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The Seventh Circuit Clarifies the Role Rejection of Settlement Offers Plays in Determining Attorney Fee Awards

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The Seventh Circuit recently clarified an important distinction between offers of judgment under Federal Rule of Civil Procedure 68 and non-Rule 68 offers of settlement, and explained the role rejection of such offers plays in reducing statutory attorney fee awards.

Rule 68 was created to encourage settlements. It limits the "costs"—construed as including attorney fees in cases under some fee-shifting statutes—that a plaintiff can recover if the plaintiff rejected a defendant's pre-trial "offer of judgment" and ultimately received an award at trial that is not more favorable than the offer. Rule 68 thus provides a path for a defendant wishing to reduce the risk of a high fee award in certain circumstances. Once triggered, Rule 68 leaves no room for judicial discretion and bars the prevailing party from recovering any costs incurred after rejecting the defendant's offer. This is in contrast to non-Rule 68 offers of settlement, which permit courts to adjust awards of post-offer costs and attorney fees by considering the totality of the circumstances. In short, unlike with Rule 68 offers, rejecting non-Rule 68 offers does not necessarily result in a limit on recovery of attorney fees and costs.

The defendant in *Cooper v. Retrieval-Masters Creditors Bureau, Inc.*, shortly after filing its answer, made an oral offer to settle the matter for $500 in damages plus reasonable attorney fees and costs incurred up to that point. The plaintiff rejected this offer, and the case proceeded. The district court eventually granted summary judgment to the plaintiff on liability, and a jury later awarded him a total of $500 in damages. The plaintiff then sought $65,357.90 in attorney fees, which the district court largely denied, awarding only $6,845.76, or about one tenth of the fees sought. In cutting down the fee award, the district court noted that the plaintiff was only eligible to receive attorney fees incurred up to the rejection of the defendant's early settlement offer, as if the defendant had made a Rule 68 offer.

The Seventh Circuit disagreed. It stressed that courts should not treat Rule 68 offers of judgment and non-Rule 68 settlement offers as interchangeable. Rule 68's "harsh consequences" on rejected offers—a complete bar on awards of post-offer expenses and fees—may only be imposed in certain specific circumstances. Notably, to obtain the benefit of the risk aversion provided by Rule 68, a defendant's offer must be made in writing and presented to the plaintiff at least 14 days before the trial. Once a Rule 68 offer is accepted, its terms are binding on the parties. Non-Rule 68 offers, on the other hand, need not be in writing, need not be left open for any particular time, and may be amended at will. In fact, a plaintiff is permitted to accept an oral offer and then reconsider it once the offer is actually put in writing.

The Seventh Circuit thus held that Rule 68 was not applicable to the offer made by the defendant, and the district court was not permitted to apply Rule 68's automatic and mandatory bar in denying fees for the post-offer work the plaintiff's attorneys did. Rather, the question was whether the district court abused its discretion in lowering the fees in light of the totality of the circumstances. To be sure, as the court explained, even under the totality-of-the-circumstances approach, a district court may decide to award no post-offer fees. But unless Rule 68's strict cut-off for post-offer fees is triggered, the rejection of an offer cannot be the sole fact that determines the fee award. As the Seventh Circuit explained, permitting district courts to deny fees for post-offer work solely because a party rejected a non-Rule 68 offer without considering the totality of the circumstances of the case would impermissibly give defendants the benefit of Rule 68 without the corresponding safeguards Rule 68 provides to plaintiffs.

Rule 68 is a powerful tool to promote settlement in certain cases involving fee-shifting statutes. But defendants must take care to make an effective Rule 68 offer to trigger the rule's bar on awards of post-offer expenses and fees. This includes making such offers in writing. Otherwise, courts will have wide discretion to adjust awards of post-offer expenses and fees by considering the totality of the circumstances, which may not shield a defendant from footing a high fee bill.

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