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"Rule 68"

Analysis of Section 22, dealing with Offers of Judgment

WHERE PLAINTIFF SUES DEFENDANT FOR \$100,000:

1. If defendant gives an offer for \$90,000, and at trial plaintiff gets \$90,000:

Even though plaintiff prevailed on the merits, and could otherwise claim Rule 82 attorney fees, the plaintiff has to pay defendant's actual attorney fees under Rule 68. Plaintiff may not try to set off the Rule 82 fees he otherwise would be entitled to against defendant's Rule 68 attorney fees.

2. If defendant gives an offer for \$90,000, and at trial plaintiff gets only \$50,000:

Although it would be arguable which is the prevailing party under Rule 82, plaintiff has to pay all of defendant's actual attorney fees under Rule 68. Plaintiff may not set off the Rule 82 fees even if plaintiff were the prevailing party.

3. If defendant gives an offer for \$90,000, and at trial plaintiff gets only \$10,000:

Defendant probably is both the prevailing party under Rule 82 and entitled to actual attorney fees under Rule 68. Defendant gets only the Rule 68 fees.

4. If defendant gives an offer for \$90,000, and at trial plaintiff gets zeroed, the result is same as example 3 above.

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5. If plaintiff gives an offer for \$90,000, and at trial plaintiff gets \$90,000:

Plaintiff is both a prevailing party under Rule 82 and entitled to actual attorney fees under Rule 68. Plaintiff gets only the Rule 68 fees.

6. If plaintiff gives an offer for \$90,000, and at trial plaintiff gets only \$50,000:

Although it would be arguable which is the prevailing party under Rule 82, defendant is not liable for plaintiff's attorney fees under Rule 68. Defendant is liable for plaintiff's Rule 82 fees if plaintiff is adjudged the prevailing party.

7. If plaintiff gives an offer for \$90,000, and at trial plaintiff gets only \$10,000:

Defendant probably is the prevailing party under Rule 82. Defendant is not liable for plaintiff's attorney fees under Rule 68. Plaintiff is probably liable to pay defendant Rule 82 attorney fees.

8. If plaintiff gives an offer for \$90,000, and at trial plaintiff gets zeroed, the result is the same as example 7 above.

To: Brian

Fm: Jim

February 18, 1997

Re: When the 60 day period to make an offer of judgment starts to run:

Under Rule 16(b), an order scheduling discovery, etc., must be entered within 90 days after the appearance of defendant's attorney.

Under Rule 26(f), the parties must meet informally to schedule discovery, etc., at least 14 days before the Rule 16(b) scheduling conference.

Under Rule 26(a)(1), the discovery disclosures (which trigger the Rule 68 offer of judgment time limits) are required to be made within 10 days after the Rule 26(f) informal meeting of counsel.

90 days - 14 days + 10 days = 86 days after defendant's attorneys have filed their appearance, the time starts to run on the 60 days within which to make an offer of judgment.

BOTTOM LINE: EITHER SIDE HAS BETWEEN 86 AND 146 DAYS AFTER DEFENDANT'S ATTORNEYS HAVE FILED AN APPEARANCE WITHIN TO FILE AN OFFER OF JUDGMENT IN ORDER TO GET 100% OF ACTUAL REASONABLE ATTORNEY FEES.