[Editor's Note: The *Trial Advocate Quarterly* is pleased to present a special issue on employment discrimination law. The following article by Spencer H. Silverglate is submitted on behalf of the Employment Law Committee of the Florida Defense Lawyers Association. A second article by Michael Scofield offers a broad overview of employment discrimination, and a third article by Brad Johnson and Dabney Ware updates the readers on the latest U.S. Supreme Court decisions on the Americans with Disabilities Act. Special thanks to these authors and to Lori Smith, chair of the Employment Law Committee of the FDLA, for her assistance.]

THE FEDERAL OFFER OF JUDGMENT RULE IN EMPLOYMENT DISCRIMINATION CASES

By Spencer H. Silverglate

I. Introduction

Federal civil rights and employment discrimination laws generally provide for an award of attorneys' fees to the prevailing party.[1] While the concept is straightforward, the courts have created a double standard when awarding fees. To advance the remedial purpose of these laws, a prevailing plaintiff is awarded attorneys' fees as a matter of course, but a prevailing defendant is awarded fees only upon a finding that the case was "frivolous, unreasonable or without foundation."[2] The effect is that the prevailing plaintiff typically will recover attorneys' fees, but the prevailing defendant rarely will.[3]

Moreover, the amount of the fee award to the plaintiff can be daunting. It is calculated by multiplying the number of hours reasonably expended on the litigation by a reasonable hourly rate.[4] This figure, commonly referred to as the "lodestar," may be adjusted upward or downward depending upon various factors.[5] The result obtained in the litigation is one of the factors, but the amount of the fee award is not necessarily capped by the amount of the underlying recovery.[6] In fact, the fee award may far exceed the recovery.[7]

Given these disparities, plaintiffs and, perhaps as significantly, their attorneys may have little incentive to settle employment cases in which liability is likely, even if the damages are relatively small. What then can the defendant do to stem the flow of attorneys' fees in such cases? The Florida proposal for settlement statute, Section 768.79, Florida Statutes (1999), does not apply to these "federal question" cases.[8] The answer lies in Federal Rule of Civil Procedure 68.[9] Rule 68, known as the "offer of judgment rule," shifts the burden of post-offer costs to a plaintiff who rejects a settlement offer which proves more favorable than the ultimate judgment.[10]

Historically, Rule 68 was regarded as being of little value and was rarely invoked.[11] Shifting costs evidently failed to provide sufficient incentive to encourage settlement. That changed with the U.S. Supreme Court's 1985 decision in *Marek v. Chesny*.[12] The *Marek* Court magnified the importance of Rule 68 in cases involving statutes that award attorneys' fees as part of costs, such as most civil rights and employment discrimination statutes.[13] In so doing, it raised the stakes for plaintiffs who receive Rule 68 offers and galvanized interest in the rule.[14]

Despite its benefits, Rule 68 remains relatively obscure, and understandably so. The rule is fraught with ambiguities and inconsistencies.[15] The purpose of this article is to remove some of the mystery.

II. Rule 68

A. Nature and Purpose of the Rule

Rule 68 provides in pertinent part:

> 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 order, with costs then accrued . . . 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.** (emphasis added).[16]

Simply put, Rule 68 shifts to the plaintiff the

cost of litigating a claim that the defendant should not have been forced to litigate.[17] Rule 68's ndatory cost shifting provision removes the entive for the plaintiff to continue a lawsuit worth less than the defendant's offer.[18] Accordingly, it is an effective means of avoiding unnecessary litigation in federal court.

B. Rule 68 in Practice

1. *Marek v. Chesny*

A plaintiff who rejects a Rule 68 offer which exceeds the judgment at trial (1) forfeits the recovery of his own post-offer costs, which usually are awarded as a matter of course under Federal Rule of Civil Procedure 54(d), and (2) must pay the defendant's post-offer costs from the date of the offer forward.[19] However, Rule 68 costs are not always limited to taxable costs as defined by 28 U.S.C. § 1920.[20] Rule 68 costs also may include attorneys' fees.

In *Marek*, plaintiff sued three police officers for allegedly violating his civil rights under 42 U.S.C. § 1983. Defendants served plaintiff with an offer of judgment "for a sum, including costs now accrued and attorney's fees, of $100,000."[21] Plaintiff refused the offer and proceeded to incur an additional 40,000 in fees and costs. He ultimately was arded a judgment of $58,000 plus $32,000 in pre-offer attorneys' fees and costs, for a total award of $90,000. In other words, plaintiff incurred an additional $140,000 in legal expenses to obtain a judgment which was $10,000 less than the Rule 68 offer.

The Court held that under Rule 68, plaintiff forfeited recovery of his post-offer costs.[22] The Court further held that the term "costs" under the Rule referred to "all costs properly awardable" under the relevant substantive statute.[23] Because § 1983 includes attorneys' fees as part of costs, plaintiff also was foreclosed from recovering his (substantial) post-offer attorneys' fees.[24]

2. Can the Defendant Recover Costs and Attorneys' Fees Under Rule 68?

While *Marek* held that successful Rule 68 defendants are not liable for the prevailing plaintiff's post-offer costs and attorneys' fees, it did not address whether the rule requires plaintiff to pay defendant's post-offer costs and fees. Since *Marek*, several courts have held that Rule 68 requires a plaintiff against whom it is invoked successfully to ay post-offer defense costs.[25] However, courts ve declined to require the plaintiff to pay the defendant's attorneys' fees.[26]

Crossman v. Marcoccio[27] is illustrative. Plaintiffs sued under § 1983 and immediately were served with a Rule 68 offer of judgment, inclusive of costs and attorneys' fees accrued to the date of the offer. Plaintiffs rejected the offer and ultimately received a less favorable judgment The Sixth Circuit held that Rule 68 required plaintiffs to pay defendants post-offer costs. However, the court held that Rule 68 does not require a prevailing plaintiff to pay defendant's post-offer attorneys' fees.[28]

3. Who Can Make a Rule 68 Offer?

Significantly, only a party "defending against a claim" may avail itself of a Rule 68 offer of judgment.[29] The rule provides no equivalent procedure for plaintiffs to make offers as to their own claims.[30] However, a plaintiff may make a Rule 68 offer of judgment in defense of a counterclaim (i.e., as the counterdefendant).[31]

4. When Should a Rule 68 Offer be Made?

A Rule 68 offer only can be served after suit is filed.[32] Once served, the offeree has 10 days to respond before it is deemed rejected.[33] Accordingly, the offer must be served more than 10 days before the trial begins.[34] Additionally, although the rule does not expressly so state, several courts have held that the offer is irrevocable for the 10 day period.[35]

While Rule 68 offers may be served late in a case, they should be considered and, if warranted, served as early as possible.[36] Because Rule 68 requires the plaintiff to pay the costs incurred after the date of the rejected offer, the later the offer is made, the smaller the penalty for refusal. This, of course, translates into less of an incentive to settle. Further, the judgment against which the Rule 68 offer is compared includes the plaintiff's pre-offer costs.[37] An early offer limits the plaintiff's costs to the date of the offer, thereby increasing the offeror's chances of successfully invoking the rule. Where attorneys' fees are awardable under the relevant substantive statute, such as civil rights and employment discrimination laws, pre-offer fees also are included in a Rule 68 judgment.[38] In these cases, an early Rule 68 offer may mean the difference between a successful and unsuccessful offer.

Finally, there is no prohibition against making multiple Rule 68 offers during the course of a case.[39]

5. What Should a Rule 68 Offer Say?

A Rule 68 offer does not require the use of any particular "magic" words or phrases.[40] The court

typically will engage in "gap filling" if the offer is ambiguous.[41] However, ambiguous offers will be resolved against the offeror.[42] And, as noted above, once made, an offer is irrevocable for 10 days.[43]

Perhaps the most important consideration the offeror faces is whether to include pre-offer costs and attorneys' fees in the offer. In *Marek*, the Court held that a Rule 68 offer need not itemize the amounts being tendered for the claim versus fees and costs.[44] In fact, fees and costs need not even be referenced in a Rule 68 offer.[45] When the offer is silent on fees and costs, the court will treat it as a "lump sum" offer in which fees and costs are included. An advantage of the lump-sum offer is that it caps the defendant's exposure in the event it is accepted. Otherwise, a defendant must pay whatever pre-offer costs and attorneys' fees the court deems reasonable.[46]

On the other hand, a lump-sum offer, if rejected, provides greater uncertainty as to whether the judgment ultimately is more favorable than the offer. In *Marryshow v. Flynn*,[47] defendants offered plaintiff "to allow judgment to be taken against them. . . for a total sum, to include all costs now accrued and attorneys' fees, of $20,000." Plaintiff refused the lump-sum offer and recovered a verdict totaling $14,500. Because defendants made a lump-sum offer, the court calculated plaintiff's pre-offer costs, including attorneys' fees, to compare the judgment to the offer. When combined with the jury verdict, the sum exceeded the offer, and the rule was not invoked.[48]

Had the *Marryshow* defendants made an offer of $14,500, "plus reasonable costs and attorneys' fees incurred to the date of the offer," the rule would have been invoked. Defendants would not have been forced to rely on the court's determination of pre-offer costs on the issue of whether their offer was more favorable than the judgment.[49]

6. Must a Rule 68 Offer be Reasonable?

In *Delta Air Lines v. August*,[50] the Supreme Court addressed the issue of whether Rule 68 offers must be reasonable. Plaintiff sued her former employer under Title VII and sought $20,000 in back pay plus attorneys' fees and costs. Defendant made a Rule 68 offer of judgment for $450, plus accrued costs. The defendant ultimately prevailed at trial, but the district court denied it costs under Rule 68.[51] The Seventh Circuit affirmed, holding that Rule 68 did not apply because defendant's offer "was insufficient to justify serious consideration."[52]

The Supreme Court affirmed, but for a completely different reason. The Court held that Rule 68 does not include a reasonableness requirement. The Court further held, however, that the plain language of the rule requires that a judgment be rendered in favor of the plaintiff. Where the defendant prevails, either on summary judgment, directed verdict or at trial, the rule, by its express terms, is simply inapplicable.[53]

After *Delta*, there likely is no reasonableness requirement for Rule 68 offers.[54] The *Delta* holding, however, is anomalous in that a defendant may recover taxable costs under Rule 68 if he loses a case but not if he wins outright.[55] That said, the anomaly is not overly significant because the prevailing defendant typically is awarded costs under Rule 54(d). The only problem is that the award of costs under Rule 54(d) is discretionary and can be denied outright.[56] In contrast, costs must be awarded under Rule 68.[57]

III. Conclusion

As the *Marek* Court aptly observed, "Prevailing at trial [says] little about whether the expenditure of counsel's time was reasonable in relation to the success achieved."[58] A successful Rule 68 offer not only relieves a losing defendant of liability for plaintiff's post-offer costs, the defendant can also recover his own post-offer costs from the plaintiff. Moreover, if a plaintiff sues under a statute which awards attorneys' fees as part of costs, Rule 68 also precludes the plaintiff from recovering post-offer fees. In this way, the rule removes the incentive for a plaintiff to pursue a claim in the face of a reasonable offer. Rule 68 thereby provides defendants with an effective tool for limiting litigation costs.

1 Among them are Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.* (1999)(Title VII); Americans with Disabilities Act of 1990, 42 U.S.C. § 1201 *et seq.* (1999)(ADA); 42 U.S.C. § 1981 (1999); 42 U.S.C. § 1983 (1999). Equal Pay Act claims only award attorneys' fees to the prevailing plaintiff, not the prevailing defendant. Fair Labor Standards Act of 1938, as amended, 29 U.S.C. § 206 *et seq.* (1999).

2 *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421 (1978). The rationale of awarding attorneys' fees to a successful plaintiff is to punish a violator of federal law. This policy consideration is absent when the defendant prevails.

3 *See Marquart v. Lodge 837, Int'l Ass'n of Machinists and Aerospace Workers*, 26 F. 3d 842, 849 (8th Cir. 1994)("prevailing defendant entitled to attorneys' fees in a Title VII case "only in very narrow circumstances.")

4 *Hensley v. Eckerhart*, 461 U.S. 424, 433-34 (1983).

5 The factors are: (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the result obtained; (9) the experience, reputation, and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. *See Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974).

6 *See City of Riverside v. Rivera*, 477 U.S. 561, 578 (1986)("A rule of proportionality would make it difficult, if not impossible, for individuals with meritorious civil rights claims but relatively small

potential damages to obtain redress from the courts.")

7 *See, e.g., id.* (prevailing plaintiffs in § 1983 action awarded $245,456 in attorneys' fees following a judgment of $33,350); *Bridges v. Eastman Kodak Co.*, 102 F.3d 56, 57 (2d Cir. 1996) (prevailing plaintiffs in Title VII action awarded $753,202 in attorneys' fees following a judgment of $117,428).

8 *See Tanker Mgt., Inc. v. Brunson*, 918 F.2d 1524 (11th Cir. 1990)

9 Fed.R.Civ.P. 68.

10 *Id.*

11 *See* 12 C. WRIGHT, A. MILLER & R. MARCUS, Federal Practice and Procedure § 3001 (1997)(hereafter, "FEDERAL PRACTICE AND PROCEDURE").

12 473 U.S. 1 (1985).

13 FEDERAL PRACTICE AND PROCEDURE, *supra* § 3001. For a partial list of statutes that award attorneys' fees as costs, *see Marek*, 473 U.S. at 44-46, app. (Brennan, J., dissenting). Note that the ADA does not award attorneys' fees as part of costs. *See Webb v. James*, 147 F.3d 617, 622-23 (7th Cir 1998).

14 *Id.*

15 *See Crossman v. Marcoccio*, 806 F. 2d 329, 331 (1st Cir. 1986), *cert. denied*, 481 U.S. 1029 (1986)(Rule 68 "has long been among the most enigmatic of the Federal Rules of Civil Procedure.").

16 Fed.R.Civ.P. 68 (emphasis added).

17 Rule 68 was designed to curb unnecessary litigation and vexatious lawsuits *See* 12 FEDERAL PRACTICE & PROCEDURE § 3001. According to the Supreme Court in *Delta Air Lines v. August*, 450 U.S. 346 (1980), the rule is especially effective in cases where liability is apparent but damages are uncertain.

18 *See Delta Air Lines v. August*, 450 U.S. 346, 351 (1980).

19 *See Tunison v. Continental Airlines Corp.*, 162 F.3d 1187 (D.C. Cir. 1998).

20 28 U.S.C. § 1920 taxable costs include: (1) fees of the clerk and marshal; (2) court reporter fees; (3) printing and witness fees; (4) copy fees;(5) docket fees; and (6) fees for interpreters.

21 437 U.S. 1, 8.

22 *Id.*

23 *Id.* at 8.

24 *Id.* The *Marek* rule does not apply where the underlying substantive statute awards fees separately from costs, such as the ADA. *See Haworth v. Nevada*, 56 F.3d 1048, 1051 (9th Cir. 1995). Nevertheless, a Rule 68 offer may still prove useful in limiting plaintiff's post offer attorneys' fees in such cases. *See Haworth v. State of Nevada*, 56 F.3d 1048, 1052 (9th Cir. 1995)("[C]lients who refuse a Rule 68 offer should know that the refusal to settle the case may have a substantial adverse impact on the amount of attorneys' fees they may recover for services rendered after a settlement offer is rejected. Just because a plaintiff has an FLSA violation in her pocket does not give her a licence to go to trial, run up the attorneys' fees and then recover them from the defendant.").

25 *See, e.g., Tunison*, 162 F.3d at 286; *Crossman*, 806 F.2d at 333 (1st Cir. 1986).

26 *See In re Water Valley Finishing, Inc.*, 139 F.3d 325, 328 (2d Cir. 1998); *O'Brien v. City of Greers Ferry*, 873 F.2d 1115, 1120 (8th Cir 1989); *Zackaroff v. Koch Transfer Co.*, 862 F.2d 1263 (6th Cir. 1988); *Crossman*, 806 F.2d at 334. Note that some Local Rules permit the offeror to receive both costs and attorneys' fees. *See* Civil Justice Expense and Delay Reduction Plan, art. 6, § 9 (E.D. Tex. 1997).

27 *See* note 15, *supra*.

28 806 F.2d at 334.

29 *See* Fed. R. Civ. P. 68.

30 *See Delta Air Lines, Inc.*, 450 U.S. at 350 (1981); *Simon v. Intercontinental Transp. (ICT) B.V.*, 882 F.2d 1435, 1439 (9th Cir.1989); *Nicolaus v. West Side Transp., Inc.*, 185 F.R.D. 608 (D. N.V. 1999).

31 *See Healy Co. V. Milwaukee Metro. Sewerage Distrib.*, 159 F.R.D 508, 511 (E.D. Wis.), *rev'd on other grounds*, 60 F.3d 305 (7th Cir. 1994).

32 *See* Fed. R. Civ. P. 68; *Macquire v. Fed. Crop Ins. Corp.*, 9 F.R.D. 240 (W.D. La. 1949), *aff'd*, 181 F.2d 320 (5th Cir. 1950).

33 *Id*

34 *See Greenwood v. Stevenson*, 88 F.R.D. 225, 229 (D.R.I. 1980)("trial begins when the trial judge calls the proceedings to order and actually commences to hear the case."). In bifurcated trials, a party adjudged liable may make a Rule 68 offer not less than 10 days before the trial on damages commences. *See Cover v. Chicago Eye Shield Co.*, 136 F.2d 374, 375 (7th Cir. 1943).

35 *See, e.g., Webb*, 147 F.3d at 620; *Richardson v. Nat'l R.R. Passenger Corp.*, 49 F.3d 760, 765 (D.C. Cir. 1995). Courts have refused to extend the time period to respond to Rule 68 offers because such an extension would unfairly prejudice the defendant. *See, e.g., Leach v. Northern Telecom, Inc.*, 141 F.R.D. 420 (D.C.N.C. 1991)(extension unfairly commits defendant to an irrevocable settlement offer).

35 Certainly, an offer of judgment may not be the right course of action for every defendant. Although no admission of liability is required to effectuate a Rule 68 offer, *see Jolly v. Coughlin*, 1999 WL 20895, *8 (S.D.N.Y. Jan. 19, 1999), the defendant must be willing to have a judgment entered against it, *see Clark v. Sims*, 28 F.3d 420 (4th Cir. 1994); *Bonenberger v. Plymouth Township*, 1998 WL 472469, *3 (E.D.Pa. Jul. 27, 1998).

37 *See Grosvenor v. Brienen*, 801 F.2d 944, 947 (7th Cir. 1986).

38 *See Marryshow v. Flynn*, 986 F.2d 689, 692 (4th Cir. 1993)

39 *See* Fed.R.Civ.P. 68 Advisory Committee Notes.

40 *See Nordby v. Anchor Hocking Packaging Co.*, WL 1085878, *3 (7th Cir. Dec. 2, 1999)

41 *Id.*

42 *See Nusom v. Comh-Woodburn, Inc.*, 122 F.3d 830, 833 (9th Cir. 1997).

43 *See* note 35, *supra*.

44 437 U.S. at 6.

45 *Id.*

46 *Id.* at 6-7.

47 *See* note 38, *supra*

48 986 F.2d at 692.

49 Of course, defendants would have been obligated to pay plaintiff's pre-offer costs and fees in an amount the court deemed reasonable.

50 *See* note 18, *supra*

51 The district court required both sides to bear their own costs, apparently declining to award defendant its costs as the prevailing party under Rule 54(d).

52 *Id.* at 349.

53 *Id.*

54 *See Lentomyynti Oy v. Mediva, Inc.*, 997 F.2d 364 (7th Cir 1993)(district court not required to examine reasonableness of Rule 68 offer); *Hopper v. Euclid Manor Nursing Home, Inc.*, 867 F.2d 291 (6th Cir. 1989)(district court lacks discretion to vacate award of $100 nominal damages on learning that the award would invoke Rule 68 offer).

55 *See* 450 U.S. at 375 (dissent); *Danese v. City of Roseville*, 757 F.Supp. 827, 831 (E.D. M.I. 1991)(noting anomaly)

56 *See Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 438 (1987).

57 *See Marek*, 473 U.S. at 28; *Hopper v. Euclid Manor Nursing Home*, 867 F.2d 291 (6th Cir. 1989). *See also Darragh Poultry & Livestock Equip. Co. v. Piney Creek Sales*, 743 S.W.2d 804, 805 (Ark. 1988)(after *Delta*, a defendant who wins a lawsuit must bear his costs unless he can persuade the court to award them under Rule 54(d))

58 473 U.S. at 11.

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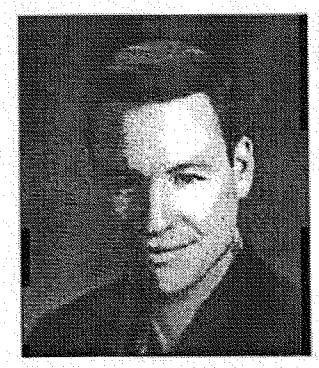

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