

**STATE OF VERMONT
VERMONT SUPREME COURT
APRIL TERM, 2022**

Order Promulgating Amendments to Rule 68 of the Vermont Rules of Civil Procedure

Pursuant to the Vermont Constitution, Chapter II, § 37, and 12 V.S.A. § 1, it is hereby ordered:

1. That Rule 68 of the Vermont Rules of Civil Procedure be amended to read as follows (deleted matter struck through; new matter underlined):

RULE 68. OFFER OF JUDGMENT

At any time more than 14 days before the trial begins or within such shorter time as the court may approve, a party ~~defending against a claim~~ may serve upon ~~the~~ an adverse party an offer to allow judgment to be ~~taken against the defending party~~ entered for the money or property or to the effect specified in the offer, with costs then accrued. If within 14 days after the service of the offer or within such shorter time as the court may order 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 thereof and thereupon the clerk shall enter judgment. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs. If the judgment finally ~~obtained by the offeree~~ entered is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer. The fact that an offer is made but not accepted does not preclude a subsequent offer. 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 14 days, or such shorter time as the court may approve, prior to the commencement of hearings to determine the amount or extent of liability.

Reporter's Notes—2022 Amendment

Rule 68 is amended to allow plaintiffs to make offers of judgment as previously provided in the rule only for defendants. The change was initially adopted as an emergency amendment to make the practice more widely available at a time when in-person civil jury trials were largely on hold pursuant to Administrative Order No. 49, ¶ 24.

The present amendment makes the change permanent. Vermont will not be alone in making the formal offer of judgment process available to plaintiffs. Among the 46 states and the federal system that provide an offer of judgment procedure, 21 states make it available to plaintiffs and two provide a partial role for them.

The present amendment continues to award to a successful offering party only costs accruing since the offer was made, thus

following F.R.C.P. 68, the rules of the 21 other states that provide the procedure only for defendants, and eight of the states allowing plaintiffs to invoke the procedure. The present amendment does not allow additional recoveries not part of costs, such as interest, attorney's fees, and expert witness fees that may otherwise be available only as an exercise of judicial discretion under Vermont law. See D'Arc Turcotte v. Estate of LaRose, 153 Vt. 196, 569 A.2d 1086 (1989) (holding that readily ascertainable damages result in prejudgment interest as of right); Estate of Fleming v. Nicholson, 168 Vt. 495, 724 A.2d 1026 (1998) (affirming monetary award to compensate for delay); see also Marek v. Chesny, 473 U.S. 1 (1985) (under F.R.C.P. 68, attorney's fees defined as "costs" in underlying statute); Rule v. Tobin, 168 Vt. 166, 171, 719 A.2d 869, 872 (1998) (following Marek and holding that where Rule 68 offer in civil rights action under 42 U.S.C. § 1983 was silent on costs and attorney's fees, plaintiffs could recover attorney's fees as part of the costs in addition to judgment amount specified in offer).

2. That this amendment be prescribed and promulgated, effective on June 20, 2022. The Reporter's Notes are advisory.

3. That the Chief Justice is authorized to report this amendment to the General Assembly in accordance with the provisions of 12 V.S.A. § 1, as amended.

Dated in Chambers at Montpelier, Vermont, this 18th day of April, 2022.



Signed by the Vermont Supreme Court

Paul L. Reiber, Chief Justice

Harold E. Eaton, Jr., Associate Justice

Karen R. Carroll, Associate Justice

William D. Cohen, Associate Justice

Nancy J. Waples, Associate Justice