OFFERS OF JUDGEMENT: CAN THE PREVAILING PARTY EVER RECOVER ATTORNEYS' FEES IN FEDERAL COURT?

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Both the federal and Nevada Rules of Civil Procedure enable a party to make an offer of judgment as a way to short circuit litigation. By making such an offer early in a case, a party (usually the defendant) creates risk for its adversary in that, if the plaintiff does not beat the defendant's offer at trial, the plaintiff could be liable for a portion of the defendant's litigation costs.

There are, of course, differences between the requirements of state and federal court offers of judgment. While this article provides a high-level discussion of such key differences, the primary question to be answered is this: in federal court, if a defendant makes an offer of judgment, and the plaintiff fails to beat that offer at trial, can the defendant ever recover its attorneys' fees (as opposed to other costs)?

State Versus Federal Court Offers of Judgment, Generally:

Under Federal Rule of Civil Procedure 68, "a party defending against a claim may serve on an opposing party [at least 14 days before trial] an offer to allow judgment on specified terms, with the costs then accrued." Fed.R.Civ.P. 68(a). If the plaintiff rejects or fails to accept the offer within 14 days, and the "judgment that the offeree finally obtains is not more favorable than the unaccepted offer, the offeree must pay the costs incurred after the offer was made." Fed.R.Civ.P. 68(d).

Nevada Rule of Civil Procedure (NRCP) 68, provides that any party may serve an offer of judgment at least 10 days before trial.[1] An offer not accepted within 10 days is deemed rejected and withdrawn. If the offeree then "fails to obtain a more favorable judgment," the offeror may recover post-offer costs and reasonable attorney's fees. NRCP 68(f)(2). The offeree is also precluded from recovering its own post-offer fees, costs or interest. *Id*.

These two rules differ in four key respects:

1. Federal Rule 68 applies only to offers of judgment made by a defendant or counter-defendant, not a plaintiff. *Goldberg v. Pac. Indem. Co.*, 627 F.3d 752, 755 (9th Cir. 2010). NRCP 68, on the other hand, governs offers made by "any party." NRCP 68;
2. By its express language, Federal Rule 68 allows the prevailing offering party to recover only post-offer costs, not post-offer attorneys' fees. Nevada Rule 68, however, penalizes rejection of an offer of judgment through payment of costs, attorneys' fees and interest. NRCP 68(f)(2); *Beattie v. Thomas*, 99 Nev. 579, 588 n.5 (1983);
3. Whereas NRCP 68 cuts off the rejecting party's ability to recover its own costs (and attorney's fees) if it fails to obtain a more favorable judgment, Federal Rule 68 does not. NRCP 68(f)(1); Fed.R.Civ.P. 68; and
4. Under Federal Rule 68, costs are only awarded if:
   a. The plaintiff obtains a judgment; and

b. That judgment is less than the amount offered by the defendant.

Where judgment is entered for the defense, there is no recovery under Federal Rule 68. *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 352 (1981). In contrast, the Nevada Supreme Court has ruled that NRCP 68 encompasses both a judgment for or against the defendant offeree. *Beattie v. Thomas*, 99 Nev. 579, 668 P.2d 268, 274 (1983) ("We decline to follow the *Delta Air Lines* reasoning, not only because of the differences between NRCP 68 and FRCP 68, but because such reasoning leads to an anomalous result.")

Can the Defendant Ever Recover Attorneys' Fees in a Federal Court Offer of Judgment? It Depends on the Claims Asserted.

By allowing either party to make an offer of judgment and requiring the losing party to pay both fees and costs, NRCP 68 is typically viewed as a much more powerful settlement device than its federal counterpart. That said, federal court defendants may still be able to recover attorneys' fees through an offer of judgment, depending on the type of case.

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First, the U.S. Supreme Court has held that the term "costs," as used in Federal Rule 68, refers "to all costs properly awardable under the relevant substantive statute or other authority." *Marek v. Chesny,* 473 U.S. 1, 9 (1985). Therefore, if the statute upon which a claim is based treats attorneys' fees as a recoverable cost, then such fees are recoverable even under the narrow language of Federal Rule 68.[2]

Second, under certain circumstances, federal court litigants may be permitted to rely on NRCP 68, instead of the federal rule, to recover attorneys' fees through an offer of judgment. As most federal court practitioners are aware, a federal court sitting in diversity, or otherwise entertaining state law claims pursuant to its supplemental jurisdiction, must apply state substantive law and federal procedural law.[3] Although listed among Nevada's rules of "civil procedure," the Ninth Circuit has held that the availability of attorneys' fees under NRCP 68 is a substantive, not procedural, issue and thus, NRCP 68 must be applied in federal court, at least as to any state law claims being considered pursuant to the federal court's diversity or supplemental jurisdiction.[4] This distinction is important, since, as demonstrated by the Ninth Circuit controlling case, *MRO Communications*, this means not only that attorneys' fees may be available in federal court cases involving state law claims, but also that, in such cases, federal courts will award fees even if the judgment is entered in favor of the defense (which, as noted above, would normally not be available to federal court defendants under Federal Rule 68). As the Ninth Circuit explained in that case, "Nevada law permits a prevailing defendant to recover attorneys' fees incurred after an offer of judgment is rejected by the plaintiff. It would be unjust and a violation of the national policy described in *Erie R. Co. v. Tompkins* … [to not permit a prevailing defendant to recover attorneys' fees under NRCP 68] simply because the forum is federal."

The question then becomes, where an offer of judgment is made in federal court pertaining to state law claims, which procedural rules govern the offer? For example, how many days does a federal court plaintiff have to accept a federal court defendant's offer of judgment pertaining to state law claims? Similarly, which rule—Federal Rule 68, NRCP 68, or both—should be referenced in the offer itself? Based on cases discussing these issues to date, the answer appears to be that, if fees are sought under NRCP 68, the federal court will employ not only the substance of NRCP 68, but also the procedural

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requirements of the rule. See *MRO Communications, Inc.*, 197 F.3d at 1282 (noting that while a different result would occur under Federal Rule 68, since NRCP 68 does not require the defendant's written offer of judgment to expressly reference that the offer is being made under NRCP 68, the defendant's offer, which made no mention of the state law, was nevertheless enforceable); *Cheffins v. Stewart*, No. 12-16913, 2016 WL 3190914 (9th Cir. June 8, 2016) (holding that the timing requirements of NRCP 68, rather than the timing requirements of Federal Rule 68, applied when district court determined whether or not to award attorney fees to defendant under NRCP 68 in federal court, the Ninth Circuit noted, "there is no conflict between Federal Rule of Civil Procedure 68 and Nevada Rule of Civil Procedure 68 that would preclude application of the Nevada Rule 68 in federal court").

In short, federal court practitioners should think carefully before assuming that attorneys' fees are never recoverable through an offer of judgment. Depending on the claims involved, a federal court offer of judgment may carry the same weight and power as its state court counterpart. **NL**

1. Prior to its repeal in 2015, NRS 17.115 also provided the procedure for making and accepting an offer of judgment and the penalties for rejecting an offer.
2. In the *Marek* case, the court noted that attorney's fees are considered "costs" under 42 U.S.C.§1981 and 62 other statutes, including Title VII of the Civil Rights Act of 1964.
3. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938).
4. *MRO Communications, Inc. v. AT&T*, 197 F.3d 1276, 1281 (9th Cir.1999), citing *Alyeska Pipeline Serv. v. Wilderness Society*, 421 U.S. 240, 259 (1975). Other cases have reached the same result. *See Cheffins v. Stewart*, No. 3:09-CV-00130-RAM, 2012 WL 5304762, at *1 (D. Nev. Oct. 25, 2012), aff'd, No. 12-16913, 2016 WL 3190914 (9th Cir. June 8, 2016); *Companion Prop. v. Sky High Sports, LLC*, No. 3:12-CV-00595-HDM-VPC, 2016 WL 475185, at *2 (D. Nev. Feb. 5, 2016); *Oakview Bldg. Consensus Joint Venture, LLC v. First Bank*, No. 2:10-CV-00117-HDM, 2013 WL 1855831, at *2 (D. Nev. Apr. 30, 2013).

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