

Overview of Federal Rule of Civil Procedure 68 as Compared to New Mexico's Version, Rule 1-068 NMRA

By Anna E. Indahl, Esq.
Modrall, Sperling, Roehl, Harris & Sisk, P.A.

*"Rule 68 has long been one of the most enigmatic of the Federal Rules of Civil Procedure"*¹

Attorneys practicing in federal court and New Mexico state courts should appreciate the differences between Fed.R.Civ.P. 68 (Offer of Judgment) ("Rule 68") and NMRA 1-068 (Offer of Settlement) ("1-068"). Although similar in purpose, the rules are significantly different in their application and effect. This article highlights those differences.

Offers of Judgment in Federal Court

Rule 68 of the Federal Rules of Civil Procedure allows only a defendant (or a plaintiff who has a counterclaim pending against it) to make an offer of judgment. If the defendant's offer of judgment is accepted, a notice of acceptance is filed with the court, and the clerk enters judgment against that defendant in favor of the plaintiff. At least one court has determined that an accepted offer of judgment is treated like a default judgment for purposes of the defendant's liability.²

If the plaintiff rejects the offer of judgment, and the plaintiff's trial judgment is less favorable than the defendant's offer of judgment, the plaintiff is not entitled to the costs incurred after the offer, and instead must pay the defendant's costs incurred after that date.³ Therefore, Rule 68 creates an exception to the general rule that the prevailing party is entitled to recover its costs by requiring

a prevailing plaintiff who recovers less than a defendant's offer of judgment to pay the defendant's post-offer costs.⁴ Essentially, Rule 68 shifts the standard for determining which party has won for the purposes of awarding post-offer costs from zero to the amount of the defendant's offer of judgment.⁵

The United States Supreme Court has interpreted the substance of Rule 68 twice. First, it found that Rule 68 does not apply if the defendant, rather than the plaintiff, obtains the judgment.⁶ The rationale was that when a defendant obtains a defense verdict, plaintiff did not "obtain" a judgment within the meaning of the Rule, and, therefore, Rule 68 did not apply. Second, the Supreme Court has also held that Rule 68 could cut off a successful plaintiff's right to recover attorney's fees and costs under fee-shifting statutes like the Civil Rights Attorney's Fees Act.⁷

Offers of Settlement in New Mexico State Court

For more than sixty years, the New Mexico Rule mirrored the Federal Rule. In 2003, however, the New Mexico Rule was changed significantly. Under New Mexico Rule 1-068, there is no longer a recognized "offer of judgment," but instead, *either party* (not just the defendant) may file an offer of settlement.⁸ An offer of settlement does not impose any liability on a defendant who accepts the offer, and cannot be used against that party in any subsequent proceedings.⁹ Under Rule 1-068, the remedy available to a defendant under Federal Rule 68 still exists.¹⁰ Rule 1-068

1 *Crossman v. Marcoccio*, 806 F.3d 329, 331 (1st Cir. 1996), cert. denied, 107 S.Ct. 1955, 481 U.S. 1029.

2 Wright, Miller and Marcus, FEDERAL PRACTICE AND PROCEDURE: CIVIL 2D, §3001, citing *Greisz v. Household Bank (Illinois)*, 176 F.3d 1012 (Ca. 1999).

3 Fed.R.Civ.Proc. 68.

4 MOORE'S FEDERAL PRACTICE 3d §68.02 [1].

5 *Id.*

6 *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 352 (1981).

7 *Marek v. Chesny*, 105 S.Ct. 3012, 473 U.S. 1, 87 L.Ed.2d 1 (1985).

8 2012 NMRA 1-068 (A) (emphasis added).

9 *Pope v. The Gap, Inc.*, 1998-NMCA-103, 125 N.M. 376, 961 P.2d 1283.

10 See, 2012 NMRA 1-068, committee commentary for 2003 Amend-

Overview of Federal Rule, Civil Procedure 68

Continued from Page 16

provides that when a plaintiff receives a judgment that is less favorable than the defendant's offer of settlement, the plaintiff not only has to pay defendant's post-offer costs, but is no longer entitled to collect any of its costs, even though it was awarded a judgment.¹¹

However, Rule 1-068, creates a remedy for plaintiffs making an offer of settlement that does not exist in Federal Rule 68. Specifically, under Rule 1-068, if a plaintiff makes an offer of settlement that is rejected and goes on to receive a judgment more favorable than the offer of settlement, the plaintiff will recover *double* its post-offer costs.¹² The rationale is that a prevailing plaintiff is already entitled to its costs under Rule 1-054 (D), and therefore, allowing for recovery of double plaintiff's costs gives defendants an incentive to accept plaintiff's offer.¹³ However, Rule 1-068 explicitly precludes a plaintiff from recovering both double its costs under Rule 1-068 and prejudgment interest.¹⁴ Attorney's fees are also explicitly excluded from the shifting costs under Rule 1-068.¹⁵

In interpreting Rule 1-068, the New Mexico Court of Appeals has agreed with the United States Supreme Court that Rule 1-068 does not apply where judgment is entered in a defendant's favor.¹⁶

Conclusion

While most commentators agree that Rule 68 was designed to encourage settlement, a more precise description of its function may be that the Rule does not encourage settlement in *every* suit, but, instead, it is intended to facilitate "early resolution of marginal suits in which the defendant perceives the claim to be without merit, and the plaintiff recognizes its speculative nature."¹⁷ Attorneys who practice in federal and New Mexico state courts should take care to note the differences in the Rules and counsel their clients on them so that they can make the best use of the appropriate Rule, depending on the jurisdiction in which the matter is pending.

Editor's Note: When making an offer of settlement in State District Court or an offer of judgment in Federal Court, the practitioner should be mindful of whether to make the

ment.

11 2012 NMRA 1-068, committee commentary for 2003 Amendment, citing *Crossman*, 806 F.3d at 333; *cert. denied*, 107 S.Ct. 1955, 481 U.S. 1029.

12 2012 NMRA 1-068 (A) (emphasis added).

13 2012 NMRA 1-068, committee commentary for 2003 Amendment.

14 NMRA 1-068 (C).

15 NMRA 1-068 (A).

16 *Apodaca v. AAA Gas Co.*, 2003-NMCA-085, 134 N.M. 77, 73 P.3d 215.

17 Wright, Miller and Marcus, FEDERAL PRACTICE AND PROCEDURE: CIVIL 2D, §3001, citing *Delta Airlines v. August*, 101 S.Ct. 1146, 1150, 450 U.S.

346, 352, 6 L.Ed.2d 287 (1981) (Powell, J. dissenting).

offer "inclusive" or "exclusive" of costs. The practitioner is advised to be specific rather than silent on this issue. It is also recommended that the practitioner be specific as to whether the offer includes attorneys' fees in a suit that is subject to a fee shifting statute or agreement.

One common question is: what happens when the plaintiff accepts an offer of settlement? The answer is easy when the offer was "inclusive" of costs: the amount offered is the total amount owed. However, when an offer "exclusive" of costs has been accepted by a plaintiff, the offeror must pay the settlement amount offered, plus plaintiff's costs incurred as of the date of the offer.

On the other hand, when a case goes to trial after an offer of settlement has been made, and a plaintiff obtains a verdict, s/he would still be considered the "prevailing party" under Rule 1-054(D) NMRA and, therefore, would be entitled to recover costs regardless of the amount of the offer. The effect of a defendant's offer of settlement would be to shift costs for the period of time after the offer of settlement was made. However, the effectiveness of the attempt to shift costs depends on whether the offer was "exclusive" or "inclusive" of costs.

The benefit of an offer that is "exclusive" of costs is that the amount of the verdict alone, without deduction of plaintiff's costs, determines whether the plaintiff must pay defendant's costs incurred after the date the offer was made. A defendant who has made an "inclusive" offer runs the risk that after plaintiff's costs are deducted from the offered amount, the verdict may exceed the settlement offer, which defeats the cost shifting purpose of the rule.

Ultimately, "inclusive" offers effectively decrease the amount of the offer by the amount of costs incurred as of the date of the offer. This should be considered when evaluating what would constitute a reasonable offer that will accomplish the objective of shifting the risk of costs because "inclusive" offers will not win the close case. "Exclusive" offers are best when defense counsel reasonably expects the plaintiff will not accept the offer because it gives the defendant the best odds to shift the risk of paying costs.

