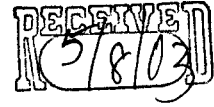


UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

125 SOUTH GRAND AVENUE  
PO BOX 91510  
PASADENA CALIFORNIA 91109-1510



CHAMBERS OF  
A. WALLACE TASHIMA  
UNITED STATES CIRCUIT JUDGE

May 2, 2003

03-CV-B

TEL (626) 229-7373  
FAX (626) 229-7457

Hon. David F. Levi  
United States District Judge  
14-200 United States Courthouse  
501 "I" Street  
Sacramento, CA 95814-2322

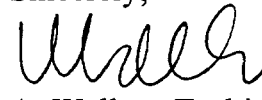
Re: Rule 68 – Offers of Judgment

Dear David:

I write to you in your capacity as Chair of the Advisory Committee on Civil Rules. One of my colleagues asked me why Federal Rule of Civil Procedure 68, unlike the California rule, permits only defendants to make offers of judgment under the rule. As you know, in California (I have not checked any other states), both defendants and plaintiffs can make offers of compromise. See Calif. Civ. Code §§ 998 & 3291.

The only answer I could give was that the origin of the rule dates from early in the last century and it appears that Rule 68 has not been given a fresh look in many years. According to the original (1937) Advisory Committee Notes, the rule is based on a 1927 Minnesota statute, a 1935 Montana statute, and a 1937 New York statute. A rule applying equally to both defendants and plaintiffs would appear to be more even handed. I know that your committee has a full plate, but this may be a rule that is ripe for re-examination.

Sincerely,

  
A. Wallace Tashima

cc: Judge Cynthia H. Hall  
Prof. Edward H. Cooper  
John K. Rabiej, Esq.

RECEIVED  
5/28/03

United States District Court

Eastern District of California  
501 "I" Street 14<sup>th</sup> Floor  
Sacramento, California 95814  
(916) 930-4090

Chambers of  
David F. Levi  
Chief Judge

May 22, 2003

Honorable A. Wallace Tashima  
United States Circuit Judge  
Ninth Circuit Court of Appeals  
Richard H. Chambers Court of Appeals Building  
125 South Grand Avenue  
Pasadena, California 91105-1652

Dear Wally:

Thank you for your letter on Rule 68. The New York State Bar Association Committee on Federal Procedure recently asked the Advisory Committee on Civil Rules to take another look at Rule 68. I recall that one of its suggestions is to permit plaintiffs to make a Rule 68 offer.

Some few years ago, the Committee tried to give Rule 68 greater bite. The original impetus to reconsider Rule 68 was a proposal by Judge Schwarzer to add more effective sanctions on the view that "costs" incurred after the offer is not much of a deterrent. His proposal included attorney fees as part of the calculus. As we were drawn further into the inquiry, we became overwhelmed by complexities suggested by game theory and negotiation experience. There are some significant Enabling Act problems as well. The Court has ruled that the Enabling Act allows Rule 68 to cut off statutory fee rights only so long as the statute characterizes fees as costs. I am less sure whether we could create a right to fees through means of Rule 68, but probably we could not under the Enabling Act. Any fee shifting proposal would be controversial, to put it mildly. In the end we were not able to develop a proposal that we had confidence in.

A limited change to permit plaintiffs to make a Rule 68 offer is doable without much re-writing of the Rule, and might be helpful. But there is still the problem that attorney fees could be included in the offer only if provided by a statute that characterizes fees as "costs." Absent a

Honorable A. Wallace Tashima  
May 22, 2003  
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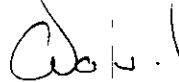
fee-shifting statute expressed as costs, a plaintiff who betters a rejected offer at trial still will recover only costs. And if the plaintiff has bettered its own offer, and if there is a fee-shifting statute, the Rule 68 sanction adds little since a prevailing plaintiff will get fees whatever the recovery.

I will confess that the fearsome complexities raised by Rule 68 do not make it an attractive project. And, as you know, our plate is rather full at the moment. Nonetheless, there do seem to be some glaring oddities about Rule 68 that might be addressed short of a more thoroughgoing revision.

Thank you for your inquiry.

I send best wishes to you and Judge Hall.

Sincerely,



cc: Judge Cynthia H. Hall  
Judge William W Schwarzer  
Professor Edward H. Cooper  
John K. Rabiej, Esq. ✓