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Perils of Ambiguity in Rule 68 Offer of Judgment

In this post we shall examine the perils of defendants failing to be specific and clear in a Federal Rule 68 offer of judgment. Our focus on Rule 68 stems from the Seventh Circuit decision *Sanchez v. Prudential Pizza, Inc.* Though the *Sanchez* decision may seem like a minor one on the surface, it one to pay much head to as the result is one very susceptible to repetition. Further, as a good rule of thumb, it is good to take notice when a court begins an opinion with:

This appeal requires us to address once more the problems posed by ambiguous offers of judgment under Rule 68 of the Federal Rules of Civil Procedure. And once more we must teach defendants making Rule 68 offers to be specific and clear in their offers.

Rule 68 allows for a defending party to provide an offer of judgment to the plaintiff to resolve the case. The particular advantage of doing so is that if the plaintiff does not accept the offer within the 14-day time frame and the matter goes to trial, if the judgment for the plaintiff is “not more favorable than the unaccepted offer, the [plaintiff] must pay the costs incurred after the offer was made.” As a quick note, pay attention to the specific language of the rule reading “not more favorable.” This means that if a verdict is reached that is exactly equal to the offer then the defendant may still seek costs.

The offer, to satisfy the requirements of Rule 68, must be made at least 14

days before trial and must be “an offer to allow judgment on specified terms, with the costs then accrued.” What is recoverable as “costs” in a case can be specified in the terms of the offer. However, where the offer remains silent to costs the matter gets much more tricky. This is particularly important when the cause of action permits the shifting of attorney’s fees.

In *Sanchez*, the defendant provided an offer of judgment on the following terms:

Pursuant to Rule 68 of the Federal Rules of Civil Procedure, Defendant, PRUDENTIAL PIZZA, INC., hereby offers to allow Judgment to be entered against them [sic] in this action in the amount of \$30,000 including all of Plaintiff’s claims for relief. This offer of judgment is made for the purposes specified in Federal Rule of Civil Procedure 68, and is not to be construed as either an admission that Defendants, PRUDENTIAL PIZZA, INC., and JOHN APOSTOLOU are liable in this action, or that the Plaintiff has suffered any damage. This Offer of Judgment shall not be filed with the Court unless (a) accepted or (b) in a proceeding to determine costs.

The plaintiff accepted the offer seven days later and judgment was entered. The plaintiff then filed a motion for attorney fees. She argued that she was entitled to fees because defendant’s “offer was silent with regard to costs and fees, and that she, as a prevailing party, was entitled to attorney fees under Title VII.” The district court denied the motion and plaintiff appealed.

On appeal, the court noted Rule 68 offers of judgment are quite different from a contract offer. This stems from the lack of freedom to accept. While it is true that the plaintiff has the option to accept the offer and can reject it. The plaintiff cannot, however, reject the offer entirely without consequence. The plaintiff who rejects the offer has thereby exposed herself to potential liability for the additional costs accrued by the defendant. As such, a is to court construe an offer of judgment against the offering party – *id est* the defendant.

In *Sanchez*, the defendant argued that the offer was not silent as to costs. Defendant argued that the language stating that it applied to all of the plaintiff’s “claims for relief” and that plaintiff had specifically “requested attorney fees and costs in her amended complaint” provided for resolution of the costs through the offer. The court rejected the argument finding:

[Defendant]’s logic would allow a defendant to force a plaintiff to guess the meaning of the offer, which the Rule [does] not permit. . . . If

Prudential Pizza's offer was meant to include attorney fees and costs, the offer was not specific. It simply did not refer to Sanchez's attorney fees or costs. It referred to Sanchez's "claims" but failed to specify what those claims were, such as whether they included her claim against the other defendant.

The court further found that "[t]he fact that Sanchez listed attorney fees when she set forth her *demands* for relief meant nothing when the issue was Sanchez's *claims*."

The court determined that to hold anything otherwise would permit "an ambiguous offer [to] put[] the plaintiff in a very difficult situation and would allow the offering defendant to exploit the ambiguity in a way that has the flavor of 'heads I win, tails you lose.'" That is, were a plaintiff to accept an ambiguous offer the defendant would invariably contend that the offer did not include costs. However, were a plaintiff to reject the offer the defendant would then argue that it did not include costs or fees thereby permitting the calculation of the favorability of the terms to hedge to the benefit of the defendant.

The court summarized its holding stating,

Whether the ambiguity is accidental or strategic, Rule 68 must be interpreted to prevent such strategic use of ambiguity by construing an ambiguous offer against the offering defendant's interests, whether the question arises from the offer's acceptance or rejection.

"If an offer recites that costs are included or specifies an amount for costs, and the plaintiff accepts the offer, the judgment will necessarily include costs; if the offer does not state costs are included and an amount for costs is not specified, the court will be obliged by the terms of the Rule to include in its judgment an additional amount which in its discretion it determines to be sufficient to cover the costs." Prudential Pizza's offer was silent as to costs and fees.

This is a very important lesson to learn for both plaintiffs' counsel as well as the defense bar. Plaintiffs' attorneys need to recognize whether such ambiguity provides the opportunity to maximize the resolution of the case in favor of their clients. Defense attorneys must be mindful to not make this error lest they seek to test the bounds of their malpractice policies.

Join us again next time for further discussion of developments in the law.

Sources

- *Sanchez v. Prudential Pizza, Inc.*, ___ F.3d ___, No. 12-2208 (7th Cir. Mar. 4, 2013).
- Federal Rule of Civil Procedure 68.

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