Offers of Judgment in Federal Court

By Gregory P. Crinion

Offers of judgment may be used in federal court lawsuits to persuade plaintiffs to evaluate the merits of their claims, and to balance the risks and costs of continued litigation against the expected outcome at trial. By its threat to shift the obligation for post-offer costs, an offer of judgment under Rule 68 of the Federal Rules of Civil Procedure often encourages plaintiffs to be more amenable to pretrial settlements. There are, however, serious traps for the unwary, both in making and responding to an offer of judgment.

The Rule

Federal Rule of Civil Procedure 68 provides as follows:

> At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against the defending party 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 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 An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs.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 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 10 days prior to the commencement of hearings to determine the amount or extent of liability.

Its Purpose

The purposes of Rule 68 have been variously stated as encouraging complete settlements and avoiding litigation, preventing a plaintiff from making exorbitant settlement demands, and protecting a party who is willing to settle from the burden of post-offer costs.[1] Rule 68 was designed to accomplish these purposes by shifting responsibility for post-offer costs from the defendant to the plaintiff if the offer is not accepted and the plaintiff fails to recover more at trial. The rule is intended to force the parties "to evaluate the risks and costs of litigation" and balance them against the likelihood of success at trial.[2]

Its Particulars

Any party defending against a claim, including a cross-claim or a counterclaim, may make an offer of judgment on that claim; parties asserting claims may not.[3] The offer must be in writing, made more than 10 days before trial, excluding intermediate Saturdays, Sundays, and legal holidays, and trial begins when the judge calls the proceedings to order and actually commences to hear the case.[4] In the instance of a bifurcated trial, an offer of judgment may also be made after a finding of liability but before a determination of damages. In that instance, the offer must be made at least 10 days before commencement of trial on damages.[5]

An offer may be made jointly by multiple defendants or jointly to multiple plaintiffs. Counsel should be aware, though, that an offer made jointly by multiple defendants will be held invalid if one of the offering defendants later settles.[6] Likewise, an offer of judgment apparently will not be enforced against plaintiffs in a class action.[7]

The offer must be unconditional and provide for a definite sum,[8] consisting of either monetary or equitable consideration, or a combination thereof.[9] The offer may be for a lump sum (damages, costs and attorneys' fees). In fact, an offer may recite that costs are included in the amount of the offer, may specify the amount the defendant will allow as costs, or may not even refer to costs at all; the offer may not, however, provide that the

* This article was adapted, in part, from Crinion, "Offers of Judgment: The Federal Rule", 65 The Wisconsin Lawyer 24 (May 1992).

judgment does not include costs.[10] Where the offer does not refer to costs, the plaintiff may accept the offer and thereafter recover its costs in addition to the amount of the offer.[11]

In preparing an offer, counsel should avoid using the phrase "with costs now accrued." Such an offer is unclear on whether the amount offered includes costs or whether costs are to be added to the amount offered. A better approach is to state that judgment is to be entered for a specific amount, which is inclusive of all costs, or for a specific amount plus costs.

There is no requirement that an offer be reasonable, but an offer that is not reasonable will rarely if ever be accepted or invoke the cost shifting penalty of Rule 68. Furthermore, a patently unreasonable offer that is not accepted will hardly be persuasive in a later effort to convince a judge not to award costs under Fed. R. Civ. P. 54(d) to a plaintiff who recovers a judgment in excess of the amount of the offer.[12]

Multiple offers of judgment may be made. Thus, if an offer is made but not accepted, or if a trial occurs but the verdict later is reversed, a defendant may make a second offer of judgment in an increased amount.[13]

Accepting Or Rejecting The Offer

An offer must be accepted if at all within 10 days of service,[14] and is usually not revocable during those 10 days.[15] In certain instances, however, an offer apparently may be revoked or rescinded. In one such instance, a plaintiff sued for the proceeds on a fire insurance policy. The defendant made an offer of judgment but moved to withdraw the offer prior to expiration of the 10 days upon discovery of evidence that the plaintiff was, in part, responsible for setting the fire. The court allowed the defendant to revoke the offer on the basis that the defendant was fraudulently induced to make the offer as a result of the plaintiff's actions.[16] In a situation merely involving confusion over the terms of an offer, however, there is no clear authority on whether the offer is revocable.[17]

A party may only accept an offer according to its terms; the offer cannot be accepted only in part or the terms thereof altered.[18] If an offer is accepted, either party may file the offer and notice of acceptance with the court, and the clerk is required to enter judgment accordingly.[19] If, however, the offer is not accepted, it is deemed withdrawn and the case will proceed as any other lawsuit.[20]

Evidence And Filing Of An Offer

Evidence of an unaccepted offer of judgment is not admissible for any purpose except in a postjudgment proceeding to determine taxation of costs.[21] Likewise, an offer of judgment is not to be filed with the court except for purposes of obtaining entry of judgment (if the offer is accepted) or, if the offer is not accepted, for purposes of taxing costs upon final judgment. A void or improperly filed offer is to be stricken.[22]

While Rule 68 presents an effective means to encourage settlement of federal lawsuits, there are serious traps for the unwary.

Application of Rule 68

There are three possible outcomes at a trial on the merits after a plaintiff rejects an offer of judgment: (1) a judgment for the defendant, (2) a judgment for the plaintiff but in an amount less than or equal to the amount of the offer of judgment, or (3) a judgment for the plaintiff for more than the amount of the offer. The applicability of the cost-shifting provisions of Rule 68 varies in each instance.

In the first instance, where judgment is entered in favor of the defendant, there is no cost-shifting under Rule 68. Instead, the defendant would ordinarily be allowed to recover its costs under Rule 54(d) as the prevailing party.[23]

In the second instance, where a plaintiff does not recover a more favorable judgment at trial, Rule 68 provides that the plaintiff may recover its pre-offer costs under Rule 54(d), does not recover any post-offer costs, and must pay all of the defendant's post-offer costs.[24]

Finally, if a plaintiff recovers a more favorable judgment, the cost-shifting provisions of Rule 68 again do not apply. Instead, the plaintiff will ordinarily be allowed to recover costs pursuant to Fed. R. Civ. P. 54(d).[25]

The cost-shifting provisions of Rule 68 are mandatory, not discretionary. Thus, the taxing of costs under Rule 68 controls over the court's discretionary award of costs under Rule 54(d).[26]

Effect of Rule 68

A judgment entered upon an acceptance of an offer made under Rule 68 acts as an adjudication of liability upon the theories plead by the plaintiff. Res judicata or collateral estoppel prevent further litigation of those claims and all requests for relief that are not consistent therewith.[27]

Is The Final Judgment More Favorable?

If a plaintiff rejects an offer of judgment and later prevails at trial, the court must determine whether the final judgment obtained is more favorable than the offer. That issue is determined by comparing the amount offered to the amount of the final judgment. The amount of the offer is usually readily calculable. Counsel should remember, however, that the plaintiff's pre-offer costs are included in determining the amount of the offer if so provided in the offer or if the offer fails to provide in any way for costs.

In determining the amount of the judgment actually obtained, the plaintiff's pre-offer costs (including attorneys' fees where appropriate) are to be added to the actual damages awarded at trial.[28] The plaintiff's post-offer costs (including attorneys' fees where appropriate), however, are not included.[29] There is presently a dispute whether the value of equitable relief offered or awarded is to be considered in comparing the value of the offer and the judgment.[30]

What Amounts are Included in Costs?

Rule 68 does not define what items are to be included in the term costs; instead, the rule "incorporates the definition of costs that otherwise applies to the case."[31] Stated otherwise, in federal court litigation "costs" are those amounts set forth in 28 U.S.C. §1920, unless the underlying substantive law applicable to the case (whether federal or state law) expands the general section 1920 definition.[32]

Of major moment is whether attorneys' fees fall within the definition of "costs" under Rule 68. In the seminal decision on this issue, the Supreme Court held that "the term 'costs' in Rule 68 was intended to refer to all costs properly awardable under the relevant substantive statute or other authority."[33] The plaintiff in that case asserted a cause of action under 42 U.S.C. §1983. Looking to 42 U.S.C. § 1988, the Court held that because attorneys' fees are to be awarded to a prevailing plaintiff as recoverable costs, the term "costs" as used in Rule 68 includes attorneys' fees under 42 U.S.C. §1988. In that case, however, the plaintiff failed to recover at trial an amount greater than the offer of judgment, and thus was not entitled to any post-offer costs or attorneys' fees.[34]

A comprehensive search for all federal and Texas statutes allowing for recovery of attorneys' fees as court costs is beyond the scope of this article. In his dissent to the *Marek v. Chesny* decision, however, Justice Brennan compiled a list of federal statutes which allow for recovery of attorneys' fees, and offered his opinion on whether those statutes define attorneys' fees as costs for purposes of Rule 68.[35] A brief review of certain of the more popular Texas statutes allowing for recovery of attorneys' fees shows only one that allows for recovery of attorneys' fees as costs.[36]

The inclusion of attorneys' fees as costs in certain instances leads to a number of other points that should be raised. First, when a defendant makes an offer of judgment, the offer must allow for recovery of costs by the plaintiff. Where there is an underlying statute defining attorneys' fees as court costs, the defendant's offer would allow the plaintiff to recover attorneys' fees in addition to the traditional costs allowed under 28 U.S.C. §1920. Accordingly, the defendant must use caution in preparing the offer of judgment to ensure that the language used in the offer properly reflects the defendant's intentions concerning payment of the plaintiff's attorneys' fees.

Second, by serving a carefully prepared offer of judgment, a defendant can cut off the plaintiff's recovery of post-offer attorneys' fees if the plaintiff is ultimately less successful at trial than the defendant's offer of judgment. As previously discussed, if a plaintiff fails to recover more at trial than was offered by the defendant, the plaintiff cannot recover post-offer costs. When an underlying statute or other authority holds that attorneys' fee are "costs" within the meaning of Rule 68, the plaintiff would be unable to recover either post-offer attorneys' fees or other costs if the plaintiff fails to recover at trial an amount in excess of the defendant's offer.[37] However, when an offer of judgment does not expressly mention attorneys' fees and the underlying statute requires an award of attorneys' fees

(but not as costs), the defendant may subject itself to paying the amount of the offer, plus costs, plus attorneys' fees.[38]

Finally, defendants have attempted to recover their post-offer attorneys' fees as part of the recoverable Rule 68 costs when a plaintiff rejects an offer of judgment and recovers less at trial. A plaintiff is required to pay a defendant's post-offer costs if the plaintiff fails to recover more at trial than the amount of a valid offer. Where an underlying statute provides for attorneys' fees as costs, the holding in *Marek v. Chesny* suggests that the defendant should recover its post-offer attorneys' fees in addition to the costs under 28 U.S.C. §1920. Such a result has not yet been allowed. The three published opinions ruling on this issue were civil rights cases under 42 U.S.C. §1983, and in each case the courts refused to shift responsibility for attorneys' fees because federal law prohibits a defendant's recovery of its attorneys' fees in such actions unless the plaintiff's claim was frivolous, unreasonable, or without foundation.[39] Whether a court will allow a shifting of fees in a case having no such prohibition remains at issue.

Conclusion

Rule 68 presents Texas attorneys with an effective means to encourage settlement of federal lawsuits. At the same time, attorneys may be able to limit their clients' exposure to liability for future court costs and further enable their clients to recover all future costs in the event the offer is not accepted. Care must be taken, however, in drafting the language of the offer to ensure that the defendant will not be subjected to any surprise taxation of attorneys' fees or costs.

Endnotes

1. *Marek v. Chesny*, 473 U.S. 1, 5, 10 (1985); *Delta Air Lines v. August*, 450 U.S. 346, 352 (1981); Report of Proposed Amendments to Rules of Civil Procedure for the District Courts of the United States, 5 F.R.D. 433, 483 note (1946); *Radecki v. Amoco Oil Co.*, 858 F.2d 397, 401 (8th Cir. 1988); *Perkins v. New Orleans Athletic Club*, 429 F. Supp. 661, 666-67 (E.D. La. 1976); and *Staffend v. Lake Central Airlines*, 47 F.R.D. 218, 219 (N.D. Ohio 1969).
2. *Marek v. Chesny*, 473 U.S. at 5.
3. Fed. R. Civ. P. 68; *Delta Air Lines v. August*, 450 U.S. at 350 n.5 and 355 n.13; *Spencer v. General Elec. Co.*, 706 F. Supp. 1234, 1241 at n.15 (E.D. Va. 1989), *aff'd on other grounds*, 894 F.2d 651 (4th Cir. 1990); and *Agola v. Hagner*, 678 F. Supp. 988, 995 (E.D.N.Y. 1987) (note that award of costs to offeror appears to have been erroneous in light of *Delta Air Lines v. August*, 450 U.S. at 351-52).
4. Fed. R. Civ. P. 6(a) and 68; *Grosvenor v. Brienen*, 801 F.2d 944, 948 (7th Cir. 1986); and *Greenwood v. Stevenson*, 88 F.R.D. 225, 226, 229 (D.R.I. 1980). Failure to comply with the ten day requirement renders the offer invalid. *Polk v. Montgomery County, Md.*, 130 F.R.D. 40, 42 (D. Md. 1990); and *Home Ins. Co. of New York v. Kirkevold*, 160 F.2d 938, 941 (9th Cir. 1947).
5. Fed. R. Civ. P. 68; *Greenwood v. Stevenson*, 88 F.R.D. at 228; and *see Cover v. Chicago Eye Shield Co.*, 136 F.2d 374 (7th Cir.), *cert. denied*, 320 U.S. 749 (1943).
6. *Johnston v. Penrod Drilling Co.*, 803 F.2d 867, 869-71 (5th Cir. 1986); and *Rohrer v. Slatile Roofing & Sheet Metal Co.*, 655 F. Supp. 736, 737 (N.D. Ind. 1987).
7. *Gay v. Waiters' and Dairy Lunchmen's Union*, 86 F.R.D. 500, 502-04 (N.D. Cal. 1980).
8. *Greenwood v. Stevenson*, 88 F.R.D. at 226; and *Tansey v. Transcontinental & Western Air*, 97 F. Supp. 458, 459 (D.D.C. 1950).
9. There is some split of authority on whether an offer of judgment can be made for equitable relief. *Compare Spencer v. General Elec. Co.*, 706 F. Supp. at 1241-43 (offer provided for reinstatement of benefits, maintenance of discrimination-free workplace, and injunction against violations of 42 U.S.C. §2000e) and *Freeman v. B & B Assoc.*, 790 F.2d 145, 146 (D.C. Cir. 1986) (offer provided for rescission of promissory note and deed of trust) with *Garrity v. Sununu*, 752 F.2d 727, 731-33 (1st Cir. 1984) (court declined to decide whether Rule 68 applies to injunctive relief) and *Johnny Carson Apparel v. Zeeman Mfg. Co.*, 203 U.S.P.Q. 585, 596 (N.D. Ga. 1978) (offer allowing only equitable relief is not an offer of judgment). *See also* Note, "Federal Rule 68 Offers of Judgment and Equitable Relief: Where Angels Fear to Tread," 70 Tex. L. Rev. 465, 470-71 nn. 44-46 (1991).
10. *Marek v. Chesny*, 473 U.S. at 5-7; *Radecki v. Amoco Oil Co.*, 858 F.2d at 401; and *see*

Scheriff v. Beck, 452 F. Supp. 1254, 1260 (D. Colo. 1978) and *Bentley v. Bolger*, 110 F.R.D. 108, 111-13 (C.D. Ill. 1986) (offers of judgment that excluded certain costs were invalid).

11. *Marek v. Chesny*, 473 U.S. at 6; *Rohrer v. Slatile Roofing & Sheet Metal Co.*, 655 F. Supp. at 738; *O'Brien v. City of Greers Ferry*, 873 F.2d 1115, 1118 (8th Cir. 1989), and *Rateree v. Rockett*, 668 F. Supp. 1155, 1157 (N.D. Ill. 1987).
12. *Delta Air Lines v. August*, 450 U.S. at 355 and 356 n.16; and *see S.G.C. v. Penn Charlotte Assoc.*, 116 F.R.D. 284, 287 (W.D.N.C. 1987) (court exercised discretion and denied costs under Rule 54(d) to prevailing plaintiff); *but see Ortiz v. Regan*, 980 F.2d 138, 141 (2d Cir. 1992) (a party's declining of a settlement offer should not reduce an otherwise appropriate fee award without a showing of bad faith).
13. Fed. R. Civ. P. 68; *Johnston v. Penrod Drilling Co.*, 803 F.2d at 871; and Report of Proposed Amendments to Rules of Civil Procedure for the District Courts of the United States, 5 F.R.D. at 483 note.
14. Fed. R. Civ. P. 68; and *Staffend v. Lake Central Airlines*, 47 F.R.D. at 220. The time for acceptance of an offer may not be extended without the offeror's agreement. *Id.*
15. *Fisher v. Stolaruk Corp.*, 110 F.R.D. 74, 75 (E.D. Mich. 1986); *Colonial Penn Ins. Co. v. Coil*, 887 F.2d 1236, 1240 (4th Cir. 1989); Udall, *May Offers of Judgment Under Rule 68 be Revoked Before Acceptance?*, 19 F.R.D. 401, 406 (1957); and *see Mallory v. Eyrich*, 922 F.2d 1273, 1279-81 (6th Cir. 1991) (offer of judgment cannot be withdrawn after judgment entered thereon).
16. *Colonial Penn Ins. Co. v. Coil*, 887 F.2d at 1240.
17. *Compare Fisher v. Stolaruk Corp.*, 110 F.R.D. at 75-6 (offeror allowed to rescind offer because of lack of mutual agreement on inclusion of attorneys' fees); *Radecki v. Amoco Oil Co.*, 858 F.2d at 402-03 (offer not enforced because of no meeting of the minds on inclusion of attorneys' fees); *Said v. Virginia Commonwealth Univ./Med. College of Va.*, 130 F.R.D. 60, 63-4 (E.D. Va. 1990) (offer enforced and plaintiff further entitled to recover costs and attorneys' fees); *Kyreakakis v. Paternoster*, 732 F. Supp. 1287, 1289-94 (D.N.J. 1990) (offer enforced and attorneys' fees were added thereto); *Erdman v. Cochise County, Ariz.*, 926 F.2d 877, 878-81 (9th Cir. 1991) (order allowing rescission of offer was reversed and plaintiff further allowed to recover costs and attorneys' fees); and *Whitaker v. Associated Credit Serv.*, 946 F.2d 1222, 1223-26 (6th Cir. 1991) (offer allowed revoked because of typographical error).
18. *Freeman v. B & B Assoc.*, 790 F.2d at 152; *Radecki v. Amoco Oil Co.*, 858 F.2d at 403; *Johnson v. University College of the Univ. of Ala. in Birmingham*, 706 F.2d 1205, 1209 (11th Cir.), *cert. denied*, 464 U.S. 994 (1983); and *Rateree v. Rockett*, 668 F. Supp. at 1158.
19. Fed. R. Civ. P. 68; and *Oates v. Oates*, 866 F.2d 203, 205 n.1, 208 (6th Cir.), *cert. denied*, 490 U.S. 1109 (1989).
20. Fed. R. Civ. P. 68; and *Staffend v. Lake Central Airlines*, 47 F.R.D. at 220.
21. Fed. R. Civ. P. 68; *Hopper v. Euclid Manor Nursing Home*, 867 F.2d 291, 294-96 (6th Cir. 1989); Report of Proposed Amendments to Rules of Civil Procedure for the District Courts of the United States, 5 F.R.D. at 483 note; and *see Investors Ins. Co. of America v. Dorinco Reins. Co.*, 917 F.2d 100, 106 (2d Cir. 1990) (disclosure of rejected offer of judgment in motion may have violated Rule 68).
22. *Kason v. Amphenol Corp.*, 132 F.R.D. 197 (N.D. Ill. 1990); *Nabors v. Texas Co.*, 32 F. Supp. 91, 92 (W.D. La. 1940); *Tansey v. Transcontinental & Western Air*, 97 F. Supp. at 459; and *Scheriff v. Beck*, 452 F. Supp. at 1259.
23. *Delta Air Lines v. August*, 450 U.S. at 351-52 and 354-55; Fed. R. Civ. P. 54(d); and *Allen v. United States Steel Corp.*, 665 F.2d 689, 697 (5th Cir. 1982).
24. Fed. R. Civ. P. 68; *Crossman v. Marcoccio*, 806 F.2d 329, 331-33 (1st Cir. 1986), *cert. denied*, 481 U.S. 1029 (1987); *Zackaroff v. Koch Transfer Co.*, 862 F.2d 1263, 1265-66 (6th Cir. 1988); *O'Brien v. City of Greers Ferry*, 873 F.2d at 1120; *Liberty Mut. Ins. Co. v. EEOC*, 691 F.2d 438, 442 (9th Cir. 1982); *Parkes v. Hill*, 906 F.2d 658, 659 (11th Cir. 1990); *Scheriff v. Beck*, 452 F. Supp. at 1259; *Waters v. Heublein, Inc.*, 485 F. Supp. 110, 113 (N.D. Cal. 1979); and *Lyons v. Cunningham*, 583 F. Supp. 1147, 1154 and 1156 (S.D.N.Y. 1983). The final judgment must be greater than the offer, not greater than or equal to the offer. *Liberty Mut. Ins. Co. v. EEOC*, 691 F.2d at 442.
25. *Delta Air Lines v. August*, 450 U.S. at 354; and *Bright v. Land O'Lakes, Inc.*, 844 F.2d 436, 443 (7th Cir. 1988). Fed. R. Civ. P. 54(d) provides that "[e]xcept when express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs ...." An award of costs under this rule is discretionary with the court. *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 441-42 (1987).
26. *Liberty Mut. Ins. Co. v. EEOC*, 691 F.2d at 442; *Hopper v. Euclid Manor Nursing Home*, 867 F.2d at 295; *Johnston v. Penrod Drilling Co.*, 803 F.2d at 869; *Adams v. Wolff*, 110 F.R.D. 291, 293 (D. Nev. 1986); and *Waters v. Heublein, Inc.*, 485 F. Supp. at 113.
27. *Goodheart Clothing Co. v. Laura Goodman Enter.*, No. 87 Civ. 3752, slip op. (S.D.N.Y. May 9, 1991) (1991 U.S. Dist. LEXIS 6144); *In re: Ethanol Plants Securities Litigation*, MDL No. 679, No. 86-0398-CV-W-6, slip op. (W.D. Mo. Jan. 25, 1991) (1991 U.S. Dist. LEXIS 987); *Mallory v. Eyrich*, 922 F.2d at 1279; and *Lyons v. Cunningham*, 583 F. Supp. at 1159.
28. *Grosvenor v. Brienen*, 801 F.2d at 948; and *O'Brien v. City of Greers Ferry*, 873 F.2d at 1118.
29. *Marek v. Chesny*, 473 U.S. at 7.
30. *Compare Real v. Continental Group, Inc.*, 653 F. Supp. 736, 738-39 (N.D. Cal. 1987) (value of offer of equitable relief not considered) with *Spencer v. General Elec. Co.*, 706 F. Supp. at 1241-43 and 894 F.2d at 664 (value of offer of equitable relief was considered and was greater than amount of judgment obtained) and *Garrity v. Sununu*, 752 F.2d at 731-33 (value of offer of equitable relief was considered but was less than amount of judgment obtained).
31. *Marek v. Chesny*, 473 U.S. at 9 n.2.
32. *Parkes v. Hall*, 906 F.2d at 660 and n.5.

33. *Marek v. Chesny*, 473 U.S. at 9.
34. *Marek v. Chesny*, 473 U.S. at 9-12. The United States Court of Appeals for the Sixth Circuit has expanded the rule to require that "the underlying statute *clearly* [define] attorney's fees as an additional component of traditional 'costs.'" *Oates v. Oates*, 866 F.2d at 208 (emphasis added).
35. *Marek v. Chesny*, 473 U.S. at 43-51.
36. *See* Tex. Bus. & Comm. Code §17.50(d) (DTPA); *International Nickel Co. v. Trammel Crow Dist. Corp.*, 803 F.2d 150, 157 n.2 (5th Cir. 1986); Tex. Civ. Prac. & Rem. Code §38.001, *et seq.* (attorneys' fee statute); Tex. Civ. Prac. & Rem. Code §37.001, *et seq.* (declaratory judgment statute); and Tex. Ins. Code art. 21.21 secs. 16(b)(1) and 17(b)(1) (all of which provide for attorneys' fees in addition to costs); *but see* Tex. Civ. Prac. & Rem. Code §31.002(e) (turnover statute) (judgment creditor is entitled to recover reasonable costs, including attorney's fees).
37. *Marek v. Chesny*, 473 U.S. at 9-12; *Grosvenor v. Brienen*, 801 F.2d at 946; and *Said v. Virginia Commonwealth Univ./Med. College of Va.*, 130 F.R.D. at 63.
38. *Shorter v. Valley Bank & Trust Co.*, 678 F. Supp. 714, 721-22 (N.D. Ill. 1988); and *Tyler v. Meola*, 113 F.R.D. 184, 186-87 (N.D. Ohio 1986).
39. *Adams v. Wolff*, 110 F.R.D. at 293-94; *Crossman v. Marcoccio*, 806 F.2d at 333-34; *O'Brien v. City of Greers Ferry*, 873 F.2d at 1120; and *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421 (1978).

Gregory P. Crinion is a partner in the trial section of Jackson & Walker, L.L.P., resident in the firm's Houston office. His work is concentrated in the areas of environmental and commercial litigation. Crinion is an honors graduate of the University of Wisconsin Law School.