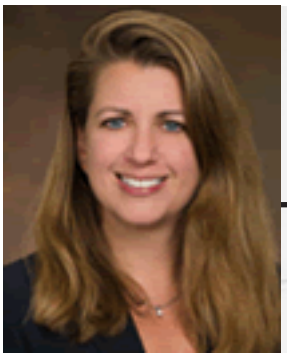

Top 5 Lessons Learned As Plaintiff In Commercial Litigation

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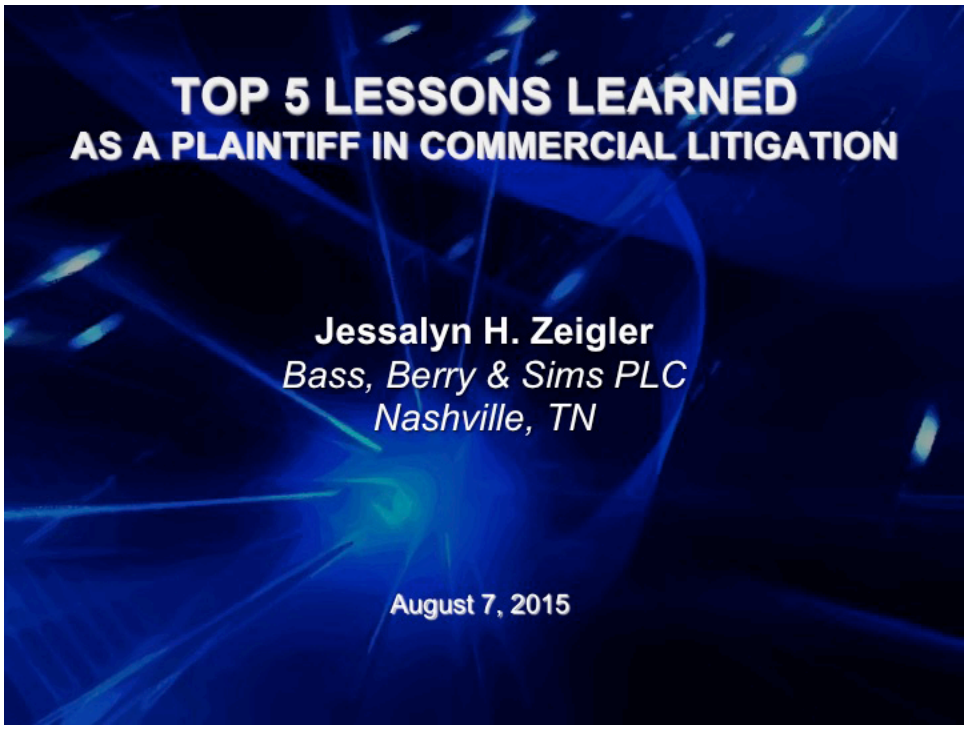
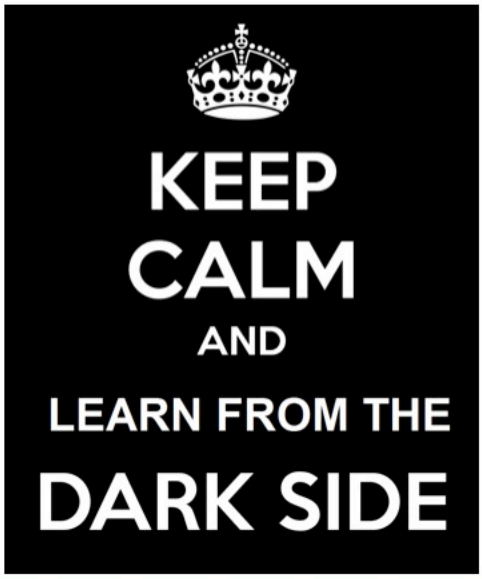


Top 5 Lessons



Top 5 Lessons

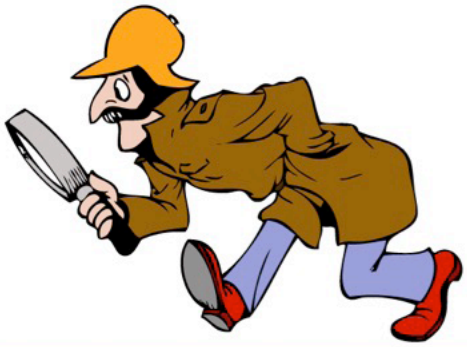
1. Consider Fresh Eyes for the Defense
2. Analyze the Case Early
3. Do not Pick the Wrong Battles
4. Consider the Judge
5. Take the High Road

Consider Fresh Eyes

- Drafter of Documents at Issue
- Relationship with Key Witnesses
- Candid Assessment Needed vs. Familiarity with Documents and Employees

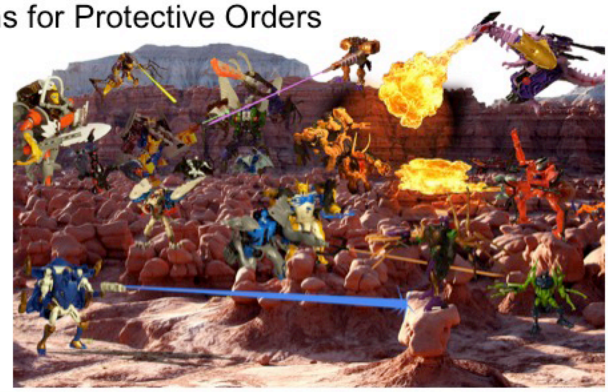
Analyze Early

- Review the Documents
- Deception ?
- Exposure ?
- Business Relationship that Could be Salvaged ?



Don't Pick the Wrong Battles

- Motions to Dismiss
- Motions to Transfer
- Motions to Compel
- Motions for Protective Orders



Consider the Judge

"Bad news, we drew Judge Rover."

Consider the Judge

- Tone
- Repetitive Pleadings
- Weak Arguments
- Motions to Reconsider

Consider the Judge

"Permission to reproach the bench?"

Take the High Road

- In Depositions
- In Briefs
- In Oral Arguments

Rule 68 Offers of Judgment and Claims for Attorneys' Fees: Strategic Practice Tips for Defense Counsel

Jessalyn H. Zeigler and Brian R. Iverson[1]

Most civil disputes end in settlement. Depending on the jurisdiction and the time period, only about 5-10% of cases make it to trial. Accordingly, settlement valuation and negotiation skills are critically important tools in every litigator's arsenal. But when a plaintiff brings suit under a statute that permits recovery of attorneys' fees, the parties often approach settlement discussions from vastly different starting points and find it quite challenging to reach a mutually agreeable settlement through private negotiation or mediation.

In those situations, offers of judgment under Rule 68 of the Federal Rules of Civil Procedure can force both sides to evaluate realistically the settlement value of the case. Under Rule 68, a defendant may make an offer at least 14 days before trial for a specific judgment to be taken against him, "with the costs then accrued."[2] If the plaintiff does not accept the offer and ultimately fails to obtain a "more favorable" judgment, the plaintiff is responsible for all costs incurred after the offer of judgment.[3] Although Rule 68 does not itself permit an award of attorneys' fees, it can have the effect of fee shifting where a statute includes attorneys' fees as a component of "costs."[4]

In this Article, we consider four issues related to offers of judgment in cases where the plaintiff is seeking attorneys' fees. First, we will address the necessary statutory language for attorneys' fees to be included in "costs" under Rule 68. Second, we will highlight key drafting considerations to indicate whether an offer of judgment is inclusive or exclusive of attorneys' fees. Third, we will address how attorneys' fees factor into the analysis of whether the ultimate outcome is "more favorable" than the offer of judgment. We will then conclude with suggestions on timing and language for offers of judgment in cases where the plaintiff seeks attorneys' fees.

A. Attorneys' Fees as "Costs" Under Rule 68.

In Marek v. Chesney, the U.S. Supreme Court made clear that attorneys' fees can be considered "costs" under Rule 68 where the plaintiff seeks recovery under a statute that allows attorneys' fees to be awarded as costs.[5] There, three police officers shot and killed a man while responding to a domestic disturbance.[6] The decedent's father filed a civil rights complaint against the officers under 42 U.S.C. § 1983 and state tort law.[7] The officers submitted an offer of judgment for $100,000, including accrued costs and attorneys' fees, which the father did not accept.[8] After trial, the father was awarded $5,000 on the state law claim, $52,000 on the § 1983 claim, and $3,000 in punitive damages.[9] He then sought $171,692.47 in attorneys' fees and costs, which the officers opposed in part, arguing that it improperly included costs incurred after the offer of judgment.[10] The district court agreed with the officers, and the parties stipulated that $32,000 of the costs accrued prior to the offer of judgment.[11] In other words, the father's total judgment with costs accrued at the time of the offer of judgment was $92,000.

On appeal, the central issue was whether "attorneys' fees" are considered "costs" under Rule 68.[12] The officers argued that the attorneys' fees were costs and, because the judgment was not "more favorable" than the offer of judgment, the father was responsible for paying costs after the offer was made.[13] The father argued that attorneys' fees are separate from costs and were recoverable independent of the offer of judgment under 42 U.S.C. § 1988.[14]

The High Court reviewed the historical backdrop of the American Rule on attorneys' fees and the federal statutes that were enacted in the years leading up to the Federal Rules of Civil Procedure in 1938.[15] It then concluded that "absent congressional expressions to the contrary, where the underlying statute defines 'costs' to include attorney's fees, we are satisfied such fees are to be included as costs for purposes of Rule 68."[16] Because § 1988 allows attorney's fees to be awarded "as part of the costs," the Court found that the father could not recover attorneys' fees after the offer of judgment was made.[17]

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2 Fed. R. Civ. P. 68(a).

3 Fed. R. Civ. P. 68(d)

4 See Marek v. Chesny, 473 U.S. 1, 9 (1985) ("[A]bsent congressional expressions to the contrary, where the underlying statute defines 'costs' to include attorney's fees, we are satisfied such fees are to be included as costs for purposes of Rule 68."). We discuss the Marek decision in much greater detail in Section A, infra.

5 Id.

6 Id. at 3.

7 Id.

8 Id. at 3-4.

9 Id. at 4.

10 Id.

11 Id.

12 Id. at 7-12. As discussed in Section B, infra, the Court also analyzed and rejected the father's argument that the offer of judgment was invalid because it provided one lump-sum amount for both damages and costs.

13 See id. at 4.

14 See id.

15 Id. at 7-9. Rule 68 has been part of the Federal Rules of Civil Procedure ever since their adoption. Like most of the rules, Rule 68 has been amended several times over the last 77 years, but the core substance and operation of the rule has remained the same.

16 Id. at 9.

17 Id. at 9-12.

The dissent in Marek cautioned that the Court's rule would "allow[] the definition of 'costs' to vary depending on the phraseology of the underlying fees-award statute."[18] In fact, the dissent went so far as to catalog 63 federal statutes in which attorneys' fees were referred to as "costs," 49 federal statutes in which they were not, and 7 federal statutes that used the phrase "costs and expenses, including attorney's fees."[19]

The 30 years of jurisprudence since the Marek decision have borne out the dissent's point, with the statutory language taking paramount importance in determining whether attorneys' fees are to be considered "costs" in the context of Rule 68 offers of judgment. For example, the Sixth Circuit has concluded that attorneys' fees are "costs" based on the language of the Voting Rights Act,[20] but attorneys' fees are not "costs" under the Fair Labor Standards Act.[21]

Though some have questioned the wisdom of the Marek rule, it is relatively straightforward to recite and apply. If the underlying statute includes attorneys' fees as "costs," they are considered "costs" for purposes of Rule 68. If the underlying statute allows attorneys' fees separately from "costs," they are not considered "costs" under Rule 68.[22]

This classification is critical. If attorneys' fees are considered "costs," post-offer attorneys' fees are subject to Rule 68's cost-shifting provision for an unaccepted offer. And if attorneys' fees are not considered "costs," a plaintiff can seek all attorneys' fees for the entire case that are allowable under the statute even if an ultimate judgment that is less favorable than the offer of judgment amount.[23]

B. Including or Excluding Attorneys' Fees from an Offer of Judgment.

Rule 68 contemplates that the defendant will serve "an offer to allow judgment on specified terms, with the costs then accrued."[24] This language makes clear that any resulting judgment must award "costs then accrued," which may include attorneys' fees that are considered "costs" under a statute. Nonetheless, an offer of judgment is not invalid simply because it does not expressly address "costs then accrued."[25] In fact, "[a]s long as the offer does not implicitly or explicitly provide that the judgment not include costs, a timely offer will be valid."[26]

Where an offer of judgment does not specifically address "costs then accrued," the plaintiff may accept the offer and then seek costs from the court in addition to the offer of judgment amount:

> If an offer recites that costs are included or specifies an amount for costs, and the plaintiff accepts the offer, the judgment will necessarily include costs; if the offer does not state that costs are included and an amount for costs is not specified, the court will be obliged 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.[27]

The simple phrase "with the costs then accrued" can, therefore, be a significant trap for the unwary defense attorney.

For example, in Lima v. Newark Police Dept., the owner of a newspaper asserted several state and federal claims against the Newark Police Department, certain police officers, and the City of Newark based on alleged intimidation, seizure, and detention related to photographs of a crime scene.[28] The defendants served an offer of judgment "in the amount of $55,000.00, including all of Plaintiff's claims for relief against all defendants, including those not represented by counsel."[29] The plaintiff accepted the offer and filed a request for "judgment against Defendants in the amount of $55,000, with costs to be taxed by the Court upon application by Plaintiff pursuant to Rule 54(d) of the Federal Rules of Civil Procedure and 42 U.S.C. § 1988."[30] The defendants disputed the plaintiff's right to seek costs, and the magistrate judge denied the plaintiff's request to file an application for attorneys' fees, finding that the offer of judgment included attorneys' fees.[31] The Third Circuit reversed, pithily stating that "the Offer was valid and was silent as to fees and costs."[32] "That fact begins and ends our analysis."[33] The circuit court then remanded the case back to the district court for a determination of allowable attorneys' fees and costs under 42 U.S.C. § 1988.[34]

18 Id. at 17 (Brennan, J., dissenting).

19 Id. at 43-51 (Brennan, J., dissenting).

20 Mallory v. Eyrich, 922 F.2d 1273, 1278 (6th Cir. 1991).

21 Fegley v. Higgins, 19 F.3d 1126, 1135 (6th Cir. 1994).

22 Importantly, if the statute gives the district court discretion to award attorneys' fees as "costs," but the court declines to award attorneys' fees, then neither pre-offer nor post-offer attorneys' fees are considered "costs" for purposes of Rule 68. See Hopper v. Euclid Manor Nursing Home, 867 F.2d 291 (6th Cir. 1989).

23 See Dalal v. Alliant Techsystems, Inc., 927 F. Supp. 1374, 1381 (D. Colo. 1996).

24 Fed. R. Civ. P. 68(a).

25 Marek, 473 U.S. at 5-7.

26 Id. at 6 (emphasis in original).

27 Id. (citing Delta Air Lines v. August, 450 U.S. 352, 362, 365 (1981) (Powell, J., concurring)).

28 Lima v. Newark Police Dept., 548 F.3d 324 (3d Cir. 2011).

29 Id. at 327.

30 Id.

31 Id. at 327-28.

32 Id. at 333.

33 Id. The Seventh Circuit reached a similar conclusion in Sanchez v. Prudential Pizza, Inc., 709 F.3d 689, 691-94 (7th Cir. 2013). The Sanchez court explained that "claims" are different than "demands for relief," and "[a]ttorney fees are not part of plaintiff's claim." Id. at 693. The court went on to state that "the judgment is the remedy for the claim, but under Federal Rule of Civil Procedure 54(d) attorney fees can be awarded separately from the judgment on the merits and can be appealed separately." Id. Based on this analysis, the court held that an offer of judgment did not include accrued attorneys' fees by stating that it included "all of Plaintiff's claims for relief." Id. at 693-94.

34 See also Bosley v. Mineral County Comm'n, 650 F.3d 408, 413 (4th Cir. 2011) (affirming the

Of course, that is not to say that a defendant cannot make a lump-sum offer of judgment that is inclusive of all costs and attorneys' fees.[35] The defendant must simply make his intent clear in the offer. He may (1) itemize the damages and cost components of the offer, (2) provide a lump-sum offer that expressly includes all accrued costs, or (3) serve a lump-sum offer that does not include accrued costs and allow the court to determine the costs.

If the defendant chooses the second option, he must use language that clearly expresses to the plaintiff and to the court that the lump sum includes costs and attorneys' fees. After all, courts will "construe the offeror's terms strictly, and ambiguities in the offer are to be resolved against the offeror."[36] Simply tracking the language of the rule and stating that the offer is "with the costs then accrued" is not clear enough, and has led some courts to award attorneys' fees and costs above the offer of judgment amount.[37] Similarly, as Lima teaches, stating that the offer includes "all claims for relief" is not sufficiently clear to include attorneys' fees and costs in a lump-sum offer.[38]

C. Attorneys' Fees and the "Not More Favorable" Judgment Analysis.

If the plaintiff ultimately obtains a judgment that is "not more favorable than the unaccepted offer," the plaintiff must pay all costs incurred after the offer.[39] This portion of the rule can substantially affect the settlement dynamic where the plaintiff seeks recovery under a statute that allows attorneys' fees as costs.

For example, consider a hypothetical case in which the plaintiff has very strong liability arguments for violation of a statute that allows attorneys' fees as costs. The plaintiff seeks $100,000 in damages, $50,000 of which can easily be proven, but the remainder of which will be more difficult to prove. The plaintiff spends $10,000 in attorneys' fees and costs to file and serve the complaint. The plaintiff's attorney forecasts an additional $250,000 in fees and costs through trial. Immediately after service of the complaint, the defendant submits an offer of judgment for $50,000 in damages and $10,000 in costs and attorneys' fees. The plaintiff is now faced with a difficult decision. If she accepts the offer, she foregoes the opportunity to obtain an additional $50,000 in damages. If she declines the offer and obtains a judgment for only $50,000 after trial, she will be responsible for the $250,000 in attorneys' fees and costs after the offer of judgment date. In addition, she will be responsible for allowable costs incurred by the defendant after the offer of judgment date. In other words, the offer of judgment in this hypothetical scenario could cause a plaintiff who proves her claims at trial to suffer a net loss in excess of $200,000.

In this hypothetical scenario, the plaintiff's decision may be difficult, but the math is simple. It is relatively easy to conclude that the judgment after trial is "not more favorable than the unaccepted offer." In other circumstances, the comparison between the offer and the judgment finally obtained may be more difficult, and the defendant bears the burden of showing that the judgment finally obtained is not more favorable than the offer.[40]

Courts have emphasized the importance of an apples-to-apples comparison in considering whether or not the judgment finally obtained is more favorable than the offer. Post-offer costs and attorneys' fees should not be included on either side of the comparison.[41] Where a statute allows attorneys' fees as costs, however, pre-offer attorneys' fees actually awarded by the court should be included on both sides of the comparison.[42] For example, in Marryshow v. Flynn, the defendant served an offer of judgment for $20,000, including attorneys' fees and costs, which the plaintiff did not accept.[43] After trial, the plaintiff a judgment for damages of $14,500 plus attorneys' fees of $20,808 and costs of $4,084.[44] The court placed a value of approximately $11,800 on his pre-offer attorneys' fees.[45] Accordingly, adding the $11,800 in pre-offer attorneys' fees to the $14,500 damages award, the court found that the judgment finally obtained ($26,300) was more favorable than the unaccepted offer ($20,000), and Rule 68's cost-shifting provisions did not apply.[46]

Conversely in O'Brien v. Greers Ferry, the defendant served an offer of judgment for $6,000, not including costs and attorneys' fees, which the plaintiff did not accept.[47] After a jury trial, the plaintiff was awarded $2,400 in damages, and the court calculated pre-offer attorneys' fees at $3,394.99.[48] Adding the pre-offer attorneys' fees of $3,394.99 to both the offer of judgment and the damages award, the Eighth Circuit

district court's award of $66,463.80 in costs in addition to the $30,000 offer of judgment amount, explaining that "[w]hen a Rule 68 offer of judgment is silent as to costs, a court faced with such an offer that has been timely accepted is obliged by the terms of the rule to include in its judgment an amount above the sum stated in the offer to cover the offeree's costs"); Barbour v. City of White Plains, 700 F.3d 631, 633-34 (2d Cir. 2012); Hennessy v. Daniels Law Office, 270 F.3d 551, 553-54 (8th Cir. 2001).

35 See Marek, 473 U.S. at 5-7.

36 Bosley, 650 F.3d at 414 (internal citation omitted); see also Webb v. James, 147 F.3d 617, 623 (7th Cir. 1998); Nusom v. Comh Woodburn, Inc., 122 F.3d 830, 833-34 (9th Cir. 1997).

37 See, e.g., Kyreakakis v. Paternoster, 732 F. Supp. 1287, 1292 (D.N.J. 1990); Laskowski v. Buhay, 192 F.R.D. 480, 483-84 (M.D. Pa. 2000); Said v. Virginia Commonwealth Univ., 130 F.R.D. 60, 62-64 (E.D. Va. 1990).

38 See Lima, 548 F.3d at 327-38, 333; see also Sanchez, 709 F.3d at 691-94.

39 Fed. R. Civ. P. 68(d).

40 Reiter v. MTA N.Y. City Transit Auth., 457 F.3d 224, 231 (2d Cir. 2006).

41 Marek, 473 U.S. at 7.

42 See, e.g., Marryshow v. Flynn, 986 F.2d 689, 692 (4th Cir. 1993).

43 Id.

44 Id. at 691.

45 Id.

46 Id. at 692; see also Townsend v. Benjamin Enters., 679 F.3d 41, 58-60 (2d Cir. 2012).

47 O'Brien v. Greers Ferry, 873 F.2d 1115, 1117 (8th Cir. 1989).

48 Id.

held that the judgment finally obtained ($5,794.99) was not more favorable than the offer of judgment ($9,394.99).[49] The court therefore rejected the plaintiff's claims for post-offer attorneys' fees and ordered the plaintiff to pay the defendant's post-offer costs.[50]

D. Best Practices in Drafting Offers of Judgment Involving Attorneys' Fees.

Based on the foregoing analysis, we offer four suggestions for defense counsel to consider when preparing offers of judgment.

Time is money.
This familiar expression can apply to most activities involving attorneys, but it carries special significance for offers of judgment in cases involving attorneys' fees. For example, the Securities Exchange Act of 1934 creates civil liability for any person who manipulates security prices, and provides that the court may "assess reasonable costs, including reasonable attorneys' fees, against either party litigant."[51] Security manipulation cases frequently involve substantial discovery and pre-trial motions, which often lead to substantial attorneys' fees. As the defendant in a security manipulation case, every day that goes by is another day that you may be paying the plaintiff's attorneys' fees.

As another example, some statutes allow a plaintiff with only nominal damages to recover attorneys' fees as a component of costs. In those cases, the plaintiff's attorneys' fees through trial often will dwarf the actual damages.[52]

As these examples demonstrate, defense counsel should consult with their clients very early in the case to determine whether to make an offer of judgment. If properly structured, an early offer of judgment may lead to prompt resolution or cut off liability for future attorneys' fees. The longer you wait, the less benefit you can derive from an offer of judgment.

Know your judge.
Many attorneys' fee statutes are permissive instead of mandatory. For example the securities manipulation statute referenced above states that "the court may, in its discretion," award costs and attorneys' fees. Different district court judges exercise their discretion differently, with some more likely to award attorneys' fees than others. And circuit courts infrequently reverse district court judgments under the abuse of discretion standard of review. If your case is before a district court judge who frequently awards attorneys' fees, an early offer of judgment may be even more prudent. Conversely, the benefits of serving an offer of judgment may diminish if your district judge rarely awards attorneys' fees.

Say what you mean.
Treat an offer of judgment like any other extremely important contract. If a particular term is important to your client, make sure it is clearly spelled out in the offer of judgment. Where a statute allows attorneys' fees as a component of cost, clearly state how attorneys' fees will be handled. We recommend the following template where attorneys' fees are involved:

> Pursuant to Rule 68 of the Federal Rules of Civil Procedure, [DEFENDANT] hereby offers to allow judgment to be entered against [DEFENDANT] and in favor of [PLAINTIFF] in the total lump-sum amount of [DOLLAR AMOUNT], inclusive of all of damages, interest, costs, attorneys' fees, and other relief sought and/or recoverable on [PLAINTIFF'S] claims, causes of action, demands, and requests for relief. This offer of judgment is made for the purposes specified in Rule 68 of the Federal Rules of Civil Procedure, and is not to be construed as an admission that [DEFENDANT] is liable in this action or that [PLAINTIFF] has suffered any damage.
>
> To accept this offer, [PLAINTIFF] must serve written notice of acceptance within fourteen (14) days. If [PLAINTIFF] does not accept this offer, and obtains a final judgment that is not more favorable than this offer, [PLAINTIFF] must pay the costs incurred after this offer was made. Evidence of this offer is not admissible except in a proceeding to determine costs, which are expressly included in the lump-sum amount offered herein.

Be reasonable.
For an offer of judgment to be worthwhile, the offer must be high enough to create some risk that the plaintiff will obtain a lower amount a trial. Without this risk, there is no incentive for the defendant to make the offer and no incentive for the plaintiff to accept it. Defendants should view the offer of judgment akin to a "best and final" offer in settlement negotiations. At the same time, defendants should keep in mind that Rule 68 allows multiple offers of judgment. If discovery changes your view of the case or the plaintiff devises a new damages theory, do not hesitate to make another offer of judgment.

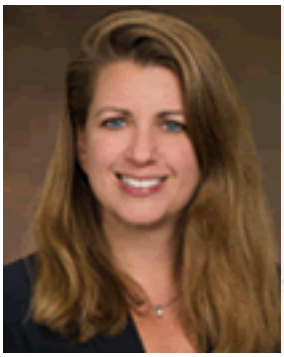
49 Id. at 1118.

50 Id. at 1118, 1120. Although outside the scope of this article, judgments awarding declaratory, injunctive and other types of non-monetary relief present another common obstacle to determining whether a judgment finally obtained "is not more favorable than the unaccepted offer." See Reiter, 457 F.3d at 231-33 ("We take this opportunity to express our concern over the current formulation of Rule 68 and to recommend to the Advisory Committee on Civil Rules and the Standing Committee on Practice and Procedure of the Judicial Conference of the United States that they address the question of how an offer and judgment should be compared when non-pecuniary relief is involved.").

51 15 U.S.C. § 77k(a).

52 There is a circuit split over whether an offer of full satisfaction of a plaintiff's claim renders the claim moot and thereby deprives the court of subject matter jurisdiction. See Genesis Healthcare Corp. v. Symczyk, 133 S. Ct. 1523, (2013) ("While the Courts of Appeals disagree whether an unaccepted offer that fully satisfies a plaintiff's claim is sufficient to render the claim moot, we do not reach this question, or resolve the split, because the issue is not properly before us.").

Faculty Biography



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Whether representing a Fortune 500 company or one of the largest municipalities in Tennessee, Jessie Zeigler has returned successful results for 100 percent of the cases she has handled for clients in a wide range of litigation matters. Her counsel has saved clients millions in losses across various industries – including automotive, food and beverage, healthcare, consumer products, pulp and paper, general manufacturing, chemical, pharmaceutical/life sciences, and medical device – as they have faced claims related to crisis management, environmental, health & safety, products liability, healthcare liability, or contracts.

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Publications
- Jessie Zeigler Co-Authors Article on Component Supplier Liability in Medical Device Cases (9/2014)
- Products and Mass Torts: 2014 Industry Group Developments (2/2014)
- Jessie Zeigler Co-Authors Article for Defense Counsel Journal (7/2013)

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