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April 3, 2013

Secretary of the Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, NE
Washington, D.C. 20544

**Re: Proposed Amendment to Rule 68 and Recommendation for
Further Study**

Dear Secretary:

I write on behalf of the Committee on Federal Courts of The Association of the Bar of the City of New York to provide comments with regard to Federal Rule 68. The Association of the Bar, founded in 1870, has over 24,000 members practicing throughout the nation and in over 50 foreign jurisdictions. The Committee on Federal Courts is charged with studying and making recommendations regarding the Federal Rules of Civil Procedure and other aspects of the federal judiciary and federal litigation.

As one of our Committee's projects, we have engaged in a review of Federal Rule 68 and concluded that it has not succeeded in its ostensible purpose of encouraging early case settlement, at least in commercial cases, and is rarely used in that category of cases. The Committee believes that the Rule's infrequent use stems from the bar's unfamiliarity with how it works, the minimal consequences flowing from rejecting an offer of judgment under the Rule, and its unavailability to plaintiffs. Although the Committee could not reach consensus on recommending drastic changes to the Rule - - such as including attorneys' fees within the costs awarded under it - - it unanimously supports a more modest alteration to increase its use by permitting plaintiffs as well as defendants to make offers of judgment under the Rule. Twenty-three states have adopted some variation of a two-way rule in their Rule 68 counterparts.

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Briefly stated, Rule 68 currently provides that if a defendant makes an offer of judgment (in keeping with certain time and procedural constraints) which is rejected by the plaintiff, and if the plaintiff then recovers a judgment at trial less favorable than the defendant's offer, the plaintiff must pay the costs incurred by the defendant after the offer was rejected. Those costs, in turn, have been limited to the costs recoverable under Federal Rule 54 (except where certain statutes, such as 42 U.S.C. § 1983, define costs to include attorneys' fees).

The Committee is not aware of any rationale for the current one-way regime. That said, it should be noted that if Rule 68 were simply to be made symmetrical, without more, the benefit to plaintiffs would be small, because Federal Rule 54 already awards costs (in the Court's discretion) to a prevailing plaintiff regardless of whether the defendant previously rejected a more favorable settlement offer. In contrast, defendants do benefit significantly from Rule 68 since, unless the Rule is triggered, they do not recover costs when plaintiffs recover a judgment of any amount at trial.

The Committee has prepared the attached report summarizing the results of its research on Rule 68, in hopes of educating the bar about how the Rule works, increasing its use as a settlement tool, and fostering thoughtful discussion of the pros and cons of incorporating into it some degree of attorneys' fee-shifting. The Committee also recommends further study of possible methods to enhance the costs recoverable by plaintiffs who successfully invoke Rule 68 by, for example, imposing a multiplier on recoverable costs or some other mechanism, to make a symmetrical rule more fair to plaintiffs and defendants, and to motivate plaintiffs to use the Rule. Regardless of how that discussion unfolds, we urge the Advisory Committee to consider in the meantime our proposal to make Rule 68 symmetrical, in the interest of fulfilling its purpose of encouraging the settlement of cases.

Respectfully submitted,



Marilyn C. Kunstler

cc: Honorable John G. Koeltl,
United States District Court, Southern District of New York

Enclosure