

Should I attempt to make an offer of settlement under Rule 68 of the Massachusetts Rules of Civil Procedure?

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Answer: An offer of settlement under Rule 68 is a tool to consider using, however, if you do considering using it be very careful you understand it very well because you may be stuck paying a settlement amount you thought you did not offer.

For example, recently in the federal case of *LaPierre v. City of Lawrence*, the City of Lawrence learned why Rule 68 can yield unexpected and unfavorable results. No. 15-1641, (1st Cir. April 26, 2016). In that case, the City was stuck paying (no doubt tens of thousands of dollars in) attorneys' fees it was not counting on after its Rule 68 offer was accepted. Here is what happened.

The City was defending a civil rights case brought under the 42 U.S.C. § 1983. It made an offer of judgment under Fed. R. Civ. P. 68 of \$300,000.00, which was silent as to whether that amount included "costs." It then, presumably realizing it may have made a mistake or otherwise sought to reduce its risk, purportedly withdrew the offer, then sent a second "amended offer" adding one sentence stating that the \$300K was inclusive of all costs, including attorneys' fees.

The plaintiff took the first offer and proceeded according to the acceptance procedures under the rule and filed the offer with an acceptance and a certificate of service. The plaintiff was no doubt hoping to have the court interpret the offer as being for \$300K and "costs," which usually does not but here would include attorneys' fees. This is because, the rule provides for "costs" and costs are determined according to what the operative statute defines as costs. Marek v. Chesny, 473 U.S. 1, 7,11 (1985). The statute the plaintiff was suing under, 42 U.S.C. § 1983 defines costs as including attorneys' fees. Id. Thus, the plaintiff was hoping, and ultimately it was determined, that the City's offer was for \$300K and the sizable attorneys' fees.

The district court agreed with the City and did not give effect to the plaintiff's acceptance of the City's Rule 68 offer agreeing with the City's argument that the parties did not have a meeting of the minds. But the plaintiff appealed and the United States Court of Appeals for the First Circuit and it reversed. At the appellate level, all parties agreed that the City's "withdrawal" of its initial offer was ineffective and that Rule 68 offers are irrevocable, leaving the issue to be whether the City's "amendment" had effect. The court interpreted the portion of Fed. R. Civ. P. 68 that states "a party defending against a claim may serve on an opposing party an offer to allow judgment on specified terms, with the costs then accrued." LaPierre v. City of Lawrence, No. 15-1641, slip op. at \*11-12 (1st Cir. April 26, 2016). It relied on other case law including the United States Supreme Court's decision in *Marek v. Chesny*, and found that the City's first offer was not ambiguous and was properly interpreted as offering the \$300K in addition to "costs," which in this case included attorneys' fees. Id. at 12-16.

What is sobering in this case is that the plaintiff actually lost the case against the City at summary judgment, so the result dictated by this decision about the offer of judgment truly turned the tide in favor of the plaintiff.

The take away here is when you decide to use Rule 68 that you understand fully the tool you are implementing. In the event you are facing litigation, especially an issue involving Rule 68, feel free to give this office a call.

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