

American College of Trial Lawyers



SURVEY OF STATE OFFER OF JUDGMENT PROVISIONS

Survey conducted by the American College of Trial Lawyers
Federal Civil Procedure Committee

October 2004

American College of Trial Lawyers

The American College of Trial Lawyers, founded in 1950, is widely considered to be the premier legal professional organization in America. It is composed of the best of the trial bar from the United States and Canada. Fellowship in the College is by invitation, extended only after careful investigation, to those experienced trial lawyers who have demonstrated exceptional skill as advocates and whose professional careers have been marked by the highest standards of ethical conduct, professionalism, and civility. Although there are currently more than 5,000 Fellows across the U.S. and Canada, membership can never be more than 1% of the total lawyer population of any State or Province. Qualified lawyers are called to Fellowship in the College from all branches of trial practice. Fellows are carefully selected from among those who represent plaintiffs and those who represent defendants in civil cases, and from those who prosecute and those who defend persons accused of crime. The College is thus able to speak with a balanced voice on important issues affecting the administration of justice.

The College is dedicated to maintaining and improving the standards of trial practice, the administration of justice, and the ethics of the profession. It brings together members of the profession who are qualified and who, by reason of probity and ability, will contribute to the accomplishments and good fellowship of the College.



“In this select circle, we find pleasure and charm in the illustrious company of our contemporaries and take the keenest delight in exalting our friendships.”

*—Hon. Emil Gumpert,
Chancellor-Founder, ACTL*

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Survey of State Offer of Judgment Provisions

We take as a given that forum shopping is bad, even evil. “The potential for the evil of forum shopping arises the moment two forums are made available.” *Bray v. United States*, 785 F.2d 989, 991 (Fed. Cir. 1986). In *Hamilton v. Roth*, 624 F.2d 1204, 1210 (3d Cir. 1980), the court described “the primary evil of forum shopping” as “an evil which results whenever a plaintiff has the ability to chose between state and federal fora, and can obtain more favorable result in federal court.”

But wait. Why is it, when we are provided with more than one possible forum in which to bring an action, that it is evil to weigh the choices? “There is nothing inherently evil about forum-shopping. The statutes giving effect to diversity jurisdiction under the Constitution, 28 U.S.C. § 1332 (jurisdiction) and § 1391 (venue) are certainly implicit, if not explicit, approval of alternate forums for plaintiffs. For example, § 1391(a) provides a suit may be brought in the district where all of the plaintiffs or all the defendants reside, or where the cause of action arose; and § 1391(c) provides that a corporation may be sued in any district in which incorporated, or is licensed to do business, or is doing business. Thus, complaints about forum shopping expressly made possible by statute are properly addressed to Congress, not the courts. “ *Goat v. Celotex Corp.*, 831 F.2d 508 , 512 (4th Cir. 1987).

There is nothing evil about following the rules. Effective advocates use the rules to their advantage.

Litigants often have expansive options when filing a new action. The plaintiff, a New Jersey corporation with its principal place of business in Connecticut, has a cause of action against a Michigan corporation with its principal place of business in California arising out of a contract negotiated in Alabama and performed in all 50 states. In addition to breach of contract theories, potential causes of action exist under federal consumer lending laws and various state laws. Where is the proper venue, the proper jurisdiction to bring the action? You may have options. Zealous representation requires that you carefully consider the pluses and minuses of each potential jurisdiction.

And one of the distinct pluses is often overlooked. Fed.R.Civ.P. 68 – offers of judgment – is a relatively toothless provision. Defendants, but not plaintiffs, can avail themselves of the rule anytime more than ten days prior to trial by offering to allow judgment to be taken against them in a specific amount; if the offer is not accepted and the plaintiff recovers an amount less favorable than the offer, the plaintiff must pay the defendants costs incurred after making the offer. But costs are typically limited to such things as copies and court reporter charges. Specific federal statutes sometimes provide for an award of costs that include big-ticket items such as attorneys’ fees; and when that happens, rule 68 can provide a vehicle to award or deny attorney’s fees. *See, Pedraza v. United Guar. Corp.*, 313 F.3d 1323, 1331 (11th Cir. 2002). But more often than not, the costs available under Rule 68 are, in the scheme of things, of relatively minor magnitude and importance.

And so we tend to think: “offers of judgment, yeah, big deal, so what?”

But the fact is that there is wide disparity among the individual states; some jurisdictions have adopted robust offer of judgment provisions which can have real impact and which ought to be carefully considered before choosing a jurisdiction. For example:

- In Connecticut, the court shall – shall not may -- add 12 percent per annum interest to the judgment from the date of the filing of the complaint. [A federal district court sitting in diversity used the Connecticut statute to add \$48 million to a \$133 million jury verdict.]
- In Alaska, Florida, Idaho, Michigan, New Jersey and Texas, costs may be defined to include attorney's fees.
- In Connecticut, New Jersey and Wisconsin, substantial amounts of interest may be added to the judgment.
- And for those of you who wish to avoid the subject entirely, you can do that in one of the states that make no provision for offers of judgment, such as Colorado, Georgia, Illinois or Maryland.

For those Fellows who do not believe that forum shopping is an evil, we offer this survey of the laws of the 50 states (and the District of Columbia) as a tool for helping to decide where to shop.¹

¹ Practitioners should, of course, check for possible changes in the statutes since publication of this survey.

Click on the state to view the complete provision

Offer of Judgment Provisions						
State	Citation	Party	Filing Deadline	Response Deadline	Consequence of Non-acceptance	Significant Difference From Federal Rule
AL	Ala. Rule Civ. Proc. 68	DEF	15 days prior to trial (14 days District Court)	10 days after service (7 days in District Court)	Same as Federal Rule; offeree must pay costs incurred after offer if judgment is not more favorable than offer	
AS	Alaska Stat. § 09.30.065	ANY	10 days prior to trial	10 days after service	If judgment is 5% (10% in case of multiple defendants) less favorable than offer, offeree shall pay all costs (including deposition expenses and travel) plus attorneys' fees on a sliding scale from 30-75% depending upon timing of offer	Costs include attorneys' fees
AK	Ark. Rule Civ. Proc. 68	DEF	10 days prior to trial	10 days after service	Similar to Federal Rule; offeree must pay costs incurred after offer if judgment is not more favorable than offer; costs include all reasonable litigation expenses, excluding attorney's fees	Expanded definition of costs
AZ	Ariz. Rule Civ. Proc. 68	ANY	30 days prior to trial	30 days after service	If judgment not more favorable than offer, offeree shall pay expert witness fees, double the taxable costs of the offeror, and prejudgment interest on unliquidated claims (with interest accruing from the date of the offer)	Expanded definition of costs; available to any party
CA	Cal. Civil Code §998	ANY	10 days prior to trial or arbitration	30 days after service or commencement of trial, whichever is first	If the defendant is the offeror and the judgment is not more favorable than offer, the plaintiff shall pay the defendant's costs from the time of the offer. If the costs awarded exceed the damages awarded to the plaintiff, the net amount is awarded to the defendant; If the Plaintiff is the offeror and the defendant fails to obtain a more favorable judgment, the court or arbitrator, in its discretion, may require the defendant to pay a reasonable sum to cover costs of expert witnesses.	Expanded definition of costs; available to any party
CO	None					No provision
CT	Conn. Gen. Stat. § 52-192a	PL	30 days prior to trial	60 days after service	If judgment is equal to or greater than an offer and is filed within 18 months of the filing of the complaint, the Court shall add 12% annually on the amount of the judgment from the date of the complaint; if the offer is filed more than 18 months after the complaint, interest runs from the date of the offer	Adds 12% per annum interest to judgment
	Conn. Gen. Stat. § 52-193 § 52-194 § 52-195-195	DEF	30 days prior to trial	10 days after service	If judgment is less than the offer, plaintiff recovers no costs accruing after receipt of notice of the offer; defendant recovers its costs incurred after date of offer. Such costs shall include attorney's costs not exceeding \$350.	
DC	D.C. Super. Ct. Rule 68	DEF	10 days prior to trial	10 days after service	Same as Federal Rule; offeree must pay costs incurred after offer if judgment is not more favorable than offer	
DE	Del. Super. Ct. C.P.R. 68	DEF	10 days prior to trial	10 days after service	Same as Federal Rule; offeree must pay costs incurred after offer if judgment is not more favorable than offer	
FL	Fla. Stat. Ann. § 768.79; Fla. Rule Civ. Proc. 1.442(a)-(j)	DEF	45 days prior to trial	30 days after service	Offeror entitled to reasonable costs and attorneys fees if judgment is 25% less favorable than offer; If offer not in good faith, court may disallow costs and fees	Costs include attorneys' fees
GA	none					No provision
HI	Haw. Rule Civ. Proc. 68	ANY	10 days prior to trial	10 days after service	Similar to Federal Rule; If the judgment 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.	Available to any party
ID	Idaho Rule Civ. Proc. 68; Rule 54(d)(1); Rule 54(e)(1)	DEF	14 days prior to trial	14 days after service	If the "adjusted award" (i.e. the verdict, as well as the offeree's costs and attorney's fees prior to the service of the offer) is less than the offer, then the offeree must pay the offeror's costs incurred after the making of the offer, while the offeror must pay costs and attorney's fees incurred before the making of the offer; if the judgment is more than the "adjusted award", the offeror must pay the offeree its costs incurred both before and after the offer.	Costs include attorneys' fees

Offer of Judgment Provisions						
State	Citation	Party	Filing Deadline	Response Deadline	Consequence of Non-acceptance	Significant Difference From Federal Rule
IL	None					No provision
IN	Ind. Rule Tr. Proc. 68.	DEF	10 days prior to trial	10 days after service	Same as Federal Rule; if judgment less favorable than offer, offeree must pay costs incurred after offer was made.	
IA	Iowa Code Ann. § 677.4 677.5 677.6.	DEF	anytime before judgment	immediate	Offer must be made “in court”; if offeree is present and refuses when offer is made or had three days notice of its amount and fails to appear, offeree must pay costs incurred after offer if judgment is not more favorable than offer.	
	Iowa Code Ann. § 677.7, 677.8, 677.9, 677..10.	DEF	anytime before trial	5 days after service	Offeree must pay costs, not including attorney’s fees, incurred after offer if judgment is not more favorable than offer; plaintiff also does not recover costs incurred after offer which would ordinarily be recoverable by prevailing party; includes offers conditional upon failure of defense.	
KS	Kan. Stat. Ann. § 60-2002(b).	DEF	15 days prior to trial	10 days after service	Same as Federal Rule except for filing deadline; offeree must pay costs incurred after offer if judgment is not more favorable than offer.	
KY	Ky. Court Rule 68; Ky. Rev. Stat. Ann. § 453.160.	DEF	10 days prior to trial	10 days after service	Similar to Federal Rule; offeree must pay costs incurred after offer if judgment is not more favorable than offer; includes offer conditioned upon failure of defense; also applies to appeals.	
LA	La. Code. Civ. Proc. Ann. art. 970.	ANY	30 days prior to trial	10 days after service	Offer admits no liability; if defendant offers, plaintiff must pay costs if judgment is 25% less than offer; if plaintiff offers, defendant must pay costs if judgment is 25% greater than the offer; costs are after offer only and may include anything except attorney’s fees, at the discretion of trial court.	Expanded definition of costs; available to any party
ME	Me. R. Civ. Proc. 68.	DEF	10 days prior to trial	10 days after service	Same as Federal Rule, except it allows court to approve filing deadline closer to trial and shorter response deadlines; offeree must pay costs incurred after offer if judgment is not more favorable than offer.	
MD	None					No provision
MA	Mass. Rule Civ. Proc. 68; Mass. Gen. Laws Ann., ch. 231, § 88.	DEF	10 days prior to trial	10 days after service	Similar to Federal Rule; offeree must pay costs incurred after offer if judgment is not more favorable than offer; expressly excludes interest from amount of judgment; statute expressly excludes offers from evidence in subsequent actions.	
MI	Mich. Court Rule 2.405.	ANY	28 days prior to trial	21 days after service	Rule contemplates that offeree may make a counteroffer; average is used for determining consequences (if no counteroffer made, the offer is deemed the average); if an offer is rejected, the party rejecting must pay costs, including reasonable attorney’s fees, incurred after the rejection if judgment is less favorable than the average offer; an offeree who does not make a counteroffer only recovers costs if the offer was made less than 42 days before trial; all costs within discretion of trial court who may refuse attorney’s fees “in the interest of justice.”	Costs include attorneys’ fees; available to any party
MN	Minn. Rule Civ. Proc. 68	ANY	10 days prior to trial	10 days	Similar to Federal Rule except that it contemplates an offer by any party and excludes provision regarding offers made after liability is determined; offeree must pay costs incurred after offer if judgment is not more favorable than offer.	Available to any party
MS	Miss. Rule Civ. Proc. 68	DEF	15 days prior to trial	10 days	Same as Federal Rule except for timing; offeree must pay costs incurred after offer if judgment is not more favorable than offer.	
MO	Mo. Rule Civ. Proc. 77.04.	DEF	30 days prior to trial	10 days	Similar to Federal Rule, but excludes provision regarding offers made after liability is determined; offeree must pay costs incurred after offer if judgment is not more favorable than offer.	
MT	Mont. Rule Civ. Proc. 68	DEF	10 days prior to trial	10 days	Same as Federal Rule; if judgment less favorable than offer, offeree must pay costs incurred after offer was made.	

Offer of Judgment Provisions						
State	Citation	Party	Filing Deadline	Response Deadline	Consequence of Non-acceptance	Significant Difference From Federal Rule
NE	Neb. Rev. Stat. §§ 25-901, 25-902	DEF	Any time prior to trial	5 days	Similar to Federal Rule; only applicable in actions for the recovery of money; if judgment less favorable than offer, offeree must pay costs incurred after offer was made.	
NV	Nev. Rule Civ. Proc. 68, Nev. Rev. Stat. §17.115	ANY	10 days prior to trial	10 days	Similar to Federal rule; allows for joint offers — joint offers to multiple parties may be conditioned on each party's acceptance; joint offers to defendants can only invoke penalties if there the theory of liability is the same for each; joint offers to plaintiffs can only invoke penalties if the damages claimed are all derivative of each other — If judgment not more favorable than offer, offeree shall not recover attorneys' fees and costs, and, if allowed, shall pay the fees and costs of offeror.	Available to any party
NH	None					No provision
NJ	NJ Court Rules R. 4:58-1, 4:58-2, 4:58-3, 4:58-4	ANY	20 days prior to trial	10 days prior to trial, or 90 days after filing	(a) Plaintiff's offer. If plaintiff's offer is not accepted and judgment is as good or better for plaintiff, defendant must pay reasonable litigation expenses, attorney's fees, and 8% interest on the amount of recovery from the date the offer was made, or the discovery was completed. However if action is for un-liquidated damages, no such awards are given unless the amount of recovery is 120% of the offer. (b) Defendant's offer. If defendant's offer is not accepted and judgment is as favorable or more favorable for defendant, plaintiff must pay the cost of defendant's suit, litigation expenses, and attorney's fees. However if action is for un-liquidated damages, no such awards are given unless the amount awarded to plaintiff is greater than \$750 and is less than 80% of the offer. Includes provisions for multiple parties.	Adds 8% interest; costs include attorneys' fees; available to any party
NM	N.M. Dist. Court Rule. Civ. Proc. 1-068	ANY	10 days prior to trial (but at least 120 days after filing of responsive pleading for plaintiff)	10 days	All penalties are barred in domestic relations actions. Acceptance of offer does not require judgment to be filed against defendant. (a) Plaintiff's offer. If plaintiff's offer is not accepted and the final judgment is more favorable to plaintiff than the offer, defendant must pay costs, excluding attorney's fees, including double the amount of costs incurred after the offer was made. (b) Defendant's offer. If defendant's offer is not accepted and the final judgment is more favorable to defendant, plaintiff must pay costs, excluding attorney's fees, incurred by defendant after the offer was made.	Available to any party
NY	N.Y. Civ. Practice Law and Rules 3219, 3220, 3221	DEF	10 days prior to trial	10 days	(a) R. 3219. This provision applies only to defendants to a contract action. Defendant must deposit tender offer to the clerk of the court. If not accepted by plaintiff within 10 days, defendant must request its return or the amount is deemed "paid into the court." If judgment is equal to or less than the amount offered, the plaintiff must pay defendant's costs from the time of the offer. (b) R. 3220. This provision applies only to defendants to a contract action. Defendant's offer is made conditional on a finding of liability — if defendant is not found liable, offer is invalid. If plaintiff does not accept, and defendant is found liable, but for less than the amount offered, plaintiff must pay defendant's expenses solely for trying the issue of damages. (c) R. 3221. This provision applies to all defendants not in a matrimonial action. If offer is not accepted, and judgment is for less than the amount offered, plaintiff must pay defendant's costs from the time of the offer.	Limited availability
NC	N.C. Gen Stat. § 1A-1, R. 68	DEF	10 days prior to trial	10 days; 20 days for conditional damage offer	Similar to Federal Rule; if judgment less favorable than offer, offeree must pay costs incurred after offer was made. Defendant may make offer conditional on a finding of liability — if defendant is not found liable, offer is invalid. If plaintiff does not accept offer, and defendant is found liable but for less than the amount offered, plaintiff must pay defendant's costs for litigating the damages issue.	
ND	N.D. Rule Civ. Proc. 68	ANY	10 days prior to trial	10 days	If judgment less favorable than offer, offeree must pay for the offeror's costs incurred after the making of the offer. Offer may be accepted without entering judgment against defendant.	Available to any party

Offer of Judgment Provisions						
State	Citation	Party	Filing Deadline	Response Deadline	Consequence of Non-acceptance	Significant Difference From Federal Rule
OH	Ohio Rule Civ. Proc. 68	ANY	Any time	Any time	None	No provision
OK	12 Okla. Stat. Ann. §§ 1101, 1101.1	ANY	Any time for action for money damages only; 10 days prior to trial for all other actions	5 days of action for money damages only; 10 days for other actions	Only defendant can initiate procedure, but once initiated, plaintiff can make counteroffer and same rules apply to either party; different rules (and deadlines) apply to certain causes of action and claimed amounts, but in general if judgment is less favorable than offer, offeror is entitled to reasonable costs and attorneys fees incurred after offer	Available to any party
OR	Or. R. Civ. P. 54(E)	DEF	10 days prior to trial	3 days	Similar to Federal Rule. If judgment not more favorable than offer, offeree shall not recover costs, prevailing party's fees, disbursements or attorney fees incurred after date of offer; and offeror shall recover costs and disbursements, not including prevailing party fees, from the time the offer was served.	
PA	None					No provision
RI	R.I. Dist. Court Rule 68	DEF	10 days prior to trial	10 days after service	Similar to Federal Rule; in addition to normal options, allows offeree to accept tender as part payment and proceed to trial solely on damages	
SC	S.C. Rule Civ. Proc. 68	DEF	Anytime	10 days after service	Similar to Federal Rule except for omission of provision allowing for offers of judgment prior to hearing for damages when liability has already been determined; offeree must pay costs incurred after offer if judgment is not more favorable than offer under Rule 68(a). Under Rule 68(b), breach of contract defendant may make offer that, if he fails on his defense, damages be assessed at a certain sum, and if plaintiff does not recover damages greater than offer, he must pay costs incurred in defense of damages claim. Costs are defined by S.C. R. Civ. P. 54, and do not include attorney's fees.	
SD	S.D. Cod. Laws § 15-6-68	DEF	10 days prior to trial	10 days after service	Similar to Federal Rule; offeree must pay costs incurred after offer if judgment is not more favorable than offer	
TN	Tenn. R. Civ. P. 68	ANY	10 days prior to trial	10 days after service	Similar to Federal Rule except for omission of provision allowing for offers of judgment prior to hearing for damages when liability has already been determined; offeree must pay costs incurred after offer if judgment is not more favorable than offer.	Available to any party
TX	E.D. Tex. Local Rules (Civil Justice Expense and Delay Reduction Plan, Art. 6 (2002))	ANY	At the Management Conference, or anytime thereafter	Set by the offering party, but must be reasonable	If judgment is 10% or less beneficial than offer, offeree must pay the litigation costs incurred after offer was rejected; "litigation costs" are costs directly related to trial preparation and actual trial expenses. "Litigation costs" include but are not limited to attorney's fees.	Costs include attorneys' fees; available to any party
UT	Utah Rule Civ. Proc. 68(b)	DEF	10 days prior to trial	10 days	Similar to Federal Rule; Costs are defined by Utah R. Civ. P. 54 and do not include attorneys' fees.	
VT	Vt. Rule Civ. Proc. 68	DEF	10 days prior to trial unless court grants shorter time	10 days after service unless court grants shorter time	Similar to Federal Rule; offeree must pay costs incurred after offer if judgment is not more favorable than offer	
VA	None					
WA	Wash. Civ Rule 68	DEF	10 days prior to trial	10 days after service	Same as Federal Rule; offeree must pay costs incurred after offer if judgment is not more favorable than offer	
WV	W. Va. Rule Civ. Proc. 68 (a)-(d)	DEF	10 days prior to trial	10 days after service	Similar to Federal Rule; offeree must pay costs incurred after offer if judgment is not more favorable than offer; in addition to Federal Rule options, allows offeree to accept tender as payment and proceed to trial solely on damages.	

Click on the state to view the complete provision

Offer of Judgment Provisions						
State	Citation	Party	Filing Deadline	Response Deadline	Consequence of Non-acceptance	Significant Difference From Federal Rule
WI	Wis. Stat. Ann. § 807.01(1) and (2)	DEF	20 days prior to trial	10 days after service and prior to trial	Defendant can make offer for pretrial judgment or to have specified sum assessed on an adverse result at trial; If judgment less favorable than offer, plaintiff recovers no costs; defendant recovers costs	Adds 12% interest; available to any party
	Wis. Stat. Ann. § 807.01(3) and (4)	PL	20 days prior to trial	10 days after service and prior to trial	If judgment greater than offer, plaintiff recovers double the amount of costs and 12% interest on the award from the date of the offer (prejudgment interest is generally not allowed other than through the offer provision)	
WY	Wyo. Rule Civ. Proc. 68	ANY	60 days after service; 30 days prior to trial	10 days after service	Similar to Federal Rule; offeree must pay cost incurred after offer if judgment is not more favorable than offer; costs do not include attorney's fees	Available to any party