The Legal Intelligencer
THE OLDEST LAW JOURNAL IN THE UNITED STATES 1843-2013
PHILADELPHIA, FRIDAY, JULY 12, 2013 VOL 248 • NO. 9 An ALM Publication

Third Circuit Approves Use of Rule 68 Offer of Judgment

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Special to the Legal

Rule 68 of the Federal Rules of Civil Procedure has been characterized by some as the most overlooked or underutilized tool available to defense counsel in federal litigation. And until last month, the tool was more or less unavailable in environmental citizen suits because its cost-shifting provision was considered to be "simply inimical to the goal of encouraging law firms to represent plaintiffs in such actions." But that all changed when the U.S. Court of Appeals for the Third Circuit issued its June 4 decision in *Interfaith Community Organization v. Honeywell International*, Nos. 11-3813 and 11-3814, the first reported decision in the country holding that Rule 68 offers of judgment are in fact valid in the context of an environmental citizen suit.

Rule 68's cost-shifting provision is intended to make a plaintiff "think very hard" before rejecting a settlement offer and continuing with its litigation, according to *Marek v. Chesny*, 473 U.S. 1 (1985). Under the rule, a defendant may serve an offer of judgment "on specified terms, with the costs then accrued," on a plaintiff at any time during the case, provided that it is at least 14 days before the date set for trial (or, if the defendant's liability has already been determined, within a reasonable time preceding a hearing to determine the extent of such liability). If the plaintiff then rejects the offer, and obtains a judgment that is "not more favorable" than the rejected offer, the plaintiff must pay for "the costs incurred after the offer was made." Rule 68 thus places on plaintiffs the risk of being responsible for "costs" in the event they decline an offer of judgment. Though "costs" are, in many cases, limited to relatively modest court costs such as copying expenses, transcript costs and witness attendance fees, the fee-shifting provisions of most environmental statutes are different in that they specifically allow for the recovery of attorney fees as part of "costs." In this way, a Rule 68 offer of judgment can provide important strategic leverage to a defendant in an environmental citizen suit because a plaintiff that chooses to reject an offer of judgment not only risks having to pay both parties' court costs, but also risks losing its right to recover all of its post-offer attorney fees. Indeed, until the Third Circuit's decision in *Interfaith Community*, all of the reported decisions addressing the issue found these risks to be so significant that offers of judgment could not be made in environmental citizen suits.

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Then came the Third Circuit's decision in *Interfaith Community*, a case that arose from two citizen suits brought against Honeywell International Inc. under the Resource Conservation and Recovery Act (RCRA) seeking cleanup of sites contaminated by Honeywell's predecessors. In the first suit, the district court entered judgment for the plaintiff citizen group, ordering Honeywell to conduct a cleanup, and awarding the plaintiff over $4.5 million in fees and expenses (an award later vacated on appeal), together with future fees and costs to be incurred to monitor Honeywell's cleanup. In the second suit, the parties entered into several consent decrees in which Honeywell agreed to remediate certain additional sites, and also agreed to pay $5 million in fees and costs that the plaintiff citizen group incurred prior to the decrees, as well as reasonable future oversight costs.

But this was not the end of the litigation because, after several years,

the plaintiffs' law firm filed a fee petition with the district court in which the firm sought over $3 million in fees and costs to monitor Honeywell's remediation efforts. In addition to contesting the hourly rates used by the firm and the reasonableness of the fees and expenses claimed, Honeywell also made several offers of judgment under Rule 68 with respect to the fee petition. The plaintiffs did not accept Honeywell's offers, though, and instead sought a declaratory judgment that Rule 68 offers are null and void in RCRA citizen suits. The district court agreed, concluding that Rule 68 is so incompatible with the policies underpinning RCRA's citizen suit provision that applying Rule 68 would contravene the Rules Enabling Act "by discouraging the very citizen suits that Congress intended to promote," the opinion said. The court then proceeded to substantially uphold the plaintiffs' fee request.

Perhaps not surprisingly, Honeywell appealed, and the Third Circuit reversed, holding that Rule 68 can be used in RCRA citizen suits. After concluding that the text of Rule 68 applies by its plain terms to RCRA citizen suits because it does not exempt any type of civil action, the court concluded that use of the rule's cost-shifting provision in this context would not violate the prohibition in the Rules Enabling Act against procedural rules that "abridge, enlarge or modify any substantive right." In this regard, the court explained that under Supreme Court jurisprudence, a procedural rule "does not run afoul of this statutory limitation merely because it 'affects a litigant's substantive rights; most procedural rules do.'" Instead, a rule is only invalid if it "alters the rules of decision by which the court will adjudicate those rights." Applying this rule, the Third Circuit held that Rule 68 does not alter a plaintiff's substantive rights, because "at best, the only impact that Rule 68 has on the ultimate outcome of the attorney fee dispute is to require [the plaintiffs] to bear their post-offer costs, including counsel fees, if the fee award is less favorable than the offer of judgment." (Note that this statement, made in dicta, appears to suggest that a plaintiff can never be required to bear a defendant's post-offer costs. But this particular issue was not before the court, and the court's own straightforward textual analysis of the scope of Rule 68 would appear to dictate otherwise. Indeed, Rule 68 is unambiguous in this regard, providing that "if the judgment that the offeree finally obtains is not more favorable than the unaccepted offer, the offeree must pay the costs incurred after the offer was made.")

The Third Circuit also specifically rejected the plaintiffs' argument, embraced by the district court, that the conflict of policies between Rule 68 and RCRA's citizen suit provision somehow renders Rule 68 inapplicable. The court recognized that Rule 68 offers may have some chilling effect on attorneys deciding to take on citizen suits, but explained that this effect "has nothing to do with whether [Rule 68] abridges or modifies some substantive right." Further, the court explained that the provision of RCRA allowing plaintiffs to recover attorney fees and Rule 68 do not embody policies that are inherently incompatible. RCRA's citizen suit provision, the court wrote, "encourages plaintiffs to bring meritorious suits to enforce environmental laws, while Rule 68 encourages settlement of civil suits." And "'there is nothing incompatible with these two objectives.'"

Under the court's analysis, there is no reason why Rule 68 offers of judgment should not be available in most, if not all, environmental citizen suits.

Though *Interfaith Community* was a case decided under RCRA, the Third Circuit's decision has far more widespread implications, because under the court's analysis, there is no reason why Rule 68 offers of judgment should not be available in most, if not all, environmental citizen suits. And though the court did not have occasion to directly address all of the nuances of Rule 68, including the use of Rule 68 to require a plaintiff citizen group to pay for costs incurred by the defendant after a rejected offer, it has no doubt introduced a new dynamic to environmental citizen suit litigation and provided an important tool for defendants to encourage plaintiffs to accept reasonable settlement offers in these cases. •

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