

RULE 68 OFFERS OF JUDGMENT—A USEFUL DEFENSE TOOL

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I. INTRODUCTION

Most civil cases resolve by settlement, rather than trial. Accordingly, significant time and effort are often devoted to strategy underlying the familiar back-and-forth negotiation process. When is the best time to engage in settlement discussions? Does it show weakness to be the first to raise the subject? How should offers be framed? Would use of a mediator be helpful?

When a case is pending in federal court, a sometimes overlooked consideration is whether a defendant should make an “offer of judgment,” pursuant to Rule 68 of the Federal Rules of Civil Procedure. A Rule 68 offer is somewhat of a hybrid between a settlement and a decision on the merits. Although if the offer is accepted, judgment is entered against the defendant, a Rule 68 offer is best understood as a way to bring settlement pressure to bear on a plaintiff.

Defendants must of course understand the mechanics and potential pitfalls of a Rule 68 offer. Once conveyed, however, a well-calculated Rule 68 offer places litigation risks on a plaintiff. For example, an unaccepted Rule 68 offer can shift subsequent litigation costs and cut-off a plaintiff’s right to attorneys’ fees. It can even moot a plaintiff’s entire claim. These significant consequences mean that a plaintiff must carefully consider a Rule 68 offer. As such, the offer is a powerful tool for defendants.

This article first explores the basics of a Rule 68 offer: what it is, what it must include, how it will be construed, and what it will be compared to if not accepted. It then discusses some strategic considerations in deploying and structuring the terms of a Rule 68 offer, using a hypothetical to illustrate pros and cons.¹

As a general rule, whenever a prevailing plaintiff’s recovery of attorneys’ fees can be a driving litigation factor, defendants should evaluate making a Rule 68 offer as early in the process as practical.

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¹ In general, this article will discuss case law as applicable in Virginia federal courts.

II. BASICS OF RULE 68 OFFERS

A. THE TEXT

Rule 68 is not lengthy. In full, it states as follows:

Rule 68. Offer of Judgment

- (a) Making an Offer; Judgment on an Accepted Offer. At least 14 days before the date set for trial, a party defending against a claim may serve on an opposing party an offer to allow judgment on specified terms, with the costs then accrued. If, within 14 days after being served, the opposing party serves written notice accepting the offer, either party may then file the offer and notice of acceptance, plus proof of service. The clerk must then enter judgment.
- (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 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.²

B. PURPOSE OF RULE 68

Rule 68 is “intended to encourage settlements and avoid protracted litigation.”³ It “prompts both parties to a suit to evaluate the risks and costs of litigation, and to balance them against the likelihood of success upon trial on the merits.”⁴ Although the “policy of encouraging settlements is neutral . . . [t]o be sure, application of Rule 68 will require plaintiffs to ‘think very hard’ about whether continued litigation is worthwhile.”⁵

² FED. R. CIV. P. 68.

³ 12 WRIGHT, MILLER & MARCUS, FEDERAL PRACTICE AND PROCEDURE, CIVIL 2D § 3001 (1997). See also *Marek v. Chesny*, 473 U.S. 1, 5 (1985) (“The plain purpose of Rule 68 is to encourage settlement and avoid litigation.”).

⁴ *Marek*, 473 U.S. at 5.

⁵ *Id.* at 10-11.

Rule 68 accomplishes its settlement objectives through the cost-shifting provision found in section (d), which is a departure from the general, discretionary rule that a prevailing party recovers its own costs.⁶ If a valid offer of judgment is refused,⁷ and the plaintiff fails to obtain a judgment “more favorable” than the unaccepted offer, then the plaintiff “must pay the costs incurred after the offer was made.”⁸ Given this framework, defendants are motivated to make well-grounded offers of judgment, and plaintiffs are incentivized to carefully consider such offers.

To be clear, for Rule 68’s absolute cost-shifting provision to apply, the plaintiff must prevail at trial.⁹ This position may seem counterintuitive.

Upon reflection, this interpretation makes good sense. It is consistent with the literal text of Rule 68. And as the Supreme Court reasoned, it “avoids the problem of sham offers” that might occur if prevailing defendants could also benefit from the cost-shifting provision of Rule 68.¹⁰ If that were the case, then a defendant would be incentivized to make a nominal offer at the outset of the litigation, even though such an offer had no chance of being accepted. If the defendant then won in court, the court’s discretion to award costs to a prevailing party would be replaced with the prevailing defendant’s absolute right to costs incurred after the offer.¹¹ The requirement that the plaintiff must prevail at trial eliminates the risk that Rule 68 will be abused in this fashion.

C. ARE ATTORNEYS’ FEES PART OF RULE 68 “COSTS”?

A Rule 68 offer is most attractive when it has the potential to cut off a plaintiff’s attorneys’ fees. For many plaintiffs’ claims, the substantive monetary relief available pales in comparison to the attorneys’ fees that could be awarded by statute if the plaintiff prevails.¹² A Rule 68 offer in some cases can stop the “meter,” which may induce a plaintiff (and her attorney) to settle.¹³

⁶ See FED. R. CIV. P. 54(d).

⁷ While a Rule 68 offer must allow judgment to be taken against the defendant, it does not require an admission of liability. See *Simmons v. United Mortg. & Loan Inv., LLC*, 634 F.3d 754, 764 n.6 (4th Cir. 2011). However, irrespective of any disclaimer in an offer of judgment, once accepted the plaintiff is the “prevailing party” for purposes of being awarded its costs under Rule 68. See, e.g., *Kahlil v. Original Old Homestead Rest., Inc.*, 657 F. Supp. 2d 470, 474 (S.D.N.Y. 2009) (holding that a Rule 68 judgment “suffices to establish plaintiffs as the prevailing party” for purposes of awarding attorneys’ fees under the Fair Labor Standards Act, despite a disclaimer of liability in the offer) (citing *Maher v. Gagne*, 448 U.S. 122 (1980)).

⁸ FED. R. CIV. P. 68(d).

⁹ See *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 352 (1981) (holding that Rule 68 did not apply “because it was the defendant that obtained the judgment”).

¹⁰ *Id.* at 355-56.

¹¹ *Id.*

¹² See, e.g., *JP v. County Sch. Bd.*, 641 F. Supp. 2d 499, 505-506 (E.D. Va. 2009) (for an Individuals with Disabilities Education Act claim that involved an unsuccessful Rule 68 offer, the plaintiffs were awarded \$33,187.90 in damages, \$307,150.20 in attorneys’ fees, and \$8,369.69 in litigation expenses).

¹³ While a plaintiff’s continuing right to attorneys’ fees may be extinguished by a Rule 68 offer that is more favorable than the judgment received at trial, the clear majority position is that Rule 68 does not impose a defendant’s attorneys’ fees on a plaintiff. This is because, if available by statute, attorneys’ fees are awarded to

As a first principle, “the term ‘costs’ in Rule 68 was intended to refer to all costs properly awardable under the relevant substantive statute or authority.”¹⁴ The key inquiry then is whether a plaintiff’s attorneys’ fees are part of the costs for purposes of an offer of judgment. The answer depends on the precise language used in the authorizing statute.¹⁵

The Supreme Court in *Marek* held that “where the underlying statute defines ‘costs’ to include attorney’s fees . . . such fees are to be included as costs for purposes of Rule 68.”¹⁶ In other words, “costs which are shifted under Rule 68 include all costs properly awardable under relevant substantive statutes, including statutes which define costs to include attorney’s fees.”¹⁷ The inverse of *Marek*’s holding is also true, “namely that where the underlying statute defines ‘costs’ to *exclude* attorney’s fees, those fees are *not* considered costs under Rule 68.”¹⁸

Reliance on this strict textual interpretation—examining whether attorneys’ fees are statutorily defined as part of costs, rather than in addition to costs—means that claims where prevailing plaintiffs can be awarded attorneys’ fees are not all the same for purposes of a Rule 68 offer. For example, claims under Title VII of the Civil Rights Act meet the above requirements for treating attorneys’ fees as Rule 68 costs, as the applicable statute both allows courts to shift attorneys’ fees to a prevailing plaintiff *and* includes attorneys’ fees within the definition of costs:

In any action or proceeding under this title the court, in its discretion, may allow the prevailing party,¹⁹ other than the Commission or the

the prevailing party. If a defendant made a successful Rule 68 offer as compared to the plaintiff’s judgment, that defendant still would not be a prevailing party. See WRIGHT, MILLER & MARCUS, FEDERAL PRACTICE AND PROCEDURE, CIVIL 2D § 3006.2 (“[T]he Supreme Court was careful to specify in *Marek* that only ‘properly awardable’ costs were to be awarded to defendants.”); *Bonner v. Dawson*, No. 5:02cv00065, 2004 U.S. Dist. LEXIS 18498, at *10-11 (W.D. Va. Mar. 9, 2004) (“[T]he majority position is that because the Copyright Act provides for an award of fees only to the prevailing party, non-prevailing defendants cannot recover fees as part of their Rule 68 costs.”). Accordingly, “defendants can recover their fees as part of costs under Rule 68 only if they can satisfy the otherwise-applicable standard for recovery by defendants.” WRIGHT, MILLER & MARCUS, FEDERAL PRACTICE AND PROCEDURE, CIVIL 2D § 3006.2. See also *infra* note 19.

¹⁴ *Marek*, 473 U.S. at 9.

¹⁵ To be sure, attorneys’ fees can also be part of a plaintiff’s substantive relief, rather than awarded only if he prevails. When attorneys’ fees are an aspect of damages, a Rule 68 offer will contemplate them as part of the underlying offer of judgment, not separately as “costs.” See *First Fin. Ins. Co. v. Hammons*, 58 Fed. Appx 31, 34 (4th Cir. 2003) (“The award of attorneys’ fees was the primary substantive relief that Hammons sought in his Counterclaim; and the offer of judgment plainly encompassed all damages asserted therein.”).

¹⁶ *Marek*, 473 U.S. at 6 (case involved claims under 42 U.S.C. §§ 1983, 1988).

¹⁷ *Marryshow v. Flynn*, 986 F.2d 689, 691 (4th Cir. 1993).

¹⁸ *Bradford v. HSBC Mortgage Corp.*, No. 1:09cv1226, 2012 U.S. Dist. LEXIS 59471, at *35 (Apr. 26, 2012 E.D. Va.) (“*Bradford II*”) (emphasis in original) (case involved claims under the Truth in Lending Act).

¹⁹ Despite 42 U.S.C. § 2000e-5(k) appearing on its face to apply equally to both plaintiffs and defendants that “prevail,” the Supreme Court had held that it “allows fee awards only to prevailing private *plaintiffs*.” *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 422 (1978) (emphasis added). Title VII plaintiffs may only be assessed defendants’ attorneys’ fees if “a court finds that [the plaintiff’s] claim was frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so.” *Id.* at 422. See also *Grier v.*

United States, a reasonable attorney's fee (including expert fees) *as part of the costs*, and the Commission and the United States shall be liable for costs the same as a private person.²⁰

Accordingly, if a Title VII defendant "makes an offer to allow judgment . . . to be entered in an amount that is determined to be more favorable than the judgment that the plaintiff ultimately obtains, attorney's fees that otherwise might be included in post-offer costs . . . *can be avoided by the defendant.*"²¹

As a counterexample, for plaintiffs' claims arising under the Fair Labor Standards Act ("FLSA"), attorneys' fees are defined separately from costs. Specifically, in addition to the substantive relief available, the statute provides that courts shall "allow a reasonable attorney's fee to be paid by the defendant, *and* costs of the action."²² Thus, a Rule 68 offer for a FLSA claim cannot by its terms stop the plaintiff's accrual of attorneys' fees.²³

D. COSTS MUST BE PART OF THE OFFER

As indicated by the text of Rule 68, an offer must include "the costs then accrued." This does not mean, however, that costs must explicitly be part of the offer. Rather, as the Supreme Court held in *Marek*, a Rule 68 offer complies with this requirement so long as it does not exclude costs:

If an offer recites that costs are included or specifies an amount for costs, and the plaintiff accepts the offer, the judgment will necessarily include costs; if the offer does not state that costs are included and an amount for costs is not specified, the court will be obliged by the terms of the Rule to include in its judgment an additional amount which in its discretion . . . it determines to be sufficient to cover the costs. In either case, however, the offer has allowed judgment to be entered against the defendant both for damages caused by the challenged conduct and for costs. Accordingly, *it is immaterial whether the offer recites that costs are included, whether it specifies the amount the defendant is allowing for costs, or, for that matter, whether it refers to*

Titan Corp., 25 F. Supp. 2d 719, 720 (E.D. Va. 1998) (discussing *Christiansburg Garment* and when Title VII defendants are entitled to their attorneys' fees). However, because Rule 68's cost-shifting provision applies only if the plaintiff prevails, the better view is that a defendant's attorneys' fees should *never* be awarded pursuant to an offer of judgment. See *Tai Van Le v. University of Penn.*, 321 F.3d 403 (3d. Cir. 2003) ("[W]e hold that a defendant in a Title VII civil rights suit can never recover its attorneys' fees under Rule 68, because the triggering event of that rule alters the potential costs that are 'properly awardable' to a defendant under § 1988."). See also *supra* note 13.

²⁰ 42 U.S.C. § 2000e-5(k) (emphasis added).

²¹ *Marryshow*, 986 F.2d at 691-92 (emphasis added).

²² 29 U.S.C. § 216(b) (emphasis added).

²³ See *Fegley v. Higgins*, 19 F.3d 1126, 1135 (6th Cir. 1994), *cert. denied*, 513 U.S. 875 (1994) (Rule 68 offer did not stop accrual of plaintiff's attorneys' fees for FLSA claim).

*costs at all. As long as the offer does not implicitly or explicitly provide that the judgment not include costs, a timely offer will be valid.*²⁴

This means that, although it is perfectly permissible, a defendant need not separate the amount offered to settle the underlying claim from the amount offered for costs.²⁵ Lump-sum offers are just as valid as itemized offers. And as another alternative, a defendant's offer may state that the amount of costs will be determined by the court at a later date.²⁶

While there is great flexibility in structuring a Rule 68 offer, defendants must be mindful that it will be construed strictly against them.²⁷ With specific respect to costs, this means that if they are not mentioned in an accepted offer, a court will impose costs *in addition* to the amount recited in the offer.

Such was the outcome in *Bosley*, recently decided by the Fourth Circuit.²⁸ There, pursuant to Rule 68, the defendants offered the plaintiff \$30,000 "as full and complete satisfaction of [plaintiff's] claim."²⁹ The plaintiff then moved the court to enter judgment for \$30,000 plus costs (including attorneys' fees), while the defendants argued that the \$30,000 offer was inclusive of costs.³⁰ Alternatively, the defendants argued that if the offer did not include costs, then there was no meeting of the minds.³¹

The district court granted the plaintiff \$66,463.80 in costs, in addition to the \$30,000 damages judgment.³² The Fourth Circuit affirmed. It reasoned that the defendants "could have easily drafted a Rule 68 offer either reciting that recoverable costs were included in the sum or specifying an amount for such costs."³³ They did not do so, and it was "this drafting failure" that mandated the result reached by the district court.³⁴ "When a Rule 68 offer of judgment is silent as to costs, a court faced with such an offer that has been timely accepted is obliged

²⁴ *Marek*, 473 U.S. at 6 (emphasis added) (emphasis in original removed) (internal citation omitted).

²⁵ *Id.* ("We do not read Rule 68 to require that a defendant's offer itemize the respective amounts being tendered for settlement of the underlying substantive claim and for costs.")

²⁶ See *Henderson v. Sterling, Inc.*, No. 97-1910, No. 97-2009, 1998 U.S. App. LEXIS 7437, at *11-12 (4th Cir. Apr. 14, 1998) ("In the absence of either an express agreement by the parties or a specified sum in the Offer of Judgment, the amount of costs and attorneys' fees are to be determined by the district court.") (citing *Marek*, 473 U.S. at 6); WRIGHT, MILLER & MARCUS, FEDERAL PRACTICE AND PROCEDURE, CIVIL 2D § 3002 ("Alternatively, the defendant can specify the amount allowed for substantive relief and leave the determination of costs for later action by the court. But the defendant cannot simply refuse to include any provision for accrued costs in a Rule 68 offer, even though such a tact is allowed in other settlement negotiations.")

²⁷ See *Bosley v. Mineral County Comm'n*, 650 F.3d 408, 414 (4th Cir. 2011). Likewise, evidence extrinsic to the offer should not be considered. *Id.*

²⁸ *Bosley*, 650 F.3d 408.

²⁹ *Id.* at 410 (emphasis removed).

³⁰ *Id.*

³¹ *Id.*

³² *Id.* at 410-11.

³³ *Id.* at 413.

³⁴ *Id.*

by the terms of the rule to include in its judgment an amount above the sum stated in the offer to cover the offeree's costs."³⁵

In support of its decision, the Fourth Circuit highlighted the differences between a Rule 68 offer of judgment and general settlement discussions. It refused defendants' request to review the negotiations that preceded the acceptance of the Rule 68 offer, as well as the parties' actions that followed. It termed these requests "imprudent, impractical, and . . . wholly foreclosed by the reasoning of *Marek*."³⁶

By making a Rule 68 offer, the *Bosley* defendants "availed themselves of the tactical advantages not available to the offeror of an ordinary settlement offer—namely, the ability to eliminate liability for any post-offer attorneys' fees and costs in the event of a less favorable judgment after trial."³⁷ A Rule 68 offer puts a plaintiff to a difficult choice: "either accept the offer on its terms or proceed to trial and run the risk not only of obtaining a judgment less than the offer but also paying the defending party's post-offer costs."³⁸ Because plaintiffs must suffer the consequences of a Rule 68 offer even when it is refused, they are entitled to "construe the offer's terms strictly, and ambiguities in the offer are to be resolved against the offeror."³⁹

E. THE OFFER MUST BE UNCONDITIONAL AND UNEQUIVOCAL

In order to be valid, a Rule 68 offer of judgment can have no strings attached. "This is because the plaintiff must know unequivocally what is being offered in order to be responsible for refusing such offer."⁴⁰ Thus, a Rule 68 offer may not impose any additional obligations on a plaintiff, including those that are common to general settlement discussions.

The Fourth Circuit recently affirmed these principles in *Simmons*. There, for multiple reasons, it found that a settlement letter from defense counsel was not a valid Rule 68 offer.⁴¹ First, the letter failed to give the plaintiffs the full period to evaluate the offer as specified in Rule 68(a).⁴² Second, rather than an unconditional offer of judgment, the letter conditioned settlement on the plaintiffs' submission of affidavits specifying facts that supported their claims.⁴³ Third, the letter required that the plaintiffs enter into a settlement agreement that would waive and release all claims, instead of offering that judgment be entered

³⁵ *Id.* (internal citation omitted).

³⁶ *Id.* at 413-14.

³⁷ *Id.* at 414.

³⁸ *Id.*

³⁹ *Id.* (internal citation omitted).

⁴⁰ *Simmons*, 634 F.3d at 764.

⁴¹ *Id.*

⁴² *Id.* At the time the offer in *Simmons* was made, Rule 68(a) required a 10-day evaluation period. Rule 68 has since been amended to require an evaluation period of 14 days from the date of offer.

⁴³ *Id.*

against the defendants.⁴⁴ Finally, the letter mandated that the plaintiffs keep the fact and amount of settlement confidential, contrary to the public nature of an unsealed Rule 68 judgment.⁴⁵

F. COMPARISON OF LIKE JUDGMENTS

When evaluating whether Rule 68(d)'s cost-shifting provision applies, courts must evaluate apples to apples to the extent possible. This means that there has to be an accounting for the pre-offer costs accrued in both the offer of judgment and the judgment obtained at trial:

To make a proper comparison between the offer of judgment and the judgment obtained when determining, for Rule 68 purposes, which is the more favorable, like “judgments” must be evaluated. Because the offer includes costs then accrued, to determine whether the judgment obtained is “more favorable,” as the rule requires, *the judgment must be defined on the same basis—verdict*⁴⁶ plus costs incurred as of the time of the offer of judgment.

* * * * *

We therefore hold that when evaluating, for Rule 68 purposes, the “judgment finally obtained” to determine whether it is more favorable to a plaintiff than an earlier offer of judgment by the defendants, the *judgment finally obtained must include not only the verdict of the jury but also the costs actually awarded by the court for the period that preceded the offer*.⁴⁷

Typically, whether the Rule 68 offer is more favorable than the trial judgment will be a straightforward calculation. Because this comparison, however, is not

⁴⁴ *Id.* The distinction between a judgment and a settlement agreement is material, as “judgments are enforceable under the power of the court. Indeed, should a settlement not embodied in a judgment come unraveled, the court may be without jurisdiction to proceed in the case, which often becomes a breach of contract action for failure to comply with the settlement agreement.” *Id.* at 765 (quotation omitted).

⁴⁵ *Id.* at 764.

⁴⁶ Use of the word *verdict* in *Marryshow* should not be interpreted to mean that the verdict amount is necessarily the relevant benchmark for evaluating Rule 68's cost-shifting provision. Instead, the amount of the judgment entered by the court controls. *See* FED. R. CIV. P. 68(d) (holding that offers of judgment must be compared against “the judgment . . . the offeree finally obtains”). In many federal employment claims, there are statutory caps on compensatory and punitive damages, so jury awards may be reduced to the cap. *See, e.g.,* *Spruill v. Winner Ford of Dover, Ltd.*, Civ. No. 94-685 MMS, 1998 U.S. Dist. LEXIS 5536, at *14-15 (D. Del. Apr. 6, 1998) (for Title VII and 42 U.S.C. § 1981 claims, the court found it “irrelevant” that defendants may have made a Rule 68 offer geared to match statutory caps on damages).

⁴⁷ *Marryshow*, 986 F.2d at 692 (emphasis added). *See also* *Marek*, 473 U.S. at 7 (“[P]ostoffer costs merely offset part of the expense of continuing the litigation to trial, and should not be included in the calculus.”).

always clear, it is “best to view the defendant as having the burden of demonstrating that the offer was superior.”⁴⁸

One such complication arises when an equitable component constitutes part of the Rule 68 offer, the judgment obtained at trial, or both. Unsurprisingly, “it is difficult to compare monetary relief with nonmonetary relief.”⁴⁹ Although there are no clear rules to guide this process, “what is required is a realistic assessment of the offer and the ultimate judgment [T]he courts must try to compare apples and oranges as best they can.”⁵⁰

Another interesting issue is the role that prejudgment interest can play in comparing an offer to the judgment obtained at trial.⁵¹ If prejudgment interest is awarded on the judgment obtained, then interest—at least calculated through the date of the Rule 68 offer—should be added to the judgment-obtained “tally” for comparison with the offer.⁵² Similarly, “[w]here a Rule 68 offer explicitly states that it is inclusive of prejudgment interest . . . the judgment to which the offer is compared must include these items if they are awarded.”⁵³

III. STRATEGIC CONSIDERATIONS RELATED TO A RULE 68 OFFER

A. TIMING

A Rule 68 offer can be made any time after the plaintiff’s lawsuit is filed, so long as it is served at least fourteen days before the trial date.⁵⁴ For at least two reasons—assuming that a defendant is comfortable with the idea of a public judgment being entered against it—making a Rule 68 offer as early as possible in the litigation can be to the defendant’s advantage.⁵⁵

⁴⁸ WRIGHT, MILLER & MARCUS, FEDERAL PRACTICE AND PROCEDURE, CIVIL 2D § 3006.1. Putting the burden on the defendant, as the offeror, is consistent with Rule 68 offers being interpreted against the defendant. *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ Prejudgment interest should not be thought of as a Rule 68 “cost,” but as “part of the damages suffered by the plaintiff.” *United States v. American Comm. Barge Line Co.*, 988 F.2d 860, 864 (8th Cir. 1993). In this vein, if a defendant makes a Rule 68 offer that is more favorable than the judgment obtained by the plaintiff at trial, this would not bear on whether the plaintiff would be entitled to prejudgment interest. *See id.*

⁵² This was the tack—although without limiting prejudgment interest to the offer date—of a Texas district court that applied *Marryshow* among other cases. *See Barrow v. Greenville Independent School Dist.*, No. 3:00cv0913, 2005 U.S. Dist. LEXIS 16043, at *74-83 (N.D. Tex. Aug. 5, 2005) (adding \$2,967.44 in prejudgment interest to the judgment obtained). *Accord Mock v. T.G.&Y. Stores Co.*, 971 F.2d 522, 527 (10th Cir. 1992) (holding that “a Rule 68 consent judgment for a sum certain must, absent indication otherwise, be deemed to include pre-judgment interest,” and affirming the denial of plaintiffs’ motion to add prejudgment interest to the offer of judgment).

⁵³ *Champion Produce, Inc. v. Ruby Robinson Co., Inc.*, 342 F.3d 1016, 1020 (9th Cir. 2003).

⁵⁴ FED. R. CIV. P. 68(a). *See also* WRIGHT, MILLER & MARCUS, FEDERAL PRACTICE AND PROCEDURE, CIVIL 2D § 3003 (“[O]nce the suit is filed, defendant may make a Rule 68 offer, and it need not wait until plaintiff has completed any discovery.”).

⁵⁵ Defendants can make multiple Rule 68 offers. FED. R. CIV. P. 68(b) (“An unaccepted offer . . . does not preclude a later offer.”). For purposes of comparison with the judgment finally obtained, each offer stands on its own. *See* WRIGHT, MILLER & MARCUS, FEDERAL PRACTICE AND PROCEDURE, CIVIL 2D § 3003 (“[A] party may make a subsequent offer if its first offer is not accepted but it is not required to do so and its first

First, if an unaccepted offer is intended to shift costs to a plaintiff and/or stop a plaintiff's right to recover its attorneys' fees, the earlier an offer is issued, the lower the costs and fees that will have been incurred by the plaintiff before the cut-off date.

Second, if there are circumstances of which the plaintiff is not yet fully aware, an offer of judgment—because of the risks it creates for plaintiffs—may prompt a settlement on more favorable terms than would be possible after discovery begins or even an answer is filed.

The benefits of early Rule 68 offers put a premium on rapid and thorough case investigation and evaluation. Ideally, this process should begin before a complaint is filed, once the prospect of litigation on certain claims is likely.

B. USING A RULE 68 OFFER TO MOOT A PLAINTIFF'S CLAIM

Far more dramatic than cost-shifting, Rule 68 offers can sometimes moot a plaintiff's claim entirely, by divesting the court of subject matter jurisdiction under Rule 12(b)(1) of the Federal Rules of Civil Procedure.

“A case can become moot either due to a change in factual circumstances, or due to a change in the law Generally speaking, one such [factual] circumstance mooting a claim arises when the claimant receives the relief he or she sought to obtain through the claim.”⁵⁶

The mootness doctrine extends to situations where complete relief has been offered to the plaintiff; it does not require actual receipt of such relief. Thus, the Fourth Circuit has “found there was no longer any case or controversy when defendants had offered [a plaintiff] the full amount of damages to which the plaintiff claimed entitlement.”⁵⁷ And with specific respect to a Rule 68 offer, the Court recently stated that “[w]hen a Rule 68 offer unequivocally offers a plaintiff all of the relief she sought to obtain, the offer renders the plaintiff's action moot.”⁵⁸

While “the doctrine of mootness is constitutional in nature, and therefore, not constrained by the formalities of Rule 68,”⁵⁹ these formalities can bear directly on the mootness inquiry. For example, the relief sought by a plaintiff's claim includes a public judgment entered against the defendant, not just a settlement agreement for the amount sought. Unlike a mere settlement offer, a Rule 68 offer allows a plaintiff to receive this judgment.⁶⁰ Likewise, the unconditional and unequivocal nature of a valid Rule 68 offer provides the certainty necessary to moot a plaintiff's claim.⁶¹

offer remains effective throughout the litigation if the ultimate judgment is not more favorable than that offer.”).

⁵⁶ *Simmons*, 634 F.3d at 763 (internal citations and quotations omitted).

⁵⁷ *Warren v. Sessoms & Rogers, P.A.*, 676 F.3d 365, 370 (4th Cir. 2012) (quotations omitted).

⁵⁸ *Id.* at 371 (internal citation and quotations omitted).

⁵⁹ *Simmons*, 634 F.3d at 764.

⁶⁰ *See id.* at 764-67.

⁶¹ *See id.* at 766.

On the need for certainty that a plaintiff has been offered complete relief as to damages,⁶² this can be achieved against various benchmarks, including (1) a specific demand for damages in the complaint,⁶³ (2) damages quantified in a plaintiff's response to a discovery request,⁶⁴ and (3) the amount of any statutory cap on a plaintiff's available damages.⁶⁵

In *Bradford I*, the Eastern District of Virginia applied language from the Fourth Circuit's recent *Simmons* and *Warren* decisions, dismissing a Truth in Lending Act ("TILA") claim after the plaintiff failed to accept a Rule 68 offer that would have given him complete relief. There, defendant RFC offered \$4001 in damages, "plus costs and reasonable attorney's fees in connection with this claim, if provided by statute."⁶⁶ It was undisputed that the \$4001 damages offer exceeded the \$4000 statutory cap the plaintiff could receive at trial. The issue was whether any of the attorneys' fees the plaintiff could recover under the TILA constituted "actual damages."⁶⁷ If they did, then the lack of specification would prevent this claim from being mooted.⁶⁸

The *Bradford I* court analyzed the TILA statute authorizing attorneys' fees. It found that the fees available were "simply a cost of recovering damages under TILA, not TILA damages themselves."⁶⁹ For this reason, the court found that "RFC's Rule 68 offer of full statutory damages plus one dollar, the costs of the action, and 'reasonable attorney's fees' would have provided [the plaintiff] with all the relief to which he was entitled for his § 1641(g) claim and therefore rendered that claim moot."⁷⁰ Accordingly, "the claim must be dismissed."⁷¹

Significantly, the *Bradford I* court then found that "[t]he expiration of the Rule 68 offer that rendered [the plaintiff's] § 1641(g) claim moot *extinguished*

⁶² In *Warren*, the Fourth Circuit left undecided whether a Rule 68 offer including costs and attorneys' fees to date as determined by the court would provide the certainty required as to these measures for a mootness inquiry. See *Warren*, 676 F.3d at 371 n.3. But see *Simmons*, 634 F.3d at 767 n.8 ("not[ing] that the absence of an amount certain with respect to the Plaintiffs' attorneys' fees . . . does not, in any manner, contribute to our holding that such letter offered the Plaintiffs less than full relief").

⁶³ *Warren*, 676 F.3d at 372.

⁶⁴ *Id.*

⁶⁵ *Bradford v. HSBC Mortgage Corp.*, 280 F.R.D. 257, 261 (E.D. Va. 2012) ("*Bradford I*").

⁶⁶ *Id.* at 259-60.

⁶⁷ See *id.* at 260-63.

⁶⁸ See *id.*

⁶⁹ *Id.* at 262.

⁷⁰ *Id.*

⁷¹ *Id.* at 263.

power to enter judgment on the claim.”⁷² This meant that the plaintiff “loses outright . . . because he has no remaining stake” in the claim.⁷³

Finally, a further wrinkle exists when a Rule 68 offer might moot a plaintiff’s claim in collective or representative actions. In these types of cases, defendants may issue a Rule 68 offer that would award full relief, in an attempt to “pick off” the named plaintiff.⁷⁴

In the class action context, the relation back doctrine has been used by courts to retain jurisdiction over a matter even if a named plaintiff’s claims might have been mooted.⁷⁵ In *Symczyk*, the Third Circuit applied this rationale in a collective FLSA action, reversing the district court and allowing a conditional certification motion to relate back to the initial filing, even when the named plaintiff’s claim had been mooted.⁷⁶

The defendants argued that an FLSA plaintiff proceeding under 29 U.S.C. § 216(b) lacks the representative status of a Rule 23 named plaintiff, which is what warranted continued subject matter jurisdiction even after the named plaintiff’s individual claim was mooted.⁷⁷ For a class action, members in a certified class are bound by a judgment unless they opt out of the class; by contrast, a collective FLSA action under § 216(b) does not bind any similarly situated employee unless he has opted in.⁷⁸

In rejecting this argument, the Third Circuit found that “[a]lthough defendants’ logic has some surface appeal, reliance on the watershed event of an opt-in to trigger application of the special mootness rules that prevail in the representative action context incentivizes the undesirable strategic use of Rule 68.”⁷⁹

The Supreme Court granted the defendants’ petition to hear this case in 2013.⁸⁰

C. RECOGNIZING THAT JUDGMENT IS ENTERED

Although a defendant need not admit liability in order to make an effective Rule 68 offer, if accepted, the offer becomes a judgment. An accepted Rule 68

⁷² *Id.* (emphasis added) (“As a constitutional matter, [the plaintiff] never regained a personal stake in advancing his § 1641(g) claim because the expiration of the Rule 68 offer of judgment did not change what made the claim moot in the first place, namely, that [the plaintiff] could have obtained through acceptance of the offer all he could have hoped to obtain through litigation.”).

⁷³ *Id.* at 264 (quotation omitted). *But see* *Young v. AmeriFinancial Solutions, LLC*, No. 12-60946, 2012 U.S. Dist. LEXIS 125661 (S.D. Fla. Sep. 5, 2012) (dismissing claim under the Fair Debt Collection Practices Act as moot due to an unaccepted Rule 68 offer, not awarding any costs, but entering judgment in the plaintiff’s favor for offer’s damages amount only).

⁷⁴ *See Symczyk v. Genesis Healthcare Corp.*, 656 F.3d 189, 195-201 (3d. Cir. 2011).

⁷⁵ *Id.* at 195-97.

⁷⁶ *Id.* at 200-201.

⁷⁷ *Id.* at 197.

⁷⁸ *Id.* at 198.

⁷⁹ *Id.*

⁸⁰ *Genesis Health Corp. v. Symczyk*, U.S. No. 11-1059.

offer is “self-executing,” generally without any discretion by the court.⁸¹ A public judgment is entered, not an agreed dismissal order reflecting a confidential settlement agreement. As the Fourth Circuit explained in *Simmons*, this is an important distinction between resolving a case through a Rule 68 offer of judgment and a private settlement.⁸²

For employers faced with accusations of employment discrimination or claims of unpaid overtime based on the misclassification of nonexempt employees, an adverse judgment on the merits can be a most unwelcome result. The judgment is public and may invite other claims. In some situations, the judgment could also be used as evidence in subsequent or pending litigation. Certainly, for those cases where insurance is involved, these broader business considerations can lead to tension between the insurer and its insured, when the insurer desires to use Rule 68 to minimize its present exposure to escalating costs and attorneys’ fees.

In short, the practical implications of allowing a judgment order to be entered need to be carefully examined and then explained to a defendant before a Rule 68 offer is made.

D. STRUCTURING A RULE 68 OFFER—A HYPOTHETICAL

Assume that you represent XYZ Corp., a company with more than 500 employees. One of XYZ Corp.’s former employees filed a Title VII sexual harassment claim three months ago. The initial wave of written discovery has just wrapped up, and liability does not look promising. Plaintiff’s counsel is smart and sophisticated, but in your view, the settlement demands to date have been unreasonable. You believe that this disconnect is due in large part to the “hammer” of Title VII attorneys’ fees.

The plaintiff seeks compensatory damages, punitive damages, back-pay, and front-pay. For compensatory and punitive damages, a jury verdict in excess of \$1 million is possible, but the statutory cap on such damages is \$300,000.⁸³

You and XYZ Corp. make the following evaluations: (1) judgment on compensatory and punitive damages is likely to be entered at the statutory cap of \$300,000; (2) the plaintiff’s other damages (back-pay, front-pay, back-pay interest, *etc.*) were stated in discovery to be \$100,000; and (3) the plaintiff’s reasonable costs (including recoverable attorneys’ fees) to date are roughly \$50,000. Regarding the costs and fees, you know that there would not be ready agreement on this figure, and expect that the plaintiff would claim that these exceed \$100,000. Through a trial of this action, you believe that the cost and fee estimates could easily quadruple.

While XYZ Corp. would ordinarily prefer a confidential settlement, it would like to make a Rule 68 offer of judgment to put a firewall on the accrual of costs

⁸¹ See, e.g., *Ramming v. Natural Gas Pipeline Co.*, 390 F.3d 366, 370 (5th Cir. 2004).

⁸² *Simmons*, 634 F.3d at 764.

⁸³ 42 U.S.C. § 1981a(b)(3)(D).

and attorneys' fees. It knows that to be effective—either by inducing acceptance or settlement, by being more “favorable” than the judgment the plaintiff could obtain at trial, or even by mooted the plaintiff's claim entirely—the offer of judgment must be a sober and realistic estimate of XYZ Corp.'s actual exposure.

Given these assessments and goals, you have identified the following three options for structuring the offer of judgment:

1. Lump-Sum, All-Inclusive

XYZ Corp. could, without admitting liability, offer judgment to be entered for a single lump-sum. With \$450,000 being its maximum exposure evaluation, XYZ Corp could make an offer of up to just over this amount (\$450,001). This offer would state that it includes all damages, costs (including attorneys' fees), and interest accrued to date. The onus would then be on the plaintiff to weigh whether the total judgment she could receive at trial, together with her reasonable costs and attorneys' fees accrued to date, could exceed this single lump-sum.

If acceptance of an offer of judgment was a realistic possibility, the black-box nature of a lump-sum offer is tailored to result in XYZ Corp. possibly obtaining a slight discount on the settlement amount (if it offered a lump-sum figure of less than \$450,001). While her maximum damages appear fixed, the plaintiff would know that there remains uncertainty in proving her costs, and she may therefore accept less than her actual costs accrued to date.

2. General Itemization

In this approach, XYZ Corp. could offer the same maximum total of \$450,001, but show its cards a bit more. Its offer would state that \$400,001 represents all damages and interest, with \$50,000 for costs accrued to date.

In practical respects, this approach is equivalent to the maximum lump-sum method discussed above. The one possible advantage of segregating the costs is to make plain the somewhat divergent interests of the plaintiff and her attorney. Whether this wedge would be effective to induce the plaintiff to accept the offer will likely depend on the terms of the attorney engagement. If plaintiff's counsel receives a fixed percentage regardless, it may make little difference.

3. Damages Lump-Sum, Costs to be Determined

This approach takes the costs issue off the table. XYZ Corp. could offer judgment in favor of the plaintiff in the amount of \$400,001, plus costs accrued to date (including reasonable attorneys' fees) in an amount to be determined by the court.

Such an offer maximizes XYZ Corp.'s chances of benefiting from Rule 68's cost-shifting mechanism if the case proceeds to trial. It also sets up the argument that, if refused, the court has lost subject matter jurisdiction over plaintiff's claim, because based on the statutory cap and sworn discovery, XYZ Corp. has

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offered a damages and costs amount in excess of the best plaintiff could hope to obtain in court.

The disadvantage of this type of offer is that if accepted (which it likely would be), then XYZ Corp would have no chance of obtaining a “discount” for the costs accrued to date. Instead, the costs would be fixed by the court.

IV. CONCLUSION

A Rule 68 offer of judgment can be a powerful defense settlement tool. In addition to shifting costs and stopping the accrual of attorneys’ fees, a Rule 68 offer can sometimes even moot a plaintiff’s entire claim. These risks force plaintiffs to make realistic assessments and often lead to a resolution, particularly when the potential recovery of plaintiff attorneys’ fees is a driving litigation factor.
