Finding an Erie Conflict Where None Exists --
State Offer of Judgment Rules Overwhelmingly
Apply in Diversity Cases

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INTRODUCTION

Although its purpose is oft times exaggerated, Rule 68 of the Federal Rules of Civil Procedure (“Federal Rule 68”) is a procedural “cost-shifting” tool that was intended to apply only in limited circumstances and is interpreted rarely to shift post-offer attorneys’ fees. In contrast to Federal Rule 68’s limited scope, numerous states have passed robust offer of judgment rules that are broader in purpose than Federal Rule 68. These rules offer various penalties for failing to accept qualified offers of judgment, including the shifting or barring of post-offer attorneys’ fees, interest, double costs, prevailing party damages, and “delay” damages. This Article extends existing scholarship on the subject by providing a practical overview of the salient differences between Federal Rule 68 and many of these state rules. Based on these differences, the Article further maintains that an Erie conflict between Federal Rule 68 and most state offer of judgment rules generally should not exist.

I. FEDERAL RULE 68 AND STATE OFFER OF JUDGMENT RULES

A. Federal Rule 68 Was Intended to Be a Limited-Purpose Rule.

Federal Rule 68 was adopted in 1938, and has not been substantially changed since that time. It provides that a defendant may serve upon a plaintiff an offer to allow judgment to be taken against the defendant for a specified sum “with costs then accrued.” If the plaintiff accepts the offer within ten days, either party may file the offer of judgment and acceptance “and thereupon the clerk shall enter judgment.” If the plaintiff does not timely accept the offer of judgment and “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.”
Federal Rule 68’s *general* purpose of encouraging settlement has been stated time and again. But, the *limited* focus of the rule is more important to the *Erie* analysis. The original Advisory Committee Note is silent on the rule’s intended purpose. The Supreme Court nonetheless has had occasion to comment on the Rule’s function. In so doing, it teaches that “Rule 68 provides an additional inducement to settle *in those cases in which there is a strong probability that the plaintiff will obtain a judgment but the amount of recovery is uncertain.*”

The Supreme Court elaborated on the class of cases Federal Rule 68 most directly seeks to address:

This incentive is most clearly demonstrated by the situation in which the defendant’s liability has been established “by verdict or offer of judgment” – or perhaps by an admission – and *the only substantial issue to be tried concerns the amount of the judgment.* In that context, the opportunity to avoid the otherwise almost certain liability for costs should motivate realistic settlement offers by the defendant, and the risk of losing the right to recover costs provides the plaintiff with an additional reason for preferring settlement to further litigation.

Further demonstrating this limited purpose, one of the members of the Advisory Committee presented the rule at a symposium shortly after the rule’s issuance as “a means for stopping the running of costs *where the defendant admits that part of the claim is good but proposes to contest the balance.*”

While litigants will differ on the relative strength of their arguments (*e.g.*, when there is “a strong probability that the plaintiff will obtain a judgment”), most can spot a strong liability, low damages case. As noted by the Supreme Court, it is this slice of cases that is the prime target of Federal Rule 68, such as when an employee raises strong allegations of direct verbal discrimination by his current employer but has admittedly suffered no salary or benefit change.
B. Many State Offer of Judgment Rules Are Intended to Be Broad-Purpose Rules.

The foregoing discussion regarding the text and purpose of Federal Rule 68 confirms that the rule was never intended to apply globally in all types of cases. This slender focus differs significantly from that of many state offer of judgment rules. Review of three situations in which Federal Rule 68 is not applicable highlights these differences.

1. Federal Rule 68 is inapplicable to settlement offers made by plaintiffs.

By its express terms, Federal Rule 68 does not permit a plaintiff to make an offer of judgment and simply “has no application to offers made by the plaintiff.” Most commentators agree that this unilateral design imposes risk on the plaintiff without a parallel risk on the defendant, and the Advisory Committee notes to the 1984 proposed Federal Rule 68 amendment criticized the rule as being a “one-way street” that encourages defendants to “delay making otherwise acceptable offers until trial so that in the interim they may have the use at favorable interest rates of funds that otherwise would have been available to the offeree under an offer accepted at an earlier time.”

The following twenty-four states follow the text of Federal Rule 68 in permitting only the defending party to make offers of judgment: Alabama, Arkansas, Delaware, Hawaii, Indiana, Iowa, Idaho, Kansas, Kentucky, Maine, Massachusetts, Mississippi, Missouri, Montana, Nebraska, New York, North Carolina, North Dakota, Oregon, Rhode Island, Vermont, Washington, West Virginia, and Utah.

Opting instead to equalize the settlement process, twenty states have enacted bilateral offer of judgment rules that permit “any party” to make an offer of judgment: Alaska, Arizona, California, Colorado, Connecticut, Florida, Georgia, Illinois, Louisiana, Maryland, Minnesota, Nevada, New Jersey, New Mexico, Ohio, South Carolina, South Dakota, Tennessee, Wisconsin,
and Wyoming. Two other states – Michigan and Oklahoma – permit plaintiffs to make counter-offers once a defendant makes an initial offer, and Texas permits “any party” to make an offer once the defendant files a declaration with the court “invoking” its state offer of judgment rule. Engendered from a policy decision of the state to expand the class of cases for which the offer of judgment procedure is aimed (beyond the narrow slice of cases in which “there is a strong probability that the plaintiff will obtain judgment but the amount of recovery is uncertain”), rulemakers in twenty-three states thus have decided to give plaintiffs the same advantages as defendants to have sanctions imposed on their adverse parties.

2. Federal Rule 68 is inapplicable to prevailing defendants.

Related to this first principle, the Supreme Court has made clear that Federal Rule 68 has no application to prevailing defendants. Rather, in Delta Air Lines, Inc. v. August, the Supreme Court held that Federal Rule 68 applies only when “the plaintiff has obtained a judgment for an amount less favorable than the defendant’s settlement offer . . . It . . . is simply inapplicable [where] . . . the defendant obtained the judgment.” Delta involved race discrimination claims brought by a plaintiff-flight attendant against Delta Air Lines, Inc. as a result of the plaintiff’s termination. Following the plaintiff’s rejection of the defendant’s offer of judgment pursuant to Federal Rule 68, the plaintiff lost at trial on all claims. Affirming the district court’s denial of costs to the defendant, the Supreme Court looked to the purpose of Federal Rule 68 to conclude that, since the rule was intended to cut off only the costs afforded a prevailing plaintiff under Rule 54(d), the rule should have no application when the plaintiff does not prevail:

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 . . . Because costs are usually assessed against the losing party, liability for costs is a normal incident of defeat. Therefore . . . Rule 68 would provide little, if any, additional incentive if it were applied when the plaintiff loses.
Important to the Court’s analysis was the rule’s unilateral provision permitting only the defendant to make an offer of judgment: “[I]f the Rule operated as defendant argues [as applicable to prevailing defendants], we cannot conceive of a reason why the drafters would have given only defendants, and not plaintiffs, the power to divest the judge of his Rule 54(d) discretion.”

The anomalous situation created by an offer of judgment rule that favors non-prevailing defendants over prevailing defendants was not lost on the dissent – then-Justice Rehnquist, joined by Chief Justice Berger and Justice Stewart:

[T]he Rule must be read not only contrary to its “plain meaning” but also woefully and perversely in order to reach the conclusion that a prevailing defendant who had made an offer pursuant to Rule 68 should be placed in a worse position than one who has lost to the plaintiff and had a judgment entered against him accordingly, but for an amount less than the amount tendered under Rule 68. This is “plain meaning” with a vengeance; a vengeance which neither the Rules Committee, this Court, nor congress in their various roles in the adoption of the Rules could have contemplated.

Courts in thirteen states expressly follow the Delta Court to hold that their state offer of judgment rules are inapplicable to prevailing defendants: Alabama, Colorado, Delaware, Idaho, Indiana, Kansas, Massachusetts, Maine, Mississippi, New Mexico, New York, South Carolina, and Washington.

Finding the dissent more persuasive (and often expressly noting that it is inherently unfair to place a prevailing defendant in a worse position than a defendant having an adverse judgment entered against him), thirteen states either expressly or impliedly reject Delta: Alaska, Arizona, Arkansas, California, Connecticut, Florida, Hawaii, Michigan, Minnesota, Nevada, New Jersey, Oklahoma, and Wyoming. Of these thirteen states, all but one, Hawaii, permit any party to make an offer. The result is predictable given the centrality to Delta
of Federal Rule 68 being a “one-way street.” Consequently, while seventeen states have not addressed the applicability of their state offer of judgment rules to prevailing defendants, those states with rules permitting any party to make an offer (five of them) may be more inclined to reject Delta.

3. Federal Rule 68 is inapplicable to fee-shifting unless the underlying statute defines fees “as a part of” costs.

In Marek v. Chesny, the Supreme Court concluded that attorneys’ fees are not Federal Rule 68 “costs” unless the underlying statute expressly awards them as a part of (rather than in addition to) costs. Marek involved a section 1983 suit. Defendants made a pretrial settlement offer of $100,000, which the plaintiff rejected. After recovering $60,000 at trial, the plaintiff sought prevailing party fees pursuant to section 1988, which provides prevailing party fees to a successful plaintiff in an action brought pursuant to section 1983. Defendants argued that Federal Rule 68 precluded the recovery of fees by the plaintiff since the judgment finally obtained was less than the defendants’ pretrial offer of judgment. The Supreme Court agreed. In denying plaintiff’s post-offer prevailing party fees, the Court looked for a definition of “costs” in Federal Rule 68. Finding none, the Court determined that attorneys’ fees were intended to be included in the definition of “costs” under Federal Rule 68 in a single limited circumstance:

[Given the importance of “costs” to the Rule, it is very unlikely that this omission was mere oversight; on the contrary, the most reasonable inference is that the term “costs” in Rule 68 was intended to refer to all costs properly awardable under the relevant substantive statute or other authority. In other words, all costs properly awardable in an action are to be considered within the scope of Rule 68 “costs.” Thus, absent congressional expressions to the contrary, where the underlying statute defines “costs” to include attorney’s fees, we are satisfied such fees are to be included as costs for purposes of Rule 68.}
Unless Congress provides otherwise, therefore, only when the underlying statute defines costs as "inclusive of" attorneys’ fees (a situation rarely available in diversity of jurisdiction cases),\(^{48}\) are such fees to be included as “costs” under Federal Rule 68.\(^{49}\)

The reaction to the *Marek* decision has been described as “explosive,”\(^{50}\) and commentators predicted that the Supreme Court had awakened a “sleeping giant” by virtue of its decision.\(^{51}\) Yet, over twenty years after the decision, Federal Rule 68 only rarely has been held to shift attorneys’ fees to a defending party\(^{52}\) and the modest effect of “cost” shifting under Federal Rule 68 has been viewed as inconsequential.\(^{53}\) Perhaps telling of the perceived ineffectiveness of Federal Rule 68, less than ten years after the Supreme Court’s decision in *Marek*, a federal district court in the Eastern District of Texas found it necessary to promulgate a local offer of judgment rule that permitted fee-shifting in circumstances where a rejected offer was outside of a ten percent margin of error from the final judgment.\(^{54}\) Desiring to raise the burden associated with bringing suit, numerous states likewise have enacted offer of judgment rules that expressly permit fee-shifting (as well as the imposition of other unique sanctions). These states have made a determined decision to deter frivolous litigation, reduce the overall cost of litigation, and encourage early case evaluation in a broad class of cases.

Twenty-one states have crafted offer of judgment rules with unique penalties for refusing qualified offers of judgment.\(^{55}\) For example, in 1995, Oklahoma’s legislature enacted its offer of judgment rule, Section 1101.1, as part of overall tort reform legislation that was intended to “promote judgments without protracted litigation by furnishing additional incentives to encourage a plaintiff to accept a defendant’s offer to confess judgment and to encourage a defendant to offer to confess judgment early . . . .”\(^{56}\) Oklahoma’s Section 1101.1 differs considerably in purpose and text from Federal Rule 68, and awards “reasonable litigation costs
and *reasonable attorney fees*” to the offeror-defendant from the date of the offer (if the “judgment awarded” the plaintiff is less than the offer) and to the offeror-defendant (if the “judgment awarded” the defendant is more than the plaintiff’s counter-offer).\(^{57}\)

In 2003, as part of House Bill 4 (an overall tort reform package), Texas likewise enacted an offer of judgment rule that is described as being “far more draconian than the Federal rule.”\(^{58}\) It permits bilateral offers of judgment after the defendant “invokes” the rule (by filing a declaration with the court) and provides for the shifting of post-rejection “litigation costs,” including costs of court, *attorneys’ fees*, and reasonable expert fees, when an “offer of settlement” is rejected and the offeree suffers a “significantly less favorable judgment” (defined by a 20 margin of error from the offer).\(^{59}\)

Nineteen other states differ from Federal Rule 68 by permitting the imposition of unique penalties for a party’s rejection of qualified offers, including the: addition or subtraction of post-offer interest,\(^{60}\) imposition of double costs,\(^{61}\) shifting of attorneys’ fees,\(^{62}\) barring of prevailing party damages,\(^{63}\) blocking of “delay” damages,\(^{64}\) and/or shifting of expert fees.\(^{65}\)

This is not to say that all states part ways with Federal Rule 68’s limited scope and effect. Twenty states follow the text (and purpose) of Federal Rule 68 in substantial form: Alabama,\(^{66}\) Arkansas,\(^{67}\) Delaware,\(^{68}\) Indiana,\(^{69}\) Iowa,\(^{70}\) Kansas,\(^{71}\) Kentucky,\(^{72}\) Maine,\(^{73}\) Massachusetts,\(^{74}\) Mississippi,\(^{75}\) Missouri,\(^{76}\) Montana,\(^{77}\) Nebraska,\(^{78}\) New York,\(^{79}\) North Carolina,\(^{80}\) North Dakota,\(^{81}\) Rhode Island,\(^{82}\) Vermont,\(^{83}\) Washington,\(^{84}\) and West Virginia.\(^{85}\) Hawaii’s rule is textually the same as Federal Rule 68; however, it has been interpreted to award more robust sanctions when applicable.\(^{86}\) And, one state that has enacted an offer of judgment rule – Ohio – has made the decision *not* to adopt Federal Rule 68 or any other cost-shifting sanction because, in its rulemakers’ opinion, cost-shifting “has in the past often had a one-sided, coercive effect.”\(^{87}\)
Consequently, apart from twenty states that follow Federal Rule 68 with regard to narrow
cost-shifting; Illinois and Georgia, which have rules that have been held to be unconstitutional;
and New Hampshire and Virginia, which have not passed formal offer of judgment rules; all but
three states have promulgated offer of judgment rules that differ significantly from Federal Rule
68 regarding penalties associated with refusing a qualified offer of judgment. 88

II. THESE DISTINCTIONS BETWEEN FEDERAL RULE 68 AND STATE OFFER
OF JUDGMENT RULES SHOULD NOT RESULT IN AN ERIE CONFLICT

The first section of this Article explores salient differences between the text and purpose
of Federal Rule 68 and numerous state offer of judgment rules. The second section reviews case
law standing for the, we think, correct proposition that these differences generally should not
result in an Erié conflict with Federal Rule 68.

A. The Applicable Standard For Determining the Existence of an Erié Conflict

The Supreme Court watershed case of Erié Railroad Company v. Tompkins 89 and its
progeny govern cases in federal court based upon diversity jurisdiction and unfortunately present
a textured fabric. In reversing the holding in Swift v. Tyson that “[t]he laws of the several states”
include only state statutory and “local” law, 90 the Erié Court concluded that federal courts sitting
as state courts should apply state substantive law and federal procedural law. 91 Underlying this
conclusion were two considerations – one constitutional and one policy-oriented. The Erié Court
was troubled by what it saw as unfair outcomes resulting from unusual forum shopping tactics
(such as reincorporation in a different state), but it nevertheless confirmed that “Congress has no
power to declare substantive rules of common law applicable in a State.” 92

Post-Erié, the Court has struggled to formulate a “test” for determining whether a state
law is “substantive” for Erié purposes that accommodates these two considerations. Three
principal questions emerge from the Supreme Court’s post-Erié pronouncements, but there is no
bright-line rule or “clear criterion for deciding whether a particular state rule is ‘substantive’ for
[Erie] purposes . . . ”.93

The first Erie question asks the following: Is the relevant state law inconsistent with a valid federal rule or statute that is “on point.” As informed by post-Erie cases, only if the relevant federal rule or statute cannot be accommodated in a manner that avoids conflict with the relevant state law will the federal rule or statute control and supercede the contrary state law.94

If the federal rule or statute can be accommodated with the relevant state law, two further questions are necessary.95 (i) “Would application of the standard . . . have so important an effect upon the fortunes of one or both of the litigants that failure to apply it would unfairly discriminate against citizens of the forum State, or be likely to cause a plaintiff to choose the federal court,”96 and (ii) if applied in a diversity case, would the state rule impair an “essential characteristic” and the integrity of the federal system.97

B. State Offer of Judgment Rules Generally Do Not “Directly Collide” with Federal Rule 68

With regard to the first Erie question, if an attempt is made to accommodate important state offer of judgment interests with Federal Rule 68, as is required under Gasperini, there generally should be no “direct collision” with regard to: (i) offers made by a plaintiff under a state offer of judgment rule; (ii) awards to a prevailing defendant under a state offer of judgment rule; and (iii) the imposition of unique penalties (such as attorneys’ fees, double costs, and post-offer interest) under a state offer of judgment rule.

MRO Communications, Inc. v. AT&T Co., illustrates this principle. There, the district court awarded the defendant-telephone service provider post-offer attorneys’ fees and costs against the plaintiff-subscriber pursuant to Nevada’s state offer of judgment rule.98 Affirming, the Ninth Circuit concluded that “no underlying substantive federal statute” is applicable to the
relevant attorneys’ fee determination.\textsuperscript{99} It further held that no \textit{Erie} conflict could exist between Nevada’s offer of judgment rule and Federal Rule 68 because “Federal Rule 68 is inapplicable in a case in which \textit{the defendant} obtains judgment.”\textsuperscript{100}

In \textit{Walsh v. Kelly}, the district court of Nevada awarded the defendant costs incurred after the date of the rejected offer of judgment pursuant to Federal Rule 68, but it refused to award post-offer attorneys’ fees permitted under Nevada’s state offer of judgment rule.\textsuperscript{101} The court distinguished \textit{MRO Communications, Inc.}, as limited to cases involving a prevailing defendant. In so doing, it gave short shrift to the defendant’s request for attorneys’ fees, reasoning that Nevada’s offer of judgment rule necessarily conflicts with Federal Rule 68 because, as interpreted, Federal Rule 68 does not permit the recovery of attorneys’ fees unless the underlying substantive statute defines costs to include attorneys’ fees.\textsuperscript{102}

The upshot of the holding in \textit{Walsh} and similar holdings is that attorneys’ fees available under state offer of judgment rules (and presumably other unique remedies available under state rules) can \textit{never} be awarded in cases where Federal Rule 68 may also apply. The conclusion on which these holdings is based – that Federal Rule 68 is broad enough to occupy the state rule’s entire “field of operation” – is shortsighted. It ignores \textit{Gasperini}’s requirement that Federal Rules be interpreted to accommodate and “to avoid conflict” with contrary state rules and “important regulatory policies.”\textsuperscript{103} In this regard, Federal Rule 68 can apply and coexist with Nevada’s offer of judgment rule because the award of attorneys’ fees under this state rule is \textit{not} counter to an award of costs under Federal Rule 68 unless the underlying statute expressly prohibits the recovery of attorneys’ fees. Further case law demonstrates the application of this “accommodation” principle.
S.A. Healy Co. v. Milwaukee Metropolitan Sewerage District presented the Seventh Circuit with an opportunity to address whether the Wisconsin offer of judgment statute conflicts with Federal Rule 68. There, the plaintiff-contractor moved, under Wisconsin’s offer of judgment rule, for double costs and interest on its judgment from the date the defendant-sewerage district rejected its offer. Unlike Federal Rule 68, Wisconsin’s offer of judgment rule is bilateral and provides that if a plaintiff recovers a judgment greater than or equal to an unaccepted offer, the plaintiff “is entitled to interest at the annual rate of 12%” and double costs. The district court denied the plaintiff’s motion.

Reversing, the court of appeals had little difficulty finding no “direct conflict” between Wisconsin’s bilateral offer of judgment rule and “any rule of federal procedure” – at least insofar as it involves offers made by plaintiffs. Important to the court’s conclusion was its finding that an offer made by the plaintiff under Wisconsin’s state rule would not eliminate the right of the defendant to make an offer under Federal Rule 68:

[T]here is no inconsistency when a plaintiff’s demand rather than a defendant’s offer is in issue. Whether or not the plaintiff makes a settlement demand backed up by the threat latent in the Wisconsin rule, the defendant is free to make his own offer under Rule 68. In this case, for example, the defendant must have thought the plaintiff’s settlement demand too high because it refused the demand. Suppose it refused because its best estimate was that the plaintiff’s claim was worth only $750,000. Then it could have made a Rule 68 offer of $750,000. If the plaintiff turned it down and the case went to trial and the plaintiff won less than $750,000, the defendant would be entitled to the award of its costs under Rule 68. This would be true whether or not the plaintiff had made any demand.

The Healy opinion was cited with approval by the Supreme Court in Gasperini.

In a factually similar situation, the Eleventh Circuit applied the predecessor statute to Florida’s offer of judgment rule in order to uphold the award of attorneys’ fees to a prevailing defendant. In so doing, it rejected the plaintiff’s argument in favor of Federal Rule 68.
preemption, in part, because, Florida’s rule differed from Federal Rule 68 in that it applied to 
*prevailing defendants* and expressly permitted an award of attorneys’ fees.\textsuperscript{110}

The Seventh, Ninth, and Eleventh Circuits’ application of the state offer of judgment rules maintains a balance between appreciating Federal Rule 68’s limited purpose and respecting distinctive state offer of judgment rules.

C. **State Offer of Judgment Rules that Are Distinct from Federal Rule 68 Generally Should be Found to be “Substantive” for *Erie* Purposes.**

The two remaining *Erie* questions – whether the failure to apply the relevant state rule is likely to cause a plaintiff to choose federal court, and whether application of the relevant state rule will impair the integrity of the federal system – both pin on the “substantive” nature of a state rule.\textsuperscript{111}

On the whole, salient distinctions between Federal Rule 68 and a particular state offer of judgment rule are likely to evince a purposeful intent on the part of a state legislature to, *inter alia*, deter frivolous claims and defenses and energize early negotiations in a broad class of cases. Such a deliberate intent is more remedial than punitive – *focusing on the outcome of a case rather than the conduct of parties before a court*.\textsuperscript{112} Analyzing the effect of these state offer of judgment rules on litigation, numerous courts have found these state rules to be “substantive” for *Erie* purposes.

For example, offer of judgment rules bearing pre-judgment interest penalties have been held to be “substantive” for *Erie* purposes. In *Fauber v. KEM Transportation & Equipment Co.*, the Third Circuit affirmed the district court’s conclusion that Pennsylvania Rule 238, which cuts off a plaintiff’s right to post-offer of judgment “delay damages,” was “substantive” for *Erie* purposes and otherwise rejected the Pennsylvania Supreme Court’s “procedural” label:
While Rule 238 may have been designed to expedite the processing of litigation in Pennsylvania, its application nevertheless results in increasing the amount of damages a plaintiff can receive and a defendant must pay, over the amount of damages that would be awarded in the absence of the Rule. As a consequence, even though adopted by Pennsylvania for control of litigation in the Pennsylvania state courts, the existence of Rule 238 has a clear and undeniable effect on the monetary outcome of a suit. Its applicability in a given forum is therefore an influence on decisions of plaintiffs and defendants as to the desirability of bringing or defending litigation in that particular forum.  

The Seventh Circuit likewise held that the Wisconsin offer of judgment rule bearing double costs was “substantive” for *Erie* purposes.\(^\text{114}\)

Based largely on the outcome determinative test, the Fifth Circuit concluded that a local offer of judgment rule accompanied by a fee-shifting penalty was “substantive” for *Erie* purposes, stating that: “[U]nlike the imposition of bad-faith sanctions . . . [application of the fee-shifting penalty] *is tied to the outcome of the case* . . . [A] fee-shifting provision which permits a prevailing party . . . to recover fees embodies a substantive policy.”\(^\text{115}\)

And, the Eleventh Circuit concluded that Florida’s state offer of judgment rule, which embodies a fee-shifting mechanism, is “substantive” for *Erie* purposes.\(^\text{116}\) Indeed, this state offer of judgment rule has been applied by federal courts sitting in diversity numerous times to shift fees.\(^\text{117}\)

The conclusion of these federal appellate courts accords with the *dicta* in *Alyeska Pipeline Service Co. v. Wilderness*.\(^\text{118}\) There, the Supreme Court examined the propriety of an equitable award of attorneys’ fees under California’s private attorney general statute. The Court concluded that, absent congressional authority, the equitable award of fees was prohibited in the context of federal question jurisdiction. However, in a footnote, it elaborated on the ability of a federal court sitting in diversity to apply “a substantial policy of the state to shift or award fees.”
A very different situation is presented when a federal court sits in a diversity case. In an ordinary diversity case where the state law does not run counter to a valid federal statute or rule of court, and usually it will not, state law denying the right to attorney’s fees or giving a right thereto, which reflects a substantial policy of the state, should be followed. Prior to the decision in Erie, this Court held that a state statute requiring an award of attorneys’ fees should be applied in a case removed from the state courts to the federal courts: It is clear that it is the policy of the state to allow plaintiffs to recover an attorney’s fee in certain cases, and it has made that policy effective by making the allowance of the fee mandatory on its courts in those cases. It would be at least anomalous if this policy could be thwarted and the right so plainly given destroyed by removal of the cause to the federal courts.

**CONCLUSION**

Federal Rule 68 has been the subject of much criticism, and the Advisory Committee on Civil Rules of the Judicial Conference of the United States has noted that the rule is “rarely . . . invoked and has been considered largely ineffective in achieving its goals.” Thus, it is not surprising that many states have recognized the need for and enacted wide-ranging offer of judgment rules that embody penalties distinct from those found in Federal Rule 68.

Indeed, while legal literature is rife with proposals to amend Federal Rule 68, and Congress has considered legislation to create a bilateral offer of judgment rule in diversity cases that would impose post-offer costs and attorneys’ fees, the only textual movement we have witnessed regarding offers of judgment has originated with state lawmakers. These state rules are the result of thoughtful enactments addressing classes of cases that move beyond those addressed by Federal Rule 68. The existence of an *Erie* conflict between these state rules and Federal Rule 68 should, therefore, generally be a textual impossibility.

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1 Prelim. Draft of Prop. Amend. to Fed. Rules, 102 F.R.D. 407, 433 (Sept. 1984) (“The rule, which has been amended twice but only in minor respects, rarely has been invoked . . . .”). The full text of Federal Rule 68 reads as follows:

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 of 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, 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.


3 Federal Rule 68.


6 Id. at 352 n.9.

7 Institute on Federal Rules at 337 (emphasis added); id. (“This rule is based upon statutes which are widely prevalent in the states, and it affords a means for stopping the running of costs where the defendant admits that part of the claim is good but proposes to contest the balance.”).


See generally App. for specific statutory information.

The offer of judgment rules in Georgia and Illinois have been held to be unconstitutional. Further, although Ohio permits offers of judgment to be made, its lawmakers have expressly recognized that they disagree with any kind of cost or fee-shifting penalty. Two states New Hampshire and Virginia do not have offer of judgment provisions. Cf. G.200313, LLC v. Town of Weare, 903 A.2d 1007, 1010 (N.H. 2006) (discussing New Hampshire's "longstanding policy of promoting settlement" and applying "the unsuitable exercise of discretion standard to our review of the trial court's approval of the consent decree . . ."). And, Pennsylvania's offer of judgment provision merely cuts off "delay damages" as an offer of judgment penalty; it does not shift costs or fees.


See e.g., Advisory Cmt. to 1984 Amendment to Tennessee R. of Civ. Proc. 68 (describing the amendment as necessary "to give [ ] the plaintiff the same advantage as that given the defendant under prior text"); see also Crawford v. Amadio, 932 P.2d 1288, 1293 n.2 (Wyo. 1997) (discussing 1995 amendment to permit "any party" to make an offer).

Delta Air Lines, Inc., 450 U.S. at 351-52 (emphasis added); Louisiana Power & Light Co. v. Kellstrom, 50 F.3d 319, 333 (5th Cir. 1995) (noting that "[i]f a plaintiff takes nothing, however, Rule 68 does not apply").

Delta, 450 U.S. at 352 (emphasis added).

Id. at 354 (emphasis added).

Id. (emphasis added).

See Ex parte Waterjet Sys., Inc., 758 So. 2d 505 (Ala. 1999) (final judgment in the plaintiff-offeree's favor in an amount less than defendant's offer is a prerequisite to the plaintiff-offeree's liability for costs under the offer of judgment statute); 2 Ala. R of Civ. Proc. Ann. Rule 68.2 Author's Cmts. Further, Alabama courts have interpreted the rule to apply only in cases that go to trial. See Denson v. Bear, Stearns Sec. Corp., 682 So. 2d 69, 71 (Ala. 1996) ("The purpose of Rule 68, as noted in the comments to the rule, is to ensure that a party accept or reject an offer at least 15 days before trial, so that a party will not make preparations for a trial that will never be held. This case did not go to trial; therefore, Rule 68 is not applicable.").

While courts have awarded costs under the state offer of judgment statute to a prevailing defendant, see Mallon Oil Co., 940 P.2d at 1059, 1062-63, the Colorado court of appeals has expressly adopted the reasoning of the United States Supreme Court in Delta. See Coldwell
Banker Comm. Group v. Hegge, 770 P.2d 1297, 1299-1300 (Colo. Ct. App. 1988) ("[A]lthough the Supreme Court’s interpretation is not controlling here, we find it persuasive … [t]here is … no reason to extend the rule to apply to prevailing defendants because they would generally recover costs under Fed. R. Civ. P. 54(d).”).


21 See Jones v. Berezay, 815 P.2d 1072, 1075 (Idaho 1991) (“We find the analysis of the Supreme Court in Delta Air Lines persuasive.”).

22 See Ingram v. Key, 594 N.E. 2d 477, 479 (Ind. Ct. App.) (“We agree with the Delta majority. By its terms, T.R. 68 clearly does not apply to situations where the offeror (defendant) has prevailed upon the merits.”), aff’d, 600 N.E.2d 95, 96 (Ind. 1992).

23 Section 60-2002 “should not apply when a verdict is returned in favor of the defendant, even though the defendant may have made an unaccepted offer of judgment.” 7 Kan. Law & Prac. Trial Handbook §39:8 (2d ed.) (citing Delta Airlines, Inc. v. August, 450 U.S. 346, 352-55 (1981)).

24 See Baghdady v. Lubin & Meyer, P.C., 770 N.E.2d 513, 520 (Mass. Ct. App. 2002) (“We see no compelling reason or significant difference in content that would oblige us not to follow Delta Air Lines, Inc., and therefore we are guided by the United States Supreme Court’s interpretation of the rule.”).

25 See Fuller v. State of Maine, 490 A.2d 1200, 1202 (Me. 1985) (citing Delta with approval and stating “[t]he purpose of the federal rule, from which the Maine rule derives, is to promote settlement and avoid protracted litigation”); see also Arsenault v. Crossman, 696 A.2d 418, 421-22 (Me. 1997) (dissent citing Delta as standing for the proposition that “Rule 68 does not apply when plaintiff recovers nothing at trial”) (emphasis added).

26 See Fiddle, Inc. v. Shannon, 834 So.2d 39, 47 (Miss. 2003) (“[T]he trial court did not err in denying the motion since there was no judgment obtained by [the plaintiff] to trigger the Rule 68 cost-shifting procedure.”) (citing Delta Air Lines, Inc. v. August, 450 U.S. 346 (1981), with approval).

27 Courts in New Mexico have adopted the United States Supreme Court’s Delta holding that “the Rule does not apply where a judgment is entered in the defendant’s favor.” See Apodaca v. AAA Gas Co., 73 P.3d 215, 245 (N.M. Ct. App. 2003).

28 Federal Rule 68, as written in 1938, was modeled on three state statutes – including New York. See Delta, 450 U.S. at 357-58. In this regard, New York courts, in cases that predate both Delta and Federal Rule 68’s enactment, extend the application of its state offer of judgment rule to cases when only the plaintiff is successful. See Fowler v. Dearing, 6 A.D. 221, 222 (N.Y. 1896) (state rule applies only when “a successful plaintiff who has refused a defendant’s offer of judgment” recovers less than the offer) (emphasis added).
See Black v. Roche Biomedical Lab., 433 S.E. 2d 21, 23-24 (S.C. Ct. App. 1993) (agreeing with the Supreme Court in Delta and holding that “because [state] Rule 68 was amended to comply with prior practice, we conclude it applies only when the plaintiff obtains a judgment in his favor in an amount less than was offered by the defendant”).

The cost-shifting mechanism of CR 68 operates only when the plaintiff receives a judgment for some amount of money, which is less than offered by the defendant. Although the result may be counterintuitive, the courts have held that if the defendant wins the case (i.e., the plaintiff takes nothing), CR 68 is out of the picture and the plaintiff’s refusal to accept the offer has no effect.” 15 WASH. PRAC. CIV. PRO. §53.9; see also Hodge v. Development Serv. of Am., 828 P.2d 1175 (1992) (in the absence of state authority, Washington courts will look to the federal interpretation of FRCP 68).

In an opinion that predates the U.S. Supreme Court’s holding in Delta, the Supreme Court of Alaska held that a prevailing defendant may recover costs under the state offer of judgment statute. See Wright v. Vickaryous, 611 P.2d 20, 23 (Ak. 1980) (“[plaintiff] contends that Civil Rule 68 does not apply since it operates only when the offeree obtains judgment in his favor … We see nothing to recommend such a result, and thus reject the interpretation offered by [plaintiff]”); see also Kellis v. Crites, 20 P.3d 1112 (Ak. 2001).


Darragh Poultry & Livestock Equip. Co., 743 S.W. 2d at 805 (“We decline to follow the reasoning expressed in Delta.”).

See e.g., Culbertson v. Werner, 190 Cal. App. 3d 704, 710-11 (4th Dist. 1987) (jury verdict of no liability (in favor of defendant) did not preclude the award of costs to defendant); see also Thompson v. Miller, 112 Cal. App. 4th 327 (Ct. App. 2003).


Section 768.79 was amended in 1990, in part, to ensure that, unlike the federal rule, defendants could recover under the statute in the event of a “no liability” finding. See MX Invest., Inc. v. Crawford, 683 So.2d 584, 586 n.2 (Fla. 1st Dist. Ct. App. 1996).

Although Hawaii’s offer of judgment rule only permits the defending party to make an offer, it has been interpreted to apply to prevailing defendants. See Kikuchi v. Brown, 130 P.3d 1069, 1074 (Haw. App. 2006) (“We therefore hold that HRCP Rule 68 does apply where the judgment is in the defendant-offeror’s favor as it too can represent a judgment that is not more favorable to the offeree than the offer.”).

Prevailing defendants may benefit from Michigan’s offer of judgment rule, but a “verdict” within the definition of the rule is a prerequisite. See Freeman v. Consumers Power Co., 437 Mich. 514, 519 (1991) (holding that a “verdict” does not include an order on summary disposition for purposes of the state offer of judgment rule); cf Auto Club Ins. Ass’n v. General

39 See, e.g., Bucko v. First Minn. Sav. Bank, F.B.S., 471 N.W.2d 95 (Minn. 1991) (plaintiff required to pay prevailing defendant’s costs and disbursements).

40 Beattie v. Thomas, 668 P.2d 268, 274 n.5 (Nev. 1983) (expressly disagreeing with the Supreme Court’s Delta holding that only a prevailing plaintiff may recover costs).

41 While the rule does not permit “allowances” to be granted if a “no cause” verdict is returned, the rule does, by omission, permit cost-shifting if a “no cause” verdict is returned.


44 New Hampshire and Virginia do not have formal offer of judgment rules. See generally App. Further, the offer of judgment rules in Illinois and Georgia have been held to be unconstitutional. See Fowler Prop., Inc. v. Dowland, 646 S.W.2d 197, 198 (Ga. 2007); Allen v. Woodfield Chev., Inc., 802 N.E.2d 752, 756 (Ill. 2003); cf. Giles v. GM Corp., 802 N.E.2d 858, 860-61 (Ill. Ct. App. 2003) (GM filed a motion for involuntary dismissal based upon its offer of judgment in full satisfaction). Finally, Ohio does not permit cost-shifting; Pennsylvania only cuts off “delay damages” as a result of its offer of judgment rule (rather than shifting any costs to an adverse party); and Texas caps any “litigation costs” shifting to an amount less than the sum of any recovery by the plaintiff. See generally App. (discussing VERNON’S CIV. PRACT. & REM. CODE §§ 42.001 et seq. and TEX. R. CIV. P. 167, OHIO R. CIV. P. 68, and PENN. R. CIV. P. 238).

45 Indeed, although Tennessee courts have not decided whether Tennessee’s offer of judgment rule applies to prevailing defendants, a local treatise notes Delta’s likely inapplicability to a bilateral offer of judgment rule. See 4 TENN. PRACT. RULES OF CIV. PRO. ANN. §68:1 (2007-2008) (“Tenn. R. Civ. P. 68 is substantially the same as the first part of Fed. R. Civ. P. 68, except that the Tennessee rule permits either party to tender an offer of judgment … The United States Supreme Court has construed Fed. R. Civ. P. 68 as allowing costs to the offering party only if the final judgment is in favor of the offering party … Central to the Supreme Court’s reasoning, however, was that Fed. R. Civ. P. 68 gives only the defendant the opportunity to make an offer.”) (emphasis added). Four other states that are undecided regarding the applicability of their offer of judgment rule to prevailing defendants have enacted bilateral offer of judgment provisions: Louisiana, Maryland, South Dakota, and Wisconsin. Of the remaining twelve states in which the applicability of their state offer of judgment rules to prevailing defendants remains an open question, ten have enacted offer judgment provisions that track Federal Rule 68 in substantial form and courts within four of these states have expressed an intention to follow federal precedent regarding their offer of judgment rule. See, e.g., Aikens v. Ludlum, 440 S.E.2d 319,
North Carolina decisions addressing Rule 68 are guided by federal law since the North Carolina version of Rule 68 is virtually identical to its United States counterpart; Burgess v. Am. Express Co., 2007 WL 1971516, at *2 (N.C. Sup. Ct. 2007) (stating that “whether AMEX [defendant] would be entitled to recover its costs in this case pursuant to Rule 68 remains an open question,” but denying costs as a result of the Supreme Court’s Delta decision); see also Jundt v. Jurassic Resources Dev., N.A., L.L.C., 677 N.W.2d 209, 214 (N.D. 2004) (“Because of that similarity, we may consider federal precedent . . . .”) (internal quotation omitted) (citing Delta Air Lines, Inc. with approval); Rule v. Tobin, 719 A.2d 869, 871 (Vt. 1998) (“Because our rule is identical to the federal rule, we look to the Federal cases interpreting the Federal Rule as an authoritative source for the interpretation of our rule.”) (internal quotations and citation omitted); Williams v. Precision Coil, Inc., 459 S.E.2d 329, 335 n.6 (W. Va. 1995) (“The West Virginia Rules of Civil Procedure practically are identical to the Federal Rules. Therefore, we give substantial weight to federal cases . . . in determining the meaning and scope of our rules.”); Meadows v. Wal-Mart Stores, Inc., 530 S.E.2d 676, 693 (W. Va. 1999) (“W. Va. R. CtV. P. 68 . . is based upon and almost identical to Rule 68 of the Federal Rules of Civil Procedure.”).

46 473 U.S. 1, 23 (1985).

47 Marek, 473 U.S. at 9 (emphasis added).


49 See Marek, 473 U.S. at 44-48 (listing 63 federal statutes that expressly refer to attorneys fees as a part of “costs” and 49 that refer to attorneys’ fees as separate from “costs”). Compare Wilson v. Nomura Sec. Intern., Inc., 361 F.3d 86, 93 (2d Cir. 2004) (former employee that accepted offer of judgment that was inclusive of “all costs available under all local, state, or federal statutes accrued to date” was not entitled to thereafter recover attorneys’ fees in connection with his Title VII claim because Title VII expressly includes attorneys’ fees within its definition of “costs”), and Jordan v. Time, Inc., 111 F.3d 102, 105 (11th Cir. 1997) (post-offer attorneys’ fees recoverable under The Copyright Act), with Crossman v. Marcoccio, 806 F.2d 329, 330 (8th Cir. 1986) (shifting of fees prohibited under 42 U.S.C. § 1983), Sheppard v. Riverview Nursing Centre, Inc., 870 F.3d 1332 (1994) (statute governing attorneys’ fees in Title VII mixed motive case were not “costs” for purposes of Rule 68 because statute provides for recovery of “attorneys fees and costs”), Arencibia v. Miami Shoes, Inc., 113 F.3d 1212, 1214 (11th Cir. 1997) (“Because § 16(b) of the FLSA does not define ‘costs’ to include attorneys’ fees, the district court erred . . . .”), Haworth v. St. of Nevada, 56 F.3d 1048, 1051 (9th Cir. 1995) (“The FLSA statute differs . . . with regard to its fee-shifting provision. The FLSA statute defines attorney fees separately from costs. Therefore . . . . attorney fees in an FLSA action are not automatically shifted by Rule 68.”) (emphasis added), and Baum v. City of Rockland, 25 F.R.D. 470 (C.D.N.Y. 2004) (because ADEA does not define “costs” to include attorneys’ fees, the rule is not pertinent as to them).


See supra n. 49; see also Solimine, “State Court Regulation of Offers of Judgment and Its Lessons for Federal Practice,” 13 OHIO ST. J. ON DISP. RESOL. at 61-62.


See Friends of the Earth v. Chevron Chemical Co., 885 F. Supp. 934 (E.D. Tex. 1995) (upholding validity of this local rule on basis that the Civil Justice Reform Act of 1990 permits local deviation from the Federal Rules); see also Comment, “The Offer You Can't Refuse: Offers of Judgment in the Eastern District of Texas,” 46 BAYLOR L. REV. 1075 (1994). The Fifth Circuit invalidated the local rule as being a substantive act beyond the rule-making authority of the district court, see Ashland Chem. Inc. v. Barco Inc., 123 F.3d 261 (5th Cir. 1997), but the rule was said to have had a positive effect on settlement. See Sherman, “From Loser Pays to Modified Offer of Judgment Rules: Reconciling Incentives To Settle With Access to Justice,” 76 Tex. L. Rev. 1863 (1998) (“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 substantially negotiated figure. No sanctions had to be granted under the rule for failure of the offeree to have obtained a judgment less than 10 percent better than the offer.”).

See generally App. (detailing unique penalties and terms from Alaska, Arizona, California, Colorado, Connecticut, Florida, Idaho, Louisiana, Maryland, Michigan, Minnesota, Nevada, New Jersey, New Mexico, Oklahoma, Pennsylvania, South Carolina, Texas, Utah, Oregon, and Wisconsin).

Hopkins, 146 P.3d at 866.


Elaine A. Carlson, “Fee Shifting in Texas,” JOURNAL OF TEXAS CONSUMER LAW at 36 (2003). Over a year before the Texas Supreme Court Advisory Committee was asked to draft implementing Rule 167, it rejected a proposal (spearheaded by Lieutenant Governor Bill Ratliff) to enact a state cost-sharing mechanism. See Mary Alice Robbins, “Committee Votes Against Offer-of-Judgment Proposal,” TEXAS LAWYER. Texas’ rule appears to be severely compromised by a cap on the “litigation costs” at an amount less than the plaintiff’s monetary recovery.

See generally App. (discussing VERNON’S CIV. PRAC. & REM. CODE § § 42.001 et seq. and TEX. R. CIV. P. 167).

For example, in Connecticut, if the plaintiff makes an offer that is not accepted and, after trial, recovers “an amount equal to or greater than the sum certain” in the plaintiff’s offer, (i) eight...
percent interest “shall” be added (either from the date of filing (if the offer was filed not later than 18 months) or the date the offer was filed (if the offer was filed after 18 months)), (ii) costs, and (iii) in the court’s discretion, reasonable attorney’s fees under $350.00. See CONN. GEN. STAT. ANN. § § 52-192a, 52-195. Pennsylvania, New Jersey, South Carolina, and Wisconsin also have offer of judgment provisions that permit the addition and/or subtraction of interest. In Pennsylvania, “delay damages” typically awarded to a prevailing plaintiff are cut off if the plaintiff’s recovery – “whether by award, verdict or decision” – is less than 125% of the defendant’s offer. See Fauber v. KEM Transportation & Equip. Co., 876 F.2d 327, 332 n.15 (3d Cir. 1989) (describing the delay damages provision as having the “purpose of encouraging settlement and reducing forum congestion and delay”). In New Jersey, the plaintiff-offeror is entitled to 8% pre-judgment interest from date of offer or completion of discovery (whichever is later) if he recovers a money judgment that is 120% of the offer or more. N.J. Ct. Civ. R. 4-58-1 – 4-58-5. In South Carolina, 8% addition will be computed on the amount of the verdict or award is at least as favorable as the rejected offer of the defendant or 8% reduction will be computed on the amount of the verdict or award if it is below the defendant’s offer. See Black v. Roche Biomedical Lab., 433 S.E. 2d 21, 23-24 (S.C. Ct. App. 1993). In Wisconsin, a party that recovers greater than or equal to an unaccepted offer of that party is entitled to 12% interest. See Dewitt Ross & Stevens v. Galaxy Gaming & Racing Ltd., 682 N. W.2d 839, 845 (Wis. 2004) (“If a party makes an offer that conforms to Section 807.01, that offer is rejected, and the offeror recovers a more favorable judgment, then costs may be shifted or doubled, and prejudgment interest may be imposed.”).

61 In Arizona, an offeree “must pay, as a sanction,” reasonable expert witness fees, double the taxable costs, and prejudgment interest on unliquidated claims from date of offer if “the judgment finally obtained is equal to, or more favorable to the offeror than, the offer.” 16 ARIZ. REV. STAT. ANN., Rule 68. In New Mexico, the defendant must pay the plaintiff’s costs, excluding attorney’s fees, including double the amount of costs incurred after the making of the offer, if the judgment finally obtained by the plaintiff-offeror is more favorable than the offer. N.M.R. Civ. P. 1-068. In Wisconsin, the plaintiff shall recover double the taxable costs if the defendant-offeree fails to accept the plaintiff’s offer and the plaintiff recovers a more favorable judgment. Wis. STAT. ANN. § 807.01.

62 As stated, Oklahoma and Texas mandate the award of reasonable attorneys’ fees. Likewise, offer of judgment rules in Alaska, Michigan, Florida, Nevada, and New Jersey expressly permit the recovery of reasonable attorneys’ fees. In Alaska, “reasonable actual attorney fees” “shall” be made as follows: (i) 75% if offer was served no later than 60 days after disclosures; (ii) 50% if offer was served more than 60 days after disclosures but more than 90 days before trial; or (iii) 30% if offer was served less than 90 days but less than 10 days before trial. Ak. STAT. ANN. § 09.03.065 (West 2006); Ak. R. Civ. P. 68. New Jersey’s rule previously imposed a $750.00 cap on attorneys’ fees. “The revised rule [revised in 1994] abolished the cap outright. By allowing for substantial cost shifting, the revised rule provides a more credible inducement for litigants to settle.” Albert Yoon & Tom Baker, “Offer-of-Judgment Rules and Civil Litigation: An Empirical Study of Automobile Insurance Litigation in the East,” 59 VAND. L. Rev. 155, 159 (Jan. 2006). Under the revised rule, the plaintiff shall be entitled to reasonable attorneys’ fees if the money judgment recovered is 120% or more of his or her offer. N.J. Ct. Civ. R. 4-58-1 – 4-58-5. Further, the defendant is entitled to reasonable attorneys’ fees if the plaintiff fails to
recover a money judgment that is more than 80% of the defendant’s offer. However, fees are not to be granted if “(i) the claimant’s claim is dismissed, (ii) a ‘no cause’ verdict is returned, (iii) only minimal damages are awarded, (iv) a fee allowance would conflict with the policies underlying a fee-shifting statute or rule of court, or the allowance would impose an ‘undue hardship.’” Florida has two rules that govern offers of judgment. See Fla. Stat. Ann. § 768.79; Fl. R. Civ. P. 1.442. However, Rule 1.442 simply provides a mechanism for implementing Section 768.79. It was reconciled with Section 768.79 in 1996, and, as amended, it permits the inclusion of conditions. See Gary M. Pappas & Joye B. Walford, “Proposals for Settlement,” 76 FLA. B. J. 69, 70 (Dec. 2002). Florida’s offer of judgment rule is extremely broad and mandates the award of attorneys’ fees unless the qualifying offer was not made in good faith. See TGI Friday’s, Inc. v. Duorak, 663 So.2d 606, 611-12 (Fla. 1995) (the court can deny fees under 768.79 “only if it determines that a qualifying offer ‘was not made in good faith’ . . . [t]hat is the sole basis on which the court can disallow an entitlement to an award of fees”). If an offer is rejected in Michigan, its offer of judgment rule provides that: (i) the offeree must pay actual costs to the offeror if the “adjusted verdict” is more favorable to the offeror than the “average offer,” and/or (ii) the offeror must pay to the offeree his/her actual costs if the “adjusted verdict” is more favorable to the offeree than the “average offer” and the offeree made a counter-offer or an offer was made less than 42 days before trial. See Schuitmaker v. Krieger, No. 233944, 2003 WL 1950238, at *8-9 (Mich. Ct. App. Apr. 24, 2003) (“The fact that plaintiff may have proceeded to trial in good faith does not excuse liability for fees when she knowingly denied the offer at the risk of having to pay those fees . . . To conclude otherwise would be to expand the ‘interest of justice’ exception to the point where it would render the rule ineffective.”) (internal citation and quotation omitted); cf. Derderian v. Genesys Health Care Sys., 689 N.W.2d 145 (Mich. Ct. App. 2004) (“MCR 2.405(A)(6) defines ‘actual costs’ as ‘the costs and fees taxable in a civil action and a reasonable attorney fee for services necessitated by the failure to stipulate to the entry of judgment,’” but “MCR 2.405(D)(3) limits application of the interest of justice exception to the attorney fee portion of the ‘actual costs.’”). Finally, Nevada permits the court, within its discretion, to award attorneys’ fees. See Chavez v. Sievers, 43 P.3d 1022, 1027 (Nev. 2002) (“Whether to award attorney fees, pursuant to NRCP 68 and NRS 17.115, lies within the discretion of the district court.”); see also Beattie v. Thomas, 668 P.2d 268, 274 n.5 (Nev. 1983) (“NRCP 68 expressly includes attorney’s fees, while FRCP 68 applies only to costs. Thus, NRCP 68 provides an additional incentive to settle.”).

63 In Oregon, if the claimant fails to accept and “fails to obtain a more favorable judgment,” the claimant “shall not recover costs, prevailing party fees, disbursements or attorney fees incurred after the date of the offer.” Or. R. Civ. P. 54.

64 In Pennsylvania, a written offer of settlement by defendant – to remain open for 90 days or the commencement of trial, whichever is first – will cut off “delay” damages to plaintiff if the plaintiff’s recovery – “whether by award, verdict or decision” – is less than 125% of such offer. PENN. R. CIV. P. 238. “Delay” damages equal the prime rate as listed in the first edition of the WSJ published for each calendar year for which damages are awarded, plus one percent, not compounded. Id.

65 In California, cost and fee shifting (including a discretionary award of expert fees incurred from the inception of litigation) applies if the plaintiff “fails to obtain a more favorable judgment
or award.” Cal. Code of Civ. P. § 998; see Carver v. Chevron USA, Inc., 118 Cal. Rptr. 2d 569 (App. 4 Dist. 2002) (no abuse of discretion to award oil company $1,966,586 in expert fees). In Minnesota the offeree must pay all the offeror’s costs and disbursements (not just post-offer) if the judgment finally entered is not more favorable to the offeree than the offer. See Vandenheuvel v. Wagner, 673 N.W.2d 524 (Minn. Ct. App.), aff’d, 690 N.W.2d 753 (2004); see also Advisory Comm. Note (“The principal effect of making an offer of settlement under Rule 68 is to shift the burden of paying costs properly taxable under Minn., R. Civ. P. 54.04.”); Bellboy Corp. v. Richmond Ltd., 2006 WL 290306, at *2 (Minn. Ct. App. 2006) (legal research is a component of attorneys’ fees and not compensable); Collins v. Minn. Sch. of Bus., Inc., 655 N.W.2d 320 (Minn. 2003) (fees recoverable only if underlying statute allows). Other states’ rules also differ from Federal Rule 68 in that the permitted “costs” is expanded far beyond that generally permitted under 28 U.S.C. 1920 and interpretive case law. See 28 U.S.C. § 1920 (nonexhaustive list of taxable costs includes clerk fees, court reporter fees “necessarily obtained,” witness fees, printing and copies “necessarily obtained,” docket fees, and fees for court-appointed experts and interpreters); cf. Col. Rev. Stat. Ann. §13-17-202 (offer of judgment rule defines “costs” to include, inter alia, legal research fees, travel expenses, visual aid preparation expenses, and “all other similar fees and expenses”); see also Mallon Oil Co. v Bowen/Edwards Assoc., Inc., 940 P.2d 1055, 1062 (Colo. Ct. App. 1997) (“To award costs under the statute: (1) the costs must have accrued after the settlement offer, (2) they must be actual costs, excluding attorney fees, and (3) the costs must be reasonable.”).


67 “With the exception of one minor change, Rule 68 is otherwise identical to FRCP 68.” Rptrs. Notes to Ark. R. Civ. P. 68. However, case law requires a “bona fide” offer. See Darragh Poultry & Livestock Equip. Co. v. Piney Creek Sales, Inc., 743 S.W.2d 804 (Ark. 1988).

68 Adams v. Nationwide Ins. Co., No. 28-10-85, 1986 WL 716911, at *2 (Del. Com. Pl. 1986) (“Since § 1402 [the underlying statute] includes attorney’s fees as a ‘part of costs,’ a Rule 68 offer of judgment providing for ‘costs then accrued’ must be read to include ‘costs and attorney’s fees then accrued.’”); see also Patterson, 2003 WL 22853657, at *6-7 (jury list, exhibit, and document copies were not “necessarily incurred,” but reduced expenses for testifying expert permitted); 988 Acres of Land v. State, 274 A.2d 139, 141 (Del. Super. Ct. 1971) (“It is well settled in Delaware that the expert’s fee that is recoverable … is limited to the time necessarily spent in actual attendance upon the court for the purpose of testifying.”).

69 See Ingram v. Key, 594 N.E.2d 477, 479 (Ind. Ct. App.).

70 Iowa’s rule differs from Federal Rule 68 in that it applies to any action for money only. See also Weaver Const. Co. v. Heitland, 348 N.W.2d 230, 233 (Iowa 1984) (holding that “costs” does not encompass attorneys’ fees because such interpretation would be “fundamentally unfair given that only defendants can take advantage of the statute”).
71 Divine v. Groshong, 679 P.2d 700, 713 (Kan. 1984) (denying paralegal time and attorneys’ fees); LAW & PRAC. TRIAL HANDBOOK §39:8 (2d ed.) (Defendant’s costs will usually not include attorney’s fees, however, even if the underlying statute provides for such fees.

72 See Childers v. Childers, 2006 WL 1560746 (Ky. App. 2006) (“while CR 68 authorizes an award of attorney’s fees where an offer of judgment is refused and the party refusing ultimately recovers less than the offer, the trial court has broad discretion in the amount of fees to be awarded”).

73 Maine’s Unfair Trade Practices Act also contains an offer of judgment provision that cuts off the claimant’s recoverable costs and fees under the Act if the “judgment obtained in court by a claimant is not more favorable than any rejected tender of settlement or offer of judgment . . . .” See Me. Rev. Stat. Ann. §213-1-A, 2. In contrast to Federal Rule 68, however, Maine’s offer of judgment provision has been interpreted to permit the court to exercise discretion in awarding costs. See Arsenault v. Crossman, 696 A.2d 418, 421-22 (Me. 1997) (“[Defendant] argues that reading §1502-D as allowing the court to exercise discretion in awarding costs under Rule 68 serves to weaken the rule … By its plain terms, Rule 68 may be mandatory; however, costs are defined by §§1502-B, C and D, and Section 1502-D grants to the court discretion in determining what costs it will award when faced with a party’s severe financial hardship.”); Id. at 422 (“I respectfully dissent. Rule 68 leaves the court no discretion to refuse to award the offeror costs based on the financial circumstances of the offeree . . . .) (Dana, J. dissenting).

74 “With one slight exception Rule 68 is the same as Federal Rule 68. The addition incorporates the provision of G.I. c. 231, § 75 excluding interest from a judgment in determining whether it is more favorable than the offer. It does not, however, prevent the plaintiff’s obtaining interest on the judgment from the date of the offer if the judgment obtained is not more favorable than the offer.” Rptrs. Notes to Mass. R. Civ. P. 68; see also Shorr v. Prof. Photographers of Am., Inc., 1997 WL 271757 (Mass. Ct. App. 1997) (attorneys’ fees are not costs recoverable under the offer of judgment rule); Baghdady v. Lubin & Meyer, P.C., 770 N.E.2d 513, 520 (Mass. Ct. App. 2002).

75 Mississippi courts reportedly follow federal law as to whether “costs” in the state offer of judgment statute includes attorneys’ fees. See Miss. Chancery Prac. §619a (2000 ed.) (“Costs certainly include the fees of the clerk, witness fees, and stenographic and reporting fees. In addition, the Supreme Court confirmed that for purposes of the cost-shifting provisions of Rule 68, costs include attorney’s fees where such fees are within the definition of costs under the relevant substantive law or statute at issue.”) (citing Marek v. Chesny, 473 U.S. 1 (1985)).

76 Mo. S. Ct. R. 77.04.

77 However, “costs” under Montana’s code are defined to include, among other things: legal fees of witnesses, expenses of taking depositions, legal fees for publication, legal fees paid to stenographers, reasonable expenses for “making a map or maps” to be used at trial or hearing, and such other reasonable and necessary taxable “expenses.” See Mon. Code Ann. 25-10-201.
In contrast to Federal Rule 68, Nebraska’s offer of judgment rule applies to actions “for money only,” and provides for a 5-day acceptance window (rather than 10).  See Neb. Rev. Stat. § 25-901.

“Costs” in the state rule reportedly refer to “court costs incurred subsequent to the time the offer was made.”  N.Y. Prac. Comm. §48:19 (2008) (emphasis added and citing Margulis v. Solomon & Berck Co., 223 A.D. 634 (1st Dep’t 1928)).

North Carolina courts have interpreted Federal Rule 68 to require that an offer be “bona fide.”  However, like Federal Rule 68, attorneys’ fees can be awarded only if authorized by some other rule or statute.  See Lincoln v. Bueche, 601 S.E.2d 237, 244 (N.C. Ct. App.).

“Subdivision (a) [the “offer of settlement” provision] is similar to Fed. R. Civ. P. 68, except for the provisions that the clerk may enter a judgment only upon order of the court and to allow a plaintiff to make an offer of settlement.”  Expl. Note to N.D. R. Civ. P. 68


“This rule is substantially identical to Federal Rule 68 . . . . The rule differs from Federal Rule 68 in giving the court discretion to permit an offer less than 10 days prior to trial or hearing. This more flexible provision is desirable in light of the simple nature of much state-court litigation.”  Rptrs. Notes to Vt. R. Civ. P. 68.  Relying on precedents from the United States Supreme Court interpreting Federal Rule 68, Vermont courts have interpreted the state offer of judgment provision, to include attorney’s fees as “costs” only “where the underlying statute defines ‘costs’ to include attorney’s fees . . . .”  Rule v. Tobin, 719 A.2d 869, 870 (Vt. 1998) (internal quotation omitted); Id. at 871 (“Because our rule is identical to the federal rule, we look to the Federal cases interpreting the Federal Rule as an authoritative source for the interpretation of our rule.”) (internal quotations and citation omitted).

See Shafer v. Kings Tire Serv., Inc., 597 S.E.2d 302, 307 (W. Va. 2004) (“[W]e hold that costs included under West Virginia Rule of Civil Procedure 68(a) include attorney’s fees when any statute applicable to the case defines costs as including attorney’s fees. However, costs under Rule 68(a) do not include attorney’s fees if the statute creating the right to attorney’s fees defines attorney’s fees as being in addition to, or separate and distinct from, costs.”).

See Canalez v. Bob’s Appliance Serv. Ctr., Inc., 972 P.2d 195, n.3 (Haw. 1999) (“Insofar as the inclusion of reasonable expert witness fees as costs under HRCP Rule 68 would clearly serve to better promote the purpose and policies underlying the rule, we expressly hold that expert witness fees incurred after the making of an offer of judgment, if deemed reasonable, are taxable in the court’s discretion as costs against the offeree pursuant to HRCP. Rule 68.”).

Ohio R. Civ. P. 68 Staff Notes; see also EEOC v. Carter-Jones Lumber Co., No. 5:04CV1824, 2006 WL 1489421, at *5 (N.D. Ohio May 26, 2006) (“Another tool to move disputes toward resolution, one that is not available under the Ohio Civil Rules, is Fed. R. Civ. P. 68 . . . .”) (emphasis added).  The Rules Committee to the Ohio Supreme Court revisited this rule in 1996,
and published for comment a revised offer of judgment rule that was “quite similar to present Federal Rule 68.” See Solimine, “State Court Regulation of Offers of Judgment and Its Lessons for Federal Practice,” 13 OHIO ST. J. ON DISP. RESOL. 51, 66 (1997). The Ohio Supreme Court, without comment, reportedly withdrew the proposal from further consideration after the Ohio Academy of Trial Lawyers “generated vociferous opposition.” Id. at 68-69.

The remaining states – South Dakota, Tennessee, and Wyoming – have enacted bilateral offer of judgment provisions and thus differ in text from Federal Rule 68. See generally App. However, “costs” in the bilateral rules appear to have been interpreted in a manner similar to Federal Rule 68. See Zahn v. Musick, 605 N.W.2d 832, 834 (S.D. 2000) (only those expenses “specifically authorized by statute may be taxed as costs” along with “other similar expenses and charges”); Person v. Fletcher, 582 S.W.2d 765 (Tenn. Ct. App. 1979) (“costs” did not include costs of photographs, depositions, reporter’s fee or counsel fees); Albright v. Mercer, 945 S.W.2d 749 (Tenn. Ct. App. 1996) (“costs” do not include attorneys’ fees).

304 U.S. 64 (1938).

41 U.S. 1 (1842).

304 U.S. at 78 (emphasis added).

Id. (“[e]xcept in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state.”)

S.A. Healy Co. v. Milwaukee Metro. Sewerage Dist., 60 F.3d 305, 310-11 (7th Cir. 1995) (emphasis added); id. (“[T]he terms ‘substance’ and ‘procedure’ are conclusions rather than algorithms.”).

In Walker v. Armco Steel Corp., the Court imposed a narrow “direct collision” test that must be met before a federal rule or statute supercedes contrary state law. 446 U.S. 740, 749-51 (1980) (“[T]he scope of the Federal Rule [is] not as broad as the losing party urge[s], and therefore, there being no Federal Rule which cover[s] the point in dispute, Erie command[s] the enforcement of state law.”). Arguably expanding the “direct collision” test, the Court in Burlington Northern Railroad v. Woods held that the “direct collision” test should yield to federal rules or statutes that are “sufficiently broad” enough to occupy the state rule’s “field of operation” on the relevant issue. 487 U.S. 22, 26-27 (1988) (reaffirming Burlington Northern). In Gasperini v. Center for Humanities, Inc., however, the Court again narrowed its focus, cautioning that federal rules or statute should be interpreted so as to accommodate and “to avoid conflict” with contrary state rules and “important state regulatory policies.” 518 U.S. 415, 438 n. 22 (1996) (citing R. Fallon, D. Meltzer, & D. Shapiro, Hart & Wechsler’s The Federal Courts and the Federal System 729-30 (4th ed. 1996).

Four post-Erie cases help frame these two follow-up questions. In Guaranty Trust Co. v. York, the Court first broadly labeled “substantive” for Erie purposes any state rule that was “outcome determinative.” 326 U.S. 99, 109 (1945) And, in Cohen v. Beneficial Industrial Loan Corp., the Court expanded the “outcome determinative” test to include state procedural law that

Gasperini, 518 U.S. at 428; see also York, 326 U.S. at 109 (“does it significantly affect the result of a litigation for a federal court to disregard a law of a State that would be controlling in an action upon the same claim by the same parties in a State court”).

Gasperini, 518 U.S. at 432.

197 F.3d 1276, 1278 (9th Cir. 1999) (affirming the award of $2,009,844.89).

Id. at 1280. In holding that Federal Rule 54 did not conflict with Nevada’s offer of judgment rule, the court notes that Federal Rule 54 merely creates a procedure but not a right to recover attorneys’ fees. Id. citing the Advisory Committee Notes to Federal Rule 54(d)(2)). See also Crockett & Myers, Ltd. v. Napier, Fitzgerald & Kirby, LLP, No. 05-00877, 2007 WL 2126869, at *1-2 D. Nev. (July 23, 2007) (awarding $90,859.12 in attorneys’ fees and $4,934.21 in costs pursuant to Nevada’s state offer of judgment rule); cf. Garcia v. Wal-Mart Stores, Inc., 209 F.3d 1170, 1176-77 (10th Cir. 2000) (“Rule 68 only governs defendants’ costs, while plaintiffs’ costs are the subject to the Colorado statute. Neither, contrary to [defendant’s contention, does Fed. R. Civ. P. 54(d) necessarily conflict with an award of ‘actual costs.’ There is no federal statute or rule providing the rule of decision when a federal court is asked to award litigation expenses other than those enumerated as [28 U.S.C.] section 1920 costs. In the present case, to the extent the Colorado statute authorizes the award of ‘actual costs’ other than those costs authorized by . . . federal statute or rule, those costs are not barred by Fed. R. Civ. P. 54(d)(1).”).

MRO Communications Inc., 197 F.3d at 1280 (emphasis added).


Id. at 600 (“This case before us presents the rare example when a state substantive law governing an award of attorney’s fees comes into conflict with a federal statute or procedural rule. Having concluded that Fed. R. Civ. P. 68 is ‘sufficiently broad to cover the point in
dispute,’ namely offer of judgment rules, we find that it controls, and that defendants are not entitled to attorney’s fees.’”) (quoting Hanna, 380 U.S. at 471-72).

103 Gasperini, 518 U.S. at 438 n.22.

104 60 F.3d 305, 310 (7th Cir. 1995) (Posner, J.).


106 Healey, 60 F.3d at 310.

107 Id. at 312 (emphasis added); see also Dillingham-Healy-Grow-Dew v. Milwaukee Metropolitan Sewerage Dist., 796 F. Supp. 1191, 1193-94 (E.D. Wis. 1992) (“The only relevant federal rule is rule 68, which governs offers of judgment. That rule, however, is narrower in scope than the Wisconsin statute. It applies only to offers made by persons defending a claim and provides costs as the remedy if the recovery made by the party rejecting the offer is less favorable than the offer. The Wisconsin statute, on the other hand, applies to offers of settlement made by either plaintiffs or defendants and provides, as a remedy, interest on the judgment at the rate of 12%.”).

108 Gasperini, 518 U.S. at 428 n.7.

109 See Tanker Mgmt., Inc. v. Brunson, M.D., 918 F.2d 1524, 1528 (11th Cir. 1990).

110 See id. at 1527-28 (“Thus, the circumstances here are similar to those in Walker v. Armco Steel Corp., 446 U.S. 740 (1980), in which the Court in a diversity action was asked to determine whether the federal court should follow state law or, alternatively, Fed. R. Civ. P. 3 in deciding when an action is commenced for the purposes of tolling the state statute of limitations. In the course of holding that Oklahoma law controlled, the Court stated: ‘[T]he scope of the Federal Rule [is] not as broad as the losing party urge[s], and therefore, there being no Federal Rule which cover[s] the point in dispute, Erie command[s] the enforcement of state law.’”).

111 Important for purposes of this Erie determination is a recognition that “it is immaterial whether [the relevant state law is] characterized as either ‘substantive’ or ‘procedural’ in state court opinions.” See Jarvis v. Johnson, 668 F.2d 740, 743 (3d Cir. 1981). Rather, whether “a state law is substantive or procedural for purposes of Erie is a federal question,” to be decided by a federal court. See Tanker Mgmt. Inc., 918 F.2d at 1529 n.3.

112 In Chambers, 501 U.S. at 53, the Supreme Court distinguished the type of sanction that depends on the outcome of the litigation – such as fee shifting pursuant to a state offer of judgment rule – and one that depends “not on which party wins the lawsuit, but on how the parties conduct themselves during the litigation,” acknowledging that with regard to this latter type of sanction, “there is no risk that the exception will lead to forum-shopping.” Id.

113 Fauber v. KEM Transportation & Equipment Co., 876 F.2d 327, 331 (3d Cir. 1989) (emphasis added); accord Jarvis v. Johnson, 668 F.2d 740, 744-45 (3d Cir. 1982) (“The fact that Rule 238 was promulgated primarily for the ‘procedural’ purposes of encouraging settlement and
lessening docket congestion does not, however, mean that it is inapplicable in a federal court.”); but see Home Indemnity Co. v. Lane Powell Moss & Miller, 43 F.3d 1322, 1332 (9th Cir. 1995) (following Alaska’s prejudgment interest statute instead of the higher interest penalty in the state offer of judgment rule because such offer of judgment rule purportedly is “punitive in nature” and, therefore “a procedural offer of judgment provision”)

114 See S.A. Healy Co., 60 F.3d at 312-13 (“If a rule so favorable to plaintiffs is inapplicable in diversity cases, defendants in such cases will have an added incentive to remove a diversity case to federal district court, just as in the days before the Erie decision, when a more favorable substantive rule of federal common law might induce a defendant to remove a case from state to federal court or even to reincorporate in a different state in order to create diversity of citizenship.”).

115 Ashland Chem. Inc. v. Barco Inc., 123 F.3d 261, 265 (5th Cir. 1997) (emphasis added and internal quotation and citation omitted); id. at n.3 (“Undoubtedly, the possibility of receiving or paying attorneys’ fees will be a consideration when plaintiffs decide where to file a diversity action and when defendants decide whether to remove such an action to federal court.”). Thus, while the Fifth Circuit has not expressly concluded that Texas’ new offer of judgment rule is “substantive” for Erie purposes, prior precedent evidences an inclination for the court to do so.

116 See Jones v. United Space Alliance, LLC, -- F.3d --, 2007 WL 2254510, at *2 (11th Cir. 2007) (“This circuit has found s. 768.79 to be substantive law for Erie purposes.”).

117 James v. Wash Depot Holdings, Inc., 489 F. Supp. 2s 1336, 1340 n.2 (S.D. Fla. 2007) (“While the Plaintiff claims that s. 768.79 does not apply in Federal Court, the case law is decidedly to the contrary.”); see also McMahan v. Toto, 311 F.3d 1077 (11th Cir. 2002) (affirming fee award under s. 768.79 and citing cases).


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120 Wright, Miller & Marcus, FED. PRAC. & PRO. 2d, 1 § 3001.

Reducing the Cost of Litigation, 1992,” 76 JUDICATURE 147, 151 (proposal including a prohibition on attorneys’ fee awards that exceed the amount of the judgment obtained and authority for the court to reduce the amount of costs to avoid the imposition of undue hardship on a party); see also Davis, “Toward a Jurisprudence of Trial and Settlement: Allocation Attorneys’ Fees by Amending Federal Rule of Civil Procedure 68, 1996,” 48 ALA. L. REV. 65 (proposing amendments to Federal Rule 68 that would authorize attorneys’ fee awards based on the settlement offers the parties made before trial); Shapard, “Likely Consequences of Amendments to Rule 68, Federal Rules of Civil Procedure,” FEDERAL JUDICIAL CENTER (1995); Comment, “Legal Dentistry: How Attorneys’ Fees And Certain Procedural Mechanisms Can Give Rule 68 The Necessary Teeth To Effectuate Its Purposes,” 27 CARDOZO L. REV. 1449 (Jan. 2006) (“Without the possibility of an award of attorney’s fees, Rule 68 will remain fairly dormant, as it has to date, within the pages of the Federal Rules of Civil Procedure.”).

122 Attorney Accountability Act of 1995, H.R., 988, 104th Cong., 1st Sess. This bill was not passed. See also Frivolous Lawsuit Reduction Act, H.R. 2393, 109th Cong., 1st Sess. (“If the court finds, under a petition filed under paragraph (5) with respect to a claim or claims, that the judgment or order finally obtained is not more favorable to the offeree with respect to the claim or claims than the last offer, the court shall order the offeree to pay the offeror’s costs and expenses, including attorneys’ fees, incurred with respect to the claim or claims from the date the last offer was made or, if the offeree made an offer under this subsection, from the date the last such offer by the offeree was made, unless the court finds that requiring the payment of such costs and expenses would be manifestly unjust”).