

## Offers of Judgment and Rule 68:

### *The Diminished Clarity and Utility of the Rule*

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**Rule 68.** Offer of judgment and disclaimer.

(a) Offer of judgment. - 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 him for the money or property or to the effect specified in his 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 An offer not accepted within 10 days after its service shall be deemed withdrawn and evidence of the offer is not admissible except in a proceeding to determine costs.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.

(emphasis added)

## Background

- The language of Rule 68(a) is virtually identical to Federal Rule of Civil Procedure 68.<sup>1</sup>
- “The purpose of Rule 68 is to encourage settlements and avoid protracted litigation.”<sup>2</sup>
- "The purpose of Rule 68 is to significantly increase the incentives for settlement by attaching financial penalties (through a cost-shifting mechanism) to the rejection of a settlement offer that was eventually proved (by the verdict) to have been reasonable. That is, if a plaintiff turns down a settlement offer and then fails to receive a greater award at trial, the plaintiff's role in prolonging the litigation results in two negative consequences: the plaintiff is precluded from recovering his own costs and is also liable for the defendant's costs from the time the settlement offer was made."<sup>3</sup>

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<sup>1</sup> *Roberts v. Swain*, \_\_\_ N.C.App. \_\_\_, \_\_\_, 521 S.E.2d 493 (16 November 1999).

<sup>2</sup> *Scallon v. Hooper*, 58 N.C.App. 551, 554, 293 S.E.2d 843, 844, *disc. rev. denied*, 306 N.C. 744, 295 S.E.2d 480 (1982).

<sup>3</sup> Bonney, Tribeck & Wrona, *Rule 68: Awakening a Sleeping Giant*, 65 *George Washington Law Review* 379, 380 (1997).

- But Rule 68 has been a disappointment and largely ineffective because "its complexity and ambiguities make it extraordinarily difficult for either the offeror or the offeree to arrive at an informed decision on the merits of making or accepting an offer of judgment."<sup>4</sup> There have been several proposals to modify federal Rule 68 to make it more effective.<sup>5</sup>
- Nevertheless Rule 68 does become important in cases where statutes give judges authority to award attorneys fees as a part of costs--because Rule 68 has been interpreted to trump such statutes.<sup>6</sup> In *Marek v. Chesny*, the U.S. Supreme Court found that the term "costs" in Rule 68 included all costs properly awardable in an action, and that if Rule 68 was found to apply, the rule shifted those costs which included attorney fees (when attorney fees were awardable as costs).<sup>7</sup>
- North Carolina cases have followed this interpretation, i.e., finding that statutes like G.S. 6-21.1<sup>8</sup> and 42 U.S.C. Section 1988 allow an award of attorney fees as costs as that term is used in Rule 68.

## Applying Rule 68: *A Typical Fact Pattern*

<sup>4</sup> Id.

<sup>5</sup> See discussions in Schwarzer, *Fee-Shifting Offers of Judgment--an Approach to Reducing Cost of Litigation*, 76 *Judicature* 147 (1992); Mincer, *Rule 68 Offer of Judgment: Sharpen the Sword for Swift Settlement*, 25 *Univ. of Memphis Law Review* 1401 (1995); Fagg, *Montana Offer of Judgment Rule: Let's Provide Bonafide Settlement Incentives*, 60 *Montana Law Review* 39 (1999). Some of the issues addressed by these proposals are expanding Rule 68 to be an option available for both plaintiff and defendant (presently only defendants can make offers of judgment), expanding the Rule 68 definition of costs to affirmatively include attorney fees (when attorney fees are not included as costs, the remaining costs may, in many cases, amount to a relatively small amount and therefore provide minimal incentive to settle even if such costs are shifted), and clarifying the predictability of the application of Rule 68.

<sup>6</sup> *Marek v. Chesny*, 473 U.S. 1, 87 L.Ed.2d 1, 105 S.Ct. 3012 (1985).

<sup>7</sup> In *Marek v. Chesny* the Supreme Court acknowledged the argument that subjecting plaintiffs--who might otherwise be entitled to attorney fees--to the settlement provision of Rule 68 might significantly deter them from bringing suit, i.e., because plaintiffs "who reject an offer more favorable than what is thereafter recovered at trial will not recover attorney's fees for services performed after the offer is rejected." *Marek* explained: "To be sure, application of Rule 68 will require plaintiffs to 'think very hard' about whether continued litigation is worthwhile; that is precisely what Rule 68 contemplates. This effect of Rule 68 ... is in no sense inconsistent with the congressional policies underlying [the statutes allowing reasonable attorney's fees to prevailing parties]. ... We specifically noted that prevailing at trial 'may say little about whether the expenditure of counsel's time was reasonable in relation to the success achieved.' ... In a case where a rejected settlement offer exceeds the ultimate recovery, the plaintiff--although technically the prevailing party-- has not received any monetary benefits from the postoffer services of his attorney."

<sup>8</sup> G.S. 6-21.1. *Allowance of counsel fees as part of costs in certain cases*: "In any personal injury or property damage suit, or suit against an insurance company under a policy issued by the defendant insurance company and in which the insured or beneficiary is the plaintiff, upon a finding by the court that there was an unwarranted refusal by the defendant insurance company to pay the claim which constitutes the basis of such suit, instituted in a court of record, where the judgment for recovery of damages is ten thousand dollars (\$10,000) or less, the presiding judge may, in his discretion, allow a reasonable attorney fee to the duly licensed attorney representing the litigant obtaining a judgment for damages in said suit, said attorney's fee to be taxed as a part of the court costs.

Plaintiff's action against defendant is one in which a statute provides that attorney fees are awardable as costs in the discretion of the judge if plaintiff prevails. Defendant makes an offer of judgment for \$6,000 plus costs then accrued. Plaintiff's costs accrued as of the date of the offer of judgment are \$500. Plaintiff rejects defendant's offer of judgment. At trial plaintiff wins a jury verdict of \$5,000 and moves for an award of attorney fees, costs and expert witness fees; defendant moves for an award of its expert witness fees. The trial judge concludes that plaintiff's attorney fee affidavit establishes that plaintiff's post-offer attorney fees reasonably total \$3,000. The judge concludes plaintiff's expert witness costs of \$1,000 were reasonable and necessary, and that defendant's expert witness costs of \$800 were also reasonable and necessary. The judge concludes he has authority to award attorneys fees and costs to plaintiff enters judgment for plaintiff in the amount of \$9,500--which includes plaintiff's pre-offer costs (\$500) and plaintiff's post-offer costs (attorney fees of \$3,000 and expert witness fees of \$1,000). The judge denies defendant's motion for its costs. Defendant appeals.

### ***Summary***

The offer of judgment is greater than the jury verdict ( $\$6,000 > \$3,000$ )

The pre-offer costs of plaintiff need not be factored into equation<sup>9</sup> ( $\$6,500 > \$3,500$ )

The offer of judgment is less than jury verdict plus post-offer costs

--with pre-offer costs excluded ( $\$6,000 < \$9,000$ )

--with pre-offer costs included ( $\$6,500 < \$9,500$ )

Is the offer of judgment less than the "judgment finally obtained," as used in Rule 68?

- A 1982 N.C. Supreme Court case, *Purdy v. Brown*,<sup>10</sup> held that because the offer of judgment was greater than the jury verdict, Rule 68 applied and divested the trial court of the statutory discretionary authority to award to plaintiff post-offer costs, i.e., the post-offer attorney fee and expert witness fees.
- A 1995 N.C. Supreme Court case, *Poole v. Miller*,<sup>11</sup> held that Rule 68 mandated that the offer of judgment be compared not to the jury verdict but to the "judgment finally obtained"--and that the judgment finally obtained included the post-offer attorney fees and expert witness fees that the trial court included in its judgment.
- A 1999 N.C. Court of Appeals case, *Blackmon v. Bumgardner*,<sup>12</sup> held that in determining whether to award an attorney fee to plaintiff the trial court should

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<sup>9</sup> This will always be the case for offers of judgment that are for a stated amount plus "all costs then accrued." This is not the case for offers of judgment that are for a lump sum amount which amount expressly already includes "all costs then accrued." For these lump sum offers of judgment the "costs then accrued" must be determined and subtracted from the lump sum offered before it can be determined what part of the offer was compensatory (and so comparable to the jury verdict). An illustrative case is *Marryshow v. Flynn*, 986 F.2d 689 (1993).

<sup>10</sup> 307 N.C. 93, 296 S.E.2d 459 (1982).

<sup>11</sup> 342 N.C. 349, 464 S.E.2d 409 (1995).

<sup>12</sup> \_\_\_ N.C.App. \_\_\_, 519 S.E.2d 335 (5 October 1999).

consider all the circumstances of the case, including whether an offer of judgment was made and whether the offer was greater than the jury verdict.

- Another 1999 N.C. Court of Appeals case, *Roberts v. Swain*,<sup>13</sup> held that the “judgment finally obtained” (that is to be compared with the offer of judgment) “should not include any costs incurred after the offer of judgment.”

## Analysis

For Rule 68 to effectively accomplish its purposes of effectuating early settlement of litigation and discouraging frivolous litigation, without resulting in substantial collateral litigation interpreting the scope and use of the rule itself, the application of the rule should be clear, consistent and mandatory--to ensure that parties can rely on the operation of the rule to reward their attempts to settle their dispute.<sup>14</sup> The North Carolina case law needs clarification.

The rule that accomplishes the purposes of Rule 68 is the rule applied in *Purdy v. Brown*, and apparently applied in *Roberts v. Swain*. This rule follows the holding of the U.S. Supreme Court in *Marek v. Chesny*, that the determination that Rule 68 applies is made before any determination that plaintiff should receive post-offer attorney fees and if Rule 68 is found to apply then plaintiff can not receive post-offer attorney fees. Nevertheless it is difficult to square the language and apparent holdings in *Poole* and *Blackmon* with the *Purdy/Roberts* interpretation.

*Purdy* held that once Rule 68 was determined to be applicable, the trial court’s statutory discretionary authority to award post-offer costs and attorneys fees was eliminated. Because the trial court actually awarded post-offer costs and attorneys fees and the Supreme Court expressly reversed this aspect of the trial court’s judgment, the Supreme Court’s holding in this regard does not appear to be dictum as *Poole* seems to conclude. In *Poole* the Court of Appeals had held that under *Purdy*, the offer of judgment should be compared with the jury verdict. But the Supreme Court rejected this interpretation and stated that *Purdy* “did not specifically address the issue currently presented.”

*Roberts* appears to reject *Poole* on a similar basis, stating that *Poole* “did not specifically address the issue of whether the costs incurred after the offer of judgment are included in calculating the ‘judgment finally obtained.’” But *Poole* did expressly acknowledge and approve that the “judgment finally obtained” in the matter before it--that *Poole* held was the proper figure to be compared to the offer of judgment--did include “costs accrued after the offer of judgment.” This language in *Poole* is arguably not dictum.

There are also problems with applying the rule in *Poole v. Miller*, that the attorney fee issue should be resolved (tentatively?) before addressing the applicability of Rule 68.

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<sup>13</sup> \_\_\_ N.C.App. \_\_\_, 521 S.E.2d 493 (16 November 1999).

<sup>14</sup> See generally the articles cited in footnotes 3 and 5 supra.

What happens when the offer of judgment was for \$9,000, the jury verdict was for \$3,000 and the judge awards costs and attorney fees (both pre- and post-offer) of \$5,500? The judgment finally obtained is \$8,500 but even under *Poole* that is less than the offer of judgment so that plaintiff is not entitled to any post-offer costs. The judge must presumably amend the judgment to deny such costs to plaintiff--making the judgment finally obtained substantially less than the \$8,500. The "judgment finally obtained" as envisioned by *Poole* that must be compared to the offer of judgment is really a forecast of a judgment that *might* be finally obtained--rather than the literal "judgment finally obtained" that the actual language of Rule 68 appears to require. This uncertain approach is compounded if the trial court is required to consider the offer of judgment in its determination of what post-offer attorney fees the court is inclined to award--as *Blackmon* seems to direct.<sup>15</sup>

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<sup>15</sup> In *Blackmon* the Court of Appeals noted that "in exercising its discretion [in awarding attorney fees], the trial court should consider all the circumstances of the case, which include offers of settlement made by the opposing party, and the timing of those offers." The Court then noted that in this case the offers of judgment "were more than four times the amount recovered by the plaintiff at trial," so that the trial court did not abuse its discretion in denying plaintiff's motion for an award of attorney fees. *Blackmon v. Bumgardner*, \_\_ N.C.App. \_\_, 519 S.E.2d 335 (5 October 1999).