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**Settlement Offers and Agreements
in Federal Civil Rights Lawsuits**

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❖ **Introduction**

Most articles in this publication address the substantive rules for liability in cases involving law enforcement officers. This article, however, concerns the role that settlement offers and agreements can play in federal civil rights litigation. We'll examine the text of Federal Rule of Civil Procedure 68 and how a timely offer of judgment using that mechanism can limit liability for attorneys' fees and other costs.

Following that is a look at some prior cases in which settlement agreements were involved and how the courts enforced them. Finally, there is a listing of useful and relevant resources and references. The related, but distinct, subject of release agreements, in which criminal charges are dropped in conjunction with a defendant releasing civil claims against an agency and/or its officers, was addressed in [Enforceability of Civil Liability Release Agreements](#), 2008 (3) AELE Mo. L.J. 101.

❖ **Rule 68 Offers**

Regardless of the ultimate outcome in a federal civil rights lawsuit, litigation in such cases can be expensive and time-consuming, often dragging on for years or, unfortunately, even decades. Additionally, a federal statute, 42 U.S.C. Sec. 1988,

provides that a prevailing plaintiff will ordinarily be awarded their attorneys' fees and costs. Sometimes, the amount of the attorneys' fees and costs may equal or even exceed the damages ultimately awarded. See [Attorneys' Fees in Federal Civil Rights Lawsuits: An Introduction - Part One](#), 2011 (4) AELE Mo. L. J. 101 and [Attorneys' Fees in Federal Civil Rights Lawsuits: An Introduction - Part Two](#), 2011 (5) AELE Mo. L. J. 101.

Federal Rules of Civil Procedure provides a mechanism in Rule 68 to encourage offers of judgment that can alleviate some of these problems. It is a risk-shifting tool designed to encourage settlements and prevent unnecessary trials. It allows defendants in federal civil lawsuits to make an "offer of judgment" at any time up until 14 days before a scheduled trial. For the plaintiff who does not accept it, there are some possible negative consequences.

The full text of the rule follows:

Federal Civil Procedure Rule 68. Offer of Judgment

- (a) **Making an Offer;** Judgment on an Accepted Offer. At least 14 days before the date set for trial, 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. If, within 14 days after being served, the opposing party serves written notice accepting the offer, either party may then file the offer and notice of acceptance, plus proof of service. The clerk must then enter judgment.
- (b) **Unaccepted Offer.** An unaccepted offer is considered withdrawn, but it does not preclude a later offer. Evidence of an unaccepted offer is not admissible except in a proceeding to determine costs.

- (c) **Offer After Liability is Determined.** When one party's liability to another has been determined but the extent of liability remains to be determined by further proceedings, the party held liable may make an offer of judgment. It must be served within a reasonable time—but at least 14 days—before the date set for a hearing to determine the extent of liability.
- (d) **Paying Costs After an Unaccepted Offer.** If 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.

The rule essentially puts the burden on the plaintiff of determining the true worth of the case. Once an offer is made, the plaintiff must decide whether they think the claim will prove to be worth more than the offer. If they don't believe it will, they should accept the offer, ending the case.

If they believe that the claim will be worth more than the offer, they can decide not to accept it and proceed to trial, or if liability has already been determined, to a hearing to determine the amount of damages. But if they are wrong, and either nothing is awarded or an amount less than the offer is awarded, under the rule they face having to pay the costs incurred by the defendant after the date of the offer.

The U.S. Supreme Court has held that, because Rule 68 does not define the term "costs," the rule "incorporates the definition of costs that otherwise applies to the case." [*Marek v. Chesny*](#), #83-1437, 473 U.S. 1 (1985). Thus, whether attorneys' fees are included as costs for purposes of Rule 68's penalty provision is dependent upon the language of the statute under which the plaintiff is proceeding in the case.

While Rule 68 speaks of costs, which in other cases does not include attorneys' fees (but rather such things as photocopying fees, transcripts, expert fees, filing fees, etc. as specified by 8 U.S.C. § 1920), in federal civil rights lawsuits, because of Sec. 1988, taxable costs include attorneys' fees.

[*Marek v. Chesny*](#) was an important case interpreting Rule 68. In it, police officers, in answering a call on a domestic disturbance, shot and killed the plaintiff's adult son. The father, on his own behalf and as administrator of his son's estate, sued the officers. Prior to trial, the defendants made a timely Rule 68 offer of settlement of

\$100,000, expressly including accrued costs and attorney's fees, but the plaintiff did not accept the offer.

The case went to trial and respondent was awarded \$5,000 on a state law claim, \$52,000 for the federal civil rights violation, and \$3,000 in punitive damages. The plaintiff then filed a request for attorneys' fees under 42 U.S.C. § 1988, which provides that a prevailing party in a § 1983 action may be awarded attorney's fees "as part of the costs." The claimed attorneys' fees included fees for work performed subsequent to the settlement offer. The U.S. Supreme Court ruled that the defendants were not liable for the attorneys' fees incurred by the plaintiff after the offer of settlement.

While the focus of this article is on proceedings in federal court, it is worth noting that a number of states have enacted similar mechanisms that apply in state court proceedings either as state law or by way of court rules or decisions. See [Offer of Judgment: Compendium of Law](#) (U.S. Law Network 2018), which collects many of the state statutes and rules.

❖ Cases Concerning Settlements

A variety of legal issues can arise in cases in which settlement offers are made, whether or not made pursuant to Rule 68. *The exact wording of the settlement offer can be important.*

. In [Crosby v. City of Chicago](#), #19-1439, 949 F.3d 358 2020 U.S. App. Lexis 3459, 2020 WL 562279 (7th Cir. 2020), a man fell three stories from a window before an officer arrested him. The arrestee claimed that the officer intentionally pushed him through the window, and then lied about him possessing a gun—backed up by other officers who also lied.

The arrestee was convicted and sentenced to eight years in prison, but his conviction was overturned. He sued the officer who allegedly pushed him for excessive force.

In an agreement between the plaintiff and the city (which was not a defendant in the lawsuit), the case was settled for \$5,000 to release "all claims he had or has against Gonzalez [the officer], the city, and its future, current or former officers ... , including but not limited to all claims he had, has, or may have in the future, under local, state, or federal law, arising either directly or indirectly out of the incident

which was the basis of this litigation.”

The agreement stated that the plaintiff’s attorney read and explained it to the plaintiff. Three years later, the plaintiff filed another suit, naming the city, the officer, and the officers who corroborated his story. The second lawsuit focused on the alleged lie that he possessed a gun and his subsequent prosecution, conviction, and imprisonment.

The trial court dismissed the second lawsuit, awarding the city \$2,131.60 for the printing of transcripts of the arrestee’s state-court criminal proceedings. A federal appeals court upheld this result. The plaintiff released all claims “arising either directly or indirectly out of the incident.” Even if “the incident” referred to his fall rather than the arrest as a whole, his claims regarding the alleged cover-up plainly “aris[e] from” the incident being covered up. The release language encompasses his claims for wrongs committed after his arrest.”

Any settlement offer should address explicitly the issue of any attorneys’ fees to be included. In [*Lilly v. City of New York*](#), #17-2823, 934 F.3d 222 (2nd Cir. 2019), the plaintiff filed a federal civil rights lawsuit against a city and a number of its police officers for alleged violations of his constitutional rights. The defendants presented plaintiff with an offer of judgment under Federal Rule of Civil Procedure 68 for \$10,001 and reasonable attorney’s fees, expenses, and costs incurred “to the date of [the] offer,” which the plaintiff accepted.

But the parties disputed the amount of the attorneys’ fees, expenses, and costs to be paid. The claims involved alleged excessive use of force during an arrest and the alleged improper issuance of three summonses for threatening behavior towards an officer, possession of an open liquor container, and littering, all of which were subsequently dismissed.

A federal appeals court upheld the trial judge’s reduction of the attorneys’ reasonable hourly rate because of the simple nature of the case, and upheld the decision to lower the hours claimed through an across-the-board reduction reflecting the clerical work performed. The appeals court also overturned the decision to award the plaintiff \$7,920 in attorneys’ fees for the work done preparing the fee application, since the express terms of the accepted Rule 68 offer of judgment limited the fees recoverable to those incurred to the date of the offer. That left a total award of attorneys’ fees, expenses, and costs of \$20,838.99.

Commenting on the method of interpreting accepted Rule 68 settlement offers, the court commented:

“Like a typical settlement agreement, an accepted Rule 68 offer of judgment is a contract, and it must be interpreted according to ordinary contract principles. Critically, ‘[i]f the terms of a contract are clear, courts must take care not to alter or go beyond the express terms of the agreement, or to impose obligations on the parties that are not mandated by the unambiguous terms of the agreement itself.’”

Some settlement agreements have attempted to address issues besides money damages and costs. In [*Overbey v. Mayor and City Council of Baltimore*](#), #17-2444, 930 F.3d 215 (4th Cir. 2019), when a city settled a police misconduct lawsuit, it included a non-disparagement clause in the settlement agreement. The plaintiff in that case spoke about it publicly and argued that the city violated her First Amendment rights by enforcing the clause against her, withholding half of her settlement money.

Overturning summary judgment for the city on the First Amendment claim concerning the enforcement of the clause, a federal appeals court ruled that the non-disparagement clause in the plaintiff’s settlement agreement amounted to a waiver of her First Amendment rights and that strong public interests rooted in the First Amendment made it unenforceable and void.

In a separate claim, a local news website asserted that the city’s alleged practice of including non-disparagement clauses in almost all settlement agreements with police misconduct claimants violated the First Amendment by interfering with its ability to report on such cases by receiving information from willing persons.

The appeals court ruled that the local news website had sufficiently pleaded an “ongoing or imminent” injury in fact that is both traceable to the city’s challenged conduct and redressable by the court. Summary judgment for the city on the website’s claim was therefore overturned.

Matters that arise after the entry of a settlement may result in awards of additional attorneys’ fees and cost, and it may be advisable to state a specific amount of attorneys’ fees rather than using terms such as “reasonable” fees and costs. In [*Morjal v. City of Chicago*](#), #14-1365, 774 F.3d 419 (7th Cir. 2014), a man sued the

City of Chicago and a number of its officers for excessive force, false arrest, and unlawful search and seizure as well as associated claims.

He accepted an offer of judgment from the defendants under Federal Rule of Civil Procedure 68(a) of \$10,001 “plus reasonable attorney’s fees and costs accrued to date.”

The plaintiff and defendants were subsequently unable to reach an agreement on the amount of attorneys’ fees, with the plaintiff asking for \$22,190.50. After further proceedings, the court awarded \$17,205.50, less than requested. The plaintiff then requested an additional \$16,773 in attorneys’ fees for the time spent litigating the fees petition.

While the defendants argued that an award of further fees would be violative of the settlement agreement, the trial court awarded an additional \$2,000 “to compensate for time spent responding to challenges to the fees that were unsupported and improper.”

The federal appeals court upheld this award, finding that the trial court had the authority under 42 U.S.C. Sec. 1988 to award the additional fees and did so only for the conduct of the defendants that “fell outside” the provisions of the offer of judgment. Rule 68(a) did not limit the court’s authority to fashion remedies for offending conduct.

Similarly, in [*Lima v. Newark Police Department*](#), 658 F.3d 324 (3d Cir. 2011), ***the court pointed out that Rule 68 settlement offers can contain a “trap for the unwary,”*** sprung when a defendant mistakenly thinks that their accepted Rule 68 offer has completely resolved their case. Then they are surprised by a court assessing substantial post-judgment attorneys’ fees and costs for the plaintiff under 42 U.S.C. Sec. 1988, which were not addressed explicitly in the settlement offer.

In *Lima*, the defendant offered the plaintiff a \$55,000 judgment to “include all of plaintiff’s claims for relief against all defendants...” After the offer was accepted, the plaintiff proceeded to file a request for judgment that sought “judgment against defendants in the amount of \$55,000, with costs to be taxed by the Court upon application by Plaintiff pursuant to...42 U.S.C. § 1988.”

The defendant understandably filed a response stating the Rule 68 offer of judgment was intended to cover such costs, quoting to emails concerning the offer and

acceptance. A federal appeals court overturned the trial court's denial of the plaintiff's request. Because the offer of judgment had not explicitly stated that costs and attorneys' fees were included in the offer, the plaintiff still had their right to seek statutory costs and fees after the entry of the judgment.

The court in *Lima* pointed to other circuits that had also applied the requirement that inclusion of costs be explicitly stated, including the Sixth, Seventh, Ninth, and Eleventh circuits. Therefore, the plaintiff could still seek their attorneys' fees despite the accepted offer stating that it would resolve the litigation "in its entirety." That "catchall phrase" was not interpreted as explicitly covering attorneys' fees and costs.

Settlement agreements will ordinarily only protect defendants who are themselves party to them. In [*Shay v. Aldrich*](#), #138908, 487 Mich. 648, 790 N.W.2d 629 (2010), a man claimed that a number of police officers assaulted him in his home, and that a second group of officers, also present, failed to intervene to stop the unjustified use of force, which he contended constituted gross negligence.

Claims against the second group of officers were settled for a total of \$25,000, and a signed release agreement was entered into which stated that it covered the discharge of "all other persons" from the plaintiff's claims.

The first group of officers, who were alleged to have assaulted the plaintiff, argued that the release covered claims against them as well as against the second group of officers, despite the fact that they had not signed it, paid nothing under it, and were represented by separate counsel and insurance companies. An intermediate Michigan appeals court upheld these officers' interpretation.

The Michigan Supreme Court reversed, and in so doing overturned a prior state court decision barring the use of testimony and other extrinsic evidence outside of the language of a release when an unnamed party asserts third-party beneficiary rights based on broad language in a liability release, and when there is an ambiguity as to the intended scope of the coverage of the release. The plaintiff's intent, it was argued, had been to only settle with the second group of officers. Further proceedings were ordered on this issue.

Some state courts have found a duty on the part of public employees and officials to accept reasonable settlement offers from plaintiffs, and have imposed penalties for failure to do so. In [*Lancaster v. Incorporated Village of Freeport*](#), #181, 22

N.Y.3d 30, 1 N.E.3d 302, 978 N.Y.S.2d 101(2013), the highest court in New York ruled that a municipality in the state may withdraw from defending or indemnifying current and former officials and employees in a civil lawsuit if they fail to accept a reasonable settlement offer. While the context of the case was not law enforcement activity, the reasoning would appear to also apply in that context.

❖ Resources

The following are some useful resources related to the subject of this article.

- [Settlement Agreements](#). AELE Civil Case Summaries.
- [Defenses: Release Agreements](#). AELE Civil Case Summaries.
- [Offer of judgment](#). Wikipedia article.
- [Offer of Judgment: Compendium of Law](#) (U.S. Law Network 2018).
- [Rule 68 Offers: A Few Sample Forms to Get You Started](#) (Settlement Perspectives 2008)

❖ Relevant Monthly Law Journal Articles

- [Enforceability of Civil Liability Release Agreements](#), 2008 (3) AELE Mo. L.J. 101.
- [Attorneys' Fees in Federal Civil Rights Lawsuits: An Introduction - Part One](#), 2011 (4) AELE Mo. L. J. 101
- [Attorneys' Fees in Federal Civil Rights Lawsuits: An Introduction - Part Two](#), 2011 (5) AELE Mo. L. J. 101
- [Attorneys' Fees in Prisoners' Civil Rights Lawsuits](#), 2016 (1) AELE Mo. L. J. 301.

❖ References: (*Chronological*)

1. [Making Attorney Fees and Costs a Clear and Unambiguous Part of Offers of Judgment](#), by Nolan T. Herslebs, American Bar Association (November 5,

2019).

2. [Practical Considerations for Use of FRCP 68 Offer of Judgment](#), by Tamar Wise and Alanna Miller, NYSBA NY Litigator (Spring 2017)
3. [Rewriting Rule 68: Realizing the Benefits of the Federal Settlement Rule by Injecting Certainty into Offers of Judgment](#), by Danielle M. Shelton, 91 Minnesota Law Review 865 (2017)
4. [Rule 68 Offers of Judgment: Lessons from the New Mexico Experience](#) by William P. Lynch, 39 New Mexico Law Review 350 (2009).

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