

Rule 68 Offer of Judgment: A Toothless Tiger for the Defense

Joseph M. Desmond

Partner

Morrison, Mahoney & Miller

Offers of Judgment pursuant to Mass. R. Civ. P. Rule 68 are often used in civil cases in an attempt by the defendant/insurer to gain leverage in settlement negotiations against a plaintiff by imposing the potential for an award of costs *against* the plaintiff. In theory, a Rule 68 Offer of Judgment should have the effect of forcing an otherwise unrealistic plaintiff to consider the consequences of rejecting a good faith offer by a defendant/insurer by imposing a sanction on the plaintiff in the event that he/she ultimately does not obtain a more favorable judgment than the settlement offered by the insurer. In practice, however, an Offer of Judgment provides little bargaining power for the defendant/insurer, and in some cases, may actually lead to additional costs and litigation against the insurer. Rule 68 provides in pertinent part:

At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against him for the money or property or to the effect specified in his offer, with costs then accrued. . . . An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs. If the judgment exclusive of interest from the date of offer 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. . . .

Defense attorneys and claims handlers must read the rule with caution in light of Massachusetts caselaw interpreting the measure of “taxable costs” recoverable pursuant to Rule 68. Massachusetts follows the traditional “American Rule” whereby each litigant is generally required to pay his own attorneys’ fees and costs in the absence of a statute, enforceable contract or applicable rule of damages which specifically provides for their award.

As a general rule, taxable costs are considered full compensation to the prevailing party even though they are nominal. In taxing costs, courts do not seek to compensate litigants fully for their actual costs of litigation. Accordingly, attorneys’ fees may not be recovered against a plaintiff following a rejection of a Rule 68 Offer of Judgment. Moreover, expert witness fees may not be recovered even in the event of a defense verdict following a plaintiff’s rejection of a Rule 68 Offer.

As noted above, costs are expressly limited to those itemized by statute or rule. Mass. Gen. Laws c. 261 permits recovery of 1) nominal attorneys’ fees in the amount of \$2.50; 2) the entry fee of the complaint (not applicable to the defendant/insurer); 3) costs of photographs and drawings

actually used at trial (limited to \$500); and 4) daily witness attendance fees in the amount of \$6.00 per witness.

In addition to the items listed in Mass. Gen. Laws c. 261, the court may tax the costs of deposition transcripts and audiovisual depositions pursuant to Mass. R. Civ. P. 54. However, the taxing of depositions is subject to the discretion of the court. The court must also make express findings that the depositions were “reasonably necessary,” and the losing party is entitled to an evidentiary hearing as a matter of right before deposition costs are taxed. *See Waldman v. American Honda, 413 Mass. 320 (1992)*. Accordingly, the expense of obtaining an award of costs may often be greater than the ultimate award in favor of the defendant. These expenses are incurred prior to any attempt to actually collect the award.

It is therefore clear that recoverable costs are nominal and not an incentive for a plaintiff to settle a case. Moreover, the offeror must evaluate several other issues prior to extending such an offer. In the event that the offer is accepted, the plaintiff is entitled to costs and statutory interest on the judgment as the “prevailing party” in the litigation. In addition to the statutory costs listed above, the plaintiff is entitled to 12% interest annually from the date of the filing of the complaint. In contract actions, the plaintiff is entitled to 12% interest from the date of the first demand after the breach of contract.

Danger in Making Offer

In addition to the statutory interest and costs, expert fees and attorneys’ fees *are* taxable as costs in cases in which such recovery is permitted by statute. For instance, a plaintiff may seek to have attorneys’ fees taxed following the acceptance of an offer of judgment in PIP cases (M.G.L. c. 90, §§ 34M) and cases brought pursuant to Mass. Gen. Laws. c. 93A. *See Perez v. Trust Ins. Co., 2000 WL 420619 (Mass. App. Div. 2000) (attorneys’ fees properly taxable as costs in PIP case after acceptance of Rule 68 offer)*. Reasonable expert witness fees are normally recoverable by a successful plaintiff in a 93A case in furtherance of the objectives of the Consumer Protection Statute. *See Linthicum v. Archanbault, 379 Mass. 381 (1979)*. By extension of the rule, plaintiffs may argue that they are entitled to the taxation of attorneys’ fees and expert fees in any case where permitted by statute, such as cases of neglect and abuse brought against nursing homes pursuant to the Attorney General’s regulations. Therefore, an insurer must be cautioned to consider the amounts that may be taxed after the acceptance of an Offer of Judgment in light of the exposure in the given case.

More problematic is the potential for additional litigation against the insurer who served the offer of judgment for the sole purpose of resolving all claims and ending the litigation. While the underlying matter may be resolved following the taxation of interest and costs against the direct defendant, the acceptance of an Offer of Judgment does not extinguish the plaintiff’s right to pursue the insurer directly for alleged unfair claims settlement practices pursuant to Mass. Gen. Laws c. 93A and c. 176D. The judgment against the underlying defendant may be used offensively by the plaintiff in an attempt to prove that the insurer forced the plaintiff to file suit before making a reasonable offer of settlement in cases where liability and damages were “reasonably clear.” In the subsequent suit

against the insurer, the plaintiff may seek attorneys' fees and multiple damages in accordance with Mass. Gen. Laws c. 93A to siphon additional funds from the insurer.

Insurers should think twice before rushing to make an Offer of Judgment. Any such offer should explicitly state that the offer includes any recoverable attorneys' fees and taxable costs. A more prudent course is to resolve cases through active negotiation and/or mediation to define the ultimate payment by the insurer and to obtain a release of all claims against the defendant and insurer. In their haste to settle claims, insurers should be cautious before resorting to Rule 68 Offers. Such offers may ultimately prove to be penny wise but dollar foolish.