The Rule 68 Offer of Judgment: Still Vexing Litigators After All These Years

Kevin J. O'Brien

FEDERAL RULE OF CIVIL PROCEDURE 68 has been cited by one court as "among the most enigmatic" of the Federal Rules. Indeed, since its inception in 1938, the Rule has been one of the most misunderstood and underutilized portions of the procedural canon. Rule 68 appears at first blush to promote settlement by forcing a plaintiff to either accept a proffered offer of judgment or risk paying the defendant's subsequent litigation costs in the event the plaintiff recovers less than the amount offered. However, the Rule's application to "post-offer costs" as opposed to "post-offer attorneys' fees" has made its effectiveness as a settlement prod marginal at best. However, Rule 68 takes on additional importance in situations where the plaintiff's underlying cause of action is based on a statute that awards attorneys' fees to the prevailing party, as there is a possibility that in those cases fees may be included as part of the "costs" awarded under the Rule. The following describes some of the complex issues that have arisen from this seemingly innocuous provision nestled at the back end of the federal rule book.

The Rule and its Strategic Purpose

The text of Rule 68 (most recently amended in 2009 to make the operative time period 14 days instead of the previous 10 days) is as follows:

> **(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.
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> **(b) Unaccepted Offer.** An unaccepted offer is considered withdrawn, but it does not preclude a later offer.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.
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> **(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.
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> **(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.

Fed. R. Civ. P. 68. By its terms, a Rule 68 offer can only be extended by a defendant. The supposed "incentive" for the plaintiff to accept the offer is the risk that pursuant to subsection (d), she will pay "the costs incurred after the offer was made" in the event that the judgment she eventually obtains is less than the unaccepted offer. However, two features of the Rule lessen the severity of the potential penalty to the plaintiff. First, the payment is limited to "costs" incurred post-offer and does not include the defendants' attorneys' fees. "Costs" under 28 U.S.C. §1920 include court and court reporter fees, witness fees, and copying and printing costs. These sums are not insignificant but may not be high enough to affect the plaintiff's decision regarding the offer. Secondly, the penalty of subsection (d) only takes mandatory effect when the plaintiff obtains a judgment in her favor that is less favorable than the Rule 68 offer. If the verdict is for the defense (and the plaintiff receives nothing), Rule 68 does not require the plaintiff to pay the post-offer costs. *Delta Airlines, Inc. v. August*, 450 U.S. 346, 356-58 (1981). The reason for this is to prevent defendants from "gaming the rule" by making a nominal (say, $1.00) Rule 68 offer, receiving a defense verdict, and thus being entitled to mandatory costs under subsection (d) of the Rule. Thus, where plaintiff receives no award, Rule 68 does not apply; however, the defendant may seek to recover costs as the prevailing party under the court's Rule 54(d) discretionary power. *Id.* at 353-54.

Rule 68 and Statutory Fee-Shifting Proivsions: Now It Gets Interesting

Although its limited application to "costs" would seem to lessen the impact of a Rule 68 offer, the stakes are raised in instances where the statute upon which the plaintiff's claim is based provides that attorneys' fees are to be awarded to the prevailing party. The Supreme Court has ruled that such statutory attorneys' fees are included in the definition of "costs" for Rule 68 purposes. *Marek v. Chesney,* 473 U. S. 1, 8 (1985). On its face, the *Marek* decision would seem to mean that in situations where a fee-shifting provision is in play, the plaintiff's risk in rejecting a Rule 68 offer is heightened because she could be liable to pay the defendant's post-offer "costs"—but now including the defendant's attorneys' fees. *Jordan v. Time, Inc.,* 111 F.3d 102, 105 (11th Cir. 1997), a copyright dispute, provides an example. The defendant made a Rule 68 judgment offer of $20,000. The plaintiff won a judgment at trial of $5,000. The Copyright Act includes a fee-shifting provision in favor of the prevailing party. The Eleventh Circuit reasoned that the post-offer award under Rule 68 is "mandatory" and that the district court had no discretion to deny the defendant's motion for costs (including the attorneys' fees) incurred after it made its Rule 68 offer. 111 F.3d at 105. Liability for the counsel fees for pre-trial and trial work on a federal copyright case undoubtedly exceeded the $5,000 the plaintiff "won" from the jury.

Although the *Jordan* decision has not been overturned, several courts have disagreed with its holding, citing a fairly obvious flaw in the court's reasoning. In *UMG Recordings, Inc. v. Shelter Capital Partners LLC,* 716 F. 3d 1006 (9th Cir. 2013), the court faced the same situation of a Copyright Act defendant making an offer of judgment and the plaintiff receiving a less favorable award at trial. When defendant sought to recover his post-offer attorneys' fees pursuant to Rule 68, the Ninth Circuit ruled that the defendant was not a "prevailing party" under the Copyright Act and thus not entitled to attorneys' fees under that statute. Because fees were not "properly awardable" to the defendant under the Copyright Act, they would not be included in the "costs" to be mandatorily assessed under Rule 68. 716 F. 3d at 1034. Courts in the First Circuit (*Crossman v. Marcoccio,* 806 F.2d 329 (1st Cir. 1986)) and the Seventh Circuit (*Payne v. Milwaukee County,* 288 F.3d 1021 (7th Cir. 2002)) have agreed that a Rule 68 offer does not "shift" responsibility for fees to a plaintiff who "prevails" by winning a judgment at trial, even if that judgment is less favorable than the defendant's offer.

However, even in instances where courts determine that Rule 68 does not allow a defendant to recover post-offer attorneys' fees after losing a judgment, there remains at least two strategic reasons to make the Rule 68 offer. The defendant will still be entitled to recover his post-offer "costs" if the plaintiff's judgment comes in lower than the offer. More importantly, where the underlying statute allows the prevailing party to recover attorneys' fees, the defendant can avoid the obligation to pay the plaintiff's post-offer attorneys' fees by making an effective Rule 68 offer. *Payne,* 288 F.3d 1021, 1027. This provides a significant incentive for both defendant to make the offer (and potentially "turn off" the plaintiff counsel's fee meter) and for plaintiff to consider whether to accept it (or risk not being awarded her counsel's post-offer attorneys' fees).

The bottom line is that Rule 68 remains a settlement tool of somewhat limited use. The magnitude of the "threat" that the defendant will recover his post-offer costs if the plaintiff's award comes in below the offer will likely not be great enough in most instances to sway the plaintiff's settlement calculations. But in situations where a fee-shifting statute is in play, the Rule 68 offer presents additional strategic issues that counsel must consider carefully in advising clients.

Kevin J. O'Brien is a partner with Butler Rubin Saltarelli & Boyd LLP, a Chicago litigation boutique. His practice is focused on complex business litigation and arbitration, including reinsurance and insurance disputes and environmental counseling and litigation. The views expressed in this article are personal to the author.
