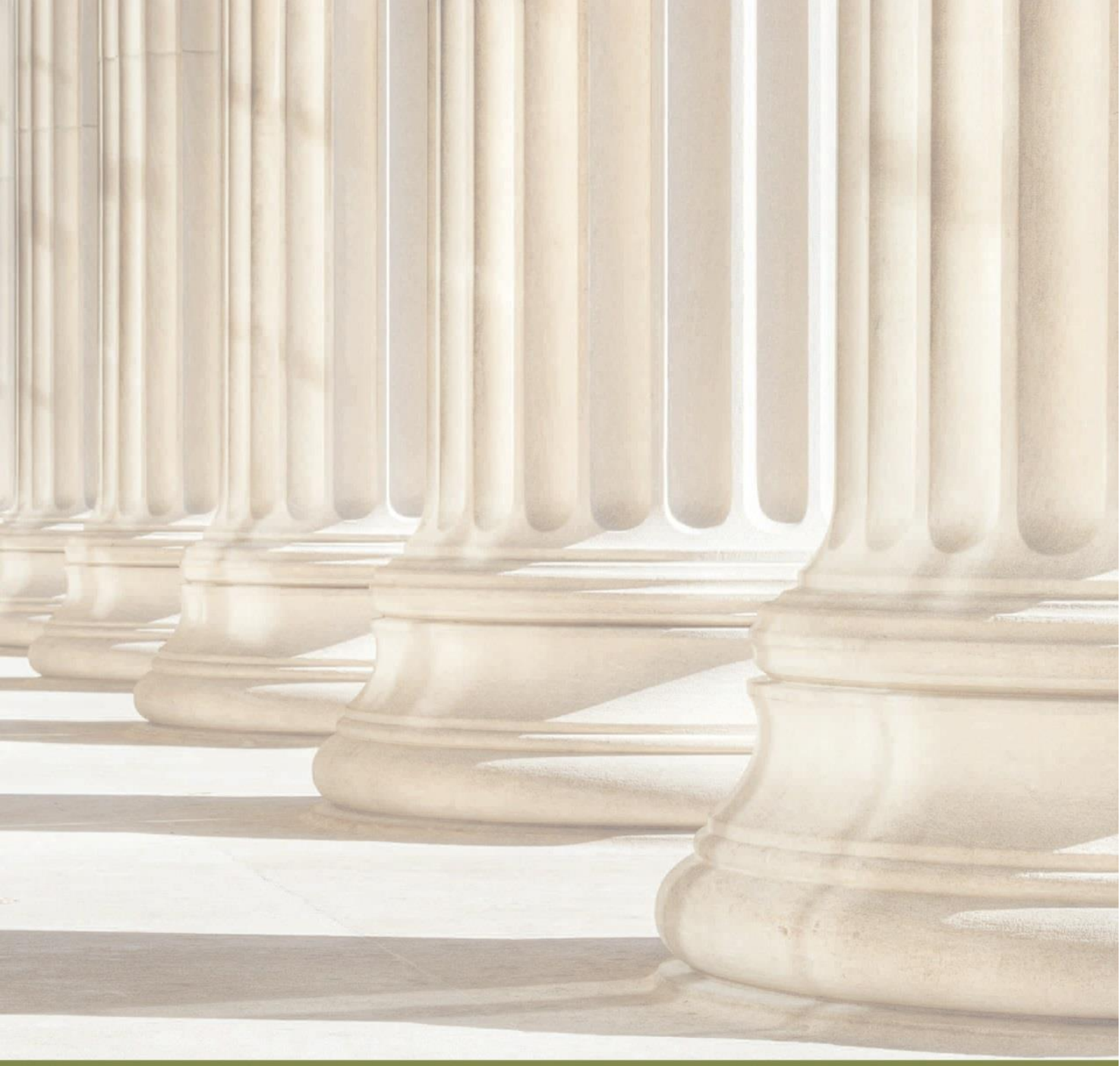

Offer *of* Judgment

COMPENDIUM
OF LAW

USLAW NETWORK, INC

ALABAMA

Under Alabama law, an Offer of Judgment is allowed by Alabama Rule of Civil Procedure 68, which provides:

> At any time more than fifteen (15) days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against the defending party for the money or property or to the effect specified in the offer, with costs then accrued**.** If within ten (10) days after the service of the offer, the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the clerk shall enter judgment. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs. If 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. The fact that an offer is made but not accepted does not preclude a subsequent offer. When the liability of one party to another has been determined by verdict or order or judgment, but the amount or extent of the liability remains to be determined by further proceedings, the party adjudged liable may make an offer of judgment, which shall have the same effect as an offer made before trial if it is served within a reasonable time, not less than ten (10) days, prior to the commencement of hearings to determine the amount or extent of liability.

Ala. R. Civ. P. 68.

In general, Alabama applies contract principles to the enforcement of Rule 68. See, e.g., Auburn Engineers, Inc. v. Downtown Properties, 675 So. 2d 415 (Ala. 1996). Alabama does not include attorney fees as "costs". Atkinson v. Long, 559 So. 2d 55 (Ala. Civ. App. 1990). However, Alabama has not yet addressed the rule adopted by the U.S. Supreme Court regarding Federal Rule 68 which provides that for purposes of Rule 68, the term "costs" includes attorney fees if the underlying claim is based on a statute that awards fees and specifically defines them as costs. See, Marek v. Chesny, 473 U.S. 1 (1985). Although Offers of Judgment in Alabama often include a provision excluding generally allowed costs from the offer, Alabama appellate courts also have not addressed the question of whether the Rule itself allows costs to be excluded. See, e.g., Thompson v. Southern Farm Bureau Cas. Ins. Co., 520 F.3d 902 (8th Cir. 2008)(holding invalid under the federal rule an offer which expressly excluded costs). The Rule does not preclude the exclusion of attorney fees from the offer, and it is recommended to expressly set out in the offer whether or not the offer is intended to encompass any claimed attorney fees.

Joseph H. Driver
Carr Allison
100 Vestavia Parkway
(205) 822-2006
jdriver@carrallison.com
www.carrallison.com

ALASKA

A. Alaska R. Civ. P. 68 governs offers of judgment and provides in part,

> (a) At any time more than 10 days before the trial begins, either the party making a claim or the party defending against a claim may serve upon the adverse party an offer to allow judgment to be entered in complete satisfaction of the claim for the money or property or to the effect specified in the offer, with costs then accrued. The offer may not be revoked in the 10-day period following service of the offer.

B. *Attorney fees and costs.* By way of background, Alaska allows the prevailing party partial attorney's fees under Civil Rule 82. Where a party beats an offer of judgment, they become the prevailing party, even if a judgment is entered against them. Thus, a party that prevails on an offer judgment is entitled to costs and fees, even where the other party recovers a money judgment. Alaska R. Civ. P. 68(c).

C. In order to beat an offer judgment, one must beat the offer of judgment by 5%, if there is one defendant, and 10%, if there are multiple defendants. Alaska R. Civ. P. 68(b).

D. The amount of costs and fees awarded under Alaska's offer of judgment rule depends on when the offer of judgment was made:

> (1) if the offer was served no later than 60 days after the date established in the pretrial order for initial disclosures required by Civil Rule 26, the offeree shall pay 75 percent of the offeror's reasonable actual attorney's fees;
>
> (2) if the offer was served more than 60 days after the date established in the pretrial order for initial disclosures required by Civil Rule 26 but more than 90 days before the trial began, the offeree shall pay 50 percent of the offeror's reasonable actual attorney's fees;
>
> (3) if the offer was served 90 days or less but more than 10 days before the trial began, the offeree shall pay 30 percent of the offeror's reasonable actual attorney's fees. Alaska R. Civ. P. 68(b).

The party that beats an offer of judgment is allowed all allowable costs for the lawsuit, and the relevant percentage of attorney's fees incurred after the date of the offer.

E. An offeror is only entitled to the greater of attorney's fees under Alaska R. Civ. P. 82 or reasonable actual attorney's fees under Alaska R. Civ. P. 68(b). A party who receives attorney's fees under Rule 68 may not also receive attorney's fees under Rule 82. Alaska R. Civ. P. 68(c).

F. *Joint Offers*. Alaska rules on joint offers are complicated, and require detailed review. In general, joint offerors to a single offeree trigger Alaska R. Civ. P. 68 penalties where 1) the offer was inclusive of all the relationships among the parties and their conflicting claims, and 2) no apportionment difficulty existed. *John's Heating Serv. v. Lamb*, 46 P.3d 1024 (Alaska 2002).

G. State offer of judgment rules apply to diversity actions filed in federal court. *MRO Commc'ns, Inc. v. Am. Tel. & Tel. Co.*, 197 F.3d 1276, 1282 (9th Cir. 1999)(applying state court Rule 68 to award attorney's fees); *Archway Ins. Servs., LLC v. Harris*, No. 2:11-CV-1173 JCM CWH, 2014 WL 3845302, at *2 (D. Nev. Aug. 5, 2014).

ARIZONA

In Arizona, offer of judgment procedure and practice is set forth in Rule 68 of the Arizona Rules of Civil Procedure. This statute provides, in part, that at any time more than thirty days before trial begins, "[a]ny party may serve on any other party an offer to allow judgment to be entered in the action." Ariz. R. Civ. P. 68(a)(1). An offer must remain open for 30 days after it is served except that:

> (A) an offer made within 60 days after service of the summons and complaint must remain effective for 60 days after the offer is served; (B) an offer made within 45 days of trial must remain effective for 15 days after it is served; and (C) in an action subject to arbitration, an unexpired offer will automatically expire at 5:00 p.m. on the fifth day before the arbitration hearing.

Rule 68(h)(1).

If an offer of judgment includes a monetary judgment, that offer "must specifically state the sum of money to be awarded, inclusive of all damages, taxable court costs, interest, and attorney's fees, if any, sought in the action." Rule 68(b)(1). An offeror may choose to exclude an amount for attorney's fees, but must specifically state that attorney's fees are being excluded from the offer. Rule 68(b)(2). An offer judgment also does not need to be apportioned by claim. Rule 68(b)(3). That is, if a plaintiff is asserting several different claims against a defendant, the defendant can still make an offer of a lump sum of money to the plaintiff without designating a certain amount for each claim.

"To accept an offer, the offeree must serve written notice—during the effective time period—that the offer is accepted." Rule 68(c). Upon acceptance of an offer, either party may then file the offer and proof of acceptance. *Id.* Then, the court must enter judgment complying with Rule 58(b). *Id.*

If an offer is not accepted while it remains effective, it is deemed rejected. Rule 68(d)(1). Evidence of an unaccepted offer of judgment is not admissible at trial, "except in a proceeding to determine sanctions under this rule." *Id.* Specifically, sub-section (g) of Rule 68 states that if a party rejects an offer and does not later obtain a more favorable judgment, that party must pay as a sanction: "the offeror's reasonable expert witness fees and double the taxable costs, as defined in A.R.S. § 12-332, incurred after the offer date; and prejudgment interest on unliquidated claims accruing from the offer date." Rule 68(g)(1).

If an offeree believes the offer is defective or invalid, the offeree must serve written notice of the objection within 10 days after the date the offer is served. Rule 68(d)(2). "The failure to serve timely objections waives the right to object to the offer's validity in any proceeding to determine sanctions under this rule." *Id.*

Pursuant to Rule 68(e), multiple parties may make a joint unapportioned offer of judgment to a single offeree. For example, multiple wrongful death claimants or a husband and wife may make a joint unapportioned offer of judgment to a single defendant. However, Rule 68 does not allow unapportioned offers to be made to multiple offerees. Rule 68(f). In other words, a defendant cannot make a joint unapportioned offer to multiple plaintiffs. Rather, a separate offer must be made to each plaintiff because there will be separate awards for each plaintiff when the jury returns a verdict. In contrast, "[o]ne or more parties may make an apportioned offer to multiple offerees conditioned on acceptance by all of the offerees." Rule 68(f)(2). In this case, "[e]ach offeree may serve a separate written notice of acceptance of the offer." *Id.*

Phillip H. Stanfield
Jones, Skelton & Hochuli, P.L.C.
40 North Central Avenue, Suite 2700
Phoenix, AZ 85004
Phone: 602-263-1745
Email: pstanfield@jshfirm.com
www.jshfirm.com

ARKANSAS

An Offer of Judgment in Arkansas is prescribed by Arkansas Rule of Civil Procedure 68 which states:

> **Rule 68 – Offer of judgment.**
>
> At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against him for the money or property or to the effect specified in his offer, with costs then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and judgment shall be entered. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs. If the judgment exclusive of interest from the date of offer 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. The fact that an offer is made but not accepted does not preclude a subsequent offer. When the liability of one party to another has been determined by verdict or order or judgment, but the amount or extent of liability remains to be determined by further proceedings, the party adjudged liable may make an offer of judgment, which shall have the same effect as an offer made before trial if it is served within a reasonable time not less than 10 days prior to the commencement of hearings to determine the amount or extent of liability. For purposes of this rule, the term "costs" is defined as reasonable litigation expenses, excluding attorney's fees.

Ark. R. Civ. P. 68 was last amended November 21, 1988. The effect of this amendment was to lengthen the time for the acceptance of an Offer of Acceptance from 5 days to 10 days. In addition, the 1988 amendment broadened the definition of the term "costs" as a means to encourage early settlement. Under Ark. R. Civ. P. 68 costs can include not only the costs allowed by statute, but may also include other reasonable expenses typically incurred in litigation such as meals and lodging.

It should also be noted that Ark. R. Civ. P. 68 does not govern the method or mechanics for preparing or entering the judgment related to the acceptance of an Offer of Judgment. Ark. R. Civ. P. 58 should be followed for preparing and entering the judgment.

John E. Tull, III
Quattlebaum, Grooms, Tull PLLC
111 Center Street, Suite 1900
Little Rock, AR 72201
Phone: 501-379-1705
jtull@@qgtlaw.com

CALIFORNIA

In California, an Offer of Judgment is governed by California Code of Civil Procedure section 998, which provides, in pertinent part:

> **Section 998. Offer to Compromise on Pending Action — Costs of Both Parties Paid By Unsuccessful Party who Refused to Compromise.**
>
> … (b) Not less than ten days prior to commencement of trial or arbitration … any party may serve an offer in writing upon any other party to the action to allow judgment to be taken or an award to be entered in accordance with the terms and conditions stated at that time. The written offer shall include a statement of the offer, containing the terms and conditions of the judgment or award, and a provision that allows the accepting party to indicate acceptance of the offer by signing a statement that the offer is accepted. Any acceptance of the offer, whether made on the document containing the offer or on a second document of acceptance, shall be in writing and shall be signed by counsel for the accepting party or, if not represented by counsel, by the accepted party.
>
> … (c)(1) If an offer made by a defendant is not accepted and the plaintiff fails to obtain a more favorable judgment or award, the plaintiff shall not recover his or her post-offer costs and shall pay the defendant's costs from the time of the offer. In addition, … the court or arbitrator, in its discretion, may require the plaintiff to pay a reasonable sum to cover costs of the services of expert witnesses, who are not regular employees of any party, actually incurred and reasonably necessary in either, or both, preparation for trial or arbitration, or during trial or arbitration, of the case by the defendant. …
>
> (d) If an offer made by a plaintiff is not accepted and the defendant fails to obtain a more favorable judgment or award in any action or proceeding … the court or arbitrator, in its discretion may require the defendant to pay a reasonable sum to cover post-offer costs of the services of expert witnesses …
>
> (e) If an offer made by a defendant is not accepted and the plaintiff fails to obtain a more favorable judgment or award, the costs under this section, from the time of the offer, shall be deducted from any damages awarded in favor of the plaintiff. If the costs awarded under this section exceed the amount of damages awarded to the plaintiff the net amount shall be awarded to the defendant and the judgment or award shall be entered accordingly.

In California, the Offer of Judgment need not always be monetary. It may propose delivery of specific property or anything of value. For example, it may propose dismissal of the action with prejudice in exchange for a payment or a waiver of costs. American Airlines, Inc. v. Sheppard, Mullin, Richter & Hampton (2002) 96 Cal.App.4th 1017, 1055. A Code of Civil Procedure section 998 offer that is silent as to costs does not preclude plaintiff's right to recover costs on entry of judgment. Thus, where an offer is silent as to costs or fees, contractual or statutory attorneys fees are recoverable in addition to the amount of the accepted offer. Ritzenthaler v. Fireside Thrift Company (2001) 93 Cal.App.4th 986, 991.

CALIFORNIA cont'd

In determining whether the verdict or award is "more favorable," post-offer costs incurred by plaintiff are excluded. By specifying that post-offer costs are excluded, the statute indicates plaintiff's pre-offer costs are included in computing whether the judgment is "more favorable" than the 998 offer. Heritage Engineering Construction, Inc. v. City of Industry (1998) 65 Cal.App.4th 1435, 1441.

Submitted By:

Edmund G. "Chip" Farrell
Murchison & Cumming, LLP
801 South Grand Avenue, 9th Floor
Los Angeles, California 90017
Tele: (213) 623-7400
Fax: (213) 623-6336
Email: efarrell@murchisonlaw.com

Other USLAW Members in California:

San Diego
Klinedinst PC
501 West Broadway, Suite 600
San Diego, CA 92101
Phone: 619-239-8131

San Francisco
Hanson Bridgett LLP
425 Market Street, 26th Floor
San Francisco, CA 94105
Phone: (415) 777-3200

Santa Barbara
Snyder Burnett Egerer, LLP
5383 Hollister Avenue, Suite 240
Santa Barbara, CA 93111
Phone (805) 692-2800

COLORADO

In Colorado, an Offer of Judgment is governed by Colorado Revised Statute section 13-17-202 which provides:

13-17-202. Award of actual costs and fees when offer of settlement was made

(1)

(a) Notwithstanding any other statute to the contrary except as provided in section 24-10-106.3, C.R.S., in any civil action of any nature commenced or appealed in any court of record in this state:

(I) If the plaintiff serves an offer of settlement in writing at any time more than fourteen days before the commencement of the trial that is rejected by the defendant, and the plaintiff recovers a final judgment in excess of the amount offered, then the plaintiff shall be awarded actual costs accruing after the offer of settlement to be paid by the defendant.

(II) If the defendant serves an offer of settlement in writing at any time more than fourteen days before the commencement of the trial that is rejected by the plaintiff, and the plaintiff does not recover a final judgment in excess of the amount offered, then the defendant shall be awarded actual costs accruing after the offer of settlement to be paid by the plaintiff. However, as provided in section 13-16-104, if the plaintiff is the prevailing party in the action, the plaintiff's final judgment shall include the amount of the plaintiff's actual costs that accrued prior to the offer of settlement.

(III) If an offer of settlement is not accepted in writing within fourteen days after service of the offer, the offer shall be deemed rejected, and the party who made the offer is not precluded from making a subsequent offer. Evidence thereof is not admissible except in a proceeding to determine costs.

(IV) If an offer of settlement is accepted in writing within fourteen days after service of the offer, the offer of settlement shall constitute a binding settlement agreement, fully enforceable by the court in which the civil action is pending.

(V) An offer of settlement under this section shall remain open for at least fourteen days from the date of service unless withdrawn by service of withdrawal of the offer of settlement.

(VI) An offer of settlement served at any time fourteen days or less before the commencement of the trial shall not be subject to this section, and evidence thereof is not admissible for any purpose.

(b) For purposes of this section, "actual costs" shall not include attorney fees but shall mean costs actually paid or owed by the party, or his or her attorneys or agents, in connection with the case, including but not limited to filing fees, subpoena fees, reasonable expert witness fees, copying costs, court reporter fees, reasonable investigative expenses and fees, reasonable travel expenses, exhibit or visual aid preparation or presentation expenses, legal research expenses, and all other similar fees and expenses.

(2) When comparing the amount of any offer of settlement to the amount of a final judgment actually awarded, any amount of the final judgment representing interest subsequent to the date of the offer in settlement shall not be considered.

(3) When the liability of one party to another has been determined by verdict or order or judgment, but the amount or extent of the liability remains to be determined by further proceedings, the party adjudged

liable may make an offer of settlement, which shall have the same effect as an offer made before trial (except with respect to costs already incurred) if it is served pursuant to subsection (1) of this section.

Notably, attorney fees are expressly excluded from "actual costs." *See* C.R.S. § 13-17-202(1)(b). A party challenging the reasonableness of costs is entitled to a hearing on the issue, but it must request such a hearing. *Dillen v. HealthOne, LLC*, 108 P.3d 297, 302 (Colo. App. 2004). Although a court does not have discretion to refuse to award actual costs under section 13-17-202, *Scholz v. Metro. Pathologists, P.C.*, 851 P.2d 901, 910 (Colo. 1993), it does have discretion to determine whether the actual costs are reasonable or reasonably incurred. *Smith v. Town of Snowmass Vill.*, 919 P.2d 868, 872 (Colo. App. 1996).

Ben M. Ochoa, Esq., bochoa@lewisroca.com
Elliott Reaven, Esq., ereaven@lewisroca.com
Tyler Owen, Esq., towen@lewisroca.com
Lewis Roca
1200 17th Street, Suite 3000
Denver, CO 80202
Phone: (303) 623-9000
Fax: (303) 623-9222

CONNECTICUT

A. Plaintiff's Offer of Compromise

Section 52-192a of the Connecticut General Statutes, effective October 1, 2011, provides that a plaintiff may serve an Offer of Compromise upon a defendant. An offer of compromise may be filed any time after 180 days after service of process is made and thirty days before trial. The former language, Offer of Judgment, is no longer used in Connecticut state court, but may be used in federal court litigation.

The defendant, (except a health care provider) has thirty days to accept the offer and the plaintiff shall then withdraw the action if the offer is accepted. If the offer is not accepted within 30 days, it is considered rejected. After trial, if the plaintiff recovers an amount equal to or greater than the offer of compromise, the court shall add to the entire amount recovered 8% annual interest from the date of the complaint or from the offer in compromise if the offer is filed late. An offer may be filed up to 30 days before trial. Interest is calculated as provided by the statute either from the date of the complaint or from the date of the offer.

An offer of compromise may be filed regarding a counterclaim, in which case the interest award is on the difference between the amount recovered and the amount of the offer.

Under Sec. 52-192(b) a special procedure applies to actions for damages for personal injury or wrongful death, whether in tort or in contract, on a claim of negligence against a health care provider. In this section, the plaintiff must wait 365 days after service of process to file the offer and the defendant has 60 days to accept the award. The provision provides the defendant with time to engage in discovery to determine the plaintiff's injury and damages. Interest is added to the amount recovered if the verdict is equal to or greater than the offer.

B. Defendant's Offer of Compromise

In any action or contract or seeking the recovery of monetary damages, the defendant may file an offer of compromise not later than thirty days before trial offering to settle the claim. Conn. Gen. Stat. § 52-193. The plaintiff may, within sixty days after the offer is filed, file a written acceptance of the offer signed by the plaintiff or the plaintiff's attorney. Upon the filing of the acceptance, a withdrawal of action shall also be filed by the plaintiff which shall be recorded by the clerk. Conn. Gen. Stat. § 52-194. If the plaintiff fails to accept the offer of compromise within sixty days and before the commencement of trial, the offer is deemed withdrawn. If plaintiff recovers less than the offer of compromise, the plaintiff shall recover no costs which accrued after the offer of compromise was received by the plaintiff, and shall further pay defendant's costs accruing after the offer was received. Such costs shall include reasonable attorney's fees not to exceed three hundred and fifty dollars ($350.00). Conn. Gen. Stat. § 52-195.

Noble F. Allen
Hinckley, Allen & Snyder LLP
20 Church Street
Hartford, CT 06103
Phone: 860-725-6237
nallen@haslaw.com

DELAWARE

Delaware Superior Court Rule of Civil Procedure 68 provides:

> At any time more than 10 days before the trial begins a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against the defending party for the money or property or to the effect specified in the offer, with costs then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the Clerk shall enter judgment. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs. If 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. The fact that an offer is made but not accepted does not preclude a subsequent offer. When the liability of one party to another has been determined by verdict or order or judgment, but the amount or extent of the liability remains to be determined by further proceedings, the party adjudged liable may make an offer of judgment, which shall have the same effect as an offer made before trial if it is served within a reasonable time not less than 10 days prior to the commencement of hearings to determine the amount or extent of liability..
>
> Del. Super. Ct. Civ. R. 68.

Because amount that victim was awarded was less than amount contained in driver's properly filed offer of judgment, victim was entitled to recover his costs incurred prior to filing of offer of judgment, but victim was liable for costs incurred after offer of judgment, including his own, overruling *Greenage v. Ward*, 2001 WL 985086. *Wilhelm v. Ryan*, 903 A.2d 745 (Del. Supr. 2006).

Collective offer of settlement for $7,500 did not support award of costs under offer of judgment rule. Offer of settlement for $7,500 that was collective, rather than individualized to address wife's personal injury claim and husband's loss of consortium claim, did not support award of costs under offer of judgment rule, although offer was greater than jury award of $2,500 to wife and nothing to husband; the offer did not state how much of the $7,500 was offered to wife for personal injury claim or how much was offered to husband for loss of consortium claim, plaintiffs were not given a clear baseline from which they could evaluate the merits of their individual claims, and the collective offer did not allow for a specific judgment to be entered on each claims. The lesson is to make a separate offer as to each plaintiff. *Cahall v. Thomas*, 906 A. 2d 24 (Del. Supr. 2006).

Appropriate remedy for trial court's abuse of discretion in imposing sanction of dismissal of complaint with prejudice for mortgagee's discovery violations was remand with instructions to enter judgment for mortgagee in the amount of mortgagor's estate's offer of judgment and to assess, against mortgagee, estate's attorney fees incurred to defend action after estate's motion to compel, including estate's expenses incurred to defend mortgagee's appeal from dismissal. *Lehman Capital v. Lofland ex rel. Estate of Monroe,* 906 A.26 122 (Del. Supr. 2006)

If the plaintiff obtains no judgment from the defendant, but the judgment is for the defendant, the offer of judgment rule does not apply and does not entitle the defendant to attorney fees and costs for the plaintiff's rejection of an offer of judgment, even if the plaintiff obtains a judgment from the other. Insured's rejection of liability insurer's offer to settle for $5,000 before dismissal of the insurer from the suit did not entitle the insurer to attorney fees and costs; the offer of judgment rule did not apply since the insured obtained no judgment from the insurer. *Hercules, Inc. v. AIU Ins. Co*., 956 A.2d 622 (Del. Supr. 20018).

Superior Court Civil Rule 6(a) by its terms applies to any period prescribed or allowed by these Rules, by order of the court or by statute. Superior Court Civil Rules 6 and 68 are patterned after Federal Rules of Civil Procedure Rules 6 and 68. Under the Federal Rules the ten day interval under Rule 68 "does not include intermediate Saturdays, Sundays and holidays under Rule 6(a)because the period is less than eleven days."[1] When these days are deducted from the time interval here, it is clear that the offer of judgment was not filed more than 10 days before the trial began. Thus, Defendant is precluded from any award of costs under Rule 68 because the Offer of Judgment was untimely. B*aker v. Hamm*, 2004 WL 4323 (Del. Super. 2004)

Rule 68 plainly states that "the offeree *must* pay the costs incurred after the making of the offer." The trial court has no discretion about whether to award costs, assuming the offer of judgment was timely, was rejected, and the plaintiff recovers an amount less than the offer. The court's discretion is limited to an analysis of whether the requested amounts are appropriately categorized as "costs" under Superior Court Rule 54. *Beaudet v. Thoma*s, 797 A.2d 678 (Table) (Del. Supr. 2002).

Submitted By:

James W. Semple
Cooch and Taylor, P.A.
1000 N. West St., 10th Floor
Wilmington DE 19801
Phone: (302) 984-3842
Email: jsemple@coochtaylor.com

FLORIDA

Florida's offer of judgment statute is Florida Statutes § 768.79. This statute sets forth the substantive requirements for offers of judgment in Florida. The procedural aspects of offers of judgment are governed by Rule 1.442 of the Florida Rules of Civil Procedure.

If a plaintiff makes an offer of judgment, the defendant has 30 days in which to accept or reject the offer. If rejected, and the case proceeds to trial, and the plaintiff obtains a recovery of at least 25% greater than the offer, then the plaintiff is entitled to the recovery of all reasonable attorney's fees incurred from the date of the service of the offer of judgment. If a defendant serves an offer of judgment, the plaintiff has 30 days in which to either accept or reject it. If the plaintiff rejects the offer, and the case proceeds to trial, with a result of either a defense verdict or a verdict at least 25% less than the offer, then the defendant is entitled to the recovery of reasonable attorney's fees from the date of service of the offer.

If the offer of judgment statute is triggered by a jury verdict, the judge must make a determination of whether the offer was made in good faith. If the court determines that the offer was not made in good faith, the court may disallow an award of fees and costs.

The motion for fees and costs under this statute must be made within 30 days of the entry of judgment that triggers the award. A proposal to a defendant can be served no earlier than 90 days after service of process on that defendant. If an amended complaint adds a new defendant, the plaintiff must wait 90 days after the new defendant served process to serve a proposal on the newly added defendant. A proposal to a plaintiff can be served no earlier than 90 days after the action has been commenced. Also, if an amended complaint adds a new defendant, even if the action has been ongoing against other parties, the newly added defendant cannot serve a proposal until 90 days after the action has been commenced against the newly named defendant. No proposal can be served later than 45 days before the date set for trial or the first date of the docket on which the case is set for trial, whichever is earlier.

The proposal must:

- Name the party or parties making the proposal and the party or parties to whom the proposal is being made;
- Identify the claim or claims the proposal is attempting to resolve;
- State with particularity any relevant conditions;
- State the total amount of the proposal and state with particularity all non-monetary terms of the proposal;
- State with particularity the amount proposed to settle a claim for punitive damages, if any;
- State whether the proposal includes attorneys' fees and whether attorneys' fees are part of the legal claim; and
- Include a certificate of service in the form required by rule 1.080.

Section 768.79 of the Florida Statutes applies to all actions for damages, meaning that an effective offer may be made on a contract action as well as on a tort action (this may be fairly unique to Florida). Any procedural defect in the Offer makes the entire Offer ineffective and unenforceable because a fee award is in derogation of the common law, which requires a party to pay their own way. Thus: (a) the statutory provision for fees must be cited, for example §§ 786.79 (damages) or 448.08 (wages); (b) Rule 1.442 must be cited; and (c) the certificate of service must be signed. If execution of a general release is a required condition, then the general release must be included with the Offer. An Offer conditioned upon the acceptance of multiple parties is defective and unenforceable, i.e., each party must have an independent opportunity to accept the offer. A joint proposal shall state the amount and terms attributable to each party. However, when a party is alleged to be solely vicariously, constructively,

derivatively or technically liable, a joint proposal made by or served on such a party need not state the apportionment or contribution as to that party.

Only costs incurred prior to the service of the offer of judgment may be added to the offer of judgment to determine if the threshold level has been reached. The Offer must be made in good faith; this does not mean that any offer is too small or too large.

There is an extensive body of appellate decisions generated by Florida's appellate courts interpreting the language of both the statute and the rule of procedure.

There is an extensive body of appellate decisions generated by Florida's appellate courts interpreting the language of both the statute and the rule of procedure.

Submitted By:

Erik P. Crep
Wicker, Smith, O'Hara, McCoy & Ford, P.A.
2800 Ponce de Leon Blvd., Suite 800
Regions Bank Building
Coral Gables, FL 33134
Phone: (305) 448-3939
www.wickersmith.com

Christopher Barkas
Carr Allison
305 S. Gadsden Street
Tallahassee, FL 32301
(850) 222-2107
www.carrallison.com

GEORGIA

I. INTRODUCTION

This memorandum will seek to provide a brief exemplar for the USLAW NETWORK Compendium of Law on the law and relevant considerations concerning the use of "offers of judgment" in the State of Georgia.

II. OFFERS OF JUDGMENT IN THE STATE OF GEORGIA

A. BACKGROUND

In the State of Georgia, an "offer of judgment" is a statutory mechanism by which parties to tort litigation may seek to shift liability for payment of litigation-related costs and/or attorney fees. Ordinarily, the allocation of liability for payment of one's litigation costs and attorney fees is governed by the so-called "American Rule", which posits that each party shall bear the responsibility for payment of his or her own fees and costs. [1] Under Georgia law, a party to litigation may seek an award of attorney fees or litigation expenses only if such an award is specifically authorized by statute or contract. [2]

The applicable statutory provision is OCGA § 9-11-68, which sets out the procedure for making—and responding to—a so-called "offer of judgment." [3] A party who successfully makes an offer under this section and meets the requirements for recovery may be entitled to tax some of its costs and attorney fees against the opposing party at the conclusion of the litigation.

B. REQUIREMENTS FOR SHIFTING LIABILITY WITH AN OFFER OF JUDGMENT

In order to successfully recover fees and costs against another party through the statutory Offer of Judgment: (1) the offer itself must comply with specific requirements as to the timing of service and the form and substance of the offer; (2) the offer must the offer must be rejected by the receiving party; and (3) the ultimate recovery at trial must fall below a specified threshold.

1. OFFER – STRICT TIMING, FORM AND SUBSTANCE REQUIREMENTS

Timing. Under OCGA § 9-11-68, any party may serve upon another party a written settlement offer at any time more than 30 days after service of a summons and complaint on a party but not less than 30 days before trial. [4] For counteroffers, this timeframe is slightly widened such that the cutoff date is 20 days before trial. [5]

Form & Substance. Pursuant to OCGA § 9-11-68, an Offer of Judgment must:
(1) Be in writing and state that it is being made pursuant to this Code section;
(2) Identify the party or parties making the proposal and the party or parties to whom the proposal is being made;

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[1] *See, e.g.*, *Georgia Veneer & Package Co. v. Florida Nat. Bank*, 198 Ga. 591, 614, 32 S.E.2d 465, 478 (1944) ("Generally every litigant must pay his own counsel fees.").

[2] *Cary v. Guiragossian*, 270 Ga. 192, 195, 508 S.E.2d 403, 406 (1998).

[3] Another example is § 9-15-1, which provides for recovery of costs by a prevailing party. *See* OCGA § 9-15-1 ("In all civil cases in any of the courts of this state, except as otherwise provided, the party who dismisses, loses, or is cast in the action shall be liable for the costs thereof.").

[4] OCGA § 9-11-68(a).

[5] *Id*.

(3) Identify generally the claim or claims the proposal is attempting to resolve;
(4) State with particularity any relevant conditions;
(5) State the total amount of the proposal;
(6) State with particularity the amount proposed to settle a claim for punitive damages, if any;
(7) State whether the proposal includes attorney's fees or other expenses and whether attorney's fees or other expenses are part of the legal claim; and
(8) Include a certificate of service and be served by certified mail or statutory overnight delivery in the form required by Code Section 9-11-5. [6]

2. REJECTION BY RECEIVING PARTY

The recipient of an Offer of Judgment may respond to the offer in one of several ways. First, the recipient may provide an explicit response to the offer communicating the recipient's acceptance of rejection of the offer. Alternatively, the recipient may respond by issuing a counteroffer. Finally, the recipient may implicitly respond to an Offer of Judgment by failing to provide a timely response. These are discussed below.

Explicit Acceptance or Rejection. The recipient of an Offer of Judgment may accept or reject the offer by serving a response to that effect, as the case may be, upon the offeror while the offer remains open. An Offer of Judgment remains open for thirty (30) days unless the offeror sooner serves a written withdrawal upon the offeree. [7]

Counteroffer. The recipient of an Offer of Judgment may reject the offer by serving a counteroffer on the original offeror while the offer remains open. Again, the Offer of Judgment remains open for thirty (30) days unless the offeror sooner serves a written withdrawal upon the offeree. In addition to serving as a rejection, counteroffer may itself serve as an Offer of Judgment under OCGA § 9-11-68 so long as it is denominated as such and otherwise meets the requirements. [8]

Failure to Respond. Finally, an Offer of Judgment that is neither withdrawn nor accepted within thirty (30) days is deemed rejected. [9]

3. INSUFFICIENT RECOVERY BY OFFEREE

Provided that the above discussed requirements have been met, the offering party may be entitled to recover fees and costs if, and only if, the offeree fails to obtain a sufficient recovery at the conclusion of the underlying litigation. As set forth in OCGA § 9-11-68(b), this sufficiency analysis depends on the party status of the offeror:

If a ***defendant*** makes an [Offer of Judgment] which is rejected by the plaintiff, the defendant shall be entitled to recover reasonable attorney's fees and expenses…if the final judgment is one of ***no liability or*** the final judgment obtained by the plaintiff is ***less than 75 percent of such offer…*** [10]

[6] OCGA § 9-11-68(a).
[7] OCGA § 9-11-68(c).
[8] OCGA § 9-11-68(c).
[9] OCGA § 9-11-68(c).
[10] OCGA § 9-11-68(b)(1).

If a ***plaintiff*** makes an [Offer of Judgment] which is rejected by the defendant and the plaintiff recovers a final judgment in an amount ***greater than 125 percent of such offer***… the plaintiff shall be entitled to recover reasonable attorney's fees and expenses…[11]

C. SPECIFIC CONSIDERATIONS & NUANCES

1. CALCULATING RECOVERY

An offeror who prevails on his or her Offer of Judgment is entitled to recover reasonable attorney's fees and expenses of litigation incurred by or on behalf of the offeror from the date of the rejection of the offer through the entry of judgment. [12] [13]

2. SUBSEQUENT OFFERS

The fact that an offer is made but not accepted does not preclude a subsequent offer. [14]

3. SERVED BUT NOT FILED

An Offer of Judgment must be served upon the receiving party but "shall not [be filed] with the court."[15] Furthermore "[e]vidence of an offer is not admissible except in proceedings to enforce a settlement or to determine reasonable attorney's fees and costs under this Code section." [16]

4. REQUIREMENT OF GOOD FAITH

Upon finding that an Offer of Judgment is otherwise enforceable under OCGA § 9-11-68, the court may disallow an award of attorney's fees and costs if the court finds that the offer was not made in good faith. [17] The court's decision to disallow fees and costs must be set forth in an Order setting forth the grounds for that determination. [18]

E. Holland "Holly" Howanitz and Adam C. Remillard
Wicker Smith O'Hara McCoy & Ford P.A.
50 North Laura Street, Suite 2700
Jacksonville, FL 32202
904.355.0225
www.wickersmith.com

[11] OCGA § 9-11-68(b)(2).
[12] OCGA § 9-11-68(b)(1) [Defendant offeror].
[13] OCGA § 9-11-68(b)(2) [Plaintiff offeror].
[14] OCGA § 9-11-68(c).
[15] OCGA § 9-11-68(a).
[16] OCGA § 9-11-68(c).
[17] OCGA § 9-11-68(d)(2).
[18] *Id.*

HAWAII

In Hawaii, an Offer of Settlement or Judgment is governed by Hawai'i Rule of Civil Procedure 68, which provides that:

> At any time more than 10 days before the trial begins, any party may serve upon any adverse party an offer of settlement or an offer to allow judgment to be taken against either party for the money or property or to the effect specified in the offer, with costs then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the clerk shall, in accordance with the agreement, enter an order of dismissal or a judgment. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs. If 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. The fact that an offer is made but not accepted does not preclude a subsequent offer. When the liability of one party to another has been determined by verdict or order or judgment, but the amount or extent of the liability remains to be determined by further proceedings, either party may make an offer of judgment, which shall have the same effect as an offer made before trial if it is served within a reasonable time not less than 10 days prior to the commencement of hearings to determine the amount or extent of liability.

In Hawaii, a defendant is entitled to recover costs pursuant to Rule 68 where the defendant makes an offer of settlement or judgment for a specific amount to the plaintiff, but later obtains a verdict or judgment in his favor at trial. Kikuchi v. Brown, 110 Haw. 204, 209, 130 P.3d 1069, 1074 (App. 2006). Costs that may be awarded are those specified by Hawaii Revised Statutes § 607-9, which provides for "actual disbursements" that are "deemed reasonable by the Court" and "that are not expressly prohibited by statute or precedent." Id. at 210, 130 P.3d at 1075. Such costs include, but are not limited to, "intrastate travel expenses for witnesses and counsel, expenses for deposition transcript originals and copies, and other incidental expenses, including copying costs, intrastate long-distance telephone charges, and postage[.]" Haw. Rev. Stat. § 607-9. Expert fees are recoverable under Rule 68 (Canalez v. Bob's Appliance Serv. Ctr., Inc., 89 Haw. 292, 308, 972 P.2d 295, 311 (1999); attorneys' fees are not (Collins v. South Seas Jeep Eagle, 87 Haw 86, 90, 952 P.2d 374, 378 (1997)).

Goodsill Anderson Quinn & Stifel LLP
999 Bishop Street, Suite 1600
Honolulu, HI 96813
(808) 547-5600
www.goodsill.com

IDAHO

Offers of Judgment in Idaho are governed by Rule 68 of the Idaho Rules of Civil Procedure (I.R.C.P.). An offer of judgment can be made at any time more than fourteen (14) days prior to commencement of a trial. I.R.C.P. 68(a). The Offer of Judgment can be for money, property, or to the effect specified in the offer, and will be deemed to include all claims that are recoverable, including attorney fees and costs accrued up to the date of judgment (See I.R.C.P. 54(e)(1) and 54(d)(1)). Id. An Offer of Judgment expires fourteen (14) days after service. Id. If by written notice the offer is accepted within fourteen (14) days after the service of the offer, either party may file the offer, along with a notice of acceptance and proof of service thereof. Id. The judgment shall thereafter be entered for the amount of the offer without costs. Id. An offer not accepted shall be deemed withdrawn and evidence of the offer is inadmissible, except in proceedings to determine costs. I.R.C.P. 68(b).

An Offer of Judgment not accepted does not preclude subsequent offers of judgment. Id. Where liability of a party has been determined, but the extent of the liability remains to be determined, the party deemed liable may make an offer of judgment, so long as it is served within a reasonable time not less than fourteen (14) days prior to the commencement of hearings to determine the extent of liability. I.R.C.P. 68(c).

In cases involving claims for monetary damages, costs awarded against the offeree must be based on a comparison of the amount of the offer and the adjusted award. I.R.C.P. 68(d)(1). An adjusted award is comprised of the verdict and the offeree's costs and attorney's fees incurred prior to service of the offer of judgment. I.R.C.P. 68(d)(1)(A). In contingent fee cases, the court prorates the offeree's attorney's fees to determine the amount incurred prior to service of the offer of judgment to reach the adjusted award. Id.

If the adjusted award is less than the offer of judgment:

1) The offeree must pay those costs of the offeror incurred after the making of the offer;

2) The offeror must pay those costs of the offeree incurred before the making of the offer; and

3) The offeror shall not be liable for costs and attorney's fees of the offeree, incurred after the making of the offer. I.R.C.P. 68(d)(B).

If the adjusted award is greater than the offer of judgment, the offeror must pay those costs and attorney's fees incurred by the offeree both prior to and subsequent to making the offer. I.R.C.P. 68(b)(C).

In cases involving claims other than for monetary damages, if the judgment, including costs and fees incurred prior to service of the offer of judgment, is less than the offer of judgment, the offeree must pay those of the offeror's costs incurred after the making of the offer. I.R.C.P. 68(A). If such judgment is greater than the offer, the offeror must pay all of the offeree's costs, incurred before and after the making of the offer. I.R.C.P. 68(2)(B).

Keely Duke
Duke Evett, PLLC
1087 W. River Street, Suite 300
Boise, ID 83705
Phone 208-342-3310
ked@dukeevett.com
www.dukeevett.com

ILLINOIS

There is no Offer of Judgment recognized in this state court.

Lew R.C. Bricker
SmithAmundsen LLC
150 North Michigan Avenue, Suite 3300
Chicago, Illinois 60601
Phone 312-894-3224
lbricker@salawus.com

INDIANA

In Indiana, an Offer of Judgment is governed by Indiana Rule of Trial Procedure 68. Trial Rule 68 provides as follows:

> At any time more than ten days before the trial begins, a party defending against a claim may serve upon an adverse party an offer to allow judgment to be taken against him for the money or property or to the effect specified in his offer, with costs then accrued. If within ten days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the clerk shall enter judgment. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs.

As a consequence for failure to accept an offer, when the judgment obtained by the offeree is less favorable than the offer "the offeree must pay the costs incurred after the making of the offer." Indeed, the Indiana Court of Appeals has made clear that Trial Rule 68 "affects only the costs incurred by the offeror," and not their attorney's fees. *See Hanson v. Valma M. Revocable Trust*, 855 N.E.2d 655, 669 (Ind. Ct. App. 2005). Costs are narrowly defined and do not include litigation expenses. *See Missi v. CCC Custom Kitchens, Inc.*, 731 N.E.2d 1037, 1039 (Ind. Ct. App. 2000).

The fact that an offer is made but not accepted does not preclude a subsequent offer. Ind. R. Tr. Pro. 68. Indeed the rule specifically states that: "[w]hen liability of one party to another has been partially determined by verdict or order of judgment, but the amount or extent of liability remains to be determined by further proceedings, the party adjudged liable may make an offer of judgment, which shall have the same effect as an offer made before trial if it is served within a reasonable time not less than ten days prior to the commencement of hearings to determine the amount of liability." *Id.*

Indiana Code § 34-50-1-1, *et seq.* offers a related scheme for "qualified settlement offers." Specifically, Indiana Code § 34-50-1-2 provides that an offer for qualified settlement may be made by either party any time after a complaint is filed in a civil action, not less than thirty days before the trial of the action. If an offeree declines a qualified settlement offer and the final judgment is less favorable than the offer, the offeree must pay costs, attorney's fees, and expenses incurred by the offeror, after the offer, in an amount not to exceed $1,000. There are a number of specific technical requirements that must be met by both the offer and acceptance in order to qualify for coverage under this statutory scheme. These requirements include, but are not limited to, a writing requirement, specific means of mailing, and signature requirements. Ind. Code § 34-50-1-1, *et seq.*

Anne M. Fishbeck
SmithAmundsen LLC
201 North Illinois Street, Suite 1400
Capital Center, South Tower
Indianapolis, IN 46204
Phone: 317-464-4100
E-Mail: afishbeck@salawus.com

IOWA

Offers of Judgment of actions for money damages are governed by Iowa Code Chapter 677. Offers of Judgment can be made before or after an action is commenced, for all or part of the amount claimed, for all or part of the causes involved in the action, and can be conditioned on whether the defendant prevails in defending the claim. Iowa Code §§ 677.1, 677.4, 677.7 and 677.11 and 677.12. At trial, the offer is not treated as an admission of the cause of action, or on the amount of judgment, nor may it be presented as evidence. *Id.* at Iowa Code § 677.3, .6, .13. The most common form of offer to confess judgment is made after an action is brought.

> 677.7 Offer to Confess After Action Brought
> The defendant in an action for the recovery of money only may, at any time after service of notice and before the trial, serve upon the plaintiff or the plaintiff's attorney an offer in writing to allow judgement to be taken against the defendant for a specified sum of costs.

The plaintiff must accept the offer within five days after it is made. Iowa Code §§ 677.8-677.9. If the offer of judgment is not accepted within five days, it is treated as withdrawn and cannot be given in evidence or mentioned at trial. *Id.* at 677.9. If the plaintiff then fails to obtain judgment for more than the defendant offered, the plaintiff will not recover costs and is required to pay the defendant's costs incurred from the time of the offer. *Id*. at 677.10, .13. A plaintiff must also pay the defendant's costs after the offer if plaintiff had three days' notice that defendant would make a specific offer at a specific time, yet fails to attend and receive the offer, but does not recover more than the offer at trial. *Id.* at 677.5.

Costs include witness fees, document fees, postage, jury fees and transcription fees. Iowa Code §§ 625.2, .6-.9. An offer of judgment made pursuant to Iowa Code Chapter 677 cannot serve as a cause for the continuance of the action or a postponement of the trial. Iowa Code at § 677.14.

Kevin J. Visser
Lynn W. Hartman
Paul D. Gamez
Simmons Perrine Moyer Bergman PLC
115 3rd Street SE, Suite 1200
Cedar Rapids, IA 52401
Phone: 319-366-7641
www.spmblaw.com

KANSAS

In Kansas, offers of judgment are governed by Kan. Stat. Ann. § 60-2002(b):

> At any time more than 21 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against such party for the money or property or to the effect specified in such party's offer, with costs then accrued. If within 14 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the clerk shall enter judgment. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs. If 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. The fact that an offer is made but not accepted does not preclude a subsequent offer. When the liability of one party to another has been determined by verdict or order or judgment, but the amount or extent of the liability remains to be determined by further proceedings, the party adjudged liable may make an offer of judgment, which shall have the same effect as an offer made before trial if it is served within a reasonable time prior to the commencement of proceedings to determine the amount or extent of liability.

Pursuant to Kan. Stat. Ann. § 60-2003, items which may be included in the taxation of costs are:

> (1) The docket fee as provided for by K.S.A. 60-2001, and amendments thereto.
> (2) The mileage, fees, and other allowable expenses of the sheriff, other officer or private process server incurred in the service of process or in effecting any of the provisional remedies authorized by this chapter.
> (3) Publisher's charges in effecting any publication of notices authorized by law.
> (4) Statutory fees and mileage of witnesses attending court or the taking of depositions used as evidence.
> (5) Reporter's or stenographic charges for the taking of depositions used as evidence.
> (6) The postage fees incurred pursuant to K.S.A. 60-303, and amendments thereto.
> (7) Alternative dispute resolution fees shall include fees, expenses and other costs arising from mediation, conciliation, arbitration, settlement conferences or other alternative dispute resolution means, whether or not such means were successful in resolving the matter or matters in dispute, which the court shall have ordered or to which the parties have agreed.
> (8) Convenience fees and other administrative fees levied for the privilege of paying assessments, fees, costs, fines or forfeitures by credit card or other means, including, but limited to, fees for electronic filing of documents or pleadings with the court.
> (9) Such other charges as are by statute authorized to be taxed as costs.

The Kansas Supreme Court has previously held that "K.S.A. 60–2002 does not provide for the payment of all of the expenses incurred by the opposing party after the making of the offer. The statute uses the term 'costs,' and the trial court allowed all items properly taxable as costs [under K.S.A. 60–2003]." *Divine v. Groshong*, 679 P.2d 700, 711 (Kan. 1984). Citing the Court's holding in *Divine*, the Kansas Court of Appeals has specifically held that "[t]he fee of an expert witness may not be charged to the losing party unless specifically authorized by statute." *Grant v. Chappell*, 916 P.2d 723, 725 (Kan. App. 1996). There is little other case law in Kansas on the specific topic of offers of judgment.

KANSAS cont'd

However, the Courts of Kansas have previously held that "[t]raditionally, we have followed federal interpretation of federal procedural rules after which our own have been patterned." *Stock v. Nordhus*, 533 P.2d 1324, 1327 (Kan. 1975). The language of Fed.R.Civ.P. 68 is similar to that used in Kan. Stat. Ann. § 60-2002(b), and, therefore, Kansas Courts would likely look to federal case law in deciding issues arising in the context of offers of judgment under the Kansas statute.

Dysart Taylor Cotter McMonigle & Brumitt, P.C.
4420 Madison Avenue, Suite 200
Kansas City, MO 64111
(816) 931-2700
www.dysarttaylor.com

KENTUCKY

In Kentucky, an Offer of Judgment is governed by Rule 68 of the Kentucky Rules of Civil Procedure, which provides as follows:

> **CR 68 Offer of Judgment**
>
> (1) At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against him for the money or property, or to the effect specified in his offer, with costs then accrued. The offer may be conditioned upon the party's failure in his defense. If within 10 days after service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance, together with the proof of service thereof, and thereupon judgment shall be rendered accordingly, except when the offer is one conditioned upon failure in defense, in which case the judgment shall be rendered when the defense has failed.
>
> (2) When the liability of one party to another has been determined by verdict or order or judgment, but the amount or extent of the liability remains to be determined by further proceedings, the party adjudged liable may make an offer of judgment, which shall have the same effect as an offer made before the trial if it is served within a reasonable time not less than 10 days prior to the commencement of hearings to determine the amount or extent of liability.
>
> (3) An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs. If 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. The fact that an offer is made but not accepted does not preclude a subsequent offer.

In summary, if an offer of judgment is made by a defendant and is accepted by the plaintiff within 10 days, the court must enter the judgment accordingly. If the offer is not accepted within 10 days, the offer is no longer valid, and if the judgment obtained by the plaintiff at trial is not more favorable than the offer, the plaintiff must pay defendant's costs incurred after the making of the offer. In Kentucky, attorneys' fees are typically not considered a taxable court cost.

After an offer of judgment is made, a defendant may not revoke it until the 10-day period expires. Smith v. Kentucky State Fair Board, 816 S.W.2d 911 (Ky. App. 1991). A defendant may not revoke an offer of judgment after timely acceptance by the plaintiff. Pennyrile Citizens Bank & Trust Co. v. Scent, 676 S.W.2d 798 (Ky. App. 1984). An offer not accepted is deemed withdrawn and evidence of the offer is not admissible except in a proceeding to determine costs.

Elisabeth S. Gray and Samantha R. Wright
Middleton Reutlinger
401 South Fourth Street
Suite 2600
Louisville, KY 40202
Tel: (502) 584-1135
Fax: (502) 588-1986
E-mail: EGray@MiddletonLaw.com
E-mail: swright@middletonlaw.com
Website: www.middletonlaw.com

LOUISIANA

In Louisiana, an Offer of Judgment is governed by Louisiana Code of Civil Procedure Article 970 which provides as follows:

> **La. Code Civ. Proc. Ann. art. 970. Motions for Judgment on Offer of Judgment**
>
> A. At any time more than thirty days[19] before the time specified for the trial of the matter, without any admission of liability, any party may serve upon an adverse party an offer of judgment for the purpose of settling all of the claims between them. The offer of judgment shall be in writing and state that it is made under this Article; specify the total amount of money of the settlement offer; and specify whether that amount is inclusive or exclusive of costs, interest, attorney fees, and any other amount which may be awarded pursuant to statute or rule. Unless accepted, an offer of judgment shall remain confidential between the offeror and offeree. If the adverse party, within ten days after service, serves written notice that the offer is accepted, either party may move for judgment on the offer. The court shall grant such judgment on the motion of either party.
>
> B. An offer of judgment not accepted shall be deemed withdrawn and evidence of an offer of judgment shall not be admissible except in a proceeding to determine costs pursuant to this Article.
>
> C. If the final judgment obtained by the plaintiff-offeree is at least twenty-five percent less than the amount of the offer of judgment made by the defendant-offeror or if the final judgment obtained against the defendant-offeree is at least twenty-five percent greater than the amount of the offer of judgment made by the plaintiff-offeror, the offeree must pay the offeror's costs, exclusive of attorney fees, incurred after the offer was made, as fixed by the court.
>
> D. The fact that an offer is made but not accepted does not preclude a subsequent offer or a counter offer. When the liability of one party to another has been determined by verdict, order, or judgment, but the amount or extent of the damages remains to be determined by future proceedings, either party may make an offer of judgment, which shall have the same effect as an offer made before trial if it is served within a reasonable time not less than thirty days before the start of hearings to determine the amount or extent of damages.
>
> E. For purposes of comparing the amount of money offered in the offer of judgment to the final judgment obtained, which judgment shall take into account any additur or remittitur, the final judgment obtained shall not include any amounts attributable to costs, interest, or attorney fees, or to any other amount which may be awarded pursuant to statute or rule, unless such amount was expressly included in the offer.
>
> F. A judgment granted on a motion for judgment on an offer of judgment is a final judgment when signed by the judge; however, an appeal cannot be taken by a party who has consented to the judgment.

[19] This article was recently amended to extend the time period allowed for making an offer from twenty days to thirty days before trial. MOTIONS FOR JUDGMENT ON OFFER OF JUDGMENT, 2012 La. Sess. Law Serv. Act 557 (S.B. 429) (WEST).

Article 970 is punitive in nature and its function is to compensate the rejected offeror who is forced to incur greater trial litigation costs that could have been avoided if the offeree had not rejected the offer. *Suprun v. Louisiana Farm Bureau Mut. Ins. Co.,* 2009-1555 (La. App. 1 Cir. 4/30/10), 40 So. 3d 261, 266. In Louisiana, the legislature does not define costs, it grants the court discretion to fix the costs for whatever items it deems fit as long as the court does not award attorney fees. *Edwards v. Daugherty,* 98-635 (La. App. 3 Cir. 6/9/99), 736 So. 2d 345, 351 *writ denied,* 99-2034 La. 9/17/99, 747 So. 2d 568.

Keith W. McDaniel
McCranie, Sistrunk, Anzelmo, Hardy, McDaniel & Welch, LLC
195 Greenbriar Blvd., Suite 200
Covington, LA 70433
Phone: (504) 846-8330
www.mcsalaw.com

MAINE

In Maine, Offers of Judgment are governed by the Maine Rules of Civil Procedure, M.R.Civ.P. 68, which provides as follows:

> **Rule 68. Offer of Judgment**
>
> At any time more than 10 days before the trial begins or within such shorter time as the court may approve, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against the defending party for the money or property or to the effect specified in the offer, with costs then accrued. If within 10 days after the service of the offer or within such shorter time as the court may order the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the clerk shall enter judgment. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs. If 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. The fact that an offer is made but not accepted does not preclude a subsequent offer. When the liability of one party to another has been determined by verdict or order or judgment, but the amount or extent of the liability remains to be determined by further proceedings, the party adjudged liable may make an offer of judgment, which shall have the same effect as an offer made before trial if it is served within a reasonable time not less than 10 days, or such shorter time as the court may approve, prior to the commencement of hearings to determine the amount or extent of liability.

Under the rules, if the offer is not accepted within ten days, it is deemed to be withdrawn and if the plaintiff later obtains a judgment which is not higher than the offer, the plaintiff must pay the defendant costs incurred after the offer was made. Note that the plaintiff's judgment is augmented by the accrued prejudgment interest. *Purwin v. Robertson Enterprises, Inc.*, 505 A.2d 1152 (1986). Attorneys' fees are not included in recoverable costs. The recoverable costs are generally deposition costs, filing fees, and some expert and witness fees. Recoverable costs are found in 14 M.R.S.A. §§1501-1504, 16 M.R.S.A. §251 and M.R.Civ.P. Rules 16B and 54.

Elizabeth G. Stouder, Esq.
Richardson, Whitman, Large & Badger
P.O. Box 9545
Portland, ME 04112-9545
(207) 774-7474
estouder@rwlb.com

MARYLAND

In Maryland, an Offer of Judgment is generally unavailable with the exception of health care malpractice claims. Under the Maryland Rules of Civil Procedure, § 2-605, "[a] party to a health care malpractice claim may serve on the adverse party an offer of judgment pursuant to Code, Courts Article, § 3-2A-08A." The Maryland Code, Courts and Judicial Proceedings Article § 3-2A-08A states as follows:

§ 3-2A-08A. Offer of Judgment

Costs defined

(a) In this section, "costs" means the costs described under Maryland Rule 2-603.

Cases dismissed following settlement

(b) This section does not apply to cases dismissed following a settlement.

Offer of judgment

(c)(1) At any time not less than 45 days before the trial begins, a party to an action for a medical injury may serve on the adverse party an offer of judgment to be taken for the amount of money specified in the offer, with costs then accrued.

(2) When the liability of one party to another has been determined by verdict or order or judgment, but the amount or extent of the liability remains to be determined by further proceedings, a party adjudged liable or a party in whose favor liability was determined may make an offer of judgment not less than 45 days before the commencement of hearings to determine the amount or extent of liability.

Acceptance of offer of judgment

(d)(1) If within 15 days after the service of the offer of judgment, the adverse party serves written notice that the offer is accepted, either party may then file with the court the offer and notice of acceptance together with an affidavit of service notifying the other parties of the filing of the offer and acceptance.

(2) If the court receives the filings specified in paragraph (1) of this subsection, the court shall enter judgment.

Withdrawal of offer not accepted

(e)(1) If an adverse party does not accept an offer of judgment within the time specified in subsection (d)(1) of this section, the offer shall be deemed withdrawn and evidence of the offer is not admissible except in a proceeding to determine costs.

(2) An offer of judgment that is not accepted does not preclude a party from making a subsequent offer of judgment in the time specified in this section.

Payment of costs

(f) If the judgment finally obtained is not more favorable to the adverse party than the offer, the adverse party who received the offer shall pay the costs of the party making the offer incurred after the making of the offer.

* * *

This legislation was passed in 2005 and has not been the subject of litigation in Maryland courts.

Albert B. Randall, Jr.
Franklin and Prokopik, P.C.
2 North Charles Street, Suite 600
Baltimore, MD 21201
(410) 752-8700
arandall@fandpnet.com
Admitted in Maryland

MASSACHUSETTS

Offers of Judgment in Massachusetts are governed by Mass Rules Civil Procedure Rule 68. The Rule provides:

At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against him for the money or property or to the effect specified in his offer, with costs then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the clerk shall enter judgment. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs. If the judgment exclusive of interest from the date of offer 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. The fact that an offer is made but not accepted does not preclude a subsequent offer. When the liability of one party to another has been determined by verdict or order or judgment, but the amount or extent of the liability remains to be determined by further proceedings, the party adjudged liable may make an offer of judgment, which shall have the same effect as an offer made before trial if it is served within a reasonable time not less than 10 days prior to the commencement of hearings to determine the amount or extent of liability.

WHEN OFFER IS NOT ACCEPTED

Only after there is an acceptance of the offer does the court get involved. The plaintiff who wants to accept the offer must indicate such acceptance within ten (10) days by serving a written notice to the offeror defendant. The offer and notice of acceptance is filed with the court and a judgment in that amount is entered.

If plaintiff rejects the defendant's offer, and recovers a judgment (exclusive of interest) less than the amount of the offer, the plaintiff must pay the costs incurred from the date of the offer. Should the verdict be in favor of the defendant, the defendant is not entitled to recover costs under this Rule as a prevailing defendant is entitled to costs under Mass. Rule. Civ. P. Rule 54. There is no limitation on the number of offers of judgment a defendant may make in the course of the litigation.

COSTS

The awarding of costs is subject to the discretion of the court and must be established by the record. The party seeking costs files an affidavit(s), with relevant exhibits, outlining those costs which are sought to be taxed against the losing party.

The costs of depositions, if determined to be reasonably necessary, and expert witness fees, are subject to the broad discretion of the court. The courts generally do not endeavor to fully compensate the party for the litigation. A hearing on a motion to assess costs is required if requested by the losing party.

Recovery of attorney's fees is subject to specific contractual or statutory allowance. The judge must determine the quality, efficiency and novelty of the attorney's efforts, the rates charged and the staffing employed to determine the amount to be awarded. *Passatempo v. McMenimen*, 86 Mass. App. Ct. 742, 747 (2014).

Rubin and Rudman LLP
53 State Street, 15th Floor
Boston, MA 02109
(617) 330-7180
www.rubinrudman.com

MICHIGAN

There is no Offer of Judgment recognized in this state court.

MINNESOTA

In Minnesota, an Offer of Judgment is governed by Minnesota Civil Procedure Rules 68.01-68.04. An offer may be made by any party at any time more than 10 days before the trial begins. Minn. R. Civ. Pro. 68.01(a). It can be either a "written damages-only or total-obligation offer to allow judgment to be entered to the effect specified in the offer, or to settle the case on the terms specified in the offer." *Id.* It does not need to be filed with the court unless the offer is accepted. Minn. R. Civ. Pro. 68.01(e). Also, when the liability of one party had been determined by verdict, order, or judgment but the amount or extent of the liability remains to be determine by further proceedings, the liable party may make an offer of judgment which will have the same effect as if it had been made before trial if it is served "within a reasonable time not less than 10 days before commencement of a hearing or trial to determine the amount or extent of liability." *Id.*

In order to be given the cost-shifting effect of the rule any offer must include express reference to the rule. Minn. R. Civ. Pro. 68.01(b); *see Matheiu v. Freeman*. 472 N.W.2d 187 (Minn. App. 1991). Further, an offer made under this rule is considered a "damages-only" offer unless it is expressly stated to be a "total-obligation" offer. Minn. R. Civ. Pro. 68.01(b). A damages-only offer does not include then- accrued applicable prejudgment interest, costs and disbursements, or applicable attorney fees. Minn. R. Civ. Pro. 68.01(c). Conversely, an offer that is expressly identified as a "total-obligation" offer does include then-accrued applicable prejudgment interest, costs and disbursements, and applicable attorney fees. Minn. R. Civ. Pro. 68.01(d).

Acceptance of an offer of judgment must be made by service of written notice of acceptance within 10 days after service of the offer. Minn. R. Civ. Pro. 68.02(a). During this ten-day period the offer is irrevocable. *Id.* If it is not accepted within the 10-day period, the offer will be deemed withdrawn. Minn. R. Civ. Pro. 68.02(d). Any subsequent offers made by the same party will supersede all prior offers made by the party. Minn. R. Civ. Pro. 68.02(e).

If the offer is accepted, either party may file the offer, notice of acceptance, and proof of service with the court. Minn. R. Civ. Pro. 68.02(b). If it is a total-obligation offer, then judgment will be entered in the amount of the offer. *Id.* at subp. (1). If it is a damages-only offer, then applicable prejudgment interest, the plaintiff-offeree's costs and disbursements, and applicable attorney fees, all accrued to the date of the offer will be determined by the court and included in the judgment. *Id.* at subp. (2). Further, if the offer is accepted as an offer of settlement, the settled claims may be dismissed upon the filing of a stipulation for dismissal setting forth the terms of the offer, including that payment of applicable prejudgment interest, costs and disbursements, and applicable attorney fees all accrued to the date of the offer have been satisfied. Minn. R. Civ. Pro. 68.02(e).

Unaccepted offers are not admissible evidence, except in a proceeding to determine costs and disbarments. Minn. R. Civ. Pro. 68.03(a). Significantly, Rule 68.03(b) provides the effect of an offer on recovery of costs and reads as follows:

Rule 68.03 Effect of Unaccepted Offer

***

(b) Effect of Offer on Recovery of Costs. An unaccepted offer affects the parties' obligations and entitlements regarding costs and disbursements as follows:

(1) If the offeror is a defendant, and the defendant-offeror prevails or the relief awarded to the plaintiff-offeree is less favorable than the offer, the plaintiff-offeree must pay the defendant-offeror's costs and disbursements incurred in the defense of the action after service of the offer, and the plaintiff-offeree shall not recover its costs and disbursements incurred after service of the offer, provided that applicable attorney fees available to the plaintiff-offeree shall not be affected by this provision.

(2) If the offeror is a plaintiff, and the relief awarded is less favorable to the defendant-offeree than the offer, the defendant-offeree must pay, in addition to the costs and disbursements to which the plaintiff-offeror is entitled under Rule 54.04, an amount equal to the plaintiff-offeror's costs and disbursements incurred after service of the offer. Applicable attorney fees available to the plaintiff-offeror shall not be affected by this provision.

(3) If the court determines that the obligations imposed under this rule as a result of a party's failure to accept an offer would impose undue hardship or otherwise be inequitable, the court may reduce the amount of the obligations to eliminate the undue hardship or inequity.

To determine whether a result is less favorable to the offeree than the offeror, a damages-only offer is compared to the damages awarded to the plaintiff and the total-obligation offer is compared with the amount of damages awarded to the plaintiff, plus applicable prejudgment interest, the plaintiff's taxable costs and disbursements and applicable attorney fees, all accrued to the date of the offer. Minn. R. Civ. Pro. 68.03(c). "Applicable attorney fees" and "applicable prejudgment interest" each mean the amount the party is entitled in either category pursuant to statue, common law, or contract for one or more claims resolved by the offer. Minn. R. Civ. Pro. 68.04.

Mark A. Solheim
Larson • King, LLP
30 East Seventh Street, Suite 2800
Saint Paul, MN 55101
Phone: 651-312-6500
msolhiem@larsonking.com
www.larsonking.com

MISSISSIPPI

In Mississippi, an Offer of Judgment is governed by Mississippi Rule of Civil Procedure 68 which relevant part provides as follows:

> **Rule 68. Offer of Judgment**
>
> At any time more than fifteen days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against him for the money or property or to the effect specified in his offer, with costs then accrued. If within ten days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the court shall enter judgment. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs. If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the cost incurred after the making of the offer. The fact that an offer is made but not accepted does not preclude a subsequent offer.

In 2011, the Mississippi Court of Appeals offered a lengthy discussion on the application of Rule 68 in the context of an automobile accident case weakening any force the rule previously had with regard to encouraging settlement. *Hubbard v. Delta Sanitation of Miss.*, 64 So. 3d 547, 559-568 (Miss. App. 2011). Finding the only costs recoverable under Rule 68 are costs specifically authorized by statute, the appeals court reversed the trial court's award of costs to a defendant of expert fees, copying/printing costs, trial exhibits such as "blow-ups" and court reporter's fee for depositions. *Id.* One such "fee statute" provides that witnesses at trial shall receive $1.50 per day in attendance fees and $.05 per mile to and from the court. MISS. CODE ANN. § 25-7-47. These negligible witness fees were the only costs found by the *Hubbard* court to have been properly taxed to the plaintiff through Rule 68 in this particular factual context. *Hubbard*, 64 So. 3d at 565.

On the other hand, there are a number of Mississippi statutes that allow for expert-witness fees to be taxed as costs in certain cases. *See*, *e.g.*, MISS. CODE ANN. § 95-5-10(3) (Rev. 2004) (providing that, in trespass-to-timber suits, "[a]ll reasonable expert witness fees and attorney's fees shall be assessed as court costs in the discretion of the court").

An Offer of Judgment made under Rule 68 by a defendant is not an admission of liability.

Submitted By:
R. Eric Toney
Copeland, Cook, Taylor & Bush, P.A.
1076 Highland Colony Parkway
Ridgeland MS 39157
Phone: (601) 856-7200
Fax: (601) 707-2999
etoney@cctb.com

Other USLAW Members in Mississippi:
Carr Allison
14231 Seaway Road, Building 2000, Suite 2001
Gulfport, MS 39503
Phone: 228-864-1060
www.carrallison.com

MISSOURI

In Missouri, an Offer of Judgment is governed by Missouri Supreme Court Rule 77.04 which provides as follows:

> **77.04. Offer of Judgment – Recovery of Costs**
>
> At any time more than thirty days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against the defending party for the money or property or to the effect specified in the offer, with costs, then accrued. If within ten days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon judgment shall be entered. If the offer is not accepted within ten days it shall be deemed withdrawn and evidence thereof is not admissible. If the adverse party fails to obtain a judgment more favorable than that offered, that party shall not recover costs in the circuit court from the time of the offer but shall pay costs from that time.
>
> Material terms of the acceptance must match those of the offer, an acceptance that does not match the material terms of the offer will be considered a counteroffer." Caldwell v. Heritage House Realty, Inc. 32 S.W.3d 773 (Mo. App. W.D. 2000).

In Missouri, attorney fees are not considered a taxable court cost. Schoemehl v. Whaley, 598 S.W.2d 607 (Mo. App. E.D. 1980). Instead, court costs are typically items such as the filing fee, service of process fees and the costs of depositions (not including video depositions). The rule should not be confused with a confession of judgment. It is designed to permit a defendant to avoid court costs by making an offer of judgment that, if accepted, would result in a consent judgment. Katz Drug Co. v. Commercial Standard Ins. Co., 647 S.W.2d 831 (Mo. App. 1983); Fritzsche v. E. Tex. Motor Freight Lines, 405 S.W.2d 541 (Mo. App. 1966). An offer under this rule by a defendant is not an admission of liability. Katz, 647 S.W.2d at 840.

Submitted by:
Kevin L. Fritz
Lashly & Baer, P.C.
714 Locust Street
St. Louis, MO 63101
(314) 436-8309 (w)
(314) 518-4355 (c)
klfritz@lashlybaer.com

Other USLAW members in Missouri | Western Missouri:
Dysart Taylor Cotter McMonigle & Brumitt, PC
4420 Madison Avenue, Suite 200
Kansas City, MO 64111
(816) 931-2700
www.dysarttaylor.com

MONTANA

In Montana, an Offer of Judgment is governed by Rule 68, Montana Rules of Civil Procedure, which provides as follows:

> **Rule 68. Offer of Judgment**
>
> (a) **Making an Offer. Judgment on an Accepted Offer.** More than 14 days before the trial begins, 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 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

Attorney fees are not considered a taxable court cost except in lien foreclosure suits where the defendant makes an offer of judgment under Rule 68. §71-3-124, Montana Code Annotated. Court costs are typically items such as the filing fee, service of process fees, the costs of depositions actually used to obtain the judgment and witness fees at the statutory rate ($10 per day plus mileage, but not the cost of hiring an expert. Only costs incurred after making the offer are borne by the plaintiff when the final judgment is less than the offer of judgment.

Paul Haffeman
Davis, Hatley, Haffeman & Tighe, P.C.
P. O. Box 2103
Great Falls, MT 59403-2103
(406) 761-5463
paul.haffeman@dhhtlaw.com

NEBRASKA

In Nebraska, an Offer of Judgment is governed by Nebraska Revised Statute § 25-901, which provides as follows:

> **25-901. Offer of judgment before trial; procedure; effect**
>
> The defendant in an action for the recovery of money only may, at any time before the trial, serve upon the plaintiff or the plaintiff's attorney an offer in writing to allow judgment to be taken against the defendant for the sum specified therein. If the plaintiff accepts the offer and gives notice thereof to the defendant or the defendant's attorney, within five days after the offer was served, the offer and an affidavit that the notice of acceptance was delivered in the time limited may be filed by the plaintiff or the defendant may file the acceptance, with a copy of the offer verified by affidavit. In either case, the offer and acceptance shall be entered upon the record, and judgment shall be rendered accordingly. If the notice of acceptance is not given in the period limited, the offer shall be deemed withdrawn and shall not be given in evidence or mentioned on the trial. If the plaintiff fails to obtain judgment for more than was offered by the defendant, the plaintiff shall pay the defendant's cost from the time of the offer.

Neb. Rev. Stat. § 25-901 (2018).

In an action to recover on an insurance policy, a court "must allow an attorney's fee to the plaintiff if judgment is entered against the insurer in an amount greater than the amount specified in a written offer to allow judgment [pursuant to § 25-901]." *Davenport Grain Co. v. Michigan Millers Mut. Ins. Co.*, 125 F.R.D. 157, 158 (D. Neb. Aug. 7, 1987); Neb. Rev. Stat. § 44-359.

Settlement offers are not the same as offers of judgment for purposes of the statute. *Young v. Midwest Fam. Mut. Ins. Co.*, 722 N.W.2d 13, 16 (Neb. 2006) ("Section 25-901 is clear—it applies to offers to allow judgment against a defendant, which, under the plain meaning of the statute, are not equivalent to settlement offers.").

An offer of judgment is subject to familiar principles of contract formation, and "must be definite and certain as to the terms and requirements." *Barnett v. Happy Cab Co.*, 28 Neb. App. 438, 444, 945 N.W.2d 200, 205 (2020) (finding that an offer to confess judgment was not valid because its terms were unclear as to which of the many defendants were subject to the offer), *review denied* (July 29, 2020).

Jennifer D. Tricker
Spencer R. Murphy
Baird Holm LLP
1500 Woodmen Tower
1700 Farnam St
Omaha, NE 68102-2068
Phone 402-344-0500
jtricker@bairdholm.com
smurphy@bairdholm.com
www.bairdholm.com

NEVADA

Offers of judgment in Nevada are permitted under Nevada Rule of Civil Procedure 68. At any time more than ten court days before trial, the parties may serve written offers of judgment. The offer is irrevocable for ten court days and, if not accepted within that time, is deemed rejected. If service is by any method other than personal service, an additional three days must be given to accept the offer. The additional three days for non-personal service must also be included when calculating the minimum number of days before trial in which the offer must be served.

Evidence of the offer is explicitly inadmissible except in proceedings to determine costs and fees. Joint offers of judgment between multiple parties are permitted, as are apportioned offers of judgment contingent upon acceptance by all offerees.

If an offer of judgment is rejected and the offeree fails to obtain a more favorable judgment, the offeree cannot recover fees, costs or interest accrued after the date the offer was served. Instead, the offeree must pay "the offeror's post-offer costs, applicable interest on the judgment from the time of the offer to the time of entry of the judgment and reasonable attorney's fees, if any be allowed, actually incurred by the offeror from the time of the offer." Nev. R. Civ. Pro. 68(f)(2). An award of costs is automatic although the ultimate amount remains within the discretion of the court. Similarly, the amount of post-offer attorneys' fees awarded is also at the discretion of the district court.

The Supreme Court of Nevada strictly construes the application of these rules. For instance, in *Quinlan v. Camden USA, Inc.*, 126 Nev. 311, 236 P.3d 613 (2010) the Court ruled a defendant's offer of judgment was void because it was faxed, not mailed. Plaintiff received the offer but the parties had not agreed to accept electronic service and local rules in place at the time did not permit service via facsimile.

When the federal court case has diversity jurisdiction in which federal procedural law applies and Nevada substantive law applies, Nev. R. Civ. Pro. 68 is inapplicable. Instead, Fed. R. Civ. Pro. 68 applies. *Walsh v. Kelly*, 203 F.R.D. 597 (D. Nev. 2001), *rev'd* on other grounds, *Walsh v. Kelly*, 2002 U.S. App. Lexis 1399 (9th Cir. Jan. 24, 2002). Fed. R. Civ. Pro. 68 does not allow for the recovery of attorneys' fees and allows for a smaller recovery of some costs, such as expert fees.

The district court must evaluate several factors before making an award of attorney fees and costs, including

> (1) whether the plaintiff's claim was brought in good faith;
>
> (2) whether the defendants' offer of judgment was reasonable and was in good faith in both its timing and amount;
>
> (3) whether the plaintiff's decision to reject the offer and proceed to trial was grossly unreasonable or in bad faith; and
>
> (4) whether the fees sought by the offeror are reasonable and justified in amount.

Beattie v. Thomas, 99 Nev. 579, 588-89, 668 P.2d 268 (1983); *Schouweiler v. Yancey Co*., 101 Nev. 827, 833, 712 P.2d 786 (1985). Failure to consider these factors prior to awarding fees and costs is an abuse of discretion. *Id*.

The amount of an award for reasonable attorney fees is not contingent on the amount of the offer of judgment. Rather, the district court evaluates several factors to determine whether fees are reasonable:

> (1) the qualities of the advocate: his ability, training, education, experience, professional standing and skill;
>
> (2) the character of the work to be done: its difficulty, intricacy, importance, the time and skill required, the responsibility imposed and the prominence and character of the parties when they affect the importance of the litigation;
>
> (3) the work actually performed by the lawyer: the skill, time and attention given to the work; and
>
> (4) the result: whether the attorney was successful and what benefits were derived.

Schouweiler v. Yancey Co., 101 Nev. 827, 833, 712 P.2d 786 (1985) (citing *Brunzell v. Golden Gate Nat'l Bank*, 85 Nev. 345, 349, 455 P.2d 31 (1969) (citation omitted). In *Schouweiler*, the issue of the calculation of a party's attorneys fees, after prevailing on his offer of judgment, was remanded to the district court when the "district court based its award on the amount of the offer of judgment and not the factors in *Brunzell*." *Id*.

Nevada's offer of judgment statute, Nev. Rev. Stat. § 17.115, was repealed effective October 1, 2015 and can no longer be used.

Thorndal Armstrong Delk Balkenbush & Eisinger
Brian K. Terry, Esq.
1100 East Bridger Ave.
Las Vegas, NV 89125
Phone: 702-366-0622
Fax: 702-366-0327
www.thorndal.com

NEW HAMPSHIRE

There is no Offer of Judgment recognized in this state court.

NEW JERSEY

In New Jersey, an Offer of Judgment is governed by New Jersey Court Rules 4:58-1 through 4:58-6. Rule 4:58-1, Time and Manner of Making and Accepting an Offer, provides, in relevant part, as follows:

> (a) Except in a matrimonial action, any party may, at any time more than 20 days before the actual trial date, serve on any adverse party, without prejudice, and file with the court, an offer to take a monetary judgment in the offeror's favor, or as the case may be, to allow judgment to be taken against the offeror, for a sum stated therein (including costs). The offer shall not be effective unless, at the time the offer is extended, the relief sought by the parties in the case is exclusively monetary in nature.
>
> (b) …If the offer is not accepted on or prior to the 10th day before the actual trial date or within 90 days of its service, whichever period first expires, it shall be deemed withdrawn and evidence thereof shall not be admissible except in a proceeding after the trial to fix costs, interest, and attorney's fees.

The consequences of a non-acceptance are governed by Rules 4:58-2 and 4:58-3. In addition to costs of suit, the offeror is entitled to: (1) all reasonable litigation expenses incurred following non-acceptance; (2) prejudgment interest of eight percent on the amount of any money recovery from the date of the offer or the date of completion of discovery, whichever is later; and (3) reasonable attorneys' fees for such subsequent services as are compelled by the non-acceptance. A claimant in a suit is only entitled to the above remedies if he/she obtains a monetary judgment in an amount that is 120% of the offer or more (R. 4:58-2); a non-claimant is only entitled to the above remedies if the claimant obtains a monetary judgment in an amount that is 80% of the offer or less (R. 4:58-3). No remedies are available to a non-claimant if: (1) the claimant's claim is dismissed; (2) a no-cause verdict is returned; (3) only nominal damages are awarded; (4) a fee allowance would conflict with the policies underlying a fee-shifting statute or rule of court; or (5) an allowance would impose undue hardship. R. 4:58-3(c); Reid v. Finch, 425 N.J. Super. 196 (Law Div. 2011).

Inducement to settlement is the fundamental purpose of the rule. Best v. C&M Door Controls, Inc., 200 N.J. 348 (2009). Accordingly, a counter-offer will not affect the viability of the original offer. See Pressler and Verniero, Comment 2 to New Jersey Court Rule 4:58. In fact, the plain language of the rule does not preclude a further offer in the same or another amount. R. 4:58-1(b).

Connell Foley LLP
56 Livingston Avenue
Roseland, NJ 07068
Phone: (973) 535-0500
www.connellfoley.com

NEW MEXICO

- In New Mexico, an Offer of Settlement is governed by New Mexico Rule of Civil Procedure for the District Courts 1-068 which provides as follows:

    - 1-068 Offer of Settlement

    - A. Offer of settlement. Except as provided in this rule, at any time more than ten (10) days before the trial begins, any party may serve upon any adverse party an offer to allow an appropriate judgment to be entered in the action in accordance with the terms and conditions specified in the offer. A claimant may not make an offer of settlement under this rule until one hundred twenty (120) days after the filing of a responsive pleading by the party defending against that claim. If within ten (10) days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon such judgment may be entered as the court may direct. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs.

      If an offer of settlement made by a claimant is not accepted and the judgment finally obtained by the claimant is more favorable than the offer, the defending party must pay the claimant's costs, excluding attorney's fees, including double the amount of costs incurred after the making of the offer. If an offer of settlement made by a defending party is not accepted and the judgment finally obtained by the claimant is not more favorable than the offer, the claimant must pay the costs, excluding attorney's fees, incurred by the defending party after the making of the offer and shall not recover costs incurred thereafter.

      The fact that an offer has been made but not accepted does not preclude a subsequent offer. When the liability of one party to another has been determined by verdict or order or judgment, but the amount or extent of the liability remains to be determined by further proceedings, any party may make an offer of settlement, which shall have the same effect as an offer made before trial if it is served within a reasonable time not less than ten (10) days prior to the commencement of hearings to determine the amount or extent of liability.

    - B. Domestic relations actions excluded. This rule shall not apply to domestic relations actions.

    - C. Awards not cumulative. In those cases where a claimant would be entitled to double costs under Rule 1-068 and also entitled to interest pursuant to the statute, the court should award double costs or interest plus the costs awarded to the prevailing party pursuant to Rule 1-054(D)(2) NMRA, but not both statutory interest and double costs.

- In New Mexico, until 2003, Rule 1-068 NMRA was titled "Offer of judgment." The superseded rule only permitted a party defending against a claim to make an offer of judgment. Under the current Rule 1-068, either party may make an offer of settlement. This change increases the likelihood of a settlement and provides an equal opportunity for the parties to initiate a settlement. Rule 1-068 also applies to actions seeking non-monetary relief.

NEW MEXICO cont'd

- To encourage settlement, if a defending party does not accept a claimant's offer of settlement and the claimant obtains a judgment larger than the offer, costs incurred by the claimant after the offer of settlement are doubled, and the doubled amount is awarded as costs. If a claimant does not accept a defending party's offer of settlement, and the claimant does not obtain a judgment more favorable than the offer, the claimant must pay the costs incurred by the defending party following the offer and is not entitled to its costs after the offer. See Rule 1-054(D) for the costs awardable pursuant to this rule. An offer of settlement may not be made by a claimant until one-hundred-twenty days after service of a responsive pleading by the defending party to allow the defending party a fair opportunity to determine the merits of the case.

    - Rule 1-068 does not disturb a claimant's ability to recover costs incurred prior to a defendant's settlement offer. Maestas v. Town of Taos, 464 P.3d 1056, 1063-64 (N.M. Ct. App. 2019). If the claimant obtains a judgment under a law that allows for the awarding of costs, the claimant is entitled to recover any costs incurred prior to the defendant's settlement offer, but will nonetheless be responsible for paying the costs incurred by the defending party after the offer was made if the ultimate judgment is less favorable than the offer. Id.

- Generally, filing written notice of an accepted settlement offer with the court under Rule 1-068 leaves "no discretion with the district court to do anything but to enter the judgment." Shelton v. Sloan, 977 P.2d 1012, 1018 (NM. Ct. App. 1999). However, because a settlement in New Mexico is generally not binding on a minor in the absence of judicial approval, a when a Rule 1-068 notice of settlement is filed in a case involving minors, the court must review the settlement before entering judgment and reject it if it is not fair to the minors. Id.

Timothy C. Holm
Jennifer G. Anderson
Modrall Sperling
500 Fourth Street NW
Suite 1000
Albuquerque, NM 87102
Telephone (505) 848-1800
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NEW YORK

While New York does not have an Offer of Judgment per se, three pretrial devices governed by Article 32 of the New York Civil Practice Law and Rules ("CPLR") entitled "Accelerated Judgment"" are akin to what other jurisdictions refer to as an Offer of Judgment. The first two provisions (CPLR 3219 and 3220) applies solely to matters where a party has a cause of action for a breach of an express or implied contract clause., The third provision (CPLR 3221, applies to all civil actions other than matrimonial cases. The CPLR provisions provide as follows:

Rule 3219. Tender

> At any time not later than ten days before trial, any party against whom a cause of action based upon contract, expressed or implied, as asserted, and against whom a separate judgment may be taken, may, without court order, deposit with the clerk of the court for safekeeping, an amount deemed by him to be sufficient to satisfy the claim asserted against him, and serve upon the claimant a written tender of payment to satisfy such claim. A copy of the written tender shall be filed with the clerk when the money is so deposited. The clerk shall place money so received in the safe or vault of the court to be provided for the safekeeping thereof, there to be kept by him until withdrawal by claimant or return to the depositor or payment thereof to the county treasurer or commissioner of finance of the city of New York, as hereinafter provided. Within ten days after such deposit the claimant may withdraw the amount deposited upon filing a duly acknowledged statement that the withdrawal is in satisfaction of the claim. The clerk shall thereupon enter judgment dismissing the pleading setting forth the claim, without costs. Where there is no withdrawal within such ten-day period, the amount deposited shall, upon request be repaid to the party who deposited it. If the tender is not accepted and the claimant fails to obtain a more favorable judgment, he shall not recover interest or costs from the time of the offer, but shall pay costs for defending against the claim from that time. A tender shall not be made known to the jury.
>
> Money received by the clerk of the court for safekeeping as hereinabove provided and later withdrawn by claimant or repaid to the depositor pursuant to the provisions hereof shall not be deemed paid into court. If the deposit is neither withdrawn by claimant nor returned to the depositor upon his request at the expiration of the ten-day period, the amount of such deposit shall be deemed paid into court as of the day following the expiration of the ten-day period and the clerk shall pay the amount of the deposit to the county treasurer or commissioner of finance of the city of New York, in accordance with section twenty-six hundred one of the civil practice law and rules. Withdrawal of such amount thereafter shall be in accordance with the provisions of rule twenty-six hundred seven. Fees for services rendered therein by a county treasurer or the commissioner of finance of the city of New York are set forth in section eight thousand ten.

Rule 3220. Offer to Liquidate Damages Conditionally

> At any time not later than ten days before trial, any party against whom a cause of action based upon contract, express or implied, is asserted may serve upon the claimant a written offer to allow judgment to be taken against him for a sum therein specified, with costs then accrued, if the party against whom the claim is asserted fails in his defense. If within ten days thereafter the claimant serves a written notice that he accepts the offer, and damages are awarded to him on the trial, they shall be assessed in the sum specified in the offer. If the offer is not so accepted and the claimant fails to obtain a more favorable judgment, he shall pay the expenses necessarily incurred by the party against whom the claim is asserted, for trying the issue of damages from the time of the offer. The expenses shall be ascertained by the judge or referee before whom the case is tried. An offer under this rule shall not be made known to the jury.

Rule 3221. Offer to Compromise

> Except in a matrimonial action, at any time not later than ten days before trial, any party against whom a claim is asserted, and against whom a separate judgment may be taken, may serve upon the claimant a written offer to allow judgment to be taken against him for a sum or property or to the effect therein specified, with costs then accrued. If within ten days thereafter the claimant serves a written notice that he accepts the offer, either party may file the summons, complaint and offer, with proof of acceptance, and thereupon the clerk shall enter judgment accordingly. If the offer is not accepted and the claimant fails to obtain a more favorable judgment, he shall not recover costs from the time of the offer, but shall pay costs from that time. An offer of judgment shall not be made known to the jury.

These provisions vary slightly in intention, procedure, and effect. CPLR 3219 and 3220 only pertain to monetary relief, whereas CPLR 3221 permits an offer of money or property.

Each of these pretrial devices may be used to attempt to toll interest accumulation. *See Fama v. Metropolitan Prop. & Cas. Ins. Co.*, 169 Misc. 2d 872, 646 N.Y.S.2d 930, 932 (Sup. Ct. Westchester Cnty. 1996); *Murphy v. Stirling*, 66 Misc. 2d 105, 107, 320 N.Y.S.2d 183, 186 (Sup. Ct. Monroe Cnty. 1971). In cases where these devices were utilized and ultimately proceed to trial, neither the tender nor offer under these provisions may be made known to the jury.

A tender under CPLR 3219 is intended to allow a party against whom a contract claim is asserted to toll the claimant's right to certain interest and to transfer the payment of costs to the claimant. Under this Rule, the defendant is essentially conceding liability and only disputing the amount sought as damages. The tender must not be conditional and requires actual payment into the Court. *See* Sigel, David D., *Practice Commentaries*, *in* NY CPLR 3212 to 3400, C3219:1 Tender (McKinney's 2005). A failure to accept a valid tender of the amount of a judgment under CPLR 3219 will halt the accumulation of interest. *Affiliated Credit Adjustors, Inc. v. Carlucci & Legum*, 139 A.D.2d 611, 613, 527 N.Y.S.2d 426, 428 (2nd Dep't 1988).

Under CPLR 3220, a defendant primarily disputes liability and the offer is to pay the specified sum only in the event that plaintiff establishes liability at the trial. Unlike CPLR 3219 and 3221, the expenses recoverable under this Rule may include attorney's fees and expenses for securing witnesses to testify at trial; however, the expenses are limited to those relevant to trying the damages question from the time of the offer. Siegel, *supra* at C3220:1; *see also Kirchoff-Consigli Constr. Mgmt., LLC v. Dharmakaya, Inc.*, 186 A.D.3d 585, 129 N.Y.S.3d 526 (2nd Dep't 2020) (The defendant's offer exceeded the awarded judgment, and therefore the court should have awarded the defendant its expenses, including attorneys' fees, incurred in trying the issue of damages from the date of its offer).

"Costs" under New York law do not include attorney's fees, but rather only statutory fees as defined in CPLR Sections 8201 through 8204, based on the stage of the litigation. *See* Marino, Joseph L., WEST'S MCKINNEY'S FORMS CIVIL PRACTICE LAW AND RULES § 5:288, Ch. 5 *Motion Practice and Accelerated Judgment* (2012).

To the extent that the offer of judgment under CPLR 3221 is not limited to monetary value, it may be difficult to ascertain whether a judgment is "more favorable." As such, if disputed, the trial judge is to render a decision as to whether the judgment obtained is "more favorable." Siegel, *supra* at C3221:1. Once the offer is accepted, a judgment by consent is entered in favor of the claimant. An offer to compromise, having been refused, cannot be used as an admission of liability. *Firedoor Corp. of Am. v. Reliance Elec. Co., Haughton Elevator Div.*, 56 A.D.2d 523, 524, 391 N.Y.S.2d 414, 416 (1st Dep't 1977).

While an offer of judgment shall not be made known to the jury, the resulting judgment under CPLR 3221 is considered binding and has been interpreted to have collateral estoppel effect in a subsequent lawsuit. *Card v. Budini*, 29 A.D.2d 35, 37, 285 N.Y.S.2d 734 (3d Dep't 1967).

USLAW Members in New York:

New York | Buffalo
Barclay Damon LLP
200 Delaware Avenue
Buffalo, NY 14202
Phone 716-856-5500
www.barclaydamon.com

New York | Hawthorne
Traub Lieberman Straus & Shrewsberry LLP
7 Skyline Drive
Hawthorne, NY 10532
Phone 914-347-2600
www.traublieberman.com

New York | Uniondale
Rivkin Radler LLP
926 RXR Plaza
Uniondale, NY 11556
www.rivkinradler.com

NORTH CAROLINA

In North Carolina, an Offer of Judgment is governed by N.C. R. Civ. Pro. 68, which provides as follows:

Rule 68. Offer of judgment and disclaimer

(a) Offer of judgment. -- At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against him for the money or property or to the effect specified in his offer, with costs then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the clerk shall enter judgment. An offer not accepted within 10 days after its service shall be deemed withdrawn and evidence of the offer is not admissible except in a proceeding to determine costs. If 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. The fact that an offer is made but not accepted does not preclude a subsequent offer.

(b) Conditional offer of judgment for damages. -- A party defending against a claim arising in contract or quasi contract may, with his responsive pleading, serve upon the claimant an offer in writing that if he fails in his defense, the damages shall be assessed at a specified sum; and if the claimant signifies his acceptance thereof in writing within 20 days of the service of such offer, and on the trial prevails, his damages shall be assessed accordingly. If the claimant does not accept the offer, he must prove his damages as if the offer had not been made. If the damages assessed in the claimant's favor do not exceed the sum stated in the offer, the party defending shall recover the costs in respect to the question of damages.

Depending on the statute authorizing the award of attorney's fees, in certain situations, attorney's fees may be considered one of the "costs then accrued" for purposes of N.C. R. Civ. Pro. 68. *See generally, e.g., Purdy v. Brown*, 307 N.C. 93 (1982). Additionally, "judgment finally obtained" for purposes of Rule 68 is the final judgment entered by the court, i.e. the jury's verdict as modified by any applicable adjustments, not simply the amount of the jury's verdict. *Poole v. Miller*, 342 N.C. 349, 464 S.E.2d 409 (1995).

Karen H. Chapman
Poyner Spruill LLP
301 S. College Street
Charlotte NC 28202
Phone:(704) 342-5293
Email: kchapman@poynerspruill.com
www.poynerspruill.com

NORTH DAKOTA

Offers of Settlement in North Dakota are governed by Rule 68(a) of the North Dakota Rules of Civil Procedure. Rule 68(a) provides:

> **(a) Offer of Settlement.**
>
> (1) *Making an Offer; Judgment on an Accepted Offer*. At least 14 days before the trial begins, a party may serve on an opposing party an offer of settlement on specified terms, with the costs then accrued and to enter into a stipulation dismissing the claim or allowing judgment to be entered accordingly. 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 on order of the court.
>
> (2) *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.
>
> (3) *Offer After Liability Is Determined*. When one party's liability to another has been determined but the amount or extent of liability remains to be determined by further proceedings, any party may make an offer of settlement. It must be served at least seven days before a hearing to determine the amount or extent of liability, or as otherwise ordered by the court.
>
> (4) *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.

In North Dakota, attorney fees are not a taxable expense by the court. Costs which are taxable are contained in N.D. Cent. Code § 28-26-06. Taxable costs include the legal fees for witnesses, sheriffs, clerks of court, process servers, and other court officers. Expenses for taking depositions and for obtaining evidence which is necessarily used or obtained for use in the trial, are taxable, fees for publication where publication is necessary for compliance with the law, and the legal fees of the court reporter for a transcript of testimony, when the transcript is used for a motion for a new trial or in preparing a statement of the case are all taxable as necessary disbursements. Additionally, the reasonable fees and actual expenses of expert witnesses may be taxable. The trial court has the sole discretion to determine what fees and actual expenses are reasonable, including such factors as the number of expert witnesses, the amount of the fees and actual expenses to be paid to includable experts.

Randall N. Sickler
Ebeltoft . Sickler . Lawyers PLLC
2272 8th Street West
Dickinson, ND 58601
Phone: 701.225.LAWS (5297)
Fac: 701.225.9650
rsickler@eskgb.com

OHIO

Federal Law:

Rule 68 of the F.R.C.P. provides that "if a timely (served within 10 days of trial) pretrial offer of settlement is not accepted and 'judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the cost incurred after the making of the offer.'"[20] "Cost" may include attorney fees only if the statute that underlay the lawsuit permits attorney fees as a "cost."[21]

Ohio Law:

Ohio's Rules of Civil Procedure parallel the F.R.C.P. Ohio's adoption of Rule 68, however, deviates from its Federal counterpart in two significant ways: both plaintiff and defendant may use the rule and a party may not enter an offer of judgment with the court for determining costs.[22]

Prior to the adoption of Rule 68, R.C. 2311.14 through 2311.20 allowed for a defendant to recover costs when the plaintiff rejected the defendant's offer of judgment and the plaintiff failed to obtain a judgment amount greater than the defendant's offer. Rule 68 repealed these provisions because "the use of offers of judgment as a basis of costs proceedings has in the past often had a one-sided, coercive effect"[23]

Bradley A. Wright
Roetzel & Andress, LPA
222 South Main Street
Akron OH 44308
Phone: (330) 849-6629
www.ralaw.com

[20] *Marek v. Chesny*, 473 U.S. 1, 5 (1985); see *Delta Air Lines, Inc., v. August*, 450 U.S. 346, 353 (1981) ("The purpose of Rule 68 is to encourage the settlement of litigation. In all litigation, the adverse consequences of potential defeat provide both parties with an incentive to settle in advance of trial. Rule 68 provides an additional inducement to settle in those cases in which there is a strong probability that the plaintiff will obtain a judgment but the amount of recovery is uncertain…").
[21] *In re Cardizem CD Antitrust Litigation*, 391 F.3d 812, 815 (6th Cir.) (citing *Marek*).
[22] Civ. R. 68 ("An offer of judgment by any party, if refused, by an opposite party, may not be filed with the court by the offering party for purposes of a proceeding to determine costs").
[23] *Cooper v. Morris*, 680 N.E.2d 735, 738-39 (Marion Muni. Ct., 1997) (holding Rule 68 "makes a clear policy statement that pretrial negotiations of settlement should not be used as a basis of assessment of court costs").

OKLAHOMA

In Oklahoma, an Offer of Judgment is governed by three statutes: 12 O.S. §940, 12 O.S. §1101, and 12 O.S. §1101.1.

12 O.S. §940 – Negligent or Willful Injury to Property – Attorney's Fees and Costs – Offer and Acceptance of Judgment

Of the three Oklahoma statutes on offers of judgment, this statute is the most commonly used. Under this statute, actions for tortious damage to property are automatically fee bearing claims.

Statute

A. In any civil action to recover damages for the negligent or willful injury to property and any other incidental costs related to such action, the prevailing party shall be allowed reasonable attorney's fees, court costs and interest to be set by the court and to be taxed and collected as other costs of the action.

B. Provided that, the defendant in such action may, not less than ten (10) days after being served with summons, serve upon the plaintiff or his attorney a written offer to allow judgment to be taken against him. If the plaintiff accepts the offer and gives notice thereof to the defendant or his attorney, within five (5) days after the offer was served, the offer, and an affidavit that the notice of acceptance was delivered within the time limited, may be filed by the plaintiff, or the defendant, verified by affidavit. The offer and acceptance shall be noted in the journal, and judgment shall be rendered accordingly. If the notice of acceptance is not given in the period limited, the offer shall be deemed withdrawn, and shall not be given in evidence or mentioned at the trial. If upon the action being adjudicated the judgment rendered is for the defendant or for the plaintiff and is for a lesser amount than the defendant's offer, then the plaintiff shall not be entitled to recover attorney's fees, court costs and interest. If the judgment rendered is for the plaintiff, and is for the same amount as the defendant's offer, then the plaintiff and defendant shall incur their own attorney's fees, court costs and interest. And if the judgment rendered is for the plaintiff, and is for a larger amount than the defendant's offer, then the plaintiff shall be entitled to recover attorney's fees, court costs and interest.

Decisions

As applied, willful or negligent injury to property in this statute refers only to physical injury to the property. Injury to intangible property rights is not eligible for an attorney fee award under § 940. *Turner Roofing & Sheet Metal, Inc. v. Stapleton*, 872 P.2d 926 (Okla. 1994).

The legislature's use of the terms "negligent and willful" indicates that §940 applies to claims arising from tortious conduct, and not from breach of contract. This section applies as long as the action sounds in tort. *Finnell v. Jebco Seismic,* 67 P.3d 339 (Okla. 2003).

If a Plaintiff prevails at trial, "taxable court costs" are added to the verdict to determine if the final judgment exceeds the offer. Attorney fees included in those costs cut off as of the day of the offer. *Carson v. Specialized Concrete, Inc.*, 801 P.2d 691 (Okla. 1990).

Adding attorney's fees under §940 to a maximum recovery under the Governmental Tort Claims Act in a wrongful death action is not permissible as it would exceed the statutory limit on total recovery against the State. *Truelock v. Del City,* 967 P.2d 1183 (Okla. 1998).

An attorney fee award is recoverable to a prevailing party only for the work attributable to a claim for which such fees are statutorily recoverable. *Parker v. Genson*, 406 P.3d 585 (Okla. Civ. App. 2017).

Section 940 does not conflict with FED. R. CIV. P. 68, which doesn't allow for the recovery of costs where the defendant receives judgment in its favor. Where judgment is in the defendant's favor, Fed. R. Civ. P. 68 becomes inapplicable, leaving §1101.1(B)(3) to operate on its own. *Scottsdale Ins. Co. v. Tolliver*, 636 F.3d 1273 (10th Cir. 2011).

An appeal-related counsel fee may be awarded in cases where there is statutory authority to award a fee for legal services rendered in the trial of a cause. *Sisney v. Smalley*, 690 P.2d 1048 (Okla. 1984).

12 O.S. §1101 – Offer – Acceptance by Plaintiff – Notice – Filing

The statue applies specifically to costs of litigation; however, attorney fees are not included.

Statute

The defendant, in an action for the recovery of money only, may, at any time before the trial, serve upon the plaintiff or his attorney an offer, in writing, to allow judgment to be taken against him for the sum specified therein. If the plaintiff accepts the offer and gives notice thereof to the defendant or his attorney, within five days after the offer was served, the offer, and an affidavit that the notice of acceptance was delivered within the time limited, may be filed by the plaintiff, or the defendant may file the acceptance, with a copy of the offer, verified by affidavit; and in either case, the offer and acceptance shall be noted in the journal, and judgment shall be rendered accordingly. If the notice of acceptance be not given in the period limited, the offer shall be deemed withdrawn, and shall not be given in evidence or mentioned on the trial. If the plaintiff fails to obtain judgment for more than was offered by the defendant, he shall pay the defendant's costs from the time of the offer.

As applied, this statute provides that in a case for the recovery of money only, before trial, the defendant may offer judgment to the plaintiff for a specified sum in order to expedite the resolution of the dispute. If the plaintiff does not accept the defendant's offer and then fails to obtain judgment for more than defendant offered, plaintiff must pay the defendant's costs from the time of the offer to the conclusion of the litigation.

Decisions

Unless the subject matter of the action permits the award of attorney's fees to the prevailing party, costs awarded do not include them. *Maltos v. Bison Federal Credit Union,* 879 P.2d 1254 (Okla. Civ. App. 1994).

The trial court has no discretion to deny costs to the defendant or to allow the plaintiff to recover his or her costs for the same time period. *Gaston v. Tillery,* 900 P.2d 1012, 1013 (Okla. Civ. App. 1995).

If the amount of the jury verdict plus prejudgment interest exceeds the defendant's offer of judgment, the trial court should not award costs to the defendant. *Bohnefeld v. Haney,* 931 P.2d 90, 92 (Okla. Civ. App. 1996).

A Plaintiff who accepts an offer of judgment under 12 O.S. § 1101 is the prevailing party and may be entitled to costs, prejudgment interest and attorney fees if a statute authorizes it. Therefore, even though § 1101 only contemplates recovery of *costs* by the prevailing party, if an offer of judgment is made under § 1101 in a case in which the prevailing party is entitled to attorney fees (such as an action to recover for labor or services rendered, or an action to enforce liens), then the prevailing party is entitled to attorney fees, regardless of the provisions of § 1101. *Winn-Tech, Inc. v. Lawson*, 395 P.3d 854 (Okla. Civ. App. 2017).

OKLAHOMA cont'd

12 O.S. §1101.1 – Actions for Personal Injury, Wrongful Death and Certain Specified Actions

Oklahoma follows the American rule where, absent a statute or contractual term to the contrary, litigants are required to bear their own attorney fees. Perhaps the most important aspect of this statute is that the Defendant can unilaterally abrogate the American rule and convert a non-fee bearing claim into a potentially fee bearing claim by making an offer of judgment under the statute's directions. The Plaintiff may then gain the benefit of potentially being awarded fees, where there was no previous authority for such fees, by making a counteroffer.

Statute

A. Actions for personal injury, wrongful death, and certain specified actions.

1. Subject to the provisions of paragraph 5 of this subsection, after a civil action is brought for the recovery of money as the result of a claim for personal injury, wrongful death, or pursuant to Chapter 21 of Title 25 or Section 5 of Title 85 of the Oklahoma Statutes, any defendant may file with the court, at any time more than ten (10) days prior to trial, an offer of judgment for a sum certain to any plaintiff with respect to the action or any claim or claims asserted in the action. An offer of judgment shall be deemed to include any costs or attorney fees otherwise recoverable unless it expressly provides otherwise. If an offer of judgment is filed, each plaintiff to whom an offer of judgment is made shall, within ten (10) days, file:

a. a written acceptance or rejection of such offer, or

b. a counteroffer of judgment, as described in paragraph 2 of this subsection.

If the plaintiff fails to file a timely response, the offer of judgment shall be deemed rejected. The fact an offer of judgment is made but not accepted or is deemed rejected does not preclude subsequent timely offers of judgment.

2. In the event a defendant files an offer of judgment, the plaintiff may, within ten (10) days, file with the court a counteroffer of judgment directed to each defendant who has filed an offer of judgment. If a counteroffer of judgment is filed, each defendant to whom the counteroffer of judgment is made shall, within ten (10) days, file a written acceptance or rejection of the counteroffer of judgment. If a defendant fails to file a timely response, the counteroffer of judgment shall be deemed rejected. The fact a counteroffer of judgment is made but not accepted or deemed rejected does not preclude subsequent counteroffers of judgment if subsequent offers of judgment are made.

3. In the event the plaintiff rejects the offer(s) of judgment and the judgment awarded the plaintiff is less than the final offer of judgment, then the defendant filing the offer of judgment shall be entitled to recover reasonable litigation costs and reasonable attorney fees incurred by that defendant from the date of filing of the final offer of judgment until the date of the verdict. Such costs and fees may be offset from the judgment entered against the offering defendant; provided, however, that prior to any such offset, the plaintiff's attorney may:

a. exercise any attorneys lien claimed in an amount not to exceed twenty-five percent (25%) of the judgment, and

b. recover the plaintiff's reasonable litigation costs, not to exceed an additional fifteen percent (15%) of the judgment or Five Thousand Dollars ($5,000.00), whichever is greater.

4. In the event a defendant rejects the counteroffer(s) of judgment and the judgment awarded to the plaintiff is greater than the final counteroffer of judgment, the plaintiff shall be entitled to recover reasonable litigation costs and reasonable attorney fees incurred by the plaintiff from the date of filing of the final counteroffer of judgment until the date of the verdict. Such costs and fees may be added to the judgment entered in favor of the plaintiff.

5. The provisions of this subsection shall apply only where the plaintiff demands in a pleading or in trial proceedings more than One Hundred Thousand Dollars ($100,000.00), or where the defendant makes an offer of judgment more than One Hundred Thousand Dollars ($100,000.00). Any offer of judgment may precede the demand.

B. Other actions.

1. After a civil action is brought for the recovery of money or property in an action other than for personal injury, wrongful death or pursuant to Chapter 21 of Title 25 or Section 5 of Title 85 of the Oklahoma Statutes, any defendant may file with the court, at any time more than ten (10) days prior to trial, an offer of judgment for a sum certain to any plaintiff with respect to the action or any claim or claims asserted in the action. An offer of judgment shall be deemed to include any costs and attorney fees otherwise recoverable unless it expressly provides otherwise. If an offer of judgment is filed, the plaintiff or plaintiffs to whom the offer of judgment is made shall, within ten (10) days, file:

a. a written acceptance or rejection of the offer, or

b. a counteroffer of judgment, as described in paragraph 2 of this subsection.

If a plaintiff fails to file a timely response, the offer of judgment shall be deemed rejected. The fact an offer of judgment is made but not accepted or is deemed rejected does not preclude subsequent timely offers of judgment.

2. In the event a defendant files an offer of judgment, the plaintiff may, within ten (10) days, file with the court a counteroffer of judgment to each defendant who has filed an offer of judgment and the claim or claims which are the subject thereof. If a counteroffer of judgment is filed, each defendant to whom a counteroffer of judgment is made shall, within ten (10) days, file a written acceptance or rejection of the counteroffer of judgment. If a defendant fails to file a timely response, the counteroffer of judgment shall be deemed rejected. The fact a counteroffer of judgment is made but not accepted or is deemed rejected does not preclude subsequent counteroffers of judgment if subsequent offers of judgment are made.

3. If no offer of judgment or counteroffer of judgment is accepted and the judgment awarded the plaintiff is less than one or more offers of judgment, the defendant shall be entitled to reasonable litigation costs and reasonable attorney fees incurred by the defendant with respect to the action or the claim or claims included in the offer of judgment from and after the date of the first offer of judgment which is greater than the judgment until the date of the judgment. Such costs and fees may be offset from the judgment entered against the offering defendant.

4. If no offer of judgment or counteroffer of judgment is accepted and the judgment awarded the plaintiff is greater than one or more counteroffers of judgment, the plaintiff shall be entitled to recover the reasonable litigation costs and reasonable attorney fees incurred by the plaintiff with respect to the action or the claim or claims included in the counteroffer of judgment from and after the date of the first

counteroffer of judgment which is less than the judgment until the date of the judgment. Such costs and fees may be added to the judgment entered in favor of the plaintiff.

5. An award of reasonable litigation costs and reasonable attorneys fees under paragraph 3 of this subsection shall not preclude an award under paragraph 4 of this subsection, and an award under paragraph 4 of this subsection shall not preclude an award under paragraph 3 of this subsection.

Decisions

The purpose of 12 O.S. §1101.1(B) is to encourage judgments without protracted litigation by providing additional incentives to encourage a plaintiff to accept a defendant's offer to confess judgment and to encourage a defendant to offer an early confession of judgment to avoid further increases in costs. *Boston Ave. Mgmt., Inc. v. Associated Res., Inc.,* 152 P.3d 880 (Okla. 2007).

This section of Oklahoma law allows a plaintiff to make a counter-offer and reallocate the risk of incurring fees and costs back to the defendant, while Federal Rule 68 does not permit such an exchange. *Hubbard v. Kaiser-Francis Oil Co.*, 256 P.3d 69 (Okla. 2011).

A defendant's offer of judgment must be reasonable to invoke the fee-shifting provisions of 12 O.S. §1101.1(B). *Hubbard v. Kaiser-Francis Oil Co.,* 256 P.3d 69 (Okla. 2011).

A judgment entered in favor of a defendant can be the basis for an award of attorney fees and costs under 12 O.S. §1101.1(B). *Hubbard v. Kaiser-Francis Oil Co.*, 256 P.3d 69 (Okla. 2011).

As long as the case continues, whether there be an appeal, remand, or new trial, and the defendant makes no further offer, his first and only offer will operate to allow him to assert his entitlement to an award of reasonable litigation costs and reasonable attorney fees with respect to the action or the claim included in the offer of judgment from and after the date of the first offer of judgment. *Hubbard v. Kaiser-Francis Oil Co.*, 256 P.3d 69 (Okla. 2011).

Acceptance of an offer of judgment removes all prejudgment issues from the trier's consideration. *Fleet v. Sanguine*, 854 P.2d 892 (Okla. Civ. App. 2010).

A plaintiff is not required to submit a counteroffer, but, only when such a written counteroffer is made can plaintiff then be entitled to an attorney's fee if the resulting jury verdict exceeds its counteroffer. In order to obtain a fee under §1101.1, the plaintiff must have filed a written counteroffer. A rejection, whether written or implied, is not a counteroffer. *Oltman Homes, Inc. v. Mirkes,* 190 P.3d 1182 (Okla. Civ. App. 2008).

If a verdict falls between defendant's offer and plaintiff's counter offer, neither party is entitled to an attorney fee award. *Linn v. Oklahoma Farm Bureau Mut. Ins. Co.*, 479 P.3d 1013 (Okla. Civ. App. 2020).

The amount contained in an offer of judgment is inclusive of all items of damage which the trial judge would include when rendering judgment, including prejudgment interest. Therefore, the prejudgment interest amount should not be added to the counter-offer of judgment amount. *Lawson v. Nat'l Steel Erectors Corp.,* 8 P.3d 171 (Okla. Civ. App. 2000).

Post-verdict attorney fees are not recoverable under 12 O.S. §1101.1, which expressly states that the party is only entitled to fees incurred from the date of the offer to confess judgment until the date of the verdict. *Fuller v. Pacheco*, 21 P.3d 74 (Okla. Civ. App. 2001).

OKLAHOMA cont'd

An unapportioned offer *as to multiple plaintiffs* is invalid under § 1101.1 where the plaintiffs have asserted different, independent claims—the offeree must know what is being offered to them individually in order to be responsible for refusing the offer. *Schommer v. Communicate Now!, L.P.,* 324 P.3d 433, 438 (Okla.Civ.App.2014). However, where multiple plaintiffs allege "joint, undifferentiated" damages, a single unapportioned offer may be valid. *Bryant v. Sagamore Ins. Co.*, 615 F. App'x 917, 921 (10th Cir. 2015)

In Federal Court in a case based on diversity jurisdiction, Oklahoma's offer-of-judgment statute is substantive for Erie purposes. *SFF-TIR, LLC v. Stephenson*, 452 F. Supp. 3d 1058, 1170 (N.D. Okla. 2020).

Mark Hardin
Pierce Couch Hendrickson Baysinger & Green, LLP
907 S. Detroit, Suite 815
Tulsa, OK 74120-4205
918-583-8100
mhardin@piercecouch.com
www.piercecouch.com

OREGON

In Oregon, offers of judgment are governed by Oregon Rule of Civil Procedure 54 E. It provides that a party against whom a claim is asserted may, at any time up to 14 days before trial, serve an offer to allow judgment to be entered against it for the amount specified. ORCP 54 E(1). The opposing party has seven days to accept the offer and to file the signed offer of judgment with the court. ORCP 54 E(2). If the offer is accepted, the court will enter a stipulated judgment against the party that made the offer. Id. If the accepted offer does not state that it is inclusive of costs and disbursements and attorney fees, the party that accepted the offer may claim its costs and disbursements and attorney fees, if attorney fees are recoverable, as provided in ORCP 68. Id.

An offer that is not accepted and filed within seven days is deemed rejected. ORCP 54 E(3). A party who rejects an offer and fails to obtain a more favorable judgment cannot recover costs and disbursements, prevailing party fees, or attorney fees that are incurred after the date of the offer. Id. In contrast, the offering party is permitted to recover the costs and disbursements that it incurred after service of the offer. Id.

However, it should be noted that there are exceptions to the offer of judgment rule for cases in which the right to attorney fees is based on a statute. In Powers v. Quigley, the Oregon Supreme Court held that an offer of judgment does not cut off the rejecting party's right to attorney fees where the right to fees is based on ORS 20.080(1), which provides a prevailing plaintiff with attorney fees in any action for personal injury or property damage when the amount pled is $10,000 or less. 345 Or. 432, 443, 198 P.3d 919 (2008). In reaching its conclusion, the court explained that, "[b]ecause ORS 20.080(1) is the more specific provision, it functions as an exception to the rule stated in ORCP 54 E, and the offer of judgment procedure under ORCP 54 E therefore does not limit a plaintiff's statutory right to an award of attorney fees under ORS 20.080(1)." Powers, 345 Or. at 434. Using Powers as a framework, the Oregon Supreme Court recently held that a prevailing plaintiff's right to attorney fees under ORS 652.200(2) (granting attorney fees for successful prosecution of an unpaid wages claim) is not limited by ORCP 54 E. See Mathis v. St. Helens Auto Ctr., Inc., 367 Or. 437, 443, 478 P.3d 946 (2020). The Mathis court reasoned that ORS 652.200(2) was akin to the statute at issue in Powers in that ORCP 54 E, as applied in the context of either statute, "'allows a defendant to nullify, at least in part, the obligation to pay attorney fees that the statute creates.'" 367 Or. at 454 (quoting Powers, 345 Or. at 440). Thus, an offer of judgment may be futile where an attorney fees claim is based on a statute.

Rodney L. Umberger
Drew V. Lombardi
Williams Kastner
1515 SW Fifth Avenue, Suite 600
Portland, OR 97201
rumberger@williamskastner.com
dlombardi@williamskastner.com
www.williamskastner.com

PENNSYLVANIA

There is no Offer of Judgment recognized in this state court.

USLAW Members in Pennsylvania:

Philadelphia:
Sweeney & Sheehan, P.C.
1515 Market Street, Suite 1900
Philadelphia, PA 19102
Phone: (215) 563-9811
www.sweeneyfirm.com

Pittsburgh:
Pion, Nerone, Girman, Winslow & Smith, P.C.
1500 One Gateway Center
Pittsburgh, Pennsylvania 15222
Phone: (412) 281-2288
www.pionlaw.com

RHODE ISLAND

In Rhode Island, an Offer of Judgment is governed by Rhode Island Superior Court Rule 68, which provides as follows:

> **Rule 68. Offer of Judgment--Payment into Court**
>
> (a) Offer of Judgment. At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against the defending party for the money or property or to the effect specified in the offer, with costs then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance and thereupon the clerk shall enter judgment.
>
> (b) Payment Into Court. A party defending against a claim may pay into court by depositing with the clerk a sum of money on account of what is claimed, or by way of compensation or amends, and plead that the defending party is not indebted to any greater amount to the party making the claim or that the party making the claim has not suffered greater damages. The party making the claim may (1) accept the tender and have judgment for the party's costs, (2) reject the tender, or (3) accept the tender as part payment only and proceed with the action on the sole issue of the amount of damages.
>
> (c) Offer Not Accepted. An offer under subdivision (a) or (b) above not accepted in full satisfaction shall be deemed withdrawn, i.e., shall not be disclosed to the jury, and evidence thereof is not admissible except in a proceeding to determine interest or costs. If 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. The fact that an offer is made but not accepted, or accepted only as part payment, does not preclude a subsequent offer.

Rhode Island has scant case law interpreting Offers of Judgment. One opinion noted that part (b) in particular was rarely used in practice because of the language of section (3), stating that the plaintiff could accept the payment into court as a partial payment. This language discouraged defendants from depositing any money with the court, as they could still be held liable for amounts in excess of the deposit. *Raiche v. Scott*, No. 2005-0336, 2011 WL 587244 at FN 6 (R.I Super. Feb. 16, 2011). Several courts have awarded "costs", but none have clearly defined exactly what this entails, nor whether this includes attorney's fees. *Cuzzone v. Bettencourt*, No. C.A. 82-476, 1983 WL 486779 at * 1 (R.I. Super. Jun. 1, 1983). Generally, Offers of Judgment are irrevocable. However, because an Offer of Judgment is a contract, it can be revoked if a "meeting of the minds" is clearly lacking. For example, the court overturned an Offer of Judgment because of a clear typographical error in the monetary offer. *McMahon v. Maille*, No. PC-2008-5888, 2011 WL 6148798 (R.I. Super. Dec. 7, 2011).

Adler Pollock & Sheehan, P.C.
One Citizens Plaza
8th Floor
Providence, RI 02903
Phone 401-274-7200
www.apslaw.com

SOUTH CAROLINA

In South Carolina, Offers of Judgment are provided for by Rule 68 of the South Carolina Rules of Civil Procedure. Rule 68 is as follows:

(a) Offer of Judgment. Any party in a civil action, except a domestic relations action, may file, no later than twenty days before the trial date, a written offer of judgment signed by the offeror or his attorney, directed to the opposing party, offering to take judgment in the offeror's favor, or to allow judgment to be taken against the offeror for a sum stated therein, or to the effect specified in the offer. Service of the offer of judgment shall be made as provided in these rules. Within twenty days after service of the offer of judgment or at least ten days prior to the trial date, whichever date is earlier, the offeree or his attorney may file a written acceptance of the offer of judgment. Upon the filing, the court shall immediately issue the judgment and the clerk shall enter the judgment as provided in the offer of judgment. If the offer of judgment is not accepted within twenty days after notification, or prior to or on the tenth day before the actual trial date, whichever date occurs first, the offer shall be considered rejected and evidence thereof is not admissible except in a proceeding after trial to fix costs, interest, attorney's fees, and other recoverable monies. Any offeror may withdraw an offer of judgment prior to its acceptance or prior to the date on which it would be considered rejected by giving notice to the offeree or his attorney as provided in these rules. Any offeror may file a subsequent offer of judgment in any amount which supersedes any earlier offer that was rejected by the offeree or withdrawn by the offeror, and, on filing and service, terminates any rights to interest or costs under the superseded offer. An offer is not considered rejected by a counter offer and shall remain effective until accepted, rejected, or withdrawn as provided in this subsection. All offers of judgment and any acceptance of offers of judgment must be included by the clerk in the record of the case.

(b) Consequences of Non-Acceptance. If an offer of judgment is not accepted and the offeror obtains a verdict or determination at least as favorable as the rejected offer, the offeror shall recover from the offeree: (1) any administrative, filing, or other court costs from the date of the offer until the entry of the judgment; (2) if the offeror is a plaintiff, eight percent interest computed on the amount of the verdict or award from the date of the offer to the entry of judgment; or (3) if the offeror is a defendant, reduction from the judgment or award of eight percent interest computed on the amount of the verdict or award from the date of the offer to the entry of the judgment.

(c) This rule shall not abrogate the contractual rights of any party concerning the recovery of attorney's fees or other monies in accordance with the provision of any written contract between the parties to the action.

Offers of Judgment also are provided for by a statute that is substantively identical to Rule 68. See South Carolina Code Ann. § 15-35-400 (Supp. 2011).

“Costs are allowed when a judgment is entered pursuant to an offer of judgment but these costs do not include attorney’s fees.” Belton v. State, 339 S.C. 71, 73, 529 S.E.2d 4, 5 (2000) (citing Steinert v. Lanter, 284 S.C. 65, 325 S.E.2d 532 (1985)). According to Rule 54(e) of the South Carolina Rules of Civil Procedure, the taxable costs to which a prevailing party may be entitled include the following: costs authorized by statute (including attorneys’ fees, if authorized), filing fees, sheriff’s service fees, other fees incurred in the service of process, witness fees, and certain fees incurred in copying documents for trial. See also S.C. Code Ann. §§ 15-37-10 et seq. (providing statutory authorization for certain cost recovery in normal civil cases).

Importantly, case law in South Carolina indicates that a defendant obtaining a defense verdict is not able to shift costs to a Plaintiff under Rule 68, because such a practice would encourage mere nominal offers that do not comport with “good faith.” See Black v. Roche Biomedical Laboratories, 315 S.C. 223, 433 S.E.2d 21 (Ct. App. 1993) (construing former Rule 68; also upholding small award of costs under Rule 54). This case law creates an

odd result where a nominal verdict in Plaintiff's favor allows a Defendant to recover costs while an outright defense verdict would not.

Mark S. Barrow
Sweeny, Wingate & Barrow, P.A.
1515 Lady Street
Columbia SC 29201
803-256-2233
msb@swblaw.com
www.swblaw.com

SOUTH DAKOTA

In South Dakota, an Offer of Judgment is governed by South Dakota Codified Law 15-6-68 which provides that if the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred only after the making of the offer.

> **15-6-68. Offer of Judgment**
> At any time more than ten days before the trial begins, any party may serve upon an adverse party an offer to allow judgment to be taken against the party for money or property or to the effect specified in the offer, with costs then accrued. If, within ten days after the service of the offer, the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the clerk shall enter judgment. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs. If 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. The fact that an offer is made but not accepted does not preclude a subsequent offer. If the liability of one party to another has been determined by verdict or order or judgment, but the amount or extent of the liability remains to be determined by further proceedings, the party adjudged liable may make an offer of judgment, which shall have the same effect as an offer made before trial if it is served within a reasonable time not less than ten days prior to the commencement of hearings to determine the amount or extent of liability.

Under SDCL 15-17-37, which allows costs or disbursements to the prevailing party, only those expenses "specifically authorized by statute may be taxed as costs" along with "other similar expenses and charges." Zahn v. Musick, 605 N.W.2d 823 (S.D. 2000). This would include such items as costs of telephonic hearings, costs of telephoto or fax charges, fees of witnesses, interpreters, translators, officers, printers, service of process, filing, expenses from telephone calls, copying, costs of original and copies of transcripts and reporter's attendance fees, court appointed experts.

Lindsey Riter-Rapp
Riter, Rogers, Wattier & Northrup, LLP
319 S. Coteau Street
Pierre, SD 57501
Phone: (605) 224-5825
l.riter-rapp@riterlaw.com
www.riterlaw.com

TENNESSEE

In Tennessee, an Offer of Judgment is governed by Tennessee Rule of Civil Procedure 68 which provides as follows:

> **Rule 68. Offer of Judgment**
>
> At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against the defending party for the money or property, or to the effect specified in the offer, with costs then accrued. Likewise, a party prosecuting a claim may serve upon the adverse party an offer to allow judgment to be taken against that adverse party for the money or property or to the effect specified in the offer with costs then accrued. If within 10 days after service of the offer the adverse party serves written notice that the offer is accepted, either party may file the offer and notice of acceptance, together with proof of service thereof, with the court and thereupon judgment shall be rendered accordingly. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs. If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree shall pay all costs accruing after the making of the offer. The fact that an offer is made but not accepted does not preclude a subsequent offer.

In Tennessee, attorney fees are not considered a taxable court cost. Person v. Fletcher, 582 S.W.2d 765 (Tenn. Ct. App. 1979). Rule 68 permits recovery of only those costs that are assessed by the trial court. Id. Deposition costs and court reporter's fees are therefore not taxable court costs under Rule 68. Id. A defendant's offer of judgment under Rule 68 is not an admission of liability. Jackson v. Purdy Bros. Trucking Co., No. E2011-00119-COA-R3-CV, 2011 WL 4824198, at *3 (Tenn. Ct. App. Oct. 12, 2011).

Lee L. Piovarcy
Martin, Tate, Morrow & Marston, P.C.
6410 Poplar Avenue
Memphis, TN 38119
Phone: (901) 522-9000
Fax: (901) 527-3746
lpiovarcy@martintate.com
www.martintate.com

TEXAS

Offers of Settlement are governed in Texas by both Chapter 42 of the Texas Civil Practice and Remedies Code and Rule 167 of the Texas Rules of Civil Procedure. The Texas Legislature included in Chapter 42 a directive to the Texas Supreme Court to promulgate a rule to implement that chapter. *See* TEX. CIV. PRAC. & REM. CODE §42.005; TEX. R. CIV. P. 167. Because the rule implements the statute, reference here will be made only to Rule 167.

Rule 167 actually encompasses Rules 167.1 through 167.7. To set out each of these rules in their entirety would be unwieldy. For this reason, rather than quoting the rules at length, the essence of each provision is set out below.

167.1. Generally.

"Certain litigation costs may be awarded against a party who rejects an offer made substantially in accordance with this rule to settle a claim for monetary damages—including a counterclaim, crossclaim, or third-party claim . . . ." The rule then lists six types of claims in which the Offer of Settlement rule does not apply.

167.2. Settlement Offer.

A settlement offer under Rule 167 may not be made until a defendant (defined as a party against whom a claim for monetary damages is made) files a declaration invoking the rule. After that time, offers may be made to settle only claims by or against that defendant. The declaration is due, at the latest, 45 days before the case is set for trial.

A party may make an offer after having made or rejected a prior offer. A rejection of an offer is subject to imposition of litigation costs only if the successive offer is more favorable to the offeree than any prior offer.

The settlement offer must be made in writing and must contain specific elements as enumerated in the rule. The offer may also contain reasonable conditions, such as the execution of appropriate releases. The offer may not, however, include any non-monetary claims or other claims to which the rule does not apply. Further, an offer may not be made before a defendant files a declaration, within 60 days after the appearance in the case of the offeror or offeree (whichever is later), or within 14 days before the date the case is set for trial.

167.3. Withdrawal, Acceptance, and Rejection of Offer.

An offer can be withdrawn by written notice served on the offeree before the offer is accepted. An offer can be accepted only by written notice served on the offeror by the deadline stated in the offer. "When an offer is accepted, the offeror or offeree may file the offer and acceptance and may move the court to enforce the settlement."

An offer may be rejected by written notice served on the offeror or by simply not responding to the offer before the deadline or before it is withdrawn.

167.4. Awarding Litigation Costs.

"If a settlement offer made under this rule is rejected, and the judgment to be awarded on the monetary claims covered by the offer is significantly less favorable to the offeree than was the offer, the court must award the offeror litigation costs against the offeree from the time the offer was rejected to the time of judgment."

"Significantly less favorable" is specifically defined in mathematical percentages. "Litigation costs" include attorney's fees, deposition costs (for cases filed on or after September 1, 2011), and the fees for up to two testifying experts, in addition to court costs. A party may not, however, recover litigation costs in excess of the total amount recovered before adding litigation costs for cases filed on or after September 1, 2011. Cases filed before September 1, 2011 are subject to a mathematical computation defined in the rule.

A party who is entitled to recover attorney fees and costs under another law, may not recover those same attorney fees and costs as litigation costs under this rule. "No double recovery permitted."

Rule 167.5. Procedures.

The parties are permitted to engage in discovery concerning litigation costs and the court must, if requested, conduct an evidentiary hearing on a request for litigation costs.

Rule 167.6. Evidence Not Admissible.

Evidence relating to an Offer of Settlement under this rule is not admissible except to enforce a settlement agreement or to obtain litigation costs.

Rule 167.7. Other Settlement Offers Not Affected.

Rule 167 applies only to settlement offers expressly made under that rule. It does not apply to offers made in mediation or arbitration or otherwise outside the rule.

As is apparent from these summaries, Offers of Settlement under the Texas rule and statute are subject to stringent (and somewhat complicated) procedural and substantive requirements. As a result, the rule and statute are seldom invoked.

Fee, Smith, Sharp & Vitullo, L.L.P.
13155 Noel Road, Suite 1000
Dallas, TX 75240
Phone: (972) 934-9100
www.feesmith.com

MehaffyWeber, P.C.
Sonja R. Galvin
500 Dallas Avenue, Suite 2800
Houston, Texas 77002
Phone: (713)655-1200
SonjaGalvin@mehaffyweber.com
www.mehaffyweber.com

UTAH

In Utah, what is typically referred to as an "offer of judgment" is governed by Rule 68 of the Utah Rules of Civil Procedure, and is referred to in the Rule as a "settlement offer." Similar to other states, when a party makes an offer under Rule 68 and that offer is rejected, the party can recuperate its costs from the time the offer is made through the resolution of the case if the offer is more favorable to the offeree than the "adjusted award" made at trial. Additionally, the offeror is not liable for the offeree's attorney's fees, costs, and prejudgment interest after the offer is made if the offer is more favorable than the "adjusted award." Where attorney's fees or prejudgment interest are allowed, this amount can be significant; especially when a Rule 68 offer is made early on.

The "adjusted award" referred to in the rule is more than the damages awarded by the finder of fact. Instead, it is "the amount awarded by the finder of fact and, unless excluded by the offer, the offeree's costs and interests incurred before the offer, and, if attorney fees are permitted by law or contract and not excluded by the offer, the offeree's reasonable attorney fees incurred before the offer." Utah R. Civ. P. 68(d). Where attorney's fees are permitted by statute or contract, the "adjusted award" can be considerably higher than just damages.

A Rule 68 settlement offer must be in writing, expressly refer to Rule 68, be made more than 10 days before trial, remain open for at least 10 days, and be served on the offeree under Rule 5 of the Utah Rules of Civil Procedure. *See* Rule 68(c). Rule 5 allows service on the party's attorney when the party is represented, and that service can be made by mail. Service by a process server is not required.

There is a general view that Rule 68 does not require that the offer be filed with the court or served on parties to the litigation other than the offeree. As a practical matter, in cases where settlement discussions must be kept confidential, it is not uncommon to serve a Rule 68 offer without filing it. If the offer is rejected and the opposing party's award is less favorable than the offer, the offer can then be filed and Rule 68 enforced.

Spencer Brown
Strong & Hanni
102 South 200 East, Suite 800
Salt Lake City, UT 84111
Phone: (801) 323-2175
Fax: (801) 596-1508
E-mail: sbrown@strongandhanni.com
www.strongandhanni.com

VIRGINIA

There is no Offer of Judgment recognized in this state court.

WASHINGTON

Washington Civil Rule (CR) 68 governs offers of judgment and provides:

CR 68 Offer of Judgment
At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against the defending party for the money or property or to the effect specified in the defending party's offer, with costs then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the court shall enter judgment. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs. If 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. The fact that an offer is made but not accepted does not preclude a subsequent offer. When the liability of one party to another has been determined by verdict or order or judgment, but the amount or extent of the liability remains to be determined by further proceedings, the party adjudged liable may make an offer of judgment, which shall have the same effect as an offer made before trial if it is served within a reasonable time not less than 10 days prior to the commencement of hearings to determine the amount or extent of liability.

Under CR 68, attorney fees are not generally recoverable unless there is an underlying statute or contract that defines attorney fees as costs. Magnussen v. Tawney, 109 Wn. App. 272, 275, 34 P.3d 899 (2001) ("CR 68 is a cost-shifting device, not a fee-shifting device") (citing Eagle Point Condo. Owners Ass'n v. Coy, 102 Wn. App. 697, 706, 9 P.3d 898 (2000)). For example, Wash. Rev. Code § 19.86.090 governs Consumer Protection Act violations and includes reasonable attorney fees as costs. For most tort cases, however, the rule is relatively weak because recoverable costs are typically minimal (e.g., filing fees, statutory witness fees, and court reporter costs). Where attorney fees are defined as costs, "the correct way to determine a plaintiff's final judgment is to add the attorney fees … to the damages awarded and compare this figure to the CR 68 offer." Magnussen, 109 Wn. App. at 276 (citing Eagle Point, 102 Wn. App. at 710).

Rodney L. Umberger
Drew V. Lombardi
Williams Kastner
Two Union Square
601 Union Street, Suite 4100
Seattle, WA 98101
Phone: 206.628.2421
rumberger@williamskastner.com
dlombardi@williamskastner.com
www.williamskastner.com

WEST VIRGINIA

In West Virginia, an Offer of Judgment is governed by Rule 68 of the West Virginia Rules of Civil Procedure, which provides as follows:

> **Rule 68. Offer of judgment; payment into court.**
> (a) *Offer of judgment.* – At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against the defending party for the money or property or to the effect specified in the defending party's offer, with costs then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the court shall direct entry of the judgment by the clerk.

Subdivision (c) of Rule 68 further provides that if an offer of judgment is not accepted, then such offer is withdrawn, and the evidence thereof is not admissible except in a proceeding to determine costs. Nonetheless, the fact that an offer is made but not accepted does not preclude the defendant from making a subsequent offer of judgment. In addition, if an offer of judgment is not accepted by the plaintiff, and the plaintiff recovers a final judgment in an amount less than the defendant's offer, the court must award the offeror its costs incurred after making the offer. However, such costs are limited to statutorily taxable costs, such as filing fees, service of process fees, and attendance fees. Finally, subdivision (d) of Rule 68 allows a defendant to make an offer of judgment even after the party is adjudged liable, provided the offer is made at least 10 days prior to the hearing to determine the amount of liability.

Flaherty Sensabaugh Bonasso PLLC
200 Capitol Street
Charleston, WV 25301
Phone: (304) 345-0200
www.flahertylegal.com

WISCONSIN

Wisconsin Law provides for three types of statutory settlement offers: Offers of Judgment, Offers of Damages, and Offers of Settlement. *See* Wis. Stat. § 807.01. Offers of Judgment (Wis. Stat. § 807.01(1)) and Offers of Damages (Wis. Stat. § 807.01(2) are usually made by defendants, whereas Offers of Settlement (Wis. Stat. § 807.01(3)) are typically made by plaintiffs. However, under Wis. Stat. § 807.01(5), a plaintiff could make an offer of judgment or damages in response to a counterclaim, or a defendant could make an offer of settlement on its counterclaim.

The purpose of the statutory offers contained in Wis. Stat. § 807.01 is to encourage pre-trial settlement and avoid delays. *DeWitt Ross & Stevens, S.C. v. Galaxy Gaming & Racing Ltd. P'ship*, 2003 WI App. 190, ¶ 38, 273 Wis. 2d 577, 682 N.W.2d 839; *Majorowicz v. Allied Mut. Ins. Co.*, 212 Wis. 2d 513, 538, 569 N.W.2d 742 (Ct. App. 1997). For statutory settlement offers to have legal effect, the following requirements must be met:

A. A lawsuit must have been filed and the issue must have been joined;

B. The statutory offer must be in writing;

C. The statutory offer must be designated as a statutory offer on its face;

D. The statutory offer must be served upon opposing counsel at least 20 days prior to trial; and

E. The statutory offer must be accepted or rejected within 10-days after receipt. During this 10-day period, the statutory offer is revocable, so for the offer to have any legal effect, acceptance must be served before the offer is revoked.

See Sachsenmaier v. Mittlestadt, 145 Wis. 2d 781, 792, 429 N.W.2d 532 (Ct. App. 1988); *Nicholson v. Home Ins. Companies, Inc.*, 137 Wis.2d 581, 405 N.W.2d 327 (1987); *Sonneburg v. Grohskopf*, 114 Wis. 2d 62, 66-67, 422 N.W.2d 925 (Ct. App. 1988).

It is the obligation of the party making the statutory offer to do so in clear and unambiguous terms. *Stan's Lumber, Inc. v. Fleming*, 196 Wis. 2d 554, 576, 538 N.W.2d 849 (Ct. App. 1995). Any ambiguity in the statutory offer will be construed against the drafter. *Id*.; *see also Kubichek v. Kotecki*, 2011 WI App 32 ¶ 40, 332 Wis. 2d 522, 796, N.W.2d 858.

An **OFFER OF JUDGMENT** is an offer to settle a case by allowing judgment to be taken against the offering defendant for a specific amount together with taxable costs and disbursements. The procedure is stated in Wis. Stat. § 807.01(1).

Offers of Judgment are procedural in nature. Once again, the plaintiff has 10 days from receipt to accept the Offer of Judgment in writing and serve notice back to the defendant. If the plaintiff chooses to accept the Offer of Judgment, then a Notice of Acceptance can be filed with the court and the judgment entered against the defendant. As a practical matter, however, the parties typically agree to a settlement amount, based upon the amount set forth in the Offer of Judgment and an itemization and documentation of the plaintiff's taxable costs and disbursements. An acceptance of the offer, followed by appropriate filing, ends the litigation.

If the plaintiff fails to accept an Offer of Judgment or fails to serve a Notice of Acceptance within the 10-day time period, then the offer is not accepted. However, the fact that the Offer was made is subject to an *In Limine* Order at time of trial. Furthermore, if the plaintiff goes on to recover a judgment that is less than or equal to the amount set forth in the Offer of Judgment, then the plaintiff will be barred from recovering taxable costs and disbursements and the defendant will be entitled to an offset against that judgment amount in the amount of its taxable costs and disbursements.

When there are multiple defendants against whom judgment is being sought jointly and severally, then these defendants may submit joint Offers of Judgment to an individual plaintiff. However, joint offers by

defendants who are only severally liable do not invoke the provisions of Wis. Stat. § 807.01(1). *Denil v. Integrity Mut. Ins. Co.*, 135 Wis. 2d 373, 380, 401 N.W.2d 13 (Ct. App. 1996); *Advanced Green Energy Sols., LLC v. Pieper Elec., Inc.*, 2014 WI App 24, ¶ 32, 352 Wis. 2d 755, 843 N.W.2d 711. Defendants who are potentially severally liable to the plaintiff should submit separate Offers of Judgment to the plaintiff for independent evaluation of the separate and distinct claims against those severally liable multiple defendants. *Denil*, 135 Wis.2d at 380.

A plaintiff can receive an Offer of Judgment from a defendant which conditions the Offer upon the plaintiff's indemnifying and satisfying any and all related claims and/or liens related to the plaintiff's bodily injury claim. *Staehler v. Beuthin*, 206 Wis. 2d 610, 615, 577 N.W.2d 487 (Ct. App. 1986).

An **OFFER OF DAMAGES** is served by a defendant upon a plaintiff for the purpose of having damages assessed in a specific amount if the defendant loses the liability question on the verdict. Wis. Stat. § 807.01(2) sets forth the procedure for a defendant's offer of damages.

The plaintiff has 10 days from receipt of the Offer of Damages to accept in writing. The plaintiff does so by serving the defendant with a Notice of Acceptance. Either party may file proof of service or both the offer and the acceptance with the court. If the defendant loses at trial on the liability issue, then the plaintiff's damages will be assessed in the Judgment as specified in the Offer of Damages.

If the plaintiff fails to accept an Offer of Damages, then the fact that the Offer was made is subject to an *In Limine* Order at the time of trial. Furthermore, if damages awarded to the plaintiff who refused the Offer of Damages are less than or equal to the amount set forth in the Offer of Damages then the plaintiff is barred from recovering taxable costs and disbursements against the defendants.

An Offer of Damages may shorten the length of trial. The value of these Offers for the defense include eliminating some inherent uncertainties of the jury trial process; lessening defense costs by shortening the duration of the jury trial process, potentially significantly so; shortening the trial process my eliminating the entire issue of damages and the need for a jury to determine damages; and eliminating any sympathy based on the nature and extent of the plaintiff's injuries that a jury might use to influence the amount of damages .

An **OFFER OF SETTLEMENT** is an offer to settle a case for a specific amount specified by the plaintiff, together with taxable costs and disbursements. Wis. Stat. § 807.01(3) lays out the procedure.

The defendant has 10 days from receipt to accept the Offer of Settlement in writing. The offer to settle the case should be for a particular sum, specific property, or other effect specified by the plaintiff, together with taxable costs. The parties will then, as a practical matter, enter into a settlement based upon the amount set forth in the Offer of Settlement and an itemization and documentation of the plaintiff's taxable costs and disbursements.

If the defendant fails to accept an Offer of Settlement, then the fact that the Offer was made is subject to an *In Limine* Order at time of trial. Wis. Stat. § 807.04(4) sets forth the procedure if an offer of settlement is not accepted. If the Offer of Settlement is not accepted and the plaintiff goes on to recover an amount that is greater than the amount set forth in the Offer of Settlement (exclusive of costs), then the plaintiff is entitled to interest. The interest rate is 1% plus the prime rate that is in effect on January 1st of the year that the judgment is entered if the judgment is entered on or before June 30th, or the rate in effect on July 1st of the year that the judgment is entered if the judgment is entered after June 30th, as reported by the federal reserve board in its federal reserve statistical release H. 15. The interest accrues until the date that the Judgment is satisfied. The applicable rate of interest is the rate that was in effect on the date of judgment. *Lands' End, Inc. v. City of Dodgeville*, 2016 WI 64, ¶ 5, 370 Wis. 2d 500, 881 N.W.2d 702, *overruling Johnson v. Cintas Corp. No. 2*, 2015 WI App 14, 360 Wis. 2d 350, 860 N.W.2d 515. And interest accrues only until judgment is paid to the clerk of court.

There is greater incentive for plaintiffs to make Offers of Settlement than for defendants to make either Offers of Judgment or Offers of Damages because plaintiffs can also recovery interest under Wis. Stat. § 807.01(4). The statute makes no distinction between pre- and post-judgment interest. *Morrison v. Rankin*, 2008 WI App 158, ¶ 10, 314 Wis. 2d 376, 760 N.W.2d 441. The "amount recovered" in Wis. Stat. § 807.01(4) means that portion of the verdict for which a party is responsible. *Nelson v. McLaughlin*, 211 Wis. 2d 487, 501, 565 N.W.2d

123 (1997). This does not include attorney's fees and costs. *Dobbratz Trucking & Excavating v. PACCAR, Inc.*, 2002 WI App 138, ¶ 30, 256 Wis. 2d 205, 647 N.W.2d 315.

The above-referenced sanctions are not available to a plaintiff who obtains a Judgment that is less than or equal to his Offer of Settlement. *Oliver v. Herritage Mut. Ins. Co.*, 179 Wis. 2d 1, 21, 505 N.W.2d 452 (Ct. App. 1993).

When determining whether the Judgment is greater than the Offer of Settlement, which triggers the above-referenced sanctions, "the offer and the judgment must be compared exclusive of any costs." *Northridge Co. v. W.R. Grace 7 Co.*, 205 Wis. 2d 267, 290, 556 N.W.2d 345 (Ct. App. 1996).

An Offer of Settlement by multiple plaintiffs will most likely be deemed to be invalid. *White v. General Cas. Co. of WI*, 118 Wis. 2d 433, 438, 348 N.W.2d 614 (Ct. App. 1984); *DeMars v. LaPour*, 123 Wis. 2d, 366, 375, 366 N.W.2d 891 (1985).

When an Offer of Settlement is served upon multiple defendants, each defendant should be able to fairly and fully evaluate the Offer from the distinct perspective of the particular claims made against that particular defendant. This cannot be accomplished through a single aggregate offer made to each defendant that would ostensibly resolve all claims against multiple defendants, even if the defendants would jointly and severally liable for the damages. *Wilber v. Fuchs*, 158 Wis. 2d 158, 164, 461 N.W.2d 803, 805 (Ct. App. 1990); *see, e.g., Prosser v. Leuck*, 225 Wis. 2d 126, 136-39, 592 N.W.2d 178, 182 (1999) (holding that an Offer of Settlement served on an insurer that did not explain whether the proposed settlement applied only to the insurer or to the insured as well was ambiguous and unenforceable).

However, an Offer of Settlement by one plaintiff upon multiple defendants is valid where multiple defendant tortfeasors are jointly and severally liable to the plaintiff and covered by the same insurance policy *and* the amount set forth in the Offer falls within the insurance company's liability coverage limits. *Testa v. Farmers Ins. Exch.*, 164 Wis. 2d 296, 303, 474 N.W. 2d 776 (Ct. App. 1991).

John W. Halpin
Maura K. Woods
Laffey, Leitner & Goode LLC
325 East Chicago Street, Suite 200
Milwaukee, WI 53202
Phone: 414-312-7003
jhalpin@llgmke.com
mwoods@llgmke.com

WYOMING

In Wyoming, Offers of Judgment are governed by Rule 68 of the Wyoming Rules of Civil Procedure, which provides as follows:

> (a) *Making an Offer; Acceptance of Offer.* – At any time more than 60 days after service of the complaint and at least 28 days before the date set for trial, any party may serve on an opposing party an offer to allow settlement or 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.
>
> (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. As used herein, "costs" do not include attorney's fees.
>
> (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 not less than 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.

W.R.CIV.P. 68 (LexisNexis 2019). The Wyoming Supreme Court has held that "Rule 68 accomplishes its objective of encouraging settlement by providing an expeditious process that forces the parties to weigh the costs and benefits of further litigation." *Dunham v. Fullerton*, 2011 WY 103, ¶ 9, 258 P.3d 701, 703 (Wyo. 2011).

"Any party can make a firm, non-negotiable offer of judgment." *Id.* (citations omitted). "Unlike traditional settlement negotiations in which a plaintiff may seek clarification or make a counteroffer, a plaintiff faced with a Rule 68 offer ***may only accept or reject the offer***." *Id.* (citations omitted) (emphasis in original). To be effective, the offer must be for a definite or ascertainable amount. *Snodgrass v. Rissler & McMurry Co.*, 903 P.2d 1015 (Wyo. 1995); *see also Dunham*, ¶ 9 ("An offer under Rule 68 must be for a definite or ascertainable amount and later proof cannot cure any defect in the offer since the party to whom the offer was made must base its decision to accept or reject solely on what is contained within that offer").

> A Rule 68 offer is not simply an offer of settlement, but an offer that judgment can be entered on specified terms. If the offer is accepted, the court automatically enters judgment in favor of the offeree; if the offer is refused, the case proceeds. The rule encourages plaintiffs to accept reasonable offers through what is referred to as "cost-shifting." It requires a party who refuses an offer, and then ultimately recovers less than the offer amount, to pay the costs incurred by the offeror from the time the offer was made.

Id. (citation omitted). As stated in the text of the Rule, attorney fees are not considered a taxable court cost. Instead, court costs are typically items such as the filing fee, service of process fees and the costs of depositions (not including video depositions). Any party who rejects an offer of settlement that is more favorable than the

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judgment finally obtained is entitled to costs up to the point that the offer is made, and the other party is entitled to the costs incurred after the offer was made. *Crawford v. Amadio*, 932 P.2d 1288 (Wyo. 1997). An offer under this rule by a defendant is not an admission of liability.

Keith J. Dodson, W.S.B. # 6-4254
Williams, Porter, Day & Neville, P.C.
159 North Wolcott, Suite 400
Casper, WY 82601
Telephone: (307) 265-0700
Facsimile: (307) 266-2306
Email: kdodson@wpdn.net
www.wpdn.net

