedly push his way through the crowd toward an exit. Officers Baker and Charlie pursue and stop Friend. In the meantime, Officer Delta approaches the second individual, Pete Plaintiff, a 16-year-old youth. What happens next is the subject of dispute. Plaintiff claims Officer Delta grabbed him for no apparent reason, punched him in the face knocking him to the ground, and jumped on top of him. Officer Delta, however, claims that Plaintiff actively resisted his efforts at a pat down search, which ultimately led the officer to perform a department-taught and approved open hand strike and take-down procedure. Plaintiff receives a bloody nose and black eye in the incident, which he claims resulted from being punched in the face. Officer Delta denies punching Plaintiff.

Plaintiff later files a Section 1983 civil rights lawsuit alleging (1) an excessive force claim against Officer Delta, (2) failure to intervene claims against Officers Baker and Charlie, and (3) a *Monell* claim against the municipality based on failure to train, failure to discipline, and an alleged department-wide "Code of Silence." Discovery involves over 15 depositions, including the parties, several witnesses from the train platform, and treating physicians. Extensive *Monell* discovery into the municipality's police department training and disciplinary programs is conducted, and experts are retained on the *Monell* issues.

Discovery and investigation reveal Plaintiff is a high school honor roll student with no prior criminal history. Officer Delta has been a police officer for six years, with four prior citizen complaints against him for excessive force, three of which were deemed unfounded by the police department's internal investigatory agency. Several of the independent witnesses appear to support Plaintiff's version of events, suggesting it looked like Officer Delta swung his right arm towards Plaintiff. Officers Baker and Charlie advise they were occupied with the other suspect and did not see the incident. The treating physicians testify Plaintiff complained in the Emergency Room he was "punched in the face" by a police officer, and they diagnosed Plaintiff with facial contusions and swelling.

The case is now at a settlement conference. Plaintiff's medical expenses and damages are minimal, and he has no permanent injury or disfigurement. You would like to settle the case in the range of $5,000 to $10,000. The Magistrate Judge mediating the settlement conference rejects your evaluation of the case, telling you Plaintiff's counsel already has expended over $100,000 in fees and costs, so that any settlement will need to be in the six figure range. What do you do?

Perhaps the better question is, "What could you have done to avoid this situation?" Federal Rule of Civil Procedure Rule 68 provides one possible answer.

THE RULE

The full text of Rule 68 is as follows:

> **RULE 68. OFFER OF JUDGMENT**
>
> (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.

PURPOSE AND OPERATION OF RULE 68

The purpose of Rule 68 is to encourage settlement and avoid litigation. *Marek v. Chesny*, 473 U.S. 1, 5, 105 S. Ct. 3012 (1985). Rule 68 "prompts both parties to a suit to evaluate the risks and costs of litigation, and to balance them against the likelihood of success upon trial on the merits." *Id*. The Rule is "designed to provide a disincentive for plaintiffs from continuing to litigate a case after being presented with a reasonable offer" (*Payne v. Milwaukee County*, 288 F.3d 1021, 1024 (7th Cir. 2002)), and requires a plaintiff to "think very hard" about whether continued litigation is prudent. *Erdman v. Cochise County*, 926 F.2d 877, 880 (9th Cir. 1991), *quoting Marek*, 473 U.S. at 10-11. The idea is to encourage the parties to realistically evaluate their cases before trial. This goal is accomplished through cost-shifting provisions in Rule 68 that become operative when a plaintiff rejects a defendant's offer of judgment, and ultimately obtains an actual judgment that is less favorable than the unaccepted offer of judgment. *See Amati v. City of Woodstock*, 176 F.3d 952, 957 (7th Cir. 1999) ("Rule 68 bites only when the plaintiff wins but wins less than the defendant's offer of judgment").

Specifically, Rule 68 provides that if a timely offer of judgment is not accepted, and the judgment finally obtained by the offeree "is not more favorable than the unaccepted offer, the offeree must pay the costs incurred after the offer was made." Fed. R. Civ. P. Rule 68(d). This cost-shifting provision has three potential consequences for a plaintiff who rejects an offer of judgment. First, a plaintiff who rejects an offer of judgment and fails to obtain a more favorable result at trial is liable to pay the costs of the defendant incurred after the offer was made. Second, such a plaintiff cannot recover his own post-offer costs, even though he has obtained a judgment against the defendant. Finally, and perhaps most importantly in Section 1983 litigation, a plaintiff who rejects an offer of judgment and fails to obtain a more favorable final judgment is prohibited from recovering attorneys' fees for post-offer work, just as he may not recover other post-offer costs. *See Marek*, 473 U.S. at 10-11. The term "costs" in Rule 68 includes attorney's fees awardable under 42 U.S.C. §1988. *Id*. at 9. A court has no discretion to disregard the cost-shifting provisions of Rule 68. *See, e.g., Pouillon v. Little*, 326 F.3d 713, 718 (6th Cir. 2003). In this way, Rule 68 can provide a significant check on fee-driven litigation, which occurs with some frequency in civil rights lawsuits against police officers.

A §1983 plaintiff's attorneys' fees are part of the plaintiff's recoverable "costs" for purposes of Rule 68. *Marek*, 473 U.S. at 9. However, recoverable "costs" under Rule 68 do *not* include the *defendant's* attorney's fees in Section 1983 actions. Pursuant to the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. §1988, only prevailing parties are permitted to recover reasonable attorney's fees as part of their costs. As one court noted, "Any defendant who is entitled to invoke Rule 68 is by definition not a prevailing party." *Poteete v. Capital Engineering, Inc.*, 185 F.3d 804, 808 (7th Cir. 1999); *see also Crossman v. Marcoccio*, 806 F.2d 329 (1st Cir. 1986); *EEOC v. Baily Ford, Inc*., 26 F.3d 570, 571 (5th Cir. 1994); *Champion Produce, Inc., v. Ruby Robinson Co*., 342 F.3d 1016, 1029 (9th Cir. 2003); *but compare Jordan v. Time, Inc.*, 111 F.3d 102, 105 (11th Cir. 1997) (awarding attorneys' fees to defendants where copyright plaintiff obtained judgment less than Rule 68 offer). Under §1988, a defendant's attorney's fees may be recovered from a plaintiff only if the plaintiff's claim is frivolous or vexatious, and not pursuant to Rule 68. *Payne v. Milwaukee County*, 288 F.3d at 1026-27.

Commentators noted that Rule 68 appeared to have little impact for many years. *See, e.g.*, 12 Charles A. Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure 2d*, Section 3001 (2d ed.); *see also King v. Rivas*, 555 F.3d 14, 20 (1st Cir. 2009) ("Rule 68 was for some time almost ignored"). This is not surprising given that a prevailing party already was entitled to its costs (other than attorneys' fees) under the Rules. Fed. R. Civ. P. 54(d). However, the United States Supreme Court's decision in *Marek* significantly increased the importance of Rule 68, particularly in cases involving fee-shifting statutes such as Section 1983 litigation. *King*, 555 F.3d at 20 (Rule 68 "stakes were raised" in *Marek*); *see also Grosvenor v. Brienen*, 801 F.2d 944, 946 (7th Cir. 1986). In particular, *Marek*'s holding that a Section 1983 plaintiff's attorneys' fees would be considered part of his or her "costs" for purposes of cost-shifting made Rule 68 a potentially powerful tool for defendants in civil rights cases. *See Erdman*, 926 F.2d at 880 ("The stakes for a plaintiff who receives an offer of judgment under Rule 68 are especially high in civil rights cases, since Section 1983 specifically authorizes attorneys' fees to be awarded to prevailing plaintiffs as an element of "costs"). Because of the binding nature of Rule 68, a number of important issues must be carefully considered before attempting to utilize this important tool.

PROCEDURAL REQUIREMENTS

As discussed in more detail below, an offer of judgment is not the same as an offer of settlement. In making an offer of judgment pursuant to Rule 68, certain procedural formalities must be followed. An offer of judgment must be made "at least 14 days before the date set for trial." Fed. R. Civ. P. 68(a). (*See* discussion on Timing of Offer, *infra*, at pp. 13-14). An offer of judgment made less than 14 days before the scheduled trial date is invalid. *See Polk v. Montgomery County*, 130 F.R.D. 40, 42 (D. Md. 1990).

Although Rule 68 does not so specify, an offer of judgment must be in writing. Rule 5(a) requires service of certain "papers" on every party, and expressly includes offers of judgment within its scope. Fed. R. Civ. P. 5(a)(1)(E). Rule 5(b) further requires service of "papers" such as offers of judgment through one of a number of designated methods. The requirement that the offer be served on a plaintiff "makes no sense unless it means that the offer must be written." *Grosvenor v. Brienen*, 801 F.2d 944, 948 (7th Cir. 1986); *see also Clark v. Sims*, 28 F.3d 420, 424 (4th Cir. 1994). It is strongly recommended a certificate of service be included with the written offer of judgment so that timing of service can be established if later challenged. *See Sanchez v. Matta*, 2005 WL 2313621, at *13 (D.N.M. Jul. 29, 2005).

The offer of judgment should not be filed with the court. *Webb v. James*, 172 F.R.D. 311 (C.D. Ill. 1997). The plain language of Rule 68 provides that an offer of judgment should be filed only after the plaintiff serves written notice accepting the offer within 14 days after being served. Fed. R. Civ. P. 68(a). At that point, either party can file the offer and notice of acceptance with the court, along with proof of service. *Id*.

SPECIFIC TERMS TO BE INCLUDED IN OFFER OF JUDGMENT

Generally, courts rely on contract principles when interpreting offers of judgment. *Webb*, 147 F.3d at 620; *Erdman v. Cochise County*, 926 F.2d 877, 880 (9th Cir. 1991); *Radecki v. Amoco Oil Co.*, 858 F.2d 397, 400 (8th Cir. 1998). Ambiguities typically are construed against the drafter of the offer. *Erdman*, 926 F.2d at 880. However, a Rule 68 offer creates potential consequences for a plaintiff making it significantly different from a normal contract offer. As one court explained:

> A Rule 68 offer of judgment . . . has characteristics that distinguish it from a normal contract. When a defending party chooses to couch its settlement offer in terms of a Rule 68 offer of judgment, it is taking advantage of certain tactical advantages not available to the normal offeror. Under the terms of Rule 68, if a timely offer of judgment is not accepted and "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. Unlike the offeree of an ordinary contract, *the Rule 68 offeree is bound by an offer of judgment whether it is accepted or not*. (Emphasis added).

> A normal final settlement offer, then, is like an ordinary contract offer in that it leaves the offeree two options: accept it on its terms, or reject it and run the risk of receiving a lesser judgment at trial. A Rule 68 offer of judgment, on the other hand, presents a more draconian choice to the plaintiff: accept it on its terms, or go to trial and run the risk of obtaining a less favorable judgment *and* paying the defending party's post-offer costs. (Emphasis in original).

Said v. Virginia Commonwealth University/Medical College of Virginia, 130 F.R.D. 60, 63 (E.D. Va. 1990).

While contract principles can be used to interpret offers of judgment, equitable contract defenses may be inapplicable. As discussed in further detail below, Rule 68 offers of judgment, once made, may not be revoked or altered during the 14-day period set by the Rule. *See Richardson v. National RR. Passenger Corp.*, 49 F.3d 760, 764 (D.C. Cir. 1994). Because of the potentially serious consequences for a plaintiff who rejects an offer of judgment, courts have been reluctant to allow defendants to challenge the interpretation of an offer of judgment, either before or after acceptance. *Erdman*, 926 F.2d at 880-81; *see also Webb*, 147 F.3d at 621. For example, the doctrine of rescission has been rejected in the context of a Rule 68 offer of judgment. *Id*. Moreover, courts will construe the offer's terms strictly and will be reluctant to allow an offeror to present extrinsic evidence to affect that construction. *Said*, 130 F.R.D. at 63.

The United States Supreme Court's decision in *Marek* provides significant guidance as to what is required for a valid offer of judgment under Rule 68. The offer must specify the amount being tendered for settlement and/or the other relief for which judgment may be entered. 473 U.S. at 6-7. There are two basic approaches to preparing an offer of judgment. In the first option, the offered amount can be a lump sum that combines damages and costs (which, pursuant to *Marek*, include attorney fees in §1983 litigation). *Id*. As *Marek* explained:

> It is immaterial whether the offer recites that costs are included, whether it specifies the amount the defendant is allowing for costs, or, for that matter, whether it refers to costs at all. As long as the offer does not implicitly or explicitly provide that the judgment not include costs, a timely offer would be valid.
>
> This construction of the Rule best furthers the objective of the Rule, which is to encourage settlements. If defendants are not allowed to make lump sum offers that would, if accepted, represent their total liability, they would understandably be reluctant to make settlement offers.

Id.

The alternative to a lump sum is an offer of a specified amount for damages caused by the challenged conduct, with an understanding the court will determine costs (and attorneys' fees) at a later date. *Id*. at 6. A defendant cannot ignore or refuse to include costs. *Webb v.*

James, 147 F.3d 617, 622 (7th Cir. 1998) ("The effect of *Marek* is clear. Rule 68 offers must include costs"). If an offer of judgment is silent as to costs, the court is authorized to determine an additional award to cover them. *Id*. For that reason, a lump sum offer inclusive of costs should include a specific term reflecting that intention. *See Fletcher v. City of Fort Wayne*, 162 F.3d 975, 977-78 (7th Cir. 1998) (a lump sum offer "including costs and attorneys' fees" would, if accepted, "cut off the plaintiff's ability to seek an additional award"). As discussed in more detail below, it is strongly recommended the offer of judgment explicitly specify whether it is inclusive or exclusive of costs and attorneys' fees.

Superficially, a lump sum approach appears to provide the offeror with more certainty. The offeror clearly has such certainty as to what it will pay if the lump sum offer of judgment is accepted. But if the offer of judgment is rejected, the lump sum approach becomes more complicated and riskier for the offeror. Indeed, it will provide little protection to the offeror if the plaintiff obtains a judgment because pre-offer costs and fees must be added to the judgment when calculating whether the judgment was in excess of the rejected lump sum offer. *Grosvenor v. Brienen*, 801 F.2d 944, 948 (7th Cir. 1986); *Marryshow v. Flynn*, 986 F.2d 689, 692 (4th Cir. 1993). Litigation involving the issue of a plaintiff's pre-offer costs and fees can be rather complicated. *See, e.g., Staples v. Wickesberg*, 122 F.R.D. 541, 542 (E.D. Wisc. 1988) ("This is another chapter in the story of how a simple request for attorney's fees in a civil rights case can turn into a journey through a tortuous legal maze. It is also another example of the time-consuming nature of these kinds of proceedings").

A hypothetical illustrates the uncertainty posed by a lump sum offer. Suppose the defendant made a lump sum offer for $30,000 that was rejected and the plaintiff was awarded $20,000 in compensatory damages at trial. Although the judgment was less than the amount of the offer, the plaintiff may be able to argue the cost-shifting provisions of Rule 68 are not triggered because his or her pre-offer fees are in excess of $10,000. Under the *Grosvenor* line of cases, the plaintiff's pre-offer costs and fees will be added to the $20,000 judgment and compared against the $30,000 offer. In this example, it would be highly unlikely the defendant would receive any benefit from the Rule 68 offer of judgment. Even in a closer case, the lump sum offer will require further litigation as to the appropriate amount of pre-offer costs and fees.

A defendant's second option is to provide an offer of judgment for a specified amount for damages caused by the challenged conduct, exclusive of the costs and fees accrued up to the date of the offer. The risk to this approach is that the accrued costs and fees are an unknown number. Obviously, the risk of significant pre-offer costs is lessened if the offer of judgment is made earlier in the litigation. Further protection should be provided by the court's review of the costs and fees submitted by the plaintiff, in that only *reasonable* costs and fees should be recoverable. Also, the defendant should have an opportunity to challenge any excessive pre-offer costs or fees being claimed by the plaintiff's counsel.

The real benefit to this second approach occurs when the plaintiff rejects the offer of judgment and ultimately obtains a damages judgment that is less than the amount of the offer. By its terms, the cost-shifting mechanism of Rule 68 is automatically triggered, which will operate to cut off the plaintiff's post-offer fees and costs and make plaintiff liable for the defendant's costs.

It also may be possible under certain circumstances for a defendant to argue it should not even have to pay plaintiff's pre-offer attorneys' fees. While a plaintiff who is awarded only nominal damages is still considered a "prevailing party" for purposes of §1988, an award of nominal damages bears on the reasonableness of the attorneys' fee award. *Farrar v. Hobby*, 506 U.S. 103, 112-14, 113 S. Ct. 566 (1992). The court has the discretion to deny attorneys' fees to a prevailing party if the recovery is "merely technical or *de minimis*." *See Fisher v. Kelly*, 105 F.3d 350, 352 (7th Cir. 1997); *see also Fletcher*, 162 F.3d at 976 ("[F]or trivial recoveries, the only reasonable award of fees is zero").

Pouillon v. Little, 326 F.3d 713 (6th Cir. 2003), presents an excellent illustration of the protections afforded by Rule 68 to a §1983 civil rights defendant. In *Pouillon*, the defendant served an offer of judgment pursuant to Rule 68 in the amount of $10,000.01, inclusive of costs and attorneys' fees. The plaintiff did not accept the offer. A jury eventually returned a verdict in favor of the plaintiff in the amount of $2.00. The district court nevertheless granted the plaintiff's motion for attorneys' fees and denied the defendants' motion for costs, reasoning that the plaintiff's rights were vindicated by the verdict. The Sixth Circuit reversed, finding the district court abused its discretion in granting the plaintiff's motion for attorneys' fees. The Sixth Circuit explained that the plaintiff recovered only nominal damages, a technical victory that did not "demonstrate a degree of success sufficient to justify an award of attorneys' fees." *Pouillon*, 326 F.3d at 717-18. The *Pouillon* court also determined it was error to deny the defendants' motion for post-offer costs. *Id*. at 718-19.

In drafting the offer of judgment, the offeror should specify its intentions with respect to both "costs" and "attorneys fees." Although *Marek* established that a §1983 plaintiff's attorneys' fees would be considered part of his "costs" for purposes of cost-shifting, a specific reference to "attorney fees" is recommended to avoid any possibility of ambiguity. For example, the Ninth Circuit has indicated any waiver or limitation of attorney's fees in §1983 cases must be explicit and unambiguous. *Erdman v. Cochise County*, 926 F.2d 877, 880-81 (9th Cir. 1991). On the other hand, the Seventh Circuit criticized the Ninth Circuit's reliance on a "magic-words approach" and held that an unambiguous offer may foreclose recovery of attorneys' fees even if the offer does not mention them explicitly. *See Nordby v. Anchor Hocking Packaging Co.*, 199 F.3d 390, 393 (7th Cir. 1999). As noted by *Nordby*, a prudent defendant will explicitly mention attorneys' fees in order to avoid the type of extensive collateral litigation that occurred in that case. *Id*.

Liability Disclaimer

Another issue to consider is the inclusion of a liability disclaimer in the offer of judgment. Courts in the Seventh Circuit have determined limitation of liability clauses do not invalidate offers of judgment. In *Mite v. Fallstaff Brewing Corp.*, 106 F.R.D. 434 (N.D. Ill. 1985), the court was asked to strike an offer of judgment because it included a provision that the offered amount was "in total settlement of this action with no admission of liability." The court explained:

> Exactly that kind of limitation was included in the accepted Rule 68 offer dealt with by this Court in *Coleman v. McLaren*, 92 F.R.D. 754 (N.D. Ill. 1981), a decision affirmed by our Court of

> Appeals at 699 F.2d 401 (7th Cir. 1983). Though the acceptance of the offer in *Coleman* caused this Court and the Court of Appeals to focus on wholly different issues, neither court indicated the offer there was in any respect flawed in Rule 68 terms. Even more to the point, a similar condition was included in the rejected offer dealt with by the Supreme Court in *Delta Airlines, Inc. v. August*, 450 U.S. 346, 101 S. Ct. 1146 (1981), and the Court decided the case without any hint the offer was insufficient for Rule 68 purposes.

Mite, 106 F.R.D. at 435. In *Fletcher*, 162 F.3d 975, the Seventh Circuit considered whether a disclaimer of liability in a Rule 68 offer precluded a plaintiff from seeking attorneys' fees where the offer was silent as to fees. The *Fletcher* court criticized the defendants' reliance on the liability disclaimer as "magic-words that preclude awards of attorneys' fees." 162 F.3d at 977. However, the *Fletcher* court did not invalidate the offer of judgment because it included the liability disclaimer. Indeed, the *Fletcher* court upheld the Rule 68 offer in that case. *Id*. at 978. In light of the potential benefit, and since there appears to be little downside in doing so, it is recommended a liability disclaimer be included in the offer of judgment.

WITHDRAWAL OF OFFER OF JUDGMENT

Rule 68 expressly provides that the offeree has 14 days in which to accept an offer of judgment; if the offer is not accepted within the 14 days, it is "considered withdrawn." Fed. R. Civ. P. 68(b). For that reason, an offer of judgment must be made 14 days "before the date set for trial" to allow sufficient time for an offeree's acceptance. Fed. R. Civ. P. 68(a). Courts have interpreted Rule 68 offers to be irrevocable. *Richardson v. National RR. Passenger Corp.*, 49 F.3d 760, 765 (D.C. Cir. 1995) ("the rule is designed to put significant pressure on a plaintiff to think hard about the likely value of the claim as compared to the defendant's offer. In return, the plaintiff, as we understand the scheme, is guaranteed [14] days to ponder the matter (as though the plaintiff had paid for a [14]-day option)"). *See also Ramming v. Natural Gas Pipeline Co. of America*, 390 F.3d 366, 370 (5th Cir. 2004); *Webb v. James*, 147 F.3d 617, 621 (7th Cir. 1998).

Courts have deemed Rule 68 offers of judgment to be irrevocable even after a defendant has been granted summary judgment. In *Perkins v. U.S. West Communications*, 138 F.3d 336 (8th Cir. 1998), the defendant made a Rule 68 offer of judgment while its summary judgment motion was pending. Two days later, the district court, having no knowledge of the offer of judgment (Rule 68 offers are not filed with the court), granted summary judgment in favor of the defendant. Perkins' counsel, learning of the adverse ruling on summary judgment, sent the defendant's attorney a notice of acceptance of the offer of judgment. Not surprisingly, the defendant argued the offer of judgment did not remain valid for the full period of time in light of the court's entry of summary judgment. The Eighth Circuit rejected that argument, concluding the plain language of Rule 68 mandated the offer of judgment remained valid and open for acceptance for the full period of time outlined in the Rule, despite the intervening grant of summary judgment. *Id.* at 339. As the *Perkins* court explained:

> Because the offer was not conditioned upon the district court's not granting [defendant's] motion for summary judgment prior to

> Perkins' acceptance of the offer, [defendant] assumed the risk that the district court would rule favorably on [defendant's] summary judgment motion during the [14]-day period for acceptance of its Rule 68 offer.

Id.

In exceptional circumstances, some courts have relied on their "inherent supervisory power" to revoke offers of judgment in circumstances involving fraud or fraudulent concealment. In *Colonial Penn Insurance Co. v. Coil*, 887 F.2d 1236 (4th Cir. 1989), an insurer made an offer of judgment pursuant to Rule 68 to its insureds, the Coils, arising out of a claim for fire damage to their home. The Coils agreed to accept the offer. Before expiration of the Rule's acceptance period (at that time, 10 days), the insurer received information indicating the Coils had engaged in arson to cause the house fire. Upon learning this information, the insurer telephoned the attorney for the Coils to revoke the offer of judgment. The Coils subsequently moved the court to enforce the offer of judgment on the basis that it was irrevocable. Understandably, the Fourth Circuit was troubled by such a request, which essentially asked them to "reward the arsonists by permitting them to mulct the insurer for the burning of their own house, and all of this to be done because it is thought the court lacks power to frustrate such fraud." *Id.* at 1240. The Fourth Circuit found "no such lack of power" and determined the district court had "inherent supervisory power" to revoke an offer of settlement made pursuant to Rule 68 if and when the offer was procured by the offeree's fraud, particularly when there was fraud upon the fairness and justice of the court's own processes. *Id.*; *see also Hawkins v. Johnston Memorial Hospital*, 267 F.R.D. 483, 485 (W.D. Va. 2010) (offer of judgment made by defendant in reliance on plaintiff's material misrepresentation about his medical history, which demonstrated fraud by concealment or constructive fraud, allowed the court to permit revocation of the offer pursuant to the court's "inherent supervisory power"); *Cesar v. Rubie's Costume Co.*, 219 F.R.D. 257, 260-261 (E.D.N.Y. 2004) (allowing revocation of Rule 68 offer in case of obvious ministerial mistake in the text of the offer).

Of note, the *Coil* and *Hawkins* courts both observed that even if the subject judgment had been allowed pursuant to the offer of judgment, a motion under Federal Rule of Civil Procedure 60(b) to set aside the judgment "undoubtedly would have been granted." *Coil*, 887 F.2d at 1240; *Hawkins*, 267 F.R.D. at 487. *See also Webb*, 147 F.3d at 622 ("the proper procedural device for relief from a Rule 68 judgment is the same as for any other judgment: Rule 60").

MULTIPLE PARTIES

In cases involving multiple plaintiffs, offers of judgment should be individually allocated among each plaintiff. Unallocated offers of judgment to multiple plaintiffs have been found ineffective under Rule 68. *See Gavoni v. Dobbs House, Inc.*, 164 F.3d 1071, 1075 (7th Cir. 1999); *Thomas v. National Football League Players Assoc.*, 273 F.3d 1124, 1130 (D.C. Cir. 2001). The *Gavoni* court based its holding on two related grounds:

> First, . . . a judgment less favorable than the offer requires that a plaintiff pay the defendant's usually substantial post-offer costs [and] there must therefore be a clear baseline from which plaintiffs

> may evaluate the merits of their case relative to the value of the offer. * * * Second, courts also need easily comparable sums.

Gavoni, 164 F.3d at 1076. The *Gavoni* court concluded the lack of two precise figures to compare precluded a meaningful determination of whether the actual judgment was less favorable than the offer of judgment. *Id*.

Offers of judgment made on behalf of multiple defendants may not need to be allocated, particularly in §1983 litigation. In *King v. Rivas*, 555 F.3d 14 (1st Cir. 2009), the First Circuit evaluated whether Rule 68 would be applied to a joint offer of judgment made on behalf of multiple defendants. The offer in that case was to settle the entire lawsuit for a fixed sum, and it did not apportion the sum among the seven defendants. Citing to the *Marek* decision, the *King* court recognized Rule 68's purpose of encouraging settlements "strongly supported" its use in multiple defendant cases. 555 F.3d at 17. *King* reasoned that in multi-defendant cases where a single employer was likely to pay the damages (such as the case when a municipality is legally, contractually, or statutorily required to indemnify its police officers), a full settlement was the only one that made sense for the defendant, the likely payor. *Id*. at 18-19; *accord Le v. University of Pennsylvania*, 321 F.3d 403, 408 (3rd Cir. 2003); *but see Harbor Motor Co. v. Arnell Cheverolet-Geo, Inc.*, 265 F.3d 638, 648-49 (7th Cir. 2001) (Rule 68 offer did not trigger fee-shifting provisions where the offer did not contain amounts allocated for each defendant).

To reiterate, it is recommended that the offer of judgment be allocated among claimants in cases involving multiple plaintiffs. The offer of judgment should also be conditioned on complete acceptance by *all* plaintiffs. In *Amati v. City of Woodstock*, 176 F.3d 952 (7th Cir. 1999), the court declined to invalidate an offer of judgment that conditioned the offer on acceptance by all 63 plaintiffs. The *Amati* court found nothing in Rule 68 or the case law to support the view that the condition imposed by defendants – all of the plaintiffs must accept the offer of judgment for it to be effective – was invalid. *Id*. Following *Lang v. Gates*, 36 F.3d 73, 75 (9th Cir. 1994), the *Amati* court noted the purpose of an offer of judgment was to settle a case in advance of trial, and conditioning an offer on acceptance by all plaintiffs might be necessary to avoid the trial. Such a joint offer might be necessary to avoid a serious holdout problem, *i.e.*, a lone holdout would be in a position to extract a significantly larger settlement offer from a defendant who otherwise would have to incur the costs of a trial. *Amati*, 176 F.3d at 958. For that reason, the defendant's form of the offer, which included conditional acceptance by all plaintiffs, "promoted rather than retarded the objectives of Rule 68." *Id*.; *see also Lang*, 36 F.3d at 75 ("because joint offers will most often be made where plaintiffs have a common interest, the risk of collusion is great").

IS IT A JUDGMENT OR A SETTLEMENT?

An offer of judgment pursuant to Rule 68 by its terms is not the same as an offer of settlement. Instead, Rule 68 contemplates entry of a "judgment." Fed. R. Civ. P. 68(a). As the Supreme Court observed, a critical feature of Rule 68 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 5 (emphasis in original). But *Marek* also stressed that the purpose of Rule 68 is to promote settlement. *Id*. at 6.

Published decisions tend to use the terms "offer of judgment" and "offer of settlement" interchangeably. The Seventh Circuit has explicitly held acceptance of an offer of judgment results in a settlement of the lawsuit. In *Fisher v. Kelly*, 105 F.3d 350, 352 (7th Cir. 1997), the court stated the plaintiff and defendant "settled the suit" when plaintiff accepted the defendant's Rule 68 offer of judgment. The Seventh Circuit subsequently affirmed its prior rulings in *Fisher* and *Pigeaud v. McLaren*, 699 F.2d 401 (7th Cir. 1983) as authority for the proposition that acceptance of a Rule 68 offer produces a settlement. *Fletcher v. City of Fort Wayne*, 162 F.3d 975, 976-77, 978 (7th Cir. 1998) ("A case resolved by acceptance of a Rule 68 offer has been settled").

Collateral Estoppel

One of the concerns that has been raised when deciding whether to tender an offer of judgment involves the issue of collateral estoppel. Could entry of a "judgment" pursuant to Rule 68 result in the offering defendant being collaterally estopped from litigating a particular issue or defense in a subsequent action? The answer should be "No." A Rule 68 judgment does not meet the requisite conditions for application of collateral estoppel.

For collateral estoppel to apply, four elements must be established: (1) the issue sought to be precluded must be the same as that involved in the previous action; (2) the issue must have been actually litigated in the previous action; (3) determination of the issue must have been essential to the final judgment in the previous action; and (4) the party against whom estoppel is sought must have been represented in the previous action. *See, e.g., Freeman United Coal Mining Co. v. Office of Workers' Compensation Program*, 20 F.3d 289, 293-94 (7th Cir. 1994). Two of these required elements are lacking in a judgment entered pursuant to a Rule 68 offer — the issue of liability will not have been "actually litigated," and there are no specific issues that need to be determined that are "essential" to a Rule 68 judgment. The elements required for application of collateral estoppel thus do not exist when a plaintiff accepts a Rule 68 offer of judgment.

In *Roye Realty & Developing, Inc. v. Arkla, Inc.*, 78 F.3d 597 (Table only), 1996 WL 87055 (10th Cir. 1996), the plaintiff argued that a Rule 68 judgment in a breach of contract lawsuit precluded the defendant from subsequently denying it had repudiated the contract. *Id.* The Tenth Circuit noted the district court's rejection of this argument because the Rule 68 judgment "did not represent an 'actual litigation' of any issues as to [the defendant's] liability." *Id.* at *4, fn. 15. Along the same lines, the Seventh Circuit considers an accepted offer of judgment to be a settlement of the case rather than "actual" litigation. *See Fletcher v. City of Fort Wayne*, 162 F.3d at 978 (Contrasting a Rule 68 offer of judgment that produces a settlement with a "victory on the merits at trial"). For evidentiary purposes, Rule 68 contemplates that an unaccepted offer of judgment be treated just like a settlement offer – an unaccepted offer is not admissible (except in a proceeding to determine costs). *See* Fed. R. Civ. P. 68(b). As a final observation, application of collateral estoppel based upon an accepted offer of judgment would seem to operate at cross-purposes with the aim of Rule 68, which is to encourage settlement. The possibility an accepted offer of judgment might have a preclusive effect in subsequent proceedings certainly would have a chilling effect on a defendant's willingness to make a Rule 68 offer.

To enhance the perception that a Rule 68 judgment is a settlement, and not a judgment on the merits, an offer can include language disclaiming any admission of liability, like that included in settlement agreements. (*See* discussion of liability disclaimers, *supra*, at pp. 8-9).

TIMING OF RULE 68 OFFER

By the express terms of Rule 68, an offer of judgment must be made "at least 14 days before the date set for trial." Fed. R. Civ. P. 68(a). The earlier discussion suggests that strategically, a Rule 68 offer typically is most effective and involves the least risk early in §1983 litigation, when a plaintiff's attorneys' fees are low. Because Fed. R. Civ. P. 16 precludes the parties from conducting formal discovery before a scheduling conference is held, a defendant should consider making a Rule 68 offer before the conference. *See Crossman v. Marcoccio*, 806 F.2d 329 (1st Cir. 1986) (Rule 68 offer served simultaneously with answer to complaint, approximately three weeks after lawsuit was filed).

If, however, a defendant did not issue an early Rule 68 offer, a lump sum offer may be preferable. While this type of offer does not provide as much post-judgment protection against costs and attorneys' fees, it limits the offeror's exposure in the event that the offer is accepted. Moreover, a late-in-the-game, lump sum offer of judgment may provide an advantage over a garden-variety settlement offer because it provides the defendant another argument for a reduction in plaintiff's post-judgment fee petition. *See Cole v. Wodziak*, 169 F.3d 486, 487-88 (7th Cir. 1999) ("When recovery is low *enough* in relation to the demand, … the judge may jettison the lodestar apparatus and choose an appropriate fee using other means") (*citing Farrar v. Hobby*, 506 U.S. 103, 114-15; *Hensley v.Eckerhart*, 461 U.S. 424, 429 (1983); *Marek*, 473 U.S. at 11).

An important, albeit unusual, situation to consider is a Rule 68 offer made while dispositive motions are pending before the court. Because a Rule 68 offer is irrevocable for a 14-day period, if the court grants summary judgment in favor of the defendants while the offer is open, the plaintiff may still be able to accept the offer. (*See* discussion of *Perkins*, *supra*, at pp. 9-10). It is questionable whether this risk can be avoided, as suggested by the *Perkins* court, by conditioning the offer on the court not granting a pending dispositive motion.

Rule 68 provides no limitation on the number of offers of judgment a defendant can make. Indeed, the Rule specifically contemplates subsequent offers can be made after the rejection of an offer. Fed. R. Civ. P. 68(b); *Payne v. Milwaukee County*, 288 F.3d 1021, 1024-25 (7th Cir. 2002) (the language of Rule 68 permits subsequent offers). Moreover, a Rule 68 offer that is not accepted within 14 days does not lose its cost-shifting effect during the life of the case. *Pouillon v. Little*, 326 F.3d 713, 718 (6th Cir. 2003). Thus, there is no requirement that a Rule 68 offer be renewed after an appeal and remand to continue its effectiveness. *Id.* at 719; *Payne*, 288 F.3d at 1024. Both *Payne* and *Pouillon* cite the Advisory Committee Notes to the 1946 amendment to Rule 68 for this issue:

> 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.

Payne, 288 F.3d at 1024-25; *Pouillon*, 326 F.3d at 718-19.

EXPLAINING THE OFFER TO YOUR CLIENTS

An attorney has a duty to explain the consequences of the offer of judgment to his or her client. Model Rules of Prof'l Conduct R. 1.2(a) (2010). This discussion should include, at a minimum, the possibility that the offer will be accepted, and an explanation of the differences between a settlement and a judgment. The discussion also might explain how an offer of judgment provides an important function as a check on fee-driven litigation.

In police cases, it is common for the same attorney to represent the municipality and the individual officers. Before making an offer of judgment in the context of a joint representation, consent (possibly written) from each client is required. Model Rules of Prof'l Conduct R. 1.8(g) (2010). The attorney should consult his or her local rules of professional responsibility, as the requirements vary among jurisdictions as to whether such consent must be in writing.

- SAMPLE 1 -

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JULES VERNE, JULIE VERNE, and JOEL VERNE, a minor, by and through Julie Verne, his mother and next best friend,	)	
Plaintiff,	)	No. 11 C 0000
v.	)	Judge Oliver W. Holmes
CITY OF CHICAGO, A Municipal Corporation; and Chicago Police Officers ANTHONY ABLE, BRIAN BAKER, and BARCLAY CHARLIE,	)	
Defendants.	)	

OFFER OF JUDGMENT

Defendants, City of Chicago, Anthony Able, Brian Baker, and Barclay Charlie, make the following offer of judgment to plaintiffs Jules Verne, Julie Verne, and Joel Verne, a minor, by and through Julie Verne, his mother and next best friend (collectively referred to as "plaintiffs") pursuant to Federal Rule of Civil Procedure 68:

1. Defendants City of Chicago, Anthony Able, Brian Baker, and Barclay Charlie offer to allow judgment to be taken against them collectively and in favor of:

A. Plaintiff JULES VERNE, in the amount of SEVENTY THOUSAND THREE AND NO/100 DOLLARS ($70,003.00); and,

B. Plaintiff JULIE VERNE, in the amount of TEN THOUSAND THREE AND NO/100 DOLLARS ($10,003.00); and,

C. Plaintiff JOEL VERNE, in the amount of TEN THOUSAND THREE AND NO/100 DOLLARS ($10,003.00);

plus reasonable attorney's fees and costs accrued as of the date of this offer in an amount to be determined by the Court.

2. This offer of judgment is inclusive of all claims plaintiffs have or may have against defendants, City of Chicago, Anthony Able, Brian Baker, and Barclay Charlie, and any other current or former employees or agents of the City of Chicago, arising from the incident or injuries alleged in plaintiffs' second amended complaint or any amendment thereof. Nothing in this offer of judgment shall be construed as an admission of liability by any defendant.

3. This offer of judgment is conditioned upon each plaintiff accepting the offer of judgment as to each defendant. Acceptance of this offer of judgment by fewer than all plaintiffs and against fewer than all defendants shall be deemed a rejection of this offer.

4. Pursuant to Fed. R. Civ. P. 68, an offer not accepted within fourteen (14) days after service of the offer shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs.

By: _____

One of the Attorneys for Defendant,
City of Chicago

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By: _____

One of the Attorneys for Defendants, John Anthony Able, Brian Baker, and Barclay Charlie

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DON'T FORGET: ATTACH CERTIFICATE OF SERVICE

- SAMPLE 2 -

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

MEL LINGERER,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 10 C 0000
	)	
CITY OF CHICAGO, Chicago Police Officers BUD ABBOTT and LOU COSTELLO,	)	Judge Anne D. Jury
	)	
	)	
Defendants.	)	

OFFER OF JUDGMENT

Defendants, City of Chicago, Bud Abbott, and Lou Costello, by their undersigned attorneys, make the following offer of judgment to plaintiff Mel Lingerer pursuant to Federal Rule of Civil Procedure 68:

1. Defendants City of Chicago, Bud Abbott, and Lou Costello, offer to allow judgment to be taken against them collectively and in favor of plaintiff Mel Lingerer in the total amount of TWENTY THOUSAND AND ONE DOLLARS ($20,001.00), which is inclusive of all reasonable attorney's fees and costs accrued through the date of service of this offer of judgment.

2. This offer of judgment is inclusive of all claims plaintiff has or may have against defendants, and any other current or former employees or agents of the City of Chicago, arising from the incident or injuries alleged in Plaintiff's First Amended Complaint or any amendment thereof. Nothing in this offer of judgment shall be construed as an admission of liability by any defendant.

3. Pursuant to Federal Rule of Civil Procedure 68, an offer not accepted within fourteen (14) days after service of the offer shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs.

Respectfully submitted,

By: s/_____
One of the Attorneys for Defendants, City of Chicago, Bud Abbott, and Lou Costello

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BE SURE TO ATTACH CERTIFICATE OF SERVICE