Practical Considerations for Use of FRCP 68 Offer of Judgment

By Tamar Wise and Alanna Miller

Under Federal Rule of Civil Procedure 68, titled, "Offer of Judgment," a defendant can make an offer of judgment to the plaintiff up to 14 days before trial.[1] If the plaintiff accepts the offer within 14 days of being served, the clerk must enter the judgment.[2] However, if the plaintiff rejects the offer, and receives a less favorable judgment at trial, the plaintiff "must pay the costs incurred after the offer was made."[3] FRCP 68 defines "costs" as those costs the plaintiff would have recovered from the cause of action in addition to the defendant's post-offer costs.

Despite the seemingly powerful remedy a Rule 68 offer can provide, defense counsel do not routinely take advantage of this Rule as a litigation tactic. At first glance, this fee-shifting device seems enticing and a great way for courts to encourage settlement. However, Rule 68 has received much criticism because it does not adequately define how to best structure an offer and which expenses constitute costs. As a result, the case law on the subject is murky and practitioners shy away from using this Rule when planning their litigation strategy. This article will examine the question of "costs" under Rule 68 in an attempt to outline for practitioners how they may try to use it properly.

"Costs" Generally Under Rule 68

While Rule 68 itself does not define costs, it adopts the definition provided in 28 U.S.C. § 1920, the federal taxation-of-costs statute.[4] Such costs include:[5]

1. Fees of the clerk and marshal;
2. Fees for printed or electronically recorded transcripts necessarily obtained for use in the case;
3. Fees and disbursements for printing and witnesses;
4. Fees for exemplification and the costs of making copies of any materials where the copies are necessarily obtained for use in the case;
5. Docket fees under section 1923 of [title 28];
6. Compensation of court-appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of [title 28].

Offers of judgment are construed literally and in accordance with fundamental contract interpretation principles.[6] To qualify as a valid offer of judgment, an offer is not required to specify or refer to the costs allowed under the statute. A court will instead read in the allowance of costs incurred.[7] Notably, attorney fees are not included in this definition of costs.[8] A significant portion of litigation surrounding Rule 68 involves attorneys' fees because the potential recovery of such fees can be an influential factor when a plaintiff is considering whether he or she should accept an offer of judgment.

Plaintiff's Statutorily Entitled Attorney fees as "Costs"

Under the proper circumstances, Rule 68 may preclude a plaintiff from recovering statutorily entitled attorney fees where the judgment recovered by the plaintiff is less than the defendant's Rule 68 offer. In *Marek v. Chesny*,[9] the Supreme Court considered plaintiff's attorney fees as post-offer costs where the plaintiff recovered less than the defendant's offer of judgment. The plaintiff, pursuing a claim under Section 1983, would have been entitled to an award of its attorney fees under the fee shifting provision of 42 U.S.C. § 1988.[10] The defendant argued that the plaintiff should be barred from recovering such fees because the plaintiff's trial award was less than the plaintiff would have recovered if the plaintiff accepted defendant's offer of judgment. The court held for the defendant: "[t]he most reasonable inference is that the term 'costs' . . . was intended to refer to all costs properly awardable under the relevant substantive statute or other authority."[11] As such, the court reasoned that "all costs properly awardable in an action are to be considered within the scope of Rule 68 'costs.'"[12] The court therefore held that the plaintiff was barred from recovering its statutory attorneys' fees pursuant to § 1988 because it failed to accept defendant's more favorable Rule 68 offer of judgment.

Since *Marek*, case law has developed to distinguish statutes that include plaintiff's attorney fees as costs, such as § 1988, and those that do not. Courts have held that if a statute pertinent to the claim does not define attorneys' fees as part of the party's "costs," a prevailing plaintiff's attorney fees will not be barred by Rule 68, if applicable, and are therefore still recoverable under the relevant statute.[13] For example, in *Fegley v. Higgins*, the Sixth Circuit held that the plaintiff could still recover attorney fees despite recovering a lesser amount at trial than defendant's offer of judgment, reasoning that the statute at issue, the Fair Labor Standards Act, did not include such fees as

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"costs." Thus, the plaintiff could recover such post-offer fees incurred as a separate claim under the relevant statute, as long as such fees were "reasonable."

Therefore, in circumstances such as those in *Fegley* where a statute does not include legal fees as costs, courts have considered a rejected offer of judgment when determining a plaintiff's reward for "reasonable" attorney fees. For example, in *Haworth v. Nev.*,[14] the Ninth Circuit agreed that the plaintiff should theoretically recover post-offer attorney fees where the statute did not define them as "costs." However, the court ultimately vacated the actual award of attorney fees, finding that "the district court should have taken into consideration the reasonableness of the plaintiffs proceedings to trial and recovering approximately $240,000 less" than the defendant's offer to settle.[15]

Defendants defending against claims under statutes with "prevailing party" provisions may therefore carry particularly weighty leverage in the form of the Rule 68 offer of judgment and plaintiffs pursuing cases under these statutes need to be particularly thoughtful in evaluating Rule 68 offers of judgment lest they lose the value of the attorney fees they hoped to recover. At the very least, even if such fees are recoverable by a plaintiff ultimately, Rule 68 offers may have some influence on the extent of plaintiff's recovery of certain statutorily entitled attorney fees.

Defendant's Statutorily Entitled Attorne Fees as "Costs"

Marek discussed whether a plaintiff can recover attorney fees incurred after a Rule 68 offer is made. The Supreme Court did not discuss whether the defendant offeror is entitled to recover its attorney fees incurred after making the offer. However, the Second Circuit Court of Appeals has held that such fees cannot be rewarded to a "prevailing" defendant. This reasoning was more fully explained by the district court in in *Jolly v. Coughlin*,[16] where the court held the defendant could not recover attorney fees as costs even if the plaintiff did not recover more than the Rule 68 offer at trial, for two reasons: (1) a defendant cannot recover costs pursuant to Rule 68 unless the plaintiff obtains a favorable judgment, but statutes limit recovery of attorney fees only to the prevailing party, and (2) the limited circumstances where a prevailing defendant could recover fees require that the action was "frivolous, unreasonable, or groundless."[17] As such, defendants will likely never be able to seek an award of attorney fees even when a plaintiff obtains a lesser judgment than a defendant's Rule 68 offer.[18]

Notably, under New York state procedure, there is some authority for holding a plaintiff responsible for defendant's attorney fees where an offer of judgment was not accepted.[19] The potential availability of this type of remedy should be one factor practitioners consider in deciding whether to file—or contest a filing—in state or federal court.

Prejudgment Interest as "Costs"

Generally, under CPLR 5001, courts can award predjugment interest in breach of performance of contract cases, or when an "act or omission depriv[ed] or otherwise interfer[ed] with title to, or possessions or enjoyment of, property, except that in an action of equitable nature."[20] Such pre-judgment interest is computed from the "earliest ascertainable date the cause of action existed" and continues to accrue until judgment.[21] In cases where pre-judgment interest is applicable, New York courts apply a default interest rate of 9%.[22]

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It is unclear whether a defendant must include prejudgment interest in its FRCP 68 offer. Indeed, 28 U.S.C. § 1920 does not define prejudgment interest as a "cost."[23] To err on the side of caution, practitioners often include prejudgment interest in Rule 68 offers, though often without assigning a specific amount to cover the prejudgment interest a plaintiff may recover. Instead, practitioners have referred in their Rule 68 offer to the federal or the otherwise applicable prejudgment interest rate, *i.e.*, the amount being offered as judgment "plus applicable prejudgment interest."[24]

Notably, there is also some authority that a Rule 68 offer of judgment stops prejudgment interest from running. For example, in *Quintel v. Citibank*,[25] the district court chose to stop the running of statutory interest in a legal malpractice case by applying CPLR 3219[26] and estoppel principles after a plaintiff rejected a Rule 68 offer of judgment from the attorney.[27] The Court reasoned that prejudgment interest is generally awarded to a plaintiff to compensate a plaintiff for his or her inability to utilize the money at issue.[28] The court held, as of the date of the offer, the plaintiff would have been able to utilize the money at issue; therefore, the defendant should not be punished to pay prejudgment interest simply because the plaintiff rejected his offer.[29]

Conclusion

While the parameters of what is encompassed under Rule 68 offers of judgment is still in flux in New York, practitioners should be mindful of certain guidelines in drafting or evaluating such offers. First, the statutory claim being litigated is very important. Plaintiffs suing under certain statutes may lose the ability to recover highly valuable attorney fees. Second, the forum can be determinative. Defendants in federal court will likely not be able to recover their attorney fees, even if their Rule 68 offer was otherwise "successful." However, this may not be the case in analogous state court proceedings. And third, the practitioners should not forget about prejudgment interest. Such interest may still be part of a plaintiff's ultimate recovery and may get in the way of a Rule 68 offer being deemed "more favorable" than the ultimate recovery.

Endnotes

1. *See* Fed. R. Civ. P. 68(a).
2. *See id.*
3. *Id.* at (d).
4. *See* 91 Minn. L. Rev. 865, 875 (2007) (citing 28 U.S.C. § 1920 (2000)).
5. 28 U.S.C. § 1920 (2000).
6. *See Foster v. Kings Park Cent. Sch. Dist.*, 174 F.R.D. 19, 23 (E.D.N.Y. 1997).
7. *See id.*
8. *See id*.
9. *Supra* n. 1.
10. *See id*. at 4.
11. *Id*. at 9.
12. *Id*.
13. *See Fegley v. Higgins*, 19 F.3d 1126, 1135 (6th Cir. 1994).
14. 56 F.3d 1048 (9th Cir. 1995).
15. *Id.* at 1052-53 (holding "[i]n determining what fee is reasonable in this circumstance, the district court must take into consideration the amount of the Rule 68 offer, the stage of the litigation at which the offer was made, what services were rendered thereafter, the amount obtained by judgment, and whether it was reasonable to continue litigating the case after the Rule 68 offer was made."); *Compare Drewery v. Mervyns Dep't Store*, 2008 U.S. Dist. LEXIS 9161 (W.D. Wash., Jan. 25, 2008) (rejecting application of rule 68 altogether because the plaintiff lost in entirety).
16. No. 92 CIV. 9026 (JGK), 1999 WL 20895 (S.D.N.Y. Jan. 19, 1999).
17. *Id.* at 12 (internal quotations omitted).
18. *See also Shepherd v. Law Offices of Cohen & Slamowitz, LLP*, 668 F. Supp. 2d 579 (S.D.N.Y. 2009) (holding, not only that defendant was entitled to costs, and that the plaintiff was not liable "for one dime of defendant's attorneys' fees based on [the plaintiff's] refusal to accept the Rule 68 offer of judgment" but also awarding the plaintiff attorneys' fees to sanction defendant's frivolous motion for such fees).
19. *Abreu v. Barkin & Assoc. Realty, Inc.*, 115 A.D.3d 624 (1st Dep't 2014); *Saul v. Cahan*. 2016 N.Y. Slip Op. 50295(U).
20. CPLR 5001(a).
21. *Id.* at (b).
22. *See* CPLR 5004.
23. This is in contrast to attorney fees discussed previously.
24. *See e.g.*, Rule 68 Offer of Judgment at 47, *Shepherd v. Cohen & Slamowitz, LLP*, No. 1:08-cv-06199 (S.D.N.Y. Dec. 10, 2009) ("This $10,000.00 figure includes all amounts that might otherwise be recovered by Plaintiff for any pre-judgment interest, penalties and damages of any nature..."); Rule 68 Offer of Judgment at 531-1, *Schoolcraft v. The City of N.Y. et al,* No. 1:10-cv-06005-RWS (S.D.N.Y. Sept. 29, 2015) ("for the total sum of $600,000.00, in addition to back pay . . . [t]he back pay shall include . . . prejudgment interest on backpay at the applicable federal rate."); Rule 68 Offer of Judgment at 263-1, *Nat'l Credit Union Admin. Bd. v. UBS Sec., LLC*, No. 1:13-cv-06731 (S.D.N.Y. Sept. 23, 2013) ("Plaintiff shall recover $33,014,285 from Defendant, plus prejudgment interest calculated at the appropriate rate and methodology as determined by the Court.").
25. 606 F.Supp. 898 (S.D.N.Y. 1985).
26. *See* Douglas J. Pepe, *Stopping the Clock on Prejudgment Interest in Contract Disputes*, New York Law Journal, Apr. 21, 2014.
27. *See* 606 F.Supp. 898 at 914.
28. *See id.* at 915.
29. *See id*.