Symposium on FRCP 68: Lessons from New Jersey

by Albert Yoon*

I. Introduction

I would like to begin by thanking the Mercer Law Review for the opportunity to participate in its Federal Rules of Civil Procedure 68 Symposium. Federal Rule of Civil Procedure 68¹ ("Rule 68") is an important topic, and it is an honor to discuss the rule with such distinguished attorneys, jurists, and fellow academics. The reach of Rule 68 is certainly wide, applying to all federal civil litigation. The effect of Rule 68, however, is small: most scholars and practitioners agree it has little bearing on how cases are litigated. If Rule 68, and offer-of-judgment rules generally, are to have a more meaningful and positive effect on civil litigation, some modifications are in order. The purpose of this symposium is, in part, to evaluate what those modifications might be.

I come to this topic from a slightly different perspective than my fellow symposium participants. While I am familiar with the existing scholarship on Rule 68, my research (co-authored with Tom Baker) centers on the effect of a state-enacted offer-of-judgment rule: New Jersey Court Rule 4:58 ("Rule 4:58").² Rule 4:58 differs from Rule 68 both substantively and procedurally, but I believe that these differences in part provide insight into possible modifications to the federal rule.

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^{1.} FED. R. CIV. P. 68.

^{2.} N.J. Ct. R. 4:58.

The format of this essay proceeds as follows: Part II briefly summarizes the findings of the New Jersey study. Part III addresses the broader implications that arise from the New Jersey study and offer-of-judgment rules generally. Last, in Part IV, I offer some suggestions for possible reforms to the federal rule.

II. OVERVIEW OF THE NEW JERSEY STUDY

The existing scholarly literature on Rule 68 is vast; some of the most important contributions were written by today's symposium participants.³ Much of the work has examined the Rule from a theoretical perspective, generally concluding that the Rule redistributes wealth from the plaintiff to the defendant because only the defendant can issue a pretrial offer.⁴ By comparison, there has been relatively little empirical work on Rule 68: most work has been experimental in nature, concluding that the rule would have only modest effects.⁵ Those who have written about Rule 68's practical effect, drawn from interviews with practicing attorneys or from their own experience, have reached a consensus that Rule 68 is largely ignored and therefore ineffectual.⁶

^{3.} See, e.g., Edward H. Cooper, Rule 68, Fee Shifting, and the Rulemaking Process, in Reforming the Civil Justice System 108 (Larry Kramer ed., 1996); Harold S. Lewis, Jr., The Excessive History of Federal Rule 15(c) and Its Lessons for Civil Rules Revision, 85 Mich. L. Rev. 1507 (1987); William W Schwarzer, Fee-Shifting Offers of Judgment—An Approach to Reducing the Cost of Litigation, 76 Judicature 147, 150 (1992).

^{4.} See, e.g., Lucian Arye Bebchuk & Howard F. Chang, The Effect of Offer-of-Settlement Rules on the Terms of Settlement, 28 J. LEGAL STUD. 489, 490 (1999); Tai-Yeong Chung, Settlement of Litigation Under Rule 68: An Economic Analysis, 25 J. LEGAL STUD. 261, 263 (1996); Amy Farmer & Paul Pecorino, Conditional Cost Shifting and the Incidence of Trial: Pretrial Bargaining in the Face of a Rule 68 Offer, 2 Am. L. & ECON. REV. 318, 318 (2000); Geoffrey P. Miller, An Economic Analysis of Rule 68, 15 J. LEGAL STUD. 93, 125 (1986); George L. Priest, Regulating the Content and Volume of Litigation: An Economic Analysis, 1 SUP. CT. ECON. REV. 163, 163-64 (1982); Kathy Spier, Pretrial Bargaining the Design of Fee-Shifting Rules, 25 RAND J. ECON. 197, 202 (1994).

^{5.} See, e.g., David A. Anderson & Thomas D. Rowe, Jr., Empirical Evidence on Settlement Devices: Does Rule 68 Encourage Settlement?, 71 CHI.-KENT L. REV. 519, 541-42 (1995); Brian G.M. Main & Andrew Park, The Impact of Defendant Offers into Court on Negotiation in the Shadow of the Law: Experimental Evidence, 22 INT'L REV. L. & ECON. 177, 188-89 (2002).

^{6.} See David A. Anderson, Improving Settlement Devices: Rule 68 and Beyond, 23 J. Legal Stud. 225, 229 (1994); Keith N. Hylton, Rule 68, The Modified British Rule, and Civil Litigation Reform, 1 Mich. L. & Pol'y Rev. 73, 76 (1996); Michael E. Solimine & Bryan Pacheco, State Court Regulation of Offers of Judgment and Its Lessons for Federal Practice, 13 Ohio St. J. On Disp. Resol. 51, 52-53 (1997); Roy D. Simon, Jr., The Riddle of Rule 68, 54 Geo. Wash. L. Rev. 1, 6-8 (1985); Roy D. Simon Jr., Rule 68 at the Crossroads: The Relationship Between Offers of Judgment and Statutory Attorney's Fees, 53 U. Cin. L. Rev. 889, 891 (1984).

It is against this scholarly backdrop that Professor Baker and I commenced our research on offer-of-judgment rules. Given the vast theoretical literature on such rules, we set out to write an empirical paper that measured the effect of these rules. We quickly decided against writing about Rule 68 for two reasons: first, we were largely convinced by the common perception of the current Rule's irrelevance in most civil litigation; second, the Rule was enacted in 1938, effectively negating the practicality of conducting an empirical study before and after its enactment. Accordingly, we turned our attention to state offer-of-judgment rules, many of which were enacted or modified more recently and varied from Rule 68.

Professor Baker and I decided to focus our efforts on Rule 4:58, which was first adopted in 1971.⁹ The basic differences are highlighted below:¹⁰

TABLE 1

	<u>FRCP 68</u>	N.J. Ct. R. 4:58
Who can make a pre-trial offer	Defendant	Plaintiff or Defendant
Triggering of Cost-Shifting	Outcome at trial less favorable to plaintiff than pre-trial offer	Outcome at trial less favorable to offeree than pre-trial offer
Sanction	Court Costs	Court costs and Attorney Fees

Rule 4:58 differs from Rule 68 in that it allows the plaintiff, as well as the defendant, to issue a formal pre-trial settlement offer, 11 and the cost-shifting sanction includes attorney fees as well as court costs. 12 However, in its initial enactment, Rule 4:58 imposed a \$750 cap on

^{7.} See 12A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3001 (2d ed. 1997 & Supp. 2005) (discussing the history and purpose of Rule 68).

^{8.} Twelve states—Alaska, Arizona, California, Colorado, Connecticut, Florida, Michigan, Minnesota, Nevada, New Jersey, North Dakota, and Wisconsin—allow bilateral offers. See Solimine & Pacheco, supra note 6, at 78-81 (Appendix A).

^{9.} N.J. Ct. R. 4:58.

^{10.} We include the full text of Rule 4:58 in the Appendix.

^{11.} See N.J. Ct. R. 4:58-1. For the offer to invoke fee-shifting in the aftermath of trial, the litigant must formally submit the offer to the court at least twenty days prior to the start of trial. Id.

^{12.} N.J. Ct. R. 4:58-2. Unlike FRCP 68, however, Rule 4:58 has a buffer before cost-shifting occurs: a rejected offer triggers cost-shifting only if the outcome at trial was at least 20% less favorable to the offeree than the pre-trial offer. N.J. Ct. R. 4:58-2, 4:58-3.

attorney fees.¹³ Moreover, the cap was not indexed for inflation, meaning the fee would decrease in real dollars over time.¹⁴ In September 1994 the New Jersey Supreme Court adopted the recommendations of its Committee on Civil Practice¹⁵ to abolish the cap altogether, subject only to the requirement that the fees be reasonable.¹⁶ By allowing for greater cost-shifting, the revised Rule 4:58 provides a more credible inducement for litigants to resolve their dispute without trial.

For our analysis, a large national insurer agreed, on the condition that its identity remain anonymous, to provide automobile claims data for our study. Our research design was to study insurance-litigated claims for the period 1992-1997, three years before and after the revision of Rule 4:58. New Jersey would be our *treatment group*; the surrounding states— Connecticut, New York, Pennsylvania, Maryland, and Delaware—would serve as the *control group*. The insurer provided information on all litigated claims during this period, including the dates the suit was filed and resolved, the state where the suit was filed, the nature of the accident, the amount the insurer paid (if any) in damages, and the amount the insurer paid (if any) in attorney fees. Overall, we analyzed 45,998 claims, the vast majority of which were automobile and automobile-related property claims.

We applied a difference-in-difference econometric model¹⁹ to evaluate the effect of Rule 4:58's revision, looking at three outcome measures: insurer's damage payout, the duration of litigation, and the amount that

^{13.} See N.J. Ct. R. 4:58-2.b. (1971).

^{14.} Id.

^{15.} See 1994 Report of the Supreme Court Committee on Civil Practice, 136 N.J. L.J. 581, 589 (Feb. 14, 1994).

^{16.} See N.J. Ct. R. 4:58-2.c.

^{17.} Albert Yoon & Tom Baker, Offer-of-Judgment Rules and Civil Litigation: An Empirical Study of Automobile Insurance Litigation in the East, 59 VAND. L. REV. __ (forthcoming 2005). The description of our findings, unless otherwise stated, come from this article.

^{18. &}quot;Litigated claims" exclude claims that are handled administratively, where the plaintiffs are primarily non-policy holders suing for injuries allegedly caused by the insurer's policyholders.

^{19.} A difference-in-difference model is a fixed-effects model which measures the effect of a given policy or rule when it is imposed on one group (treatment), but not the other group (control). For applications of this approach, see Orley Ashenfelter, *Estimating the Effect of Training Programs on Earnings*, 60 Rev. Econ. & Stat. 47, 48 (1978); David Card & Alan B. Krueger, *Minimum Wages and Employment: A Case Study of the Fast-Food Industry in New Jersey and Pennsylvania*, 84 Am. Econ. Rev. 772, 778-79 (1994); Jonathan Gruber, *The Incidence of Mandated Maternity Benefits*, 84 Am. Econ. Rev. 622, 623, 627 (1994).

the insurer paid in its own attorney fees. We summarize our regression results below:

TABLE 2

	I. <u>Damage</u> <u>Amount</u>	II. <u>Duration</u> of Litigation	III. Attorney Fees (for Insurer)
New Jersey	-\$6,531*** (\$1,540)	-0.1371 (0.3082)	-\$915*** (\$263)
Period 2	-\$2,676** (\$1,342)	1.2087*** (0.2136)	-\$684* (\$400)
(New Jersey) x (Period 2)	-\$1,560 (\$2,230)	-2.3359*** (0.4498)	-\$1,173** (\$537)
Control for type of insurance claim ^a	YES	YES	YES
\mathbf{r}^2	0.0211	0.0411	0.0083
Mean	\$31,220	34.02	\$5,880
N	41,545	41,545	41,545

Notes: Data provided by Insurer X for all suits filed between January 1, 1992 and April 20, 1997. Claims exceeding 7.25 years are omitted. Standard errors are in parentheses. Control states are Connecticut, Delaware, Maryland, New Jersey, and New York. All payout figures are in 2003 dollars, adjusted by the Consumer Price Index.

We found that the relative average damage award in New Jersey decreased by \$1560 in the aftermath of revised Rule 4:58, but this effect was not statistically significant. Conversely, the changes in duration of litigation and attorney fees were statistically significant. Claims took

^a The regression controls for type of insurance claim through a series of 27 dummy variables, including for auto: collision, dismemberment, other property; property: burglary, fire, and theft.

st Significant at the 90% confidence level, two-tailed test.

^{**} Significant at the 95% confidence level, two-tailed test.

^{***} Significant at the 99% confidence level, two-tailed test.

less time to resolve, by an average of 2.3 months. Moreover, this reduction in litigation duration appeared to occur throughout the distribution of payouts.²⁰ These shorter litigation periods correspondingly translated into the insurer paying lower fees to its own attorneys, by an average of \$1200.

These findings suggest that Rule 4:58, once revised, had a measurable effect on how the insurer resolved its automobile litigation claims. These findings also suggest that a robust offer-of-judgment rule, symmetric in design, could serve the dual objectives of efficiency and fairness. The argument would be as follows: Rule 4:58 is efficient because it allows for faster resolution of disputes and lower attorney fees (at least for the insurer). Rule 4:58 is also fair, and arguably enhances social welfare, in that the change in damage awards was not statistically significant. This result is consistent with the claim that gains in efficiency do not create distributional consequences favoring one litigant or the other. Of course, one group who might have fared worse in the aftermath of Rule 4:58's revision is the insurer's attorneys, who generated smaller fees per claim.

III. IMPLICATIONS FROM THE NEW JERSEY STUDY

The findings from our study provide empirical insight into offer-ofjudgment rules, while generating additional questions, both theoretical and empirical. I offer these comments in the hopes that it will motivate discussion on reforms to Rule 68 and civil litigation generally.

A. Why Offer-of-Judgment Rules May Decrease the Duration of Litigation

In effect, the central finding of our study was that parties took less time to resolve litigation (the insurer's lower attorney fees logically follows). The question that naturally arises is *why does this happen*? The current theoretical scholarship on offer-of-judgment rules focuses on the likelihood of settlement, predicting that, under certain conditions, they increase the likelihood of settlement.²¹ This scholarship has not attempted to explain the temporal effect, if any, the offer-of-judgment rules have on cases that ultimately settle. Given that the vast majority

^{20.} We broke the damage awards into quartiles (\$0, \$1-\$7,500; \$7,501-\$25,000; \$25,001 and above) and ran separate regressions examining the effect of the rule change on duration of litigation. We found that the duration decreased for each quartile, although the magnitude decreased in the higher quartiles.

^{21.} Most of the theoretical scholarship has focused on the rule's effect on the likelihood of settlement. *See, e.g.*, Spier, *supra* note 4, at 202 (stating that the rule encourages settlement when litigants agree on liability but not damages).

of civil disputes result in settlement, 22 it is worth exploring this point further.

This question is something that Eric Talley and I intend to pursue in future research, but we offer our preliminary thoughts thusfar. Litigation can be characterized as a bargaining game of asymmetric information. Generally, the plaintiff and the defendant each possess private information about the dispute (e.g., the plaintiffs know better their true damages; the defendants their own conduct which allegedly caused the plaintiffs' injury), and are unwilling to resolve the dispute until they reach a mutually acceptable outcome. As litigation continues, each side obtains additional information (typically through discovery) that allows better evaluation of their respective claims, as well as that of the other litigant. As the parties gather more information, their respective positions regarding the claim often converge, making settlement possible. Of course, parties that fail to identify a mutually acceptable outcome proceed to trial.

How does Rule 4:58²³ expedite the time to resolution? Unfortunately, the insurer data does not reliably tell us the manner in which the claim resolved (e.g., settlement, dismissal, or trial). We can therefore only hypothesize from the known results. The average claim took nearly three years to resolve, and revised Rule 4:58 shortened that by roughly 2.3 months, or approximately seven percent. The reduction, while statistically significant, was modest. One interpretation is that revised Rule 4:58 expedites the bargaining not during the initial stages, but later on, typically after the parties have invested in discovery.

Our preliminary hypothesis is that Rule 4:58 forces the parties to engage in a game of *mutual assured destruction* ("MAD").²⁴ Here is the intuition: in most civil litigation, the incurring of attorney fees provides positive but diminishing returns to the actual outcome. At some point, the net expected return is negative (e.g., when the amount the plaintiff would spend on attorney fees exceeds the anticipated damage award). In the absence of an offer-of-judgment rule, litigants cannot convince their adversaries that they will spend an amount on attorney fees that

^{22.} See, e.g., Marc Galanter & Mia Cahill, "Most Cases Settle": Judicial Promotion and Regulation of Settlements, 46 STAN. L. REV. 1339, 1340 (1994) ("two thirds of cases settle without a definitive ruling"). The insurer data for our study suggests that the resolution rate in automobile disputes is even higher.

^{23.} N.J. Ct. R. 4:58.

^{24. &}quot;Mutual Assured Destruction" refers to the Cold War, where superpowers maintain peace by credibly committing to retaliate against any nuclear attack with a nuclear attack of its own. See Wolfgang K.H. Panofsky, *The Mutual Hostage Relationship Between Russia and America*, 52 FOREIGN AFF. 109, 109 (1973).

exceeds the anticipated damage award. It is irrational, and therefore, not a credible commitment.

However, with an offer-of-judgment rule, this commitment to greater attorney expenditures now becomes credible: upon making a pre-trial offer, offerors may shift their attorney fees to the offerees if fee-shifting occurs (e.g., if the outcome at trial is less favorable than the pre-trial offer). Because Rule 4:58 allows both sides to make repeated offers, litigants could engage in an escalating series of commitments to spend higher amounts on attorney fees to prevail at trial by invoking the fee-shifting. At the same time, litigants realize that such behavior, if carried through, would negatively affect both sides. Therefore, they decide it is better to resolve their dispute prior to trial. As with MAD in the Cold War context, the game does not occur: each side elects not to exercise the "nuclear" option of going to trial.

For most parties, Rule 4:58's impact is felt, not at trial, but in settlement negotiations. This observation is supported by our conversations with practicing attorneys in New Jersey, none of whom report ever submitting a formal offer before the courts. The litigants, as Kornhauser and Mnookin have famously written, "bargain in the shadow of the law." Rule 4:58 has the effect of decreasing the returns to litigating and increasing the returns to settlement. Pursuant to Rule 4:58, litigants have an incentive to begin serious settlement negotiations sooner, which results in faster resolution.

B. The Potential Perils of Offer-of-Judgment Rules

One of the attractive features of Rule 4:58 is its symmetric construction. Plaintiffs and defendants alike are allowed to invoke Rule 4:58, and the potential benefits, and pitfalls, are imposed equally. This Rule stands in contrast to Rule 68 and many of its state adaptations, which, if they have any effect, work to the advantage of the defendant. There is an intuitive appeal to creating neutral rules that apply equally to all parties. To do otherwise is to invite discrimination against particular individuals or groups.

At the same time, rules that are facially neutral may nonetheless have a disparate effect. Rule 4:58 may be such an example. Theoretically, with a similarly-situated plaintiff and defendant, Rule 4:58 should not bias either side. But this theory is based on a strong assumption that may not be true in many areas of civil litigation, such as when the

^{25.} Robert H. Mnookin & Lewis Kornhauser, Bargaining in the Shadow of the Law: The Case of Divorce, 88 YALE L.J. 950, 997 (1979).

^{26.} See, e.g., Miller, supra note 4, at 108 (writing that the effect of Rule 68 is to redistribute wealth from the plaintiff to the defendant).

plaintiff or, in most cases, the defendant has a weaker bargaining position. For example, divorce proceedings have historically favored the working spouse.²⁷ Similarly, in voting rights cases, it is not uncommon for plaintiffs, often individual minority voters, to lack the funds to present expert witnesses to establish the necessary preconditions, leaving only the defendant state government to present an expert witness.²⁸

As for automobile insurance litigation, the data is inconclusive, but it suggests that the plaintiffs and the insurer may not be similarly situated. First, while the change was not statistically significant, the damage award did decrease by roughly twenty percent after Rule 4:58 was revised. Second, while we know that the insurer's attorney fees decreased, we do not know if the plaintiffs also experienced this reduction. One could certainly imagine how the insurer would hold a stronger bargaining position than many plaintiffs: the insurer has an informational advantage, in that it has experience dealing with such disputes, and can draw upon the vast number of prior similar claims. In addition, the insurer may possess greater economic clout than most plaintiffs because they are able to absorb the loss of any one case (and possibly fee-shifting). Of course, plaintiffs are often represented by large firms, who also possess similarly strong economic clout.

That said, there is an important conceptual distinction between rules that create distributional inequities between litigants and rules that perpetuate existing inequities. Rules that create inequities are suspect and should be closely scrutinized. Conversely, rules that perpetuate existing inequities are less suspect, and accordingly should not be as heavily scrutinized. Whether a rule falls within the ambit of the former or the latter can usually be discerned on its face. For example, Rule 68, in its current form, creates distributional inequity because the plaintiff alone bears the consequences of rejecting an offer. Rule 68 has no practical effect because the fee-shifting mechanism in Rule 68 is so weak.

Last, contingency fees, which are common in automobile insurance litigation as well as other forms of civil litigation, may also affect the plaintiff's bargaining position. Scholars have written on the effect of contingency fees on the types of cases brought and the time to settle-

^{27.} See generally Mary E. Becker, Obscuring the Struggle: Sex Discrimination, Social Security, and Stone, Seidman, Sunstein and Tushnet's Constitutional Law, 89 COLUM. L. REV. 264 (1989) (noting that men fare better in divorce proceedings than women because asset distribution benefits wage earners [e.g, men] over dependent spouses).

^{28.} See Mallory v. Ohio, 38 F. Supp. 2d 525 (S.D. Ohio 1997), aff'd, 173 F.3d 377 (6th Cir. 1999).

ment,²⁹ but none have discussed their distributional effects in the context of an offer-of-judgment rule. The potential effects of contingency fees on offer-of-judgment rules require additional research, but it is likely that the answer turns on the same issues of relative bargaining strength between the litigants.

IV. Possible Avenues for Reform

Even in the absence of any offer-of-judgment rule, litigants have a natural incentive to settle: namely, the opportunity to forego the costs of trial (e.g., time, attorney fees, expert witnesses, etc.). But if our goal is to create a rule that provides additional incentives to the parties, then Rule 68 requires some changes. Given our observations of the New Jersey rule, I offer the following modest recommendations for reform to Rule 68.

A. Allow for Meaningful Cost-Shifting

The current cost-shifting measure of court costs in Rule 68 is too weak for the rule to have an effect. Court costs often comprise a trivial percentage of litigation costs, thereby posing little threat. To remedy this weakness, the cost-shifting measure needs to be greater. The easiest mechanism is to include attorney fees, as in Rule 4:58.³⁰ The concern of disparate impact, discussed *supra*, can be addressed in part by judicial discretion, which allows the court to determine what are reasonable fees.

B. Make the Rule Symmetric

Another suggestion is to design a rule that creates the same rights, and potential obligations, for plaintiffs and defendants alike. The commonly-offered rationale for allowing only the defendant to make the offer is that the plaintiff's alleged damages in the pleadings effectively serve as a pre-trial offer. Such reasoning is unpersuasive: the amount for which the plaintiff would be willing to settle is likely lower than the pleaded amount (because the plaintiff would be allowed to save on her own time and attorney fees). Accordingly, the plaintiff, like the defendant, should be able to issue a pre-trial offer to reflect this difference.

^{29.} See Eric Helland & Alexander Tabarrok, Contingency Fees, Settlement Delay, and Low-Quality Litigation: Empirical Evidence from Two Datasets, 19 J.L. ECON. & ORG. 517, 539-40 (2003) (finding that jurisdictions with contingency fee arrangements produce higher-quality suits and shorter duration of litigation).

^{30.} N.J. Ct. R. 4:58.

C. Create a Judicial Database of Settlement

If parties do indeed "bargain in the shadow of the law," it would be helpful to allow the shadow to reflect as much of the law as possible. This rationale means not only informing litigants of the outcomes for those who proceeded to trial, but also the vast majority who settled. While every case is unique, litigants can and do look at these similar cases to assess reasonable settlement terms. As novel as this may sound, it already exists. In the Northern District of Illinois, magistrate judges maintain a database of completed settlement conferences.³¹ The database contains settlements across the spectrum of civil litigation (e.g., employment, civil rights, and personal injury). While protecting the anonymity of past litigants, the database reports information directly relevant to current litigants: the initial offer and demand, the amount of discovery, the amount and terms of the final settlement, and any additional comments by the assigned judge.³²

V. CONCLUSION

Rule 68, and offer-of-judgment rules generally, offer the potential to help parties resolve their disputes. Prior efforts to revise Rule 68 have met with strong resistance.³³ But some reform is needed, as there is general consensus that current Rule 68 is ineffectual. There are certainly legitimate concerns about a revised rule biasing one litigant or the other,³⁴ which is a risk inherent in any reform measure. But these concerns, as briefly discussed above, can be addressed without generating new biases. It is my hope this essay contributes to discussion of meaningful reform measures.

^{31.} See Hon. Morton Denlow & Jennifer E. Shack, Judicial Settlement Databases: Development and Uses, 43 Judges' J. 19, 19 (2004).

^{32.} Id. at 20-21.

^{33.} See Schwarzer, supra note 3, at 147.

^{34.} See id. at 147-48 (discussing how increased fee-shifting measures would have a "devastating impact" on plaintiffs).

APPENDIX

Text of New Jersey Court Rule 4:58

N.J. Ct. R 4:58. Offer of Judgment

4:58-1. Time and Manner of Making and Accepting Offer

Except in a matrimonial action, any party may, at any time more than 20 days before the actual trial date, serve upon any adverse party, without prejudice, and file with the court, an offer to take judgment in the offer[o]r's favor, or as the case may be, to allow judgment to be taken against the offer[o]r, for a sum stated therein or for property or to the effect specified in the offer (including costs). If at any time on or prior to the 10th day before the actual trial date the offer is accepted, the offeree shall serve upon the offeror and file a notice of acceptance with the court. The making of a further offer shall constitute a withdrawal of all previous offers made by that party. An offer shall not, however, be deemed withdrawn upon the making of a counter-offer by an adverse party but shall remain open until accepted or withdrawn as is herein provided. If the offer is not accepted on or prior to the 10th day before the actual trial date or within 90 days of its service, whichever period first expires, it shall be deemed withdrawn and evidence thereof shall not be admissible except in a proceeding after the trial to fix costs, interest and attorney's fee. The fact that an offer is not accepted does not preclude a further offer within the time herein prescribed in the same or another amount or as specified therein.

4:58-2. Consequences of Non-acceptance of Claimant's Offer

If the offer of a claimant is not accepted and the claimant obtains a verdict or determination at least as favorable as the rejected offer, or if a money judgment, in an amount that is 120% of the offer or more, excluding allowable prejudgment interest and counsel fees, the claimant shall be allowed, in addition to costs of suit: (a) all reasonable litigation expenses incurred following non-acceptance; (b) prejudgment interest of eight percent on the amount of any money recovery from the date of the offer or the date of completion of discovery, whichever is later but only to the extent that such prejudgment interest exceeds the interest prescribed by R. 4:42-11(b), which also shall be allowable; and (c) a reasonable attorney's fee, which shall belong to the client, for such subsequent services as are compelled by the non-acceptance such fee to

be applied for within 20 days following entry of final judgment and in accordance with R. 4:42-9(b).

4:58-3. Consequences of Non-acceptance of Offer of Party Not a Claimant

If the offer of a party other than the claimant is not accepted and the determination is favorable to the offeror as defined by this rule, the offeror shall be allowed, in addition to costs of suit, the allowances as prescribed by R. 4:58-2, which shall constitute a prior charge upon the judgment. A favorable determination qualifying for allowances under this rule is a verdict or determination at least as favorable to the offeror as the offer or, if a money judgment, is in an amount, excluding allowable prejudgment interest and counsel fees, that is 80% of the offer or less. No allowances shall be granted, however, if the claimant's claim is dismissed, a no-cause verdict is returned, or only nominal damages are awarded. Allowances pursuant to this rule must be applied for within 20 days following entry of final judgment and in accordance with R. 4:42-9(b).

4:58-4. Multiple Claims; Multiple Parties

- (a) Multiple Plaintiffs. If a party joins as plaintiff for the purpose of asserting a *per quod* claim, the claimants may make a single unallocated offer.
- (b) Multiple Defendants. If there are multiple defendants against whom a joint and several judgment is sought, and one of the defendants offers in response less than a *pro rata* share, that defendant shall, for purposes of the allowances under R. 4:58-2 and -3, be deemed not to have accepted the claimant's offer. If, however, the offer of a single defendant, whether or not intended as the offer of a pro rated share, is at least as favorable to the offeree as the determination of total damages to which the offeree is entitled, the single offering defendant shall be entitled to the allowances prescribed in R. 4:58-3, provided, however, the single defendant's offer is at least 80% of the total damages determined.
- (c) Multiple Claims. If a claimant asserts multiple claims for relief or if a counterclaim has been asserted against the claimant, the claimant's offer shall include all claims made by or against that claimant. If a party not originally a claimant asserts a counterclaim, that party's offer shall also include all claims by and against that party.