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TO: SCAC MEMBERS

FROM: Professor Elaine A. Carlson

RE: Offer of Judgment Proposal: Rule 166b

March 1, 2002

Chairman Babcock has requested the SCAC Offer of Judgment Subcommittee review the proposed Offer of Judgment Rule 166b generated by the Supreme Court Task Force Committee chaired by Joe Jamail. (Attachment A) We have reviewed the proposed rule and the literature surrounding the subject and set forth the following analysis and observations for your consideration.

I. Overview of Offer of Judgment Rule

An offer of judgment rule provides for the shifting of costs upon an offeree who fails to accept an offer of judgment from their adversary when the ultimate judgment in the case is less favorable than that offered. Federal Rule of Civil Procedure 68, as well as many parallel state rules or statutes, provide that if a defendant offers to have judgment entered against him, the plaintiff does not accept, and the plaintiff's judgment is not more favorable than the offer, then the plaintiff must pay the defendant's post-offer costs.[1] "The effect

[1] It has been reported that twenty-eight states (including a majority of the federal replica jurisdictions), plus the District of Columbia, have provisions identical or substantially similar to Federal Rule 68. Another thirteen states have provisions which depart from the Federal Rule in significant ways, while nine states apparently have no provision at all. See Solimine & Pacheco,

is to reverse the usual rule that a losing party must pay the winner's costs."[2] State rules vary as to whether the offer of judgment mechanism extends to both plaintiffs and defendants and as to what is recoverable beyond costs, with some providing recovery for attorney's fees as well as expert fees under a myriad of offer of judgment schemes.

Proposed Rule 166b is an offer of judgment rule that applies to both plaintiffs and defendants. It provides for the shifting of litigation costs including costs of court, attorneys fees, as well as reasonable expert fees when an offer of judgment is rejected and the offeree suffers a less favorable judgment. A less favorable money judgment is defined by the rule as a judgment more favorable to the offeror when the amount of monetary damages awarded is equal to or great than twenty-five percent of the offer to settle. A more favorable nonmonetary judgment results when the "judgment is more favorable to the party who made the offer to settle the claims".[3]

A majority of our subcommittee is opposed to an offer of judgment rule. However, a majority of the subcommittee endorses a modification to rule 131 to clarify that the trial court has the discretion to tax costs against a prevailing plaintiff who receives less than the amount offered by a Defendant before trial. The following discussion reflecting our concerns is offered for the full committee's consideration.

II. Historical Overview of Fee and Cost Shifting

The United States has long rejected the "English Rule", followed in Great Britain and most European nations, that the loser must pay the successful party's attorney's fees.[4] The historical justification for the "American Rule"- that parties bear the costs of their own attorney's fees in litigation whether

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State Court Regulation of Offers of Judgment and Its Lessons For Federal Practice,13 Ohio St. J. Dispute Resolution 51, 64 (1997).

[2] Rowe & Vidmar, Empirical Research on Offers of Settlement: A Preliminary Report, 51 Law & Contemporary Problems 13, 13-14, Autumn 1988.

[3] See Appendix A. Proposed Rule 166b.

[4] Sherman, "From Loser Pays to Modified Offer of Judgment Rules: Reconciling Incentives To Settle With Access to Justice", 76 Tex. L. Rev. 1863, 1863 (1998).

they win or lose- is premised upon the American belief in liberal access to the courts to redress wrongs.[5] A deterrent, including the threat of paying the other sides attorney's fees if suit is unsuccessful, raises the concern that wrongs may go unremedied in our society, and that any such rule would disproportionately impact the plaintiff's access to the courts. It has been suggested that the differences in our two systems justifies these practices:

> England virtually abolished juries in civil cases (except for libel and malicious prosecution) more than 50 years ago. Cases are tried before judges whose decisions are narrowly bound by precedent, not only on liability but on damages as well. Outcomes, therefore, tend to be more predictable in England than in the United States….. Moreover, lack of predictability in American law is not limited to juries. Substantive and procedural law has undergone constant and sometimes dramatic change during the past 40 years. Law in America is more volatile and less precedent-bound than in England. Propositions that might at one time have been thought frivolous, or at least highly speculative, have become accepted. It is a rare case of which one can say with assurance that it cannot prevail.[6]

There are a number of exceptions to the American rule that permit recovery of attorney's fees by a claimant. For example, a party determined to have brought an action in bad faith may be responsible for the attorneys fees of an opponent. Further, a myriad of statutory provisions allow the recovery of attorney's fees by a prevailing party despite the American rule. Further, some states have adopted offer of judgment rules that allow for the shifting of attorney's fees when an offeree refuses his opponent's offer to settle and does no better at trial. (The state adoptions are both by rule and by statute).

Offer of judgment rules are intended to encourage settlements and avoid protracted litigation. Perhaps more precisely, the object of such rules are "to encourage more serious evaluation of a proposed settlement at an earlier stage than otherwise might occur, which should lead to more dispositions of cases

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[5] Sherman, "From Loser Pays to Modified Offer of Judgment Rules: Reconciling Incentives To Settle With Access to Justice", 76 Tex. L. Rev. 1863, 1863 (1998).

[6] William W Schwarzer, Fee-Shifting Offers of Judgment--An Approach to Reducing the Cost of Litigation, Judicature, Oct.-Nov. 1992, at 147, 149-150.

before the heaviest expenses have been incurred".[7]

Federal Rule 68 provides for an offer of judgment mechanism. It "resembles the English practice, except that by its terms it is limited to court costs, generally only a fraction of attorney fees. As noted above, the rule permits a defendant at any time more than 10 days before trial to serve an offer of judgment for money or other relief and costs then accrued. If the plaintiff accepts the offer within 10 days, judgment is entered. If the plaintiff does not accept and the final judgment "is not more favorable (to the plaintiff) than the offer," it must pay the costs incurred after the making of the offer. If an offer is not accepted, a subsequent offer may be made."[8]

Federal Rule 68 was adopted in 1938, and since that time over thirty states have adopted by rule or statute an offer of judgment mechanism.[9] The Federal Advisory Committee on the Civil Rules, noted in its proposed 1983 amendment to Rule 68, that the rule "has rarely been invoked and has been considered largely ineffective in achieving its goals."[10] [11] In particular, the federal rule has been criticized as: (1) it only provides for a defending party to make an offer of judgment, (2) it only provides for the recovery of court costs, and not attorney's fees so there is insufficient incentive to utilize it, and, (3) the time to make and accept an offer is too limited to allow parties to assess whether the proposed offer should be accepted. Proposed

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[7] See Committee on Federal Rules of Civil Procedure, to the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Submitting Proposals for Amendment of the Federal Rules of Civil Procedure (Aug. 1984), reprinted in 102 F.R.D. 423, 423-24 (1984).)

[8] William W Schwarzer, Fee-Shifting Offers of Judgment--An Approach to Reducing the Cost of Litigation, Judicature, Oct.-Nov. 1992, at 147.

[9] See Solimine & Pacheco, State Court Regulation of Offers of Judgment and Its Lessons For Federal Practice,13 Ohio St. J. Dispute Resolution 51, 64 (1997).

[10] Wright, Miller & Marcus, Federal Practice & Procedure 2d, § 3001 (West Publishing, 2001).

[11] Fisher, Federal Rule 68, A Defendant's Sublte Weapon: Its Use and Pitfalls, 14 DePaul Bus. L. J. 89, 90 (Fall 2001): "Commentators claim that Rule 68 is not often utilized. More likely, its use is underreported. A Rule 68 offer that is not accepted will not be filed with the court. Thus, no reliable mechanism exists for counting the frequency of Rule 68 offers. In addition, a defendant may prefer to settle privately even though it has made a Rule 68 offer. The plaintiff usually loses nothing by settling privately and may gain additional concessions from the defendant, such as additional money for a confidentiality provision. In such situations, the parties will settle privately, outside the scope of Rule 68. While this will not be reported as a "successful" Rule 68 offer, the application of the rule was nonetheless an important force driving the settlement."

amendments to the federal rules to correct these deficiencies were not adopted. As observed by Professor Sherman:

> Although proposals for changes in Rule 68 have primarily focused on expanding it to apply to offers by plaintiffs and recovery of attorneys' fees, a number of proposals have also tinkered with the basic terms of what triggers cost shifting. One of the more interesting proposals came from the local rule experimentation fostered by the Civil Justice Reform Act of 1990 (CJRA). For example, the CJRA-generated plan adopted in 1993 by the United States District Court for the Eastern District of Texas [See Appendix B] provides that "a party may make a written offer of judgment" and "if the offer of judgment is not accepted and the final judgment in the case is of more benefit to the party who made the offer by l0%, then the party who rejected the offer must pay the litigation costs incurred after the offer was rejected." "Litigation costs" is defined to include "those costs which are directly related to preparing the case for trial and actual trial expenses, including but not limited to reasonable attorneys' fees, deposition costs and fees for expert witnesses." If the plaintiff recovers either more than the offer or nothing at trial, or if the defendant's offer is not realistic or in good faith, the cost shifting sanctions do not apply. Chief Judge Robert M. Parker reported that in the rule's first two years, hundreds of parties made offers of judgment, generally resulting in settlement at a subsequently negotiated figure. No sanctions had to be granted under the rule for failure of the offeree to have obtained a judgment less than 10% better than the offer. There is a question, however, as to whether such a local federal rule is inconsistent with Rule 68, and similar modification of Rule 68 has not been followed in other local rules. (citations omitted).

Indeed, the fifth circuit held the local rule to be invalid[12]:

> In Ashland Chemical Inc. v. Barco Inc., the Fifth Circuit held that an award of attorney's fees as litigation costs under a United States District Court for the Eastern District of Texas local rule was a substantive, rather than procedural, rule and thus required

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[12] Ashland Chemical Inc. v. Barco Inc., 123 F.3d 261, 268 (5th Cir. Sept. 1997).

> congressional approval….. The Fifth Circuit held that Congress must authorize substantive departures from the American rule, which requires each party to pay its own attorney's fees. After reviewing congressional history, as well as the Civil Justice Reform Act of 1990, the Fifth Circuit found that there was no congressional approval for the fee-shifting provision of the Eastern District's local rule. (citations omitted).[13]

The ABA proposed amendments to Federal Rule 68 are reproduced in Appendix C.

III. Propriety of Court Rule Making Power to Effectuate Fee Shifting

Is an offer of judgment rule that includes fee shifting within the rule making power of the courts? As noted above, federal rule 68 does not provide for shifting attorney's fees, only costs, so the issue has not been directly addressed in federal jurisprudence. However, the United States Supreme Court has expressed general disapproval of the judicial creation of fee-shifting provisions. Perhaps to compensate for the omission in the federal offer of judgment rule to allow for the recovery of attorney's fees, the private attorney general doctrine developed whereby federal courts could exercise their inherent equity powers to award fees "when the interests of justice so required." By 1970, intermediate court decisions permitted the recovery of fees in the absence of a fee-shifting statute by prevailing plaintiffs who "vindicated a right that (1) benefits a large number of people, (2) requires private enforcement, and (3) is of societal importance."

In Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975), however, the Supreme Court eliminated the private attorney general doctrine, holding that the federal judiciary had exceeded its authority in crafting the broad private attorney general exception to the American Rule. Justice White, writing for the majority opined that fee shifting was generally a matter within the legislative province and that federal courts could not play a role in creating substantive exceptions to the American Rule of attorneys' fees, "no matter how noble the purpose" Justice White wrote:

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[13] James M. McCown, Civil Procedure Survey, 30 Tex. Tech L. Rev. 475, 504 (1999).

> [The] rule followed in our courts with respect to attorneys' fees has survived. It is deeply rooted in our history and in congressional policy; and it is not for us to invade the legislature's province by redistributing litigation costs in the manner suggested by respondents and followed by the Court of Appeals."

Subsequently, Congress enacted a myriad of statutes allowing for the recovery of attorneys fees, some expressly providing for the recovery of attorney's fees as part of the plaintiff's costs.

One academician opines that *Aleyska* has been misinterpreted and concludes "that properly read, the rulings suggest that fee-shifting laws related to conduct triggering a cause of action are usually substantive, while fee-shifting laws related to conduct during litigation are typically procedural. Fee-shifting laws related to conduct surrounding the commencement of a lawsuit may be either substantive or procedural depending on their purpose."[14]

Attorney fee shifting has been allowed on a limited basis in federal practice. The United States Supreme Court in Marek v. Chesny, 473 U.S. 1 (1985), held that when a statute provides for an award of attorneys' fees to a prevailing party and the statute defines the fees as costs, a prevailing plaintiff who does not obtain a judgment more favorable than the defendant's offer of judgment loses the right to recover his or her attorneys' fees. In *Marek*, the successful Plaintiff lost its statutory right to recover attorney's fees as provided in the Civil Rights Attorney's Fees Award Act of 1976, due to its failure to accept an offer of judgment when the resulting judgment was less favorable and the fees were awarded as a part of costs. Thus, where the underlying statute defines "costs" to include attorney's fees, such fees, according to the majority, are to be included as costs for purposes of applying Federal Rule 68.

Justice Brennan's dissent suggests that the majority's interpretation of Rule 68 to include attorney's fees as a part of costs in these types of cases

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[14] See Parness, "Choices About Attorney-Fee Shifting Laws: Further Substance/Procedure Problems Under Erie and Elsewhere" 40 U. Pitt. L. Rev. 393 (1988).

violates the separation of powers doctrine and is beyond the judiciary's rulemaking authority. Procedural rules or interpretation of rules that abridge, enlarge or modify a substantive right of a litigant are prohibited by the Federal Rules Enabling Act. (Citing: The Conflict Between Rule 68 and the Civil Rights Attorneys' Fee Statute: Reinterpreting the Rules Enabling Act, 98 Harv.L.Rev. 828, 844 (1985)). [Texas Rules Enabling Act has substantially the same limitation.] Justice Brennan opined that "The right to attorney's fees is substantive under any reasonable definition of that term" and that while the courts have "inherent authority to asses fees against parties who act in bad faith, vexatiously, wantonly or for oppressive reasons" it may not impose a mechanical per se rue awarding attorneys fees that supplants the congressionally prescribed reasonableness standard for imposing fees in civil rights cases. Justice Brennan noted that the September 1984 revised version of Rule 68, provided for the recovery of attorney's fee but only if a court determined that "an offer was rejected unreasonably," and the proposal sets forth detailed factors for assessing the reasonableness of the rejection. It would seem that a majority of the Court would view an Offer of Judgment rule that provides for the recovery of attorney's fees due to the unreasonable rejection of an offer of judgment as proper and within the rule making authority of the court. Our subcommittee considered inclusion of this restriction, but rejected it due to concerns that any reasonableness standard would provoke satellite litigation and needlessly consume judicial resources.

In 1991 the United States Supreme Court handed down its decision in Chambers v. NASCO, Inc.,[15] limiting the scope of Aleyeska's determination that fee shifting is substantive in nature and thus must be the subject of congressional approval. The district court, in reliance of its inherent powers, sanctioned the defendant for its bad faith conduct ordering the payment to plaintiff of approximately one million dollars in attorneys' fees and expenses. The Supreme Court upheld the award recognizing the trial court's inherent powers to "assess attorney's fees when a party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons." The Court further held that when a federal court sits in a diversity case, its inherent power to use fee shifting as a sanction for bad-faith conduct is not limited by the forum state's law regarding sanctions.[16]

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[15] 501 U.S. 32 (1991).

[16] Chambers v. NASCO, Inc., 501 U.S. 32 (1991).

Two other United States Supreme Court decisions interpreting fee shifting under Rule 68 are noteworthy. In Evans v. Jeff, 475 U.S. 717 (1986), the Court expanded fee shifting under the rule holding that an offer of settlement in a class action could properly be conditioned upon the Plaintiff's attorney waiving his or her right to statutory attorney's fees. The Ninth Circuit viewed these types of offers of judgment as inherently unfair, noting the potential conflict that would exist between the plaintiff's attorney and the client. The Supreme Court, however, upheld the settlement offer as a proper offer of judgment, dismissed the conflict issue, and acknowledged "the possibility of a tradeoff between merits relief and attorney's fees." The Court in Delta Air Lines, Inc. v. August, 450 U.S. 346 (1981), held that Rule 68 fee shifting is not implicated when the judgment is for the defendant, presenting the anomaly that a plaintiff may be better off under the fee shifting provision by a take nothing judgment that a plaintiff's verdict that was less favorable than the rejected offer. Academicians suggest that "The virtue of this literal interpretation of the rule…is to prevent defendants from making token, rater than serious, offer for small amounts (say $1) in order to invoke fee shifting in every case in which there is a defendant's verdict." [17]

A necessary corollary to the debate over rule making authority that is dependent upon whether fee shifting provisions are substantive or procedural in nature, is the question as to the law that should apply when the law of another state is controlling or Erie principles are implicated in federal court. One academician has concluded that "properly read, the rulings suggest that fee-shifting laws related to conduct triggering a cause of action are usually substantive, while fee-shifting laws related to conduct during litigation are typically procedural. Fee-shifting laws related to conduct surrounding the commencement of a lawsuit may be either substantive or procedural depending on their purpose."[18]

Assuming that rule making power supports an offer of judgment rule allowing for the shifting of attorney's fees, consideration should be given to

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[17] Sherman, "From Loser Pays to Modified Offer of Judgment Rules: Reconciling Incentives To Settle With Access to Justice", 76 Tex. L. Rev. 1863, 1880-1881 (1998).

[18] See Parness, "Choices About Attorney-Fee Shifting Laws: Further Substance/Procedure Problems Under Erie and Elsewhere" 40 U. Pitt. L. Rev. 393 (1988).

the extensive legislative entrenchment in the recoverability of attorney's fees and the advisability of the court entering this arena.

IV. Pros vs Cons-Offer of Judgment Rule

Pros

Promotion of earlier settlement and serious consideration of offers to settle.

An offer of judgment rule serves to elicit realistic settlement offers early by giving parties a potential gain together with incentives for an adversary to take the offer seriously.

Settlement at an earlier stage than otherwise might occur, should lead to more dispositions of cases before the heaviest expenses have been incurred.

An offer of judgment that is not accepted, nonetheless may promote settlement on other terms.

An offer of judgment device affecting liability for post-offer fees should give parties with strong claims or defenses, who otherwise might have to yield more in negotiations than the merits seem to warrant (because of the threat of unrecoverable fees), an effective way of countering groundless opposition.

Offer of judgment rules may help fulfill a goal of remedial law, full compensation of injured plaintiffs. Rather than being limited to damages minus a large attorney's fee, a party with a strong claim who makes a reasonable, early offer seems likely to get an early settlement with relatively little fee expense or a judgment including a fee award. Similarly, a defendant could be compensated for expenses suffered because of a plaintiff's unjustified persistence.

Application of a properly constructed offer of judgment is within the rule making authority of the court and is equitable. Is it fair for a party that makes a reasonable offer to settle that is rejected to bear the post-offer costs and fees for preparing and trying the case successfully to judgment?

Criticisms of Offer of Judgment Rule

There is no preexisting procedural duty to settle. Parties who file suit do not have a duty to settle. Thus, the premise underlying an offer of judgment rule is faulty. An offer of judgment rule undermines access to the courts.

Gain from increased settlement is marginal and is offset by the complexity in applying an offer of judgment rule

Parties do not have an obligation to accurately predict the outcome of the suit.

An offer of judgment rule that shifts attorney's fees is arguably beyond the rule making authority of the court and is a matter for legislative determination. (See discussion above)

Prevailing parties should not be punished for losing a gamble or insisting on litigating a nonfrivolous claim. Offer of judgment rules are "Vegas rules" that "force a party to accept an offer of judgment, even if they reasonably believe that they are entitled to a larger judgment and even if they reasonably believe that they are entitled to adjudicate their legal claim in court--or they may gamble that they will receive more at trial than the offer, thereby risking their status as prevailing party for purposes of costs and, in some cases, attorneys' fees."[19]

Given the difficulty of predicting jury verdicts in many cases, is it illogical and incongruous to have a rule of civil procedure that punishes parties who reasonably believe that they will fare better at trial beyond that offered pre-trial?[20]

Rules of civil procedure should not punish litigants for nonfrivolous, nonvexatious, good faith pursuit of claims or defenses.

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[19] Merenstein, "More Proposals To Amend Rule 68: Time To Sink the Ship Once and For All", 184 F.R.D. 145 (1999).

[20] William W Schwarzer, Fee-Shifting Offers of Judgment--An Approach to Reducing the Cost of Litigation, Judicature, Oct.-Nov. 1992, at 147, 148-49.

Auto Policy Litigation. Will an auto policy cover the additional costs and fees under an offer of judgment rule, or must the parties pick up those fees? If the latter, is this fair when the insurer directs the defense? Further, many offers to settle are already routine under the Stowers doctrine.

What is the harm we are trying to address? Ninety-five percent of cases settle. The federal offer of judgment rule was formulated before alternate dispute resolution. Today, a large percentage of cases settle after mediation. Further, sanctions rules allow for the imposition of attorney's fees in appropriate circumstances. Why allow attorney's fees under an offer of judgment rule in cases where the parties have bona fide differences as to the value of the case: example: cases where experts advance competing damage models.

An offer of judgment rule does more than promote or encourage settlements; it coerces settlement. Proposed Rule 166b provides a hammer to the defense, will likely result in lower settlements, and harms plaintiffs of limited means disproportionately. On the other hand, plaintiffs with no assets may actually value the claim higher with the potential increased recovery under an offer of judgment rule. Instead of encouraging settlements, litigants who believe they have a strong potential for offer of judgment recovery may "dig in" and not seriously entertain future bona fide offers. [21]

The savings from settlement are not evenly distributed between the parties and the rule favors wealthier litigants.

A defendant willing to offer a particular amount to settle without a cost- (or fee-) shifting rule will offer something less under an offer of judgment. Even with a bilateral rule, the detrimental effects on plaintiffs would remain in the many cases in which the plaintiff is more risk-averse than the defendant or when a prevailing plaintiff would already be entitled to costs (or fees) in the absence of an offer of judgment rule.[22]

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[21] Merenstein, "More Proposals To Amend Rule 68: Time To Sink the Ship Once and For All", 184 F.R.D. 145,165 (1999).

[22] Merenstein, "More Proposals To Amend Rule 68: Time To Sink the Ship Once and For All", 184 F.R.D. 145,165 (1999).

VI. Issues To be Decided In Crafting an Offer of Judgment Rule

1) Time for Making Offer

a) The timing is important. Should a party be able to make an offer of judgment immediately after service of process when there has not been adequate time for discovery and to fairly evaluate clams and defenses? On the other hand, the offer should be made before trial and at such time as parties may seriously entertain settlement negotiations.
Reasonable time after discovery, after suit is filed? But no later than _____ days before trial?

Under federal rule, an offer may be made after the complaint is filed. This arguably leads to gamesmanship and does not allow for an honest evaluation of the value of the case before an offer must be responded to. It is arguably not desirable to allow an offer to be made too early in the litigation, as evidenced by the following strategies:

> Plaintiffs. "First, plaintiffs should conduct as much investigation and research as possible before filing suit. Second, plaintiffs should conduct all formal discovery as early in the case as possible. Third, when an unsatisfactory rule 68 offer is received, plaintiffs should immediately launch into intensive discovery before rejecting the offer. Fourth, when unable to evaluate an offer within ten days, plaintiffs should seek an extension of time to respond. Fifth, plaintiffs' attorneys should modify their fee arrangements in fee-shifting cases to account for the new situation created by Marek. Sixth, if a plaintiff ultimately obtains a judgment less favorable than a rejected settlement offer, the plaintiff should be prepared to argue vigorously that rule 68 does not apply."
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> Defendants. "Rule 68 allows a defendant to make an offer of judgment as soon as the complaint is filed. Defendants should take advantage of this right by making rule 68 offers as soon as possible, meaning as soon as the case can be roughly evaluated. If a defendant anticipates suit, then she should evaluate the anticipated suit and prepare a rule 68 offer to be served on the plaintiff immediately after the complaint is filed.
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> Early offers have several advantages. First, if an offer is successful (i.e., if the offer equals or exceeds the judgment finally obtained by the

plaintiff), it stops costs from accruing at the earliest possible point. Especially in fee-shifting suits, cutting off costs at the earliest possible moment will make a substantial economic difference.

Second, an early offer may catch the plaintiff by surprise before the plaintiff has had an opportunity to evaluate the case. The plaintiff may then either accept an offer that is too low or reject one that is too high, saving the defendant money in either instance. More specifically, since the plaintiff is not ordinarily entitled to responses to interrogatories or document requests until forty-five days after the complaint is served, and since the plaintiff has only ten days to respond to the offer, an early offer may force the plaintiff to accept or reject the offer before taking any discovery.

Third, if the plaintiff rejects it, the rule 68 offer will hang over the litigation like a guillotine, influencing the plaintiff's behavior in several ways." (Citations Omitted) [23]

2) The Offer

a) Apply to Plaintiffs and Defendants.
Federal rule only applies to defendants. ABA proposal applies to both plaintiffs and defendants. Proposed Rule 166b allows plaintiffs as well as defendants to make offers of judgment.

b) As to all claims.
To qualify, an offer must extend to all claims. Otherwise, piecemeal settlement would be encouraged and the purpose of the offer of judgment rule would not be fulfilled.

c) Buffer. Should the rule include a buffer or a cap?
As proposed, the rule provides offerees a 25% margin of error before they can be subjected to cost shifting. This tracks the ABA proposal. "The 75%-125% percentages that trigger cost shifting were chosen in the belief that case evaluations by parties and their attorneys often lack exact precision and that a margin of error should be accorded to offerees before imposing cost shifting." See Sherman article. The offeree who rejects a more

[23] Simon, The New Meaning of Rule 68: Marek v. Chesney and Beyond, 14 N.Y.U. Rev. L. & Soc. Change 475 (1986).

favorable offer than she receives at trial must pay the offeror's costs, including all reasonable attorney's fees and expenses incurred after the date of the offer. However, this penalty provision does not operate to shift costs to the offeree unless the final judgment is greater than 125% of the amount of the offer. Similarly, an offeror cannot recover costs unless the final judgment obtained is less than 75% of the amount of the offer.

d) Cap.
The proposal specifically limits the maximum fee award to the amount of the judgment,

e) Joint Offers. Should multiple parties be entitled to make a joint offer of judgment, and if so, may they be conditioned upon acceptance by al the parties?

- Nevada's rule provides extensive provisions regarding multi-parties.
    a) Multi-parties may make a joint offer of judgment.
    b) A party may make two or more parties an apportioned offer of judgment that is conditioned upon acceptance by all the parties.
    c) The sanctions for refusing an offer apply to each party who rejected the apportioned offer, but not to a party who accepted the offer.
    d) An offer to multiple <u>defendants</u> only applies if:
        1) the same person is authorized to decide whether to settle the claims against all defendants; AND
        2) there is a single common theory of liability against all the defendants; OR
        3) the liability of one or more of the defendants to whom the offer is made is entirely derivative of the liability of the remaining defendants to whom the offer is made; OR
        4) the liability of all the defendants to whom the offer is made is entirely derivative of the liability of the remaining defendants to whom the offer is made

e) A similar provision applies to multiple plaintiffs.

- Wisconsin requires a plaintiff suing multiple defendants under multiple theories to make separate settlement offers. Wisconsin also allows defendants who are jointly and severally liable to submit joint offers of judgments to an individual plaintiff. [24]

- ABA Proposal. When there are multiple plaintiffs or multiple defendants, this provision shall not apply unless: 1) in the case of multiple plaintiffs, the right of each such plaintiff to recovery is identical to the right of every other plaintiff and only one award of damages may be made; and 2) in the case of multiple defendants, the liability of each such defendant is joint and not several.

f) Admissability. An offer of judgment is served by the offeror upon the offeree. It is not filed with the court and is inadmissible except on the issue of costs and attorneys' fees. The court will see the offer only if the offeror puts it at issue to recover its litigation expenses.

3) Time Period for Keeping the Offer Open

Revocability of Offer. Should an offer be irrevocable for a time period? How long should an offer be open to constitute an offer of judgment?

4) Terms of the Acceptance

Should the acceptance of the offer be unconditional to be effective for purposes of cost shifting?

5) The Fee Shifting Formula

a. What Litigation Costs Should be Shifted? Costs only, costs x10, attorney's fees, some cap on recovery of attorney's fees, expert fees?

[24] January 2, 2002 Memo from Megan Cooley to Dee Kelly re Offer of Judgment.

b) Costs. Should costs include both taxable[25] and non-taxable costs?
c) Limits. Should the rule limit the offeror's recovery of costs, including attorneys' fees, to the total amount of the judgment.?

d) Fees. Plaintiff's Recovery of Contingent Fees. Ordinarily, Plaintiffs do not keep hourly time records, how would Plaintiff prove up reasonableness of fee after offer of judgment rejected by the Defense? Would a lodestar apply? Should factors for reasonable of attorney's fees be included in any offer of judgment rule?

e) Statutory Basis Exists Already for Recovery of Attorney's Fees. Does that mean a prevailing Plaintiff under the Offer of Judgment rule, gets to recover double as to those fees incurred after the Defense rejects the offer and the Plaintiff obtains a more favorable option? One option is to prohibit double recovery.

6) What is a more favorable judgment?

a) Is a more favorable judgment limited to a verdict, does it include summary judgment, or other final disposition of the case?

b) Fees and Costs incurred after the expiration of a refused offer. Should the same be excluded in determining whether a judgment is more favorable than the offer?

- Much of the comparison depends on the details and terms of the offer. (E.g. if costs and fees are independently specified in the offer)

- The Unadopted Amendments to FRCP 68 exclude costs, attorney's fees, and other items after the expiration of a refused offer.

    ? E.g. A defendant offered a lump sum of $50,000, and the plaintiff received a $45,000 judgment. The judgment would be "more favorable" to the plaintiff if the costs, attorney's fees, and other items awarded for the period before the offer expired total more than $5,000.

[25] See Allen & Ellis, "What are Taxable Costs in Texas?" 36 Houston Lawyer 14, October 1998.

- **Colorado's** rule provides that any amount of the final judgment representing interest subsequent to the date of the settlement offer should not be considered when comparing the amount of the judgment and the amount of the settlement.

- **Oklahoma** subtracts attorney's fees and costs from the judgment when calculating the difference between the offer and judgment. **Wisconsin** also compares the offer and judgment exclusive of costs.[26]

c) Should a take-nothing judgment be considered a more favorable judgment for the defendant who has made an offer that was rejected by the Plaintiff? The U.S. Supreme Court held federal offer of judgment rule does not apply to a take-nothing judgment applying the literal language of the rule. (Delta Airlines v. August). "The virtue of this literal interpretation of the rule…is to prevent defendants from making token, rater than serious, offer for small amounts (say $1) in order to invoke fee shifting in every case in which there is a defendant's verdict." On the other hand, it is ironic that a Plaintiff may fare better by a take nothing judgment than a very small judgment in its favor. A majority of the subcommittee believes that a take nothing judgment is a more favorable judgment for the Defendant.

d) Remittiturs. Should the offer of judgment rule expressly include a provision that takes into account a remittitur in determining the ultimate judgment?

e) Should an offer of judgment rule apply to cases seeking injunctive or declaratory relief[27] and, if so, how should a court compare a Rule 166b offer to the final judgment when injunctive relief has been offered or awarded?

f) Non-Monetary Relief. What constitutes a favorable judgment? We should clarify how the rule would apply in cases seeking equitable relief. Proposal:

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[26] January 2, 2002 Memo from Megan Cooley to Dee Kelly re Offer of Judgment
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[27] Rhodes v. Stewart, 488 U.S. 1, 2 (1988) (per curiam). (Obtaining a declaratory judgment does not automatically mean that a party has prevailed within the meaning of the Fees Act. Citing its "equivalency doctrine," the Court held that a plaintiff only achieves prevailing party status if the litigation affects the "behavior of the defendant towards the plaintiff.").

The terms of the offer must address all non-monetary relief. A judgment is not more favorable unless it includes substantially all non-monetary relief requested.

g) Non-Monetary and Monetary Relief. What constitutes a favorable judgment? Any offer of judgment rule should clarify how the rule would apply in cases where a party recovers one but not the other requested relief.

7) Exemptions:

a) Class Actions? Derivative suits? DTPA? Family law cases? Workers Comp?

b) Statutory Cap Damage Cases. Won't the defense (in a clear liability case) always make an offer 25% below the cap so as to shift the post-offer expense of fees and cost to the Plaintiff? Should statutory cap cases be exempted from the offer of judgment rule, or should the Defendant be required to offer the cap, before the fee shifting under an offer of judgment rule would apply?

c) Exempt action between a landlord and tenant affecting the tenant's residence. Perhaps exempt all actions brought before a justice court?

8) Withdrawal of Offers and Subsequent Offers

a) Withdrawal. Should withdrawal of an offer be forbidden within the time period during which the offer stated that it would remain open? Should the court have the discretion to permit withdrawal for good cause shown and to prevent manifest injustice?

b) Subsequent Offers. Should subsequent offers be allowed? It would seem so. Even if an offeror has locked in an offeree with an unaccepted offer, the offeror may want to improve its chances of recovery of its costs and attorneys' fees by improving the offer which thereby improves the chances of settlement, thereby fulfilling the objective of the rule.

9) Court Discretion to Deny Fee Shifting.

"The ABA proposal contains a broad discretionary grant to the court to reduce or eliminate cost shifting to avoid undue hardship, in the interest of justice, or for other compelling reason to seek judicial resolution."

Rule 166b(9)(c). Do we need a more precise standard for the court's discretion to decline to award litigation costs under the rule, other than "the amount as justice requires"?

Should parties be able to "opt out" of an offer of judgment rule? Should the court have discretion, on motion of a party, to determine that the offer of judgment rule will be inapplicable to the case at hand?

10) Collateral estoppel implications.

What are the collateral estoppel implications when a defendant offers a judgment, as to other cases involving the same incident or transaction? One option is to provide in the rule or by comment, that a judgment reached under the rule is not the basis for collateral estoppel in other proceedings.

VII. Alternative Proposals Discussed

Amend the Cost Rules.

Clarify that costs may be taxed against a prevailing party for the unreasonable rejection of an offer of judgment. Rule 131 provides that a prevailing party is entitled to costs "unless the court otherwise directs." The rule could be amended to make clear that the trial court may consider an unreasonable rejection of a settlement offer when determining whether to award costs to a prevailing party, to deny such costs, or even to award them to a losing party who made a good faith settlement offer that was unreasonably rejected. The addition of the following sentence to Texas Rule of Civil Procedure 131 is suggested:

> When a plaintiff receives less than the amount offered by a Defendant before trial, the trial court has the discretion to tax all or part of the costs against the Plaintiff.

Alternate suggestion: provide for shifting of costs under offer of judgment principles in cases in which "the judgment finally entered is not more favorable to the offeree than the rejected offer", and provide for taxation to up

to ten times taxable costs.[28]

Amend the Sanctions Rules.

Sanctions rules could be amended to provide that all offers of settlement and refusals of such offers must not be presented for any improper purpose, as well as be "warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law" and be supported by evidence obtained after a reasonable pre-offer (or pre-refusal) inquiry.[29] Alternatively, provide for shifting of attorneys' fees only when settlement offers were rejected "frivolously, in bad faith, or for an improper purpose." [30] Our subcommittee rejected this idea.

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[28] See Roy D. Simon, Jr., The Riddle of Rule 68, 54 GEO. WASH. L. REV. 1, 12-16 (1986).

[29] See Professor Burbank**,** Proposals to Amend Rule 68--Time to Abandon Ship, 19 U. MICH. J.L. REF. 425 (1986); Merenstein, "More Proposals To Amend Rule 68: Time To Sink the Ship Once and For All", 184 F.R.D. 145,165 (1999).

[30] See Roy D. Simon, Jr., The Riddle of Rule 68, 54 GEO. WASH. L. REV. 1, 12-16 (1986).

Subcommittee Recommendation

Appendix A

Revised 2/01/02

PROPOSED RULE 166b

1. <u>Definitions.</u>

(a.) "Claim" means a claim to recover monetary damages or for other relief, and includes a counterclaim, cross-claim, or third-party claim.

(b.) "Claimant" means a person making a claim.

(c.) "Defendant" means a person from whom a claimant seeks recovery of damages or other relief on a claim, including a counterdefendant, cross-defendant, or third-party defendant.

(d.) "Litigation costs" means costs actually incurred that are directly related to preparing an action for trial and actual trial expenses which are incurred after the date of the rejected offer to settle which is used to measure an award under Section 9 of this rule, including:

(1) attorneys' fees, including fees earned pursuant to a valid contingency fee contract;

(2) costs of court;

(3) reasonable deposition costs; and

(4) reasonable fees for necessary testifying expert witnesses.

(e.) "Offer to settle" means an offer to settle or compromise a claim made in compliance with Section 5.

2. <u>Applicability and Effect.</u>

(a.) This rule does not apply to:

(1) a class action;

(2) an action brought under the Deceptive Trade Practices-Consumer Protection Act (Sections 17.41 et seq., Business & Commerce Code);

(3) an action brought under the Family Code; or

(4) an action to collect workers' compensation benefits under Subtitle A, Title 5, Labor Code.

(b.) This rule does not limit or affect the ability of any person to make an offer to settle or compromise a claim that does not comply with this rule. A party's offer to settle or compromise that does not comply with subsection 5 of this rule does not entitle the party to recover litigation costs under this rule.

3. <u>Election By Governmental Units; Waiver.</u>

(a.) This rule does not apply to an action by or against the state, any unit of state government, or any political subdivision of the state unless the governmental unit expressly elects both to seek recovery of litigation costs under this rule and to waive immunity from liability for litigation costs awarded under this rule.

(b.) To be effective as an election and waiver, the governmental unit must make the election and waiver specifically and affirmatively by a writing filed with the court within 45 days of the filing of the governmental unit's original petition or original answer.

(c.) An election and waiver is effective only in the action in which it is filed, even if the action is subsequently joined or consolidated with another action.

4. <u>Service.</u> When this rule requires a writing to be served on another party, service is adequate if it is performed in a manner described in Rules 4, 5 and 21a, Texas Rules of Civil Procedure.

5. <u>Offer To Settle.</u>

(a.) A party may serve on an opposing party an offer to settle all the claims in the action between that party and the opposing party.

(b.) The offer to settle:

(1) must be in writing;

(2) must state that it is an offer to settle all claims pursuant to this section;

(3) must specify the terms by which the claims may be settled;

(4) must specify a deadline by which the offer must be accepted;

(5) may not include a demand for litigation costs except for costs of court;

(6) must offer to allow a judgment to be entered consistent with the terms of the offer; and

(7) must be served on the party to whom the offer is made.

(c.) A party may not make an offer to settle under this section after the tenth day before the date set for trial, except that a party may make an offer to settle that is a counteroffer on or before the seventh day before the date set for trial.

(d.) The parties are not required to file with the court an offer to settle.

(e.) A party may only make an offer to settle under this rule during the course of the litigation but may make successive offers to settle.

6. <u>Acceptance of Offer.</u>

(a.) A party may accept an offer to settle on or before 5:00 p.m. on the 14th day after the date the party received the offer to settle or before the deadline specified in the offer, whichever is later.

(b.) Acceptance of an offer must be:

(1) in writing; and

(2) served on the party who made the offer.

(c.) Upon acceptance of an offer to settle, either party may file the offer and notice of acceptance together with proof of service thereof, and thereupon the court shall enter judgment in accordance with the offer and acceptance except that the Court may not seal any judgment without first complying with Rule 76a, T.R.C.P..

7. <u>Withdrawing an Offer</u>

(a.) A party may withdraw an offer to settle by a writing served on the party to whom the offer was made before the party accepts the offer. A party may not accept an offer to settle after it is withdrawn. A party may not withdraw an offer to settle after it has been accepted.

(b.) If a party withdraws an offer to settle, that offer does not entitle the party to recover litigation costs.

8. <u>Rejection of Offer.</u> For purposes of this rule, an offer to settle a claim is rejected if:

(a.) the party to whom the offer was made rejects the offer by a writing served on the party making the offer; or

(b.) the offer is not withdrawn and is not accepted before the deadline for accepting the offer.

9. <u>Award of Litigation Costs.</u>

(a.) A party who made an offer to settle the claims between that party and the party to whom the offer was made may recover litigation costs provided:

(1) the offer to settle was rejected;

(2) the court entered a judgment on the claims and;

(3) if a party sought monetary damages.

(A) the amount of monetary damages awarded on the claims in the judgment is more favorable to the party who made the offer than the offer to settle the claims; and

(B) the difference between the amount of monetary damages awarded on the claims in the judgment and the amount of the offer to settle the claims is equal to or greater than twenty-five percent of the amount of the offer to settle the claims; or

(4) if a party sought nonmonetary relief, the judgment is more favorable to the party who made the offer to settle the claims.

(b.) Each element of litigation costs awarded under this rule must be both reasonable and necessary to the prosecution or defense of the action.

(c.) The court will determine the amount of "Litigation Costs" under this rule and may reduce, but not enlarge, the amount as justice requires.

(d.) The amount of litigation costs awarded against the claimant may not exceed the amount of the damages recovered by the claimant in any action for personal injury or death.

10. <u>Attorney's Fees.</u>

(a.) A party may not recover attorneys' fees as litigation costs under this rule unless the party was represented by an attorney.

(b.) If Litigation Costs are contested, the court may award additional Litigations Costs for the reasonable and necessary amount expended to pursue or dispute the claimed Litigation Costs.

11. <u>Evidence Not Admissible.</u>

(a.) Evidence relating to offers to settle is not admissible except in an action to enforce the settlement or in a proceeding to obtain litigation costs under this rule.

(b.) Except in an action or proceeding described in Subsection 11(a), the provisions of this rule may not be made known to the jury through any means, including voir dire, introduction into evidence, instruction, or argument.

Appendix B

Proposed 1984 Amendments to Rule 68 Offer of Judgment Rule Incorporating Unreasonable Rejection of Offer As Prerequisite to Recovery of Attorney's Fees.

"At any time more than 60 days after the service of the summons and complaint on a party but not less than 90 days (or 75 days if it is a counteroffer) before trial, either party may serve upon the other party but shall not file with the court a written offer, denominated as a[n] offer under this rule, to settle a claim for the money, property, or relief specified in the offer and to enter into a stipulation dismissing the claim or to allow judgment to be entered accordingly. The offer shall remain open for 60 days unless sooner withdrawn by a writing served on the offeree prior to acceptance by the offeree. An offer that remains open may be accepted or rejected in writing by the offeree. An offer that is neither withdrawn nor accepted within 60 days shall be deemed rejected. The fact that an offer is made but not accepted does not preclude a subsequent offer. Evidence of an offer is not admissible except in proceedings to enforce a settlement or to determine sanctions under this rule.

"If, upon a motion by the offeror within 10 days after the entry of judgment, the court determines that an offer was rejected unreasonably, resulting in unnecessary delay and needless increase in the cost of the litigation, it may impose an appropriate sanction upon the offeree. In making this determination the court shall consider all of the relevant circumstances at the time of the rejection, including (1) the then apparent merit or lack of merit in the claim that was the subject of the offer, (2) the closeness of the questions of fact and law at issue, (3) whether the offeror had unreasonably refused to furnish information necessary to evaluate the reasonableness of the offer, (4) whether the suit was in the nature of a "test case," presenting questions of far-reaching importance affecting non-parties, (5) the relief that might reasonably have been expected if the claimant should prevail, and (6) the amount of the additional delay, cost, and expense that the offeror reasonably would be expected to incur if the litigation should be prolonged.

"In determining the amount of any sanction to be imposed under this

rule the court also shall take into account (1) the extent of the delay, (2) the amount of the parties' costs and expenses, including any reasonable attorney's fees incurred by the offeror as a result of the offeree's rejection, (3) the interest that could have been earned at prevailing rates on the amount that a claimant offered to accept to the extent that the interest is not otherwise included in the judgment, and (4) the burden of the sanction on the offeree. "This rule shall not apply to class or derivative actions under Rules 23, 23.1, and 23.2." Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure (Sept. 1984), reprinted in 102 F.R.D. 407, 432-433 (1985).

Appendix C A.B.A. Report on Offer-of-Judgment Legislation

§1. Offer of Judgment

At any time in a suit in which the claims are for monetary damages, or where any non-monetary claims are ancillary and incidental to the monetary claims, but at least 60 days after the service of the complaint and not later than 60 days before the trial date, any party may make an offer to an adverse party to settle all the claims between the offeror and another party in the suit and to enter into a stipulation dismissing such claims or to allow judgment to be entered according to the terms of the offer.

When there are multiple plaintiffs or multiple defendants, this provision shall not apply unless: 1) in the case of multiple plaintiffs, the right of each such plaintiff to recovery is identical to the right of every other plaintiff and only one award of damages may be made; and 2) in the case of multiple defendants, the liability of each such defendant is joint and not several.

§ 2. Form of Offer of Judgment

An offer of judgment must be in writing and state that it is made under this rule; must be served upon the opposing party to whom the offer is made but not be filed with the court except under the conditions stated in § 11; must specify the total amount of money offered; and must state whether the total amount of money offered is inclusive or exclusive of costs, interest, attorney's fees and any other amount which the offeror may be awarded pursuant to statute or rule. Only items expressly referenced shall be deemed included in the offer.

§ 3. Determination of Applicability

At any time after the commencement of the action, any party may seek a ruling from the court that this rule shall not apply as between the moving party or parties and any opposing party or parties by reason of the fact that an exception to the rule exists or that one or more of the circumstances set forth in Section 11(e) for eliminating the application of the rule exists. The court, upon receiving and considering any such application, may grant the application, deny the application, or, in its discretion, defer a ruling on the application until a later time including a time after the entry of judgment. Any

moving party obtaining the relief sought under such a motion prior to judgment may not, itself, use the rule as to any opposing party to which the motion is applied.

§ 4. Time Period During Which Offer Remains Open.

An offer may state the time period during which it remains open, which in no event may be less than 60 days. An offer that states a time period of less than 60 days is an invalid offer. An offer that does not state the time period during which it remains open is deemed to remain open for 60 days, and thereafter indefinitely until 60 days before the date set for trial unless withdrawn pursuant to the provisions of § 8 in which case it shall have no further consequence under this rule.

§ 5. Extension of Time Period During Which Offer Remains Open

Upon the application of the offeree, the court may, for good cause shown, extend the time period during which an offer remains open. If the court extends the time period during which an offer may remain open, the offeror has the option of withdrawing the offer.

§ 6. Acceptance of Offer.

An offer is accepted when a party receiving an offer of judgment serves written notice on the offeror, within the time period during which the offer remains open, that the offer is accepted without qualification.

§ 7. Refusal of Offer.

An offer is deemed to be refused if it is not accepted within the time period during which the offer remains open.

§ 8. Withdrawal of Offer.

An offer may not be withdrawn, except with the consent of the court for good cause shown and to prevent manifest injustice, before the expiration of the time period during which the offer stated that it would remain open. An offer not made subject to an expressly stated time period may be withdrawn after 60 days by serving the offeree with written notice of the withdrawal and

shall have no further consequence under this rule.

§ 9. Inadmissibility of An Offer Not Accepted.

Evidence of an offer not accepted is not admissible for any purpose except in a proceeding to determine costs and attorney's fees under a statute or rule permitting recovery thereof or pursuant to an entry of judgment under § 11.

§ 10. Subsequent Offers.

The fact than an offer is made but not accepted does not preclude any party from making subsequent offers. If more than one offer made by an offeror is not accepted within the time period during which the offers remained open, and therefore are deemed to be rejected, the offeror would be entitled to seek fee- shifting under § 11(a) or (b) as to any one of such offers.

§ 11. Effect of Rejection of an Offer.

If an offer made by a party is not accepted and is not withdrawn before final disposition of the claim that is the subject of the offer, the offeror may file with the clerk of the court, within 10 days after the final disposition is entered, the offer and proof of service thereof. A final disposition is a verdict, order on motion for summary judgment, or other final order on which a judgment can be entered, including a final judgment, but a judgment based on a settlement agreement will not result in cost-shifting unless the parties expressly agree to cost-shifting rights under this rule. The court, after due deliberation and after providing the parties to the offer an opportunity to submit proposed findings, will enter judgment as follows:

(a) If a final judgment obtained by a claimant who did not accept an offer from an adverse party is not greater than 75% of the amount of the offer, the claimant offeree shall pay the offeror's costs, including all reasonable attorney's fees and expenses, but excluding expert witness fees and expenses, incurred after the date the offer was made, except that the fee award may not exceed the total money amount of the judgment. Such recovery shall be in addition to any right of the offeror to recover any other costs pursuant to statute or rule, except that the offeror may not recover twice for the same costs, attorney's fees, or expenses. If an offeree subject to attorneys fees under this rule is entitled to attorneys fees under court rule or contract, the

court shall determine the amount of those attorneys fees to which the offeree is so entitled and exclude such fees from the judgment for purposes of this subsection so that they are not available to the offeror as a set off. This subsection (a) shall not apply if the claimant offeree receives a take-nothing judgment.

(b) If a final judgment obtained by a claimant against an adverse party who did not accept an offer from such claimant is greater than 125% of the amount of the offer, the offeree shall pay the claimant offeror's costs, including all reasonable attorney's fees and expenses, but excluding expert witness fees and expenses, incurred after the date the offer was made, except that the fee award may not exceed the total money amount of the judgment. Such recovery shall be in addition to any right of the claimant offeror to recover any other costs pursuant to statute or rule, except that the offeror may not recover twice for the same costs, attorney's fees, or expenses. If an offeree subject to attorneys fees under this rule is entitled to attorney fees under court rule or contract, the court shall determine the amount of those attorneys fees to which the offeree is so entitled and exclude such fees from the judgment for purposes of this subsection so that they are not available to the offeror as a set off.

(c) In comparing the amount of a monetary offer with the final judgment, which shall take into account any additur or remittitur, the latter shall not include any amounts that are attributable to costs, interest, attorney's fees, and any other amount which the offeror may be awarded pursuant to statute to rule, unless the amount of the offer expressly included any such amount.

(d) If both the offeree and the offeror may be entitled to recovery of attorneys fees under rules or contract, the court shall determine the amount of the recovery of such attorneys' fees by either side by the application of this rule, of such other rule as may apply to the recovery of fees, the language of any contract providing for fees and general principles of law.

(e) The court may reduce or eliminate the amounts to be paid under subsections (a) and (b) to avoid undue hardship, or in the interest of justice, or for any other compelling reason that justifies the offeree party in having sought a judicial resolution of the suit rather than accepting the offer of judgment.

(f) The amount of any attorney's fees to be paid under subsections (a) and (b) shall be a reasonable attorney's fee for services incurred in the case as to the claims for monetary damages after the date the offer was made, calculated on the basis of an hourly rate which may not exceed as to the claims for monetary damages that which the court considers acceptable in the jurisdiction of final disposition of the action, taking into account the attorney's qualifications and experience and the complexity of the case, except that any attorney's fees to be paid by an offeree shall not:

(1) exceed the actual amount of the attorney's fees incurred by the offeree as to the claims for monetary damages after the date of the offer; or

(2) if the offeree had a contingency fee agreement with its attorney, exceed the amount of the reasonable attorney's fees that would have been incurred by the offeree as to the claims for monetary damages on an hourly basis for the services in connection with the case.

§ 12. Nonapplicability.

This provision does not apply to an offer made in an action certified as a class or derivative action, involving family law or divorce, between a landlord and a tenant as to a residence, or in which there are claims based on state or federal constitutional rights.

This provision for fee shifting also does not apply to any case in which attorneys fees are statutorily available to a prevailing party to insure the ability of claimants to prosecute a claim in implementation of the public policy of the statute.