

5 OFFERS OF JUDGMENT

Beginning with all new cases filed on or after August 7, 1997, the rules concerning offers of judgment have changed significantly. The increase (or decrease) of prejudgment interest as the reward (or penalty) for a successful offer of judgment has been eliminated entirely, and a graduated scale of recoverable attorney's fees has taken its place. In addition, under the pre-August 7, 1997 system, a party needed only to obtain a judgment that was more favorable than the Civil Rule 68 offer (in other words, beat the offer by one dollar) in order to trigger the provisions of Civil Rule 68 and AS 09.30.065. Under the current provisions, parties must obtain a judgment that is more favorable than their offer by five (5) percent or, in the case of multiple defendants, ten (10) percent.¹ The changes to Civil Rule 68 in 1997 apply to all cases filed on or after August 7, 1997, regardless of whether the cause of action accrued before that date.²

Many of the basic concepts concerning offers of judgment have not changed. Civil Rule 68 and AS 09.30.065 specifically authorize offers of judgment. Offers of judgment may be made either by a plaintiff or by a defendant, but they must be made at least ten (10) days prior to trial. At least one trial court judge has held that the offeree must have the opportunity to accept the offer on a business day prior to the commencement of the trial. An offer of judgment must be in writing and once made it is irrevocable for ten (10) days.³ Oral or written communications between counsel after service of offer of judgment are ineffective to revoke or modify the original offer of judgment.⁴ If, after a timely offer is made, the court accelerates the trial date so that trial will commence before the 10-day irrevocable offer period, the offer must be accepted before trial starts, or the court will neither recognize the acceptance nor affirm the judgment.⁵

The provisions of AS 09.30.065 have been held inapplicable in Alaska diversity cases filed in federal court.⁶ However, since this decision was based on interpretation of AS 09.30.065 prior to the 1997 amendments, when penalties were defined as

¹ See AS 09.30.065(a).

² *Ellison v. Plumbers & Steam Fitters Union Local 375*, 118 P.3d 1070 (Alaska 2005).

³ See *Rules v. Sturn*, 661 P.2d 615, 618 (Alaska 1983).

⁴ See *LaPerriere v. Shrum*, 721 P.2d 630, 634 (Alaska 1973).

⁵ *MAPCO Express, Inc., v. Faulk*, 24 P.3d 531, 541 (Alaska 2001).

⁶ See *Home Indem. Co. v. Lane Powell Moss and Miller*, 43 F.3d 1322, 1331 (9th Cir. 1995).

enhancing or reducing prejudgment interest, it is not necessarily settled whether the same limitation would apply to enhanced attorney's fees.

If an offer of judgment is not accepted, and the judgment is at least five percent (5%) less favorable to the offeree, or ten percent (10%) if the case involves multiple defendants, then the offeree must pay all of the offeror's costs allowable by the Civil Rules and, depending on when the offer of judgment was made, 30%, 50% or 75% of the offeror's "reasonable actual attorney fees" incurred after the date the offer was made, as follows:

- 75% If the offer was served within sixty (60) days of the date in the civil pretrial order for the exchange of the initial disclosures required under Rule 26;
- 50% If the offer was served more than sixty (60) days after the date for Rule 26 disclosures but more than ninety (90) days before trial; or
- 30% If the offer was served less than ninety (90) days but more than ten (10) days before trial.

Under this scheme, not only does the percentage of recoverable fees go down for offers made later in the case, but it is a smaller portion of the total attorney's fees incurred that is used to make the calculation. The rule heavily favors early offers of judgment.

The proper calculation to compare an offer of judgment to a verdict includes adjustment of the verdict by the addition of prejudgment interest and attorney's fees and costs from the time prejudgment interest began to accrue to the date of the judgment.⁷ And, in the unique circumstances where a defendant has made pre-trial payments to a plaintiff (such as where the defendant's insurer unconditionally paid plaintiff's medical expenses), the court will reduce the total award of damages to the plaintiff by the amount of those pre-trial payments before comparing the judgment received by the plaintiff to the offer of judgment made by the defendant.⁸

In *Jackman*, the Alaska Supreme Court noted that, if the insurer had made it clear that the pre-trial payment was intended to be applied to its insured's potential liability, then that insured would have been entitled to an even greater benefit, because the pre-trial payment would then be subtracted from the amount of plaintiff's damages allocated to that insured-defendant. Consequently, whenever a pre-trial payment is

⁷ See *Jaso v. McCarthy*, 923 P.2d 795, 802 n.12 (Alaska 1996).

⁸ *Jackman v. Jewel Lake Villa One*, 170 P.3d 173 (Alaska 2007)

contemplated, it is advisable to make it clear that the payment is intended as compensation for the particular defendant's potential share of fault and particular defendant's particular share of any damages awarded to plaintiff.⁹

In those situations where the prevailing party would recover more under Civil Rule 82 than it would by making the calculations under Civil Rule 68(b), the party recovers the higher amount.¹⁰

Another issue relates to whether a joint offer triggers the penalty provisions of Civil Rule 68 and AS 09.30.065. The Alaska Supreme Court has held that joint offers of judgment present apportionment issues that may make them inappropriate for application of the penalty provisions of Civil Rule 68.¹¹ *Brinkerhoff* involved an offer that was made to joint offerees by a single offeror and the offer was unapportioned between the two offerees. The Alaska Supreme Court has identified two factors that should be analyzed in deciding whether a joint offer should trigger Civil Rule 68 penalties in the context of an offer made by joint offerors to a single offeree.¹² First, if the offer is inclusive of all the relationships among the parties and their conflicting claims (e.g., had the offer been accepted, all claims between the parties would have been resolved) and, second, if no apportionment difficulty exists, the unaccepted offer triggers Civil Rule 68 penalties.¹³

Although the language of Rule 68 could support the conclusion that an offer may be made with respect to any claim, as opposed to all claims, the Alaska Supreme Court has found otherwise. The Court has held that an offer of judgment is invalid if acceptance of the offer would only settle the plaintiff's legal claims, leaving plaintiff's equitable claims unresolved, in a situation where both the legal and equitable claims were based on the same set of facts.¹⁴ The Court has also held that "[b]oth the rule and statute implicitly require that an offer of judgment include all claims between the parties

⁹ *Id.*, at 179-180.

¹⁰ See Alaska R. Civ. P. 68(c); see also Tab 14 Attorney's Fees.

¹¹ See *Brinkerhoff v. Swearingen Aviation Corp.*, 663 P.2d 937, 943 (Alaska 1983).

¹² See *Taylor Construction Services, Inc. v. URS Co.*, 758 P.2d 99 (Alaska 1988).

¹³ *Id.* at 102; see also *John's Heating Service v. Lamb*, 46 P.3d 1024 (Alaska 2002).

¹⁴ See *Fernandes v. Portwine*, 56 P.3d 1 (Alaska 2002).

and be capable of completely resolving the case by way of a final judgment if accepted."¹⁵ Therefore, an offer that only addresses individual claims will not be valid..

The Alaska Supreme Court has decided several cases refining the court's analysis of Rule 68 offers of judgment. In *Cook Schumann & Groseclose, Inc. v. Brown & Root, Inc.*,¹⁶ Guess & Rudd successfully defended a non-monetary Rule 68 Offer of Judgment served with the defendant's Answer, obtaining an award for its client of 75% of its reasonable attorneys' fees. First, the court concluded that offers of judgment made prior to Rule 26 Initial Disclosures are valid. Second, the court concluded that an offer is not ambiguous where it fails to state a definite sum. The court held that "nonmonetary offers of judgment are valid under the rule so long as they are unambiguous and unconditional." The court reasoned that its "real concern" relates to the "specificity of the offer rather than its communication of a monetary amount." The court recognized, but did not address, the additional issue of how the trial court is to quantify a nonmonetary offer of judgment when determining attorney's fees awards.

Similarly, the court considered nonmonetary offers of judgment in *Lowell v. Hayes*.¹⁷ Although the decision is without precedential value, the court implicitly ruled that zero dollar offers of judgment are permissible and that nonmonetary offers -- such as apologies -- do have value. The court again did not address how to determine whether a nonmonetary offer is more favorable than a judgment, noting only that "Lowell's primary goal was an apology and that the defendants secured a judgment better than his offer by not having to give one." However, the offer must allow an actual judgment to be entered in order to be enforceable.¹⁸

In *Ellison v. Plumbers and Steamfitters Union Local 375*,¹⁹ the court held that a prevailing party cannot receive attorney's fees under both Civil Rule 82 and Civil Rule 68. Therefore, a prevailing party cannot obtain Rule 82 fees for work done prior to making an offer of judgment and Rule 68 fees for work done after the offer of judgment; the prevailing party must choose attorney's fees under one rule or the other.

The Alaska Supreme Court in *Pagenkopf v. Chatham Electric* created a new hurdle for situations where the defendant making the offer has made a third-party claim

¹⁵ *Progressive Corp. v. Peter ex rel. Peter*, 195 P.3d 1083, 1088 (Alaska 2008).

¹⁶ 116 P.3d 592 (Alaska 2005).

¹⁷ 117 P.3d 745 (Alaska 2005).

¹⁸ *Sayer v. Bashaw*, 214 P.3d 363 (Alaska 2009).

¹⁹ 118 P.3d 1070 (Alaska 2005).

against another party with potential negligence.²⁰ In that case, the court refused to allow Rule 68 fees where the offer by the defendant, Chatham Electric, did not disclose the fact that the third-party defendant was contributing. It further clarified that, even if there had not been a side deal, the offer of judgment by Chatham Electric would cause apportionment problems and make the offer invalid for purposes of receiving enhanced Rule 68 attorney's fees. It appears the only way an offer of judgment would be valid is if it came jointly from the defendant and the third-party. As a result of this case, we recommend making an offer of judgment before filing a third-party claim for apportionment.

The Alaska Supreme Court has issued rulings which have done away with the "bright line rule" and which have limited the applicability of enhanced attorney's fees under Civil Rule 68 in cases where they "could not be considered valid offers of settlement or compromise, or valid attempts to encourage negotiation."²¹ In *Beal*, the Court held that offers of judgment of \$1.00 were invalid because the "offers were nothing more than tactical demands that plaintiffs dismiss their claims to avoid exposure to Rule 68 fees awards."²² Similarly, in *Anderson*, the Court found that a \$10.00 offer of judgment was invalid because "there was no objectively reasonable prospect that Anderson would accept ten dollars to settle her case - or that the offer would even start a dialogue that could lead to settlement-at that stage of the litigation [and] Alyeska's offer was in effect an opening 'walkaway' offer that had no reasonable chance of acceptance or of fostering further settlement negotiations."²³ Based on these rulings, it is somewhat difficult to determine what minimum amount will be found to constitute a valid offer of judgment. Even an offer of \$1,000 might be found too low in certain factual scenarios, such as a wrongful death case.

²⁰ 165 P.3d 634 (Alaska 2007).

²¹ *Anderson v. Alyeska Pipeline Serv. Co.*, 234 P.3d 1282, 1289 (Alaska 2010) citing *Beal v. McGuire* 216 P.3d 1154 (Alaska 2009).

²² *Beal*, 216 P.3d at 1178.

²³ *Anderson*, 234 P.3d at 1289.

Appendices:

Alaska R. Civ. P. 68
AS 09.30.065

CIVIL RULES

Rule 68

Rule 68. [Applicable to cases filed before August 7, 1997.] Offer of Judgment.

(a) At any time more than 10 days before the trial begins, either the party making a claim or the party defending against a claim may serve upon the adverse party an offer to allow judgment to be entered in complete satisfaction of the claim for the money or property or to the effect specified in the offer, with costs then accrued. The offer may not be revoked in the 10 day period following service of the offer. If within 10 days after service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service, and the clerk shall enter judgment. An offer not accepted within 10 days is considered withdrawn and evidence of the offer is not admissible except in a proceeding to determine costs. The fact that an offer is made but not accepted does not preclude a subsequent offer.

(b) If the judgment finally rendered by the court is not more favorable to the offeree than the offer, the prejudgment interest accrued up to the date judgment is entered shall be adjusted as follows:

(1) if the offeree is the party making the claim, the interest rate will be reduced by the amount specified in AS 09.30.065 and the offeree must pay the costs and attorney's fees incurred after the making of the offer (as would be calculated under Civil Rules 79 and 82 if the offeror were the prevailing party). The offeree may not be awarded costs or attorney's fees incurred after the making of the offer.

(2) if the offeree is the party defending against the claim, the interest rate will be increased by the amount specified in AS 09.30.065.

(c) When the liability of one party to another has been determined by verdict or order or judgment, but the amount or extent of the liability remains to be determined by further proceedings, the party adjudged liable may make an offer of judgment, which shall have the same effect as an offer made before trial if it is served within a reasonable time not less than 10 days prior to the commencement of hearings to determine the amount or extent of liability.

Rule 68. [Applicable to cases filed on or after August 7, 1997.] Offer of Judgment.

(a) At any time more than 10 days before the trial begins, either the party making a claim or the party defending against a claim may serve upon the adverse party an offer to allow judgment to be entered in complete satisfaction of the claim for the money or property or to the effect specified in the offer, with costs then accrued. The offer may not be revoked in the 10 day period following service of the offer. If within 10 days after service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service, and the clerk shall enter judgment. An offer not accepted within 10 days is considered withdrawn, and evidence of the offer is not admissible except in a proceeding to determine costs. The fact that an offer is made but not accepted does not preclude a subsequent offer.

(b) If the judgment finally rendered by the court is at least 5 percent less favorable to the offeree than the offer, or, if there are multiple defendants, at least 10 percent less favorable to the offeree than the offer, the offeree, whether the party making the claim or defending against the claim, shall pay all costs as allowed under the Civil Rules and shall pay reasonable actual attorney fees incurred by the offeror from the date the offer was made as follows:

(1) if the offer was served no later than 60 days after both parties made the disclosures required by Civil Rule 26, the offeree shall pay 75 percent of the offeror's reasonable actual attorney fees;

(2) if the offer was served more than 60 days after both parties made the disclosures required by Civil Rule 26 but more than 90 days before the trial began, the offeree shall pay 50 percent of the offeror's reasonable actual attorney fees;

(3) if the offer was served 90 days or less but more than 10 days before the trial began, the offeree shall pay 30 percent of the offeror's reasonable actual attorney fees.

(c) If an offeror receives costs and reasonable actual attorney fees under paragraph (b), that offeror shall be considered the prevailing party for purposes of an award of attorney fees under Civil Rule 82. Notwithstanding paragraph (b), if the amount awarded an offeror for attorney fees under Civil Rule 82 is greater than a party would receive under paragraph (b), the offeree shall pay to the offeror attorney fees specified under Civil Rule 82 and is not required to pay reasonable actual attorney fees under paragraph (b). A party who receives attorney fees under this rule may not also receive attorney fees under Civil Rule 82.

Rule 68

ALASKA RULES OF COURT

(Adopted by SCO 5 October 9, 1959; amended by SCO 818 effective August 1, 1987; and by SCO 1281 effective August 7, 1997)

Note to SCO 1281: In 1997 the legislature amended AS 09.30.065 concerning offers of judgment. According to ch. 26, § 52, SLA 1997, the amendment to AS 09.30.065 has the effect of amending Civil Rules 68 and 82 by requiring the offeree to pay costs and reasonable actual attorney fees on a sliding scale of percentages in certain cases, by eliminating provisions relating to interest, and by changing provisions relating to attorney fee awards. According to § 55 of the session law, the amendment to AS 09.30.065 applies "to all causes of action accruing on or after the effective date of this Act." However, the amendments to Civil Rule 68 adopted by paragraph 5 of this order are applicable to all cases filed on or after August 7, 1997. See paragraph 17 of this order.

Annotations

Cases

- I. In General
- II. Payment of Costs
 - A. Construction
 - B. Prejudgment Interest

I. In General

A payment document which, in itself, did not have the criterion of an offer of judgment and could, at most, be considered as a deposit in the superior court, made under the provisions of Civil Rule 67(a), was by virtue a stipulation of the parties as reasonably construed converted into an offer of judgment which plaintiff's accepted under the stipulation. *Albritton v. Estate of Larson*, Op. No. 413, 428 P2d 379 (Alaska 1967).

The purpose of this rule is to encourage settlement of civil litigation as well as to avoid protracted litigation. *Miklautsch v. Dominick*, Op. No. 538, 452 P2d 438 (Alaska 1969).

An offer of judgment and acceptance thereof is a contract and the amount of the offer of judgment must be definite so that it is clear there is a meeting of the minds on an essential term of the contract. *Davis v. Chism*, Op. No. 919, 513 P2d 475 (Alaska 1973).

This rule does not apply to eminent domain proceedings. *Anchorage v. Schavenius*, Op. No. 1183, 539 P2d 1169 (Alaska 1975).

The purpose of this rule is to encourage settlement and to avoid protracted litigation. *Continental Ins. Co. v. U.S. Fid. & Guar. Co.*, Op. No. 1298, 552 P2d 1122 (Alaska 1976).

Offer of judgment that paralleled Form 128, Forms for Rules of Civil Procedure, differing only in that it supplied defendant's identity and filled in blank spaces, was valid compliance with Civil Rule 68. *Farnsworth v. Steiner*, Op. No. 1955, 601 P2d 266 (Alaska 1979).

This rule applies not only when the offeree obtains judgment in his favor but also when the offeree does not prevail at all. *Wright v. Vickaryous*, Op. No. 2075, 611 P2d 20 (Alaska 1980).

A contract for an entry of judgment is not formed if the written notice of acceptance of an offer under this rule is not

served within the ten day limit. *Gumear v. Interior Credit Bureau*, Op. No. 2339, 627 P2d 647 (Alaska 1981).

A defendant is not bound under this rule to make an offer of judgment commensurate with any degree of compensation. *Rules v. Sturn*, Op. No. 2640, 661 P2d 615 (Alaska 1983).

An offer of judgment under this rule must be in writing to be valid. *Rules v. Sturn*, Op. No. 2640, 661 P2d 615 (Alaska 1983).

An offer of judgment made pursuant to this rule is irrevocable for 10 days after it is served on the adverse party. *Rules v. Sturn*, Op. No. 2640, 661 P2d 615 (Alaska 1983).

Where written offer of judgment by defendant was silent as to an offset for sums which had been advanced to plaintiff for medical treatment, defendant was required to pay the full amount of the offer without the offset. *Rules v. Sturn*, Op. No. 2640, 661 P2d 615 (Alaska 1983).

Joint offers are excluded from the penal cost provisions of this rule. *Brinkerhoff v. Swearingen Aviation Corp.*, Op. No. 2666, 663 P2d 937 (Alaska 1983).

The cost provision of this rule refers to those costs permitted by the Civil Rules and the Administrative Rules. *Hayes v. Xerox Corp.*, Op. No. 3045, 718 P2d 929 (Alaska 1986).

This rule awards actual costs although it does not award actual attorney's fees. *Hayes v. Xerox Corp.*, Op. No. 3045, 718 P2d 929 (Alaska 1986).

Where settlement offer to plaintiffs specifically designated the amount offered to each plaintiff individually, did not contain a proviso mandating joint acceptance, and could be construed as permitting one plaintiff to accept and the other to go to trial, the settlement offer came within the penal cost provisions of this rule. *Hayes v. Xerox Corp.*, Op. No. 3045, 718 P2d 929 (Alaska 1986).

Joint offers of settlement are generally excluded from the penal cost provisions of this rule. *Hayes v. Xerox Corp.*, Op. No. 3045, 718 P2d 929 (Alaska 1986).

Because an offer of a lump sum presents problems of apportionment between offerees, it is treated as a joint offer and excluded from the penal cost provisions of this rule. *Hayes v. Xerox Corp.*, Op. No. 3045, 718 P2d 929 (Alaska 1986).

Failure of court, which made an award of attorney fees at variance with the schedule in the Civil Rules, to state its specific reasons for the amount awarded, required reversal. *Hayes v. Xerox Corp.*, Op. No. 3045, 718 P2d 929 (Alaska 1986).

Offer of judgment was not invalid as indefinite regarding the amount for attorney's fees. *Hayes v. Xerox Corp.*, Op. No. 3045, 718 P2d 929 (Alaska 1986).

Trial court did not err in refusing to deduct the amount of worker's compensation benefits received by plaintiff from his judgment against defendant in computing the "judgment finally obtained" for purpose of comparing plaintiff's judgment with the prejudgment offer made by defendant. *Alyeska Pipeline Service Co. v. Beadles*, Op. No. 3151, 731 P2d 572 (Alaska 1987).

To the extent that the trial court concluded that defendant prevailed because much of his attorney fees were incurred after his offer of judgment was made, the trial court considered an impermissible factor; while consideration of that factor is relevant in determining the amount of attorney fees to be awarded under this rule, it is irrelevant to the determination of

Sec. 09.30.065. Offers of judgment. (a) At any time more than 10 days before the trial begins, either the party making a claim or the party defending against a claim may serve upon the adverse party an offer to allow judgment to be entered in complete satisfaction of the claim for the money or property or to the effect specified in the offer, with costs then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service, and the clerk shall enter judgment. An offer not accepted within 10 days is considered withdrawn, and evidence of that offer is not admissible except in a proceeding to determine the form of judgment after verdict. If the judgment finally entered on the claim as to which an offer has been made under this section is at least five percent less favorable to the offeree than the offer, or if there are multiple defendants at least 10 percent less favorable to the offeree than the offer, the offeree, whether the party making the claim or defending against the claim, shall pay all costs as allowed under the Alaska Rules of Civil Procedure and shall pay reasonable actual attorney fees incurred by the offeror from the date the offer was made, as follows:

(1) if the offer was served no later than 60 days after both parties made the disclosures required by the Alaska Rules of Civil Procedure, the offeree shall pay 75 percent of the offeror's reasonable actual attorney fees;

(2) if the offer was served more than 60 days after both parties made the disclosures required by the Alaska Rules of Civil Procedure but more than 90 days before the trial began, the offeree shall pay 50 percent of the offeror's reasonable actual attorney fees;

(3) if the offer was served 90 days or less but more than 10 days before the trial began, the offeree shall pay 30 percent of the offeror's reasonable actual attorney fees.

(b) If an offeror receives costs and reasonable actual attorney fees under (a) of this section, that offeror shall be considered the prevailing party for purposes of an award of attorney fees under the Alaska Rules of Civil Procedure. Notwithstanding (a) of this section, if the amount awarded an offeror for attorney fees under the Alaska Rules of Civil Procedure is greater than a party would receive under (a) of this section, the offeror shall pay to the offeror attorney fees specified under the Alaska Rules of Civil Procedure and is not required to pay reasonable actual attorney fees under (a) of this section. A party who receives attorney fees under this section may not also receive attorney fees under the Alaska Rules of Civil Procedure. (§ 3 ch 107 SLA 1980; am § 1 ch 48 SLA 1981; am § 2 ch 139 SLA 1986; am §§ 16, 17 ch 26 SLA 1997)

Reviser's notes. — Formerly AS 09.30.055. Renumbered in 1983. Originally enacted as AS 45.45.010(i) and renumbered in 1980.

Cross references. — For related court rule, see Civ. R. 68.

For provisions relating to the effect of the 1997 amendments to subsection (a) and addition of (b) on Rules 68 and 82, Alaska Rules of Civil Procedure, see § 52, ch. 26, SLA 1997 in the 1997 Temporary and Special Acts.

For a statement of legislative intent relating to the provisions of ch. 26, SLA 1997, see § 1, ch. 26, SLA 1997 in the 1997 Temporary and Special Acts. For

severability of the provisions of ch. 26, SLA 1997, see § 56, ch. 26, SLA 1997 in the 1997 Temporary and Special Acts.

Effect of amendments. — The 1997 amendment, effective August 7, 1997, rewrote subsection (a) and added subsection (b).

Editor's notes. — Section 9, ch. 139, SLA 1986 provides that the 1986 amendment to this section applies "to all causes of action accruing after June 11, 1986."

Section 55, ch. 26, SLA 1997 provides that the provisions of ch. 26, SLA 1997 apply "to all causes of action accruing on or after August 7, 1997."