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April 19, 2002

02-CV-D

Mr. Peter G. McCabe
Secretary of the Committee on
Rules of Practice and Procedure
Administrative Office of the United
States Courts
1 Columbus Circle, N.E.
Room 4-170
Washington, D.C. 20544

Re: Federal Rule of Civil Procedure 68

Dear Mr. McCabe:

I am the Chair of the Committee on Federal Procedure of the Commercial and Federal Litigation Section of the New York State Bar Association. On April 17, 2002, the Section narrowly approved the enclosed report on Providing Offers of Judgment with "Teeth"; A Proposal for the Amendment of Federal Rule of Civil Procedure 68. On behalf of the Commercial and Federal Litigation Section, I would like to submit this report for consideration by the Advisory Committee on Civil Rules.

This report identifies an intriguing and possibly controversial change in an underutilized rule with the objective of encouraging settlements. The strong dissent in the Section was concerned that the proposal contained a significant and inappropriate disincentive to litigate imposed upon plaintiffs, especially less wealthy plaintiffs; contained a strong incentive for deep-pocket defendants to run up costs beyond what they would otherwise spend; and left it to the uncertain and undoubtedly non-uniform discretion of individual judges to ameliorate any unfairness in imposing expenses upon parties who reject settlement offers less favorable than the outcome after trial.

If you would like further information or wish to pass along any comments, I would be pleased to hear from you.

Sincerely yours,

Gregory K. Arenson

Enclosure

cc: Jay G. Safer, Esq. (w/o encl.)
Chair, Commercial and Federal Litigation Section

PROVIDING OFFERS OF JUDGMENT WITH "TEETH"; A PROPOSAL FOR THE AMENDMENT OF *FEDERAL RULE OF CIVIL PROCEDURE* 68

Summary

The concept of an "offer of judgment" under Rule 68 has been practically a dead letter since its adoption as one of the original *Federal Rules of Civil Procedure* in 1938. The intent of the Rule has been to encourage settlements by shifting taxable costs to a claimant (usually the plaintiff) who rejects a written settlement offer on the claim and later fails to obtain a judgment more favorable than the rejected offer. The Section believes that the Rule's lack of utility as a settlement-promoting device stems from the fact that it does not apply to a broad enough range of situations, and because its limited financial consequences do not provide a sufficient economic incentive for offerees to settle by accepting offers of judgment.

Accordingly, the Section recommends that Rule 68 be modified **(i)** to make it applicable to both claimants and defendants on a claim; **(ii)** to make it applicable when a claimant-offeror obtains a result that is more favorable than the offer; **(iii)** to make it applicable when the claimant-offeree loses at trial or on a dispositive motion; and **(iv)** to strengthen the potential economic consequences to the party rejecting the offer by shifting, in addition to taxable costs, the offeror's reasonable post-offer expenses (but not attorneys' fees) to the offeree, in the discretion of the court, if the offeree fails to obtain a result more favorable than the rejected offer.

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1. The Current State of the Federal Rule on Offers of Judgment

As a matter of course, Fed. R. Civ. P. 54(d)[1] provides that a party who loses at trial or on a dispositive motion, *i.e.*, the non-prevailing party, will be taxed the costs of suit defined in 28 U.S.C. § 1920,[2] unless the court otherwise directs. *See Kohus v. Cosco, Inc.*, Case No. 01-1358 (Fed. Cir. 2002) ("Section 1920 'embodies Congress' considered choice as to the kinds of expenses that a

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[1] **Rule 54. Judgments; Costs**

* * *

(d) Costs; Attorneys' Fees.

(1) Costs Other than Attorneys' Fees. Except when express provision therefor is made either in a statute of the United States or in these rules, costs other than attorneys' fees shall be allowed as of course to the prevailing party unless the court otherwise directs; but costs against the United States, its officers, and agencies shall be imposed only to the extent permitted by law. Such costs may be taxed by the clerk on one day's notice. On motion served within 5 days thereafter, the action of the clerk may be reviewed by the court.

[2] **§ 1920. Taxation of costs.**

A judge or clerk of any court of the United States may tax as costs the following:
(1) Fees of the clerk and marshal;
(2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;
(3) Fees and disbursements for printing and witnesses;
(4) Fees for exemplification and copies of papers necessarily obtained for use in the case;
(5) Docket fees under section 1923 of this title;
(6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title.

A bill of costs shall be filed in the case and, upon allowance, included in the judgment or decree.

federal court may tax against the losing party,' " citing *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437 (1987)).

Rule 68 of the *Federal Rules of Civil Procedure*[3] shifts the risk of being saddled with taxable costs to a prevailing claimant under the circumstances spelled out in the Rule, which reads as follows:

> **Rule 68. Offer of Judgment**
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> 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,

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3 For comprehensive discussions of Rule 68, *see* 12 *Wright, Miller & Marcus, Federal Practice and Procedure: Civil 2d* §§ 3001-3007 (1997); and 13 *Moore's Federal Practice* 3d §§ 68.01-68.10 and 68 App. 01-68 App. 101 (3d 2001). An extensive and scholarly analysis of Rule 68, its history, shortcomings, and proposals for amending it, can be found in Roy D. Simon, "*The Riddle Of Rule 68*," 54 Geo. Wash. L. Rev. 1 (1985).

> 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.

Rule 68 introduced a new concept in federal jurisprudence[4] by allowing a party defending against a claim to serve upon the claimant more than 10 days prior to trial 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 the claimant-offeree refuses the offer but does not obtain a better result at trial, then "costs [under 28 U.S.C. § 1920] incurred after the making of the offer" are taxed to the offeree in accordance with Rule 54(d). Rule 68 operates only when the offeree refuses the offer and subsequently wins on the merits of the claim but obtains the same or less than the amount offered.[5] A plaintiff may make an offer of judgment under Rule 68 only as to a counterclaim or cross-claim against it. In short, "Rule 68 bites only when the plaintiff wins but wins less than the defendant's offer of judgment." *Amati v. City of Woodstock*, 176 F.3d 952, 957 (7th Cir. 1999).

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4 State court antecedents can be found in Minnesota, Montana and New York. *See* 2 *Minn.Stat.* (Mason, 1927) § 9323; 4 *Mont.Rev.Codes Ann.* (1935) § 9770; and *N.Y.C.P.A.* (1937) § 177.

5 Rule 68 does not apply if the claimant-offeree refuses the offer of judgment and subsequently loses on the merits, because the claimant-offeree did not "obtain" a judgment within the meaning of the Rule. In almost all such cases, Rule 68 would be superfluous because "costs" under 28 U.S.C. § 1920 are taxed against the losing claimant-offeree under Rule 54(d). *Delta Air Lines, Inc. v. August*, 101 S.Ct. 1146, 450 U.S. 346 (1981).

The long-recognized purpose of Rule 68 has been "to relieve overburdened courts from litigation by encouraging early settlement." Martha A. Mills et al., *Report on Proposed Rule 68: Offer of Settlement*, "The New and Proposed Rules of Civil Procedure" 501, 506 (PLI 1984). In theory at least, parties are more likely to settle early in the case when prolonging the litigation carries with it the prospect that the prevailing party (i.e., the claimant-offeree) will have to pay the losing party's costs taxable under 28 U.S.C. § 1920 which were incurred after the offer of judgment was served. The Supreme Court in *Delta Air Lines, supra*, explained the rationale of Rule 68 -- which has no purpose other than to promote settlement -- as follows:

> 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 judgement but the amount of recovery is uncertain. Because prevailing plaintiffs presumptively will obtain costs under Rule 54(d), Rule 68 imposes a special burden on the plaintiff to whom a formal settlement offer is made. If a plaintiff rejects a Rule 68 settlement offer, he will lose some of the benefits of victory if his recovery is less than the offer.

101 S.Ct. at 1150, 450 U.S. at 352.

In his concurring opinion, Justice Powell commented further on the Rule's purpose as follows:

> The Rule particularly facilitates the early resolution of marginal suits in which the defendant perceives the

> claim to be without merit, and the plaintiff recognizes its speculative nature.

Id. at 1156, 450 U.S. at 363.

2. Why Has Rule 68 Not Fulfilled Its Purpose?

In reality, Rule 68 is used infrequently by litigants,[6] and has come to be generally regarded as ineffective as a means of inducing settlements, especially in protracted cases where the purpose of the rule would, in principle, be best served.[7] *See*, Association of the Bar of the City of New York, *Report of the Committee on the Federal Courts*, March 1, 1984 at 11.

There are several reasons why parties forego making offers of judgment under Rule 68. For instance, the Rule refers to "costs," which presumptively entail only *taxable costs* specified in 28 U.S.C. § 1920, incurred after the offer of judgment was made. Such costs (*see*, fn. 2, *supra*) are usually relatively small -- especially if the offer is made close to the 10-day pre-trial deadline -- compared to the offeree's actual expenses (even without taking into account its attorneys' fees), such as document imaging, travel and lodging, and

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6 See, Simon, *supra* at 8.

7 "[T]he rule 'has rarely been invoked and has been considered largely ineffective in achieving its goals.' " 12 *Wright, Miller & Marcus, supra*, at § 3001 at 67-68 (*quoting* Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure, 98 F.R.D. 339, 363 (1983)). In a Court of Appeals decision, the Rule was described as being "among the most enigmatic of the Federal Rules of Civil Procedure because it offers imprecise guidelines regarding which post-offer costs become the responsibility of the plaintiff," *Crossman v. Marcoccio*, 806 F.2d 329, 331 (1st Cir. 1986).

interpreters and testifying experts. Therefore, the risk of having to pay the costs prescribed in 28 U.S.C. § 1920 provides little financial incentive for defending parties to make, and claimant-offerees to accept, Rule 68 offers of judgment even at an early stage of a case. Also, only a party defending against a claim may invoke the rule. While a plaintiff defending against a counterclaim or a cross-claim may make an offer of judgment, it may not make an offer of judgment in order to settle its affirmative claim, 12 *Wright, Miller & Marcus, supra*, § 3000 at fn. 7.

Recognizing the shortcomings of Rule 68, proposals to amend it were made in 1983[8] and 1984,[9] but were never enacted.

3. Opposing Views Regarding Possible Changes to Rule 68

Notwithstanding -- or perhaps because of -- its desuetude, there has been considerable debate over how Rule 68 can be made more effective as a

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[8] Committee on Rules of Practice & Procedure of the Judicial Conference of the United States, *Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure, Federal Rules of Criminal Procedure, Rules Governing Section 2254 Cases in the United States District Courts, and Rules Governing Section 2255 Proceedings in the United States District Courts, reprinted in* 98 F.R.D. 337, 361-67 (1983).

[9] Committee on Rules of Practice & Procedure of the Judicial Conferences of the United States, *Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate Procedure, Federal Rules of Civil Procedure, Federal Rules of Criminal Procedure, and Rules Governing Section 2254 Cases and Section 2255 Proceedings in the United States District Courts, reprinted in* 102 F.R.D. 407, 432-37 (1984).

settlement tool in litigation.

It has been suggested that Rule 68 be amended to include an award of the offeror's attorney's fees.[10] The Association of the Bar of the City of New York has criticized such a change, reasoning that amending the rule to allow an award requiring "losing" claimants to pay defendants' litigation expenses beyond the usual taxable costs -- especially attorneys' fees -- would be a "radical departure from traditional American litigation philosophy." *See* Association of the Bar of the City of New York, *Report of the Committee on the Federal Courts*, *supra* at 10. Amending Rule 68 to include attorneys' fees, the Association later stated, would be tantamount to foregoing the traditional "American Rule" (requiring each party to bear its own legal expenses, regardless of the outcome) in favor of the "English Rule" (requiring the loser to pay the winner's attorneys' fees).[11] *See,* Association of the Bar of the City of New York, *Report of the*

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10 *See* 28 U.S.C. § 1927 (counsel's liability for excessive costs) The rule (R.4:58) governing offers of judgment in New Jersey state courts provides for the shifting of attorneys' fees. *See, New Jersey Law Journal*, January 14, 2002, p. 1.

11 The "English Rule" on attorneys' fees in litigation under the Civil Procedure Rules of England is that the unsuccessful party will be ordered to pay the "costs" (see below) of the successful party (Rule 44.3(2)(a)), although the court may order otherwise if it considers it appropriate (Rule 44.3(2)(b)). In assessing costs, the court will only allow those costs that were reasonably incurred, are reasonable in amount (Rule 44.4(1)) and are proportionate to the matters at issue in the case, which generally is about 65% -75% of a party's actual legal bills.

"Costs" are defined in the Civil Procedure Rules to include fees, charges, disbursements and expenses. There is no definition of either "disbursements" or "expenses" but, in addition to the time charges of its solicitors, a winning party may be entitled to claim:

Committee on Federal Legislation, "Attorney Fee-Shifting and the Settlement Process," *The Record*, Vol. 51, No. 4, 391 at 393-94 (1996).

The United States Supreme Court has repeatedly reaffirmed its commitment to the American Rule. *See, e.g., Fleischman Distilling Corp. v. Maier Brewing Co.*, 87 S. Ct. 1404, 386 U.S. 714 (1967) (citing several rationales for continued support of the American Rule); *Alyeska Pipeline Service v. Wilderness Society*, 95 S. Ct. 1612, 421 U.S. 240 (1975) (rejecting a general theory in support of attorney fee-shifting). But compare 35 U.S.C. § 285, a statutory partial abrogation of the American Rule, whereby courts in patent infringement cases of an "exceptional" nature "may award reasonable attorney fees to the prevailing party."

In short, plaintiffs generally contend that amending Rule 68 to allow

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1. The costs of being represented by a barrister;
2. Court fees;
3. The fees and expenses of expert witnesses;
4. The expenses of witnesses of fact; and
5. Disbursements such as travel expenses and translation fees.

Solicitors' internal expenses (photocopying, postage, couriers, outgoing telephone calls and faxes etc.) are assumed to be covered by the solicitors' time charges and are not normally recoverable separately (exceptions can be made where the expenses are heavy, for example photocopying voluminous discovery documents for trial bundles).

It is not possible to recover internal costs of a corporate client (e.g., time spent by in-house counsel in supervising the case) save in the rare situation where it can be shown that in-house counsel has performed a role normally carried out by the outside legal team.

for an award of attorneys' fees[12] would dramatically shift the risks of litigation in favor of well-financed defendants, thereby forcing many small or individual claimants to forego pursuing litigation claims. They argue that this would be especially true in "test cases," such as those involving civil rights or toxic torts, where there is a strong societal interest in allowing them to come to a final resolution on the merits rather than by settlement. *See* Mills et al., *supra,* at 509. On the other hand, defendants generally would obviously favor an award of attorneys' fees against plaintiffs who refuse to settle. Clearly, there is a need and consensus for changing Rule 68 to make it more vigorous in achieving its purpose,[13] but which would accommodate the concerns regarding attorneys' fees.

The Recommendation of The Section

(1) The Section recommends that Rule 68 be amended to state that the offeror can be either the claimant or a party defending against a claim. This was suggested by the Advisory Committee on the Federal Rules of Civil

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12 Some statutes provide for the award of attorneys' fees to the prevailing party as part of "taxable costs" under 28 U.S.C. § 1920. *See,* for example, 42 U.S.C. § 1988 (Civil Rights Act), 42 U.S.C. § 7413(b) (Clean Air Act), and 17 U.S.C. § 505 (Copyright Act). Fed.R.Civ.P. 54(d)(2) applies to applications for attorneys' fees in such cases, and the shifting of taxable costs under Rule 68 carries with it the denial of an attorney's fee to the prevailing plaintiff-offeree who fails to win a judgment for more than the offer. *See Marek v. Chesny*, 105 S.Ct. 3012, 3017, 473 U.S. 1, 11 (1985). Parties litigating under such statutes would not be treated any differently by the Section's recommendation.

13 *See*, Simon, *supra* at 53. ("Nearly everyone agrees that the existing procedures under Rule 68 should be changed.")

Procedure and favored by the Committee on Second Circuit Courts of the Federal Bar Council in 1984. *See* "Bar Panel Opposes Change in Civil-Procedure Rule," *New York Law Journal* Mar. 1, 1984. The Federal Bar Council Committee stated that a revised Rule 68 applicable equally to claimants and parties defending against claims would best serve the interests of all parties and eliminate concerns regarding parties on opposite sides of a litigation with unequal resources and levels of sophistication. *Id.* The Section submits that there is ample reason to allow claimants to make offers of judgment in view of the Section's proposal to allow the offeror to recover certain post-offer expenses from the offeree, subject to court approval. Counterpart rules in several states permit plaintiffs to make offers of judgment.[14]

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[14] *See 12 Wright, Miller & Marcus, supra*, at § 3001.2, fn. 2. For a detailed discussion of the applicability in federal cases of offers of judgment by plaintiffs under state rules, *see 12 Wright, Miller & Marcus, supra,* at § 3001.2.

For example, in Connecticut there are separate statutes for plaintiffs and defendants governing offers of judgment. The plaintiff's statute, *Conn. Gen. Statute* § 52-192a, provides that a plaintiff in an action on a contract or for the recovery of money (whether or not other relief is sought) can make a written pre-trial offer of judgment to the defendant offering to settle the claim underlying the action and to stipulate to a judgment as upon a default, for a sum certain. The offer is filed with the clerk of the court and notice thereof is served on the defendant. If the defendant rejects the offer by failing to file a written acceptance thereof with the clerk of the court within the earlier of 30 days or the rendering of the verdict or court award, and judgment is ultimately entered in the case, the court then determines whether the plaintiff has recovered an amount equal to or greater than the amount the plaintiff offered to settle for in the offer of judgment. If the amount recovered is equal to or greater than the sum certain stated in the offer of judgment, then the court adds 12% annual interest to the amount recovered, running either from the date on which the complaint was filed (if the offer of judgment was filed in the first 18 months of the case), or the date on which the offer of judgment was filed (if the offer was filed after the first 18

(2) In view of the Section's proposal to allow the offeror to recover certain post-offer expenses (see below), the Section recommends that the Rule be amended to make it applicable also to cases where a claimant-offeree loses on the merits at trial or on a dispositive motion.

(3) The Section further recommends that Rule 68 be amended so that the trial court has discretion as to whether and to what extent an award of post-offer expenses, exclusive of attorneys' fees, should be made beyond the costs that may be taxed under 28 U.S.C. § 1920. Such post-offer expenses could include discovery expenses such as photocopying, deposition transcripts, travel and lodging for attorneys, witnesses, and other personnel, fees of testifying

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months of the case). The court may also award up to $350 in reasonable attorney's fees to the plaintiff.

The defendant's statutes, *Conn. Gen. Statute* § 52-193 through § 52-195 provide, in essence, that the defendant in the same types of actions may offer judgment and file the offer with the clerk of the court. If the plaintiff fails to accept the offer of judgment within 10 days prior to the commencement of the trial and obtains a judgment for an amount not greater than the amount of the defendant's offer, with interest included, then plaintiff shall recover no costs that accrued after he received notice of the filing of the offer of judgment and must pay defendant's costs accruing after plaintiff's receipt of such notice. Defendant's costs may include defendant's reasonable attorneys' fees up to $350.

Because the Connecticut plaintiff's statute, *supra*, created a substantive right under state law (*see*, *Erie)*, it is not preempted in federal diversity actions by Fed. R. Civ. P. 68 which in its current form only allows offers of judgment by claim defendants. *See*, *Murphy v. Marmon Group, Inc.*, 562 F. Supp. 856 (D. Conn. 1983).

experts and other expert expenses recoverable under Fed.R.Civ.P. 26(b)(4)(c),[15] and office services such as electronic imaging and storage. Since the offeror could be the claimant or the party defending against the claim, giving courts such discretion would "up the ante" without embracing the "English Rule" as to attorneys' fees (and thereby avoid the possibility of running afoul of the Rules Enabling Act).[16]

There is also a procedural correction to Rule 68 which the Section

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15 **Rule 26(b) Discovery Scope and Limits**

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(4) Trial Preparation: Experts.

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(C) Unless manifest injustice would result, (i) the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under this subdivision; and (ii) with respect to discovery obtained under subdivision (b)(4)(B) of this rule the court shall require the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

16 **28 U.S.C. § 2072. Rules of procedure and evidence; power to prescribe**

(a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrates thereof) and courts of appeals.

(b) Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

(c) Such rules may define when a ruling of a district court is final for the purposes of appeal under section 1291 of this title.

recommends. Since its enactment in 1938, Rule 54(a) has defined "judgment" to include "a decree and any order from which an appeal lies." In the interim, Rules 54(b)[17] and 62(h)[18] were amended to make clear that a judgment on less than all the claims or involving less than all the parties is not appealable as of right as a final judgment. Yet the provision in Rule 68 allowing the clerk of the court to enter judgment upon acceptance of an offer of settlement, which could be for less than all claims or involve less than all parties, was not so amended. This creates the potential for an anomalous situation of there being an offer and acceptance of

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[17] **Rule 54. Judgment; Costs**

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(b) Judgment Upon Multiple Claims or Involving Multiple Parties. When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

[18] **Rule 62. Stay of Proceedings to Enforce a Judgment**

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(h) Stay of Judgment as to Multiple Claims or Multiple Parties. When a court has ordered a final judgment under the conditions stated in Rule 54(b), the court may stay enforcement of that judgment until the entering of a subsequent judgment or judgments and may prescribed such conditions as are necessary to secure the benefit thereof to the party in whose favor the judgment is entered.

judgment on less than all the claims or involving fewer than all the parties which cannot be entered by the clerk. The Section recommends that this be corrected by providing that, if a judgment is entered under Rule 68 on fewer than all claims or involving fewer than all parties, then, to establish its finality, the judgment be considered an appealable final judgment.

Thus, the Section recommends that Rule 68 be amended as follows, where changes are indicated in boldface (additions underlined and deletions bracketed):

> **(a)** At any time more than 10 days before the trial begins, a party **[defending against a claim]** may serve upon **[the]** **an** adverse party an offer to **[allow judgment to be taken against the defending party]** **resolve a claim** 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 **which, if with respect to fewer than all claims or all parties, shall nonetheless be considered an appealable final 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]** **does** not **obtain a** more favorable **judgment on the merits of the claim** than the offer, the offeree must pay **to the offeror** the costs incurred after the making of the offer **and, upon motion by the offeror, in the court's discretion, reasonable expenses, excluding attorneys' fees, incurred by the offeror after the making of the offer**. The fact that an offer is made but not accepted does not preclude a subsequent offer.

> **(b)** 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,] either party may make an offer to resolve the amount or extent of the liability,** 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.
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> **(c) In exercising its discretion whether and to what extent to award reasonable expenses, exclusive of attorneys' fees, a court may consider, among other things, (1) the relation of the claim to any other claim in the action, (2) the relation of the expenses to the claim, (3) the reasonableness of the offer, (4) the burden on the offeree in paying the expenses, (5) the resources of the offeror, (6) the importance of the claim, and (7) the reasonableness of the rejection of the offer.**

How Rule 68 would read, as amended, is shown in Appendix A.

The Section believes that this amendment effects a workable compromise in several respects.

First, it does not adopt the English Rule of awarding attorneys' fees to the winning party, because such fees are not normally awarded under the proposal. *See, Marek v. Chesny,* 105 S. Ct. 3012, 3016, 3018, 473 U.S. 1, 9, 12 (1985) (where a statute provides for attorneys' fees to be awarded to the prevailing party as part of costs, a claimant who rejects a Rule 68 offer and recovers less than the offer may not recover attorneys' fees incurred after the

offer); *Crossman v. Marcoccio*, 806 F.2d 329, 333-4 (1st Cir. 1986). Any award of the offeror's expenses is likely to be far less than the amount of its attorneys' fees incurred after a rejected offer.

Second, any expenses and costs that are shifted are only those incurred after an offer is rejected. It does not include what may be substantial expenses and costs incurred prior to the offer. It might be anticipated that offers would be made after substantial discovery occurs, thereby reducing the amounts that would be subject to shifting.

Third, under the proposal, judges may exercise their discretion to reduce the amount of costs and expenses to be shifted. Judges may explicitly consider the relative resources of the parties (items (4) and (5)), which is meant to alleviate concerns that shifting costs and expenses after rejection of an offer might have a chilling effect on civil actions which society has an interest in fostering, such as class actions in which class representatives reject an offer, environmental claims, etc. Further, judges should consider the importance of the claim or claims offered to be settled and their relationship to the other claims in the action and to the post-offer expenses (items (1), (2) and (6)) in apportioning additional costs and expenses incurred after the offer. Moreover, judges may examine any gamesmanship in making or rejecting the offer (items (3) and (7)).

The proposal retains the applicability of Rule 68 to non-monetary claims. 13 *Moore's Federal Practice 3d*, *supra*, at § 68.04[5]. Under the

Section's proposed amendment of Rule 68, offers of judgment would remain in the form of "money or property or to the effect specified in the offer." The Section agrees that the term "to the extent specified in the offer" includes equitable claims, which appears to be consistent with Fed.R.Civ.P. 1 making the rules applicable to "all suits of a civil nature" unless exempted by Fed.R.Civ.P. 81, and that allowing a party to make an offer to settle equitable claims, such as injunctive relief, would "create much greater incentives to use the Rule." *Mills et al., supra* at 506.

Finally, there may be some concern that proposed Rule 68 would lead to further litigation. To be sure, there would be an increase in collateral proceedings after some judgments on the merits. However, the Section believes that shortening of litigation times and reduction in case loads due to increased pretrial settlements would result in greater cost savings than any increase in collateral post-trial litigation costs in consequence of an amended Rule 68.

Conclusion

The Section believes that its present recommendation will add more "teeth" to Rule 68 by modifying it (i) to make it applicable to both a claimant and a party defending against a claim, (ii) to make it applicable when a claimant-offeror obtains a result that is more favorable than the offer, (iii) to make it applicable when a claimant-offeree loses on the merits at trial or on a dispositive motion,

and (iv) to strengthen its financial "bite" upon the party rejecting the offer by creating the risk that the offeror's reasonable post-offer expenses -- exclusive of attorneys' fees -- will be shifted to the offeree, in addition to taxable court costs. Most importantly, the Section believes that in the long run, the proposed amendment would make Rule 68 effective in achieving its intended purpose of encouraging settlement of litigation.

April 17, 2002

New York State Bar Association
Commercial and Federal Litigation Section
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APPENDIX A

Rule 68. Offer of Judgment

(a) At any time more than 10 days before the trial begins, a party may serve upon an adverse party an offer to resolve a claim for the money or property or to the effect specified in the offer. 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 which, if with respect to fewer than all claims or all parties, shall nonetheless be considered an appealable final judgment. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs. If the offeree does not obtain a more favorable judgment on the merits of the claim than the offer, the offeree must pay to the offeror the costs incurred after the making of the offer and, upon motion by the offeror, in the court's discretion, reasonable expenses, excluding attorneys fees, incurred by the offeror after the making of the offer. The fact that an offer is made but not accepted does not preclude a subsequent offer.

(b) 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 to resolve the amount or extent of the liability, which shall have the same effect as an offer made before trial if it is served not less than 10 days prior to the commencement of hearings to determine the amount or extent of liability.

(c) In exercising its discretion whether and to what extent to award reasonable expenses, exclusive of attorneys' fees, a court may consider, among other things, (1) the relation of the claim to any other claim in the action, (2) the relation of the expenses to the claim, (3) the reasonableness of the offer, (4) the burden on the offeree in paying the expense, (5) the resources of

the offeror, (6) the importance of the claim, and (7) the reasonableness of the rejection of the offer.