MASSACHUSETTS LAWYERS WEEKLY

Revision of Rule 68 settlement disallowed

1st Circuit: Silence on fees did not make offer ambiguous

By: Kris Olson May 5, 2016

An attorney who neglects to address whether an offer of judgment under Federal Rule of Civil Procedure 68 covers the plaintiff's legal fees and costs will not be allowed to revise that offer, if it was otherwise clear and the statute at issue in the case provides for such an award, the 1st U.S. Circuit Court of Appeals has decided.

The city of Lawrence made a Rule 68 offer of $300,000 to a woman who had been sexually assaulted by a police officer. The city then quickly tried to revise the offer to clarify that it included the fees and costs the woman had accrued.

When the woman subsequently filed her acceptance of the original Rule 68 offer, the city moved to strike the filing.

U.S. District Court Judge Rya W. Zobel agreed that there had been no meeting of the minds and granted the city's motion.

But the 1st Circuit said that traditional contract law concept did not apply in this context.

A "threshold question," the court said, was whether "extrinsic evidence" could be considered in interpreting the original offer.

"Incomplete or ambiguous" offers might justify doing so, the panel allowed. But here, the "trailing language" of Rule 68 (the phrase "with the costs then accrued") and precedent interpreting it (most notably the 1985 U.S. Supreme Court decision Marek v. Chesny) obliged the court to tack on an award of costs where the offer was silent on that issue but otherwise clear.

Here, the woman sued under the federal civil rights statute 42 U.S.C. §1983, which makes attorneys' fees a subset of "costs." That means the city is responsible for those fees.

The 17-page decision is LaPierre v. City of Lawrence, et al., Lawyers Weekly No. 01-108-16. The full text of the ruling can be found by clicking here.

A game-ending tool

The plaintiff's attorney, Marsha V. Kazarosian, said the decision should serve as a reminder that Rule 68 creates an atypical settlement scenario.

"It's a game-ending litigation tool. Obviously, if you don't wield it very carefully it could come back to bite you," she said.

Kazarosian said she was heartened that the decision acknowledged that, if "pre-acceptance clarifications" were allowed in the absence of ambiguity under Rule 68, a defendant could "game the system," artificially shrinking the already intense 14-day window a plaintiff has to contemplate whether to accept an offer.

If a plaintiff rejects a Rule 68 offer and then obtains a less favorable judgment, she is responsible for the costs the defendant incurs thereafter.

Dustin F. Hecker said decision offers a stark reminder that attorneys need to be "crystal clear" when making a Rule 68 offer, particularly when a plaintiff has the right to attorneys' fees by statute or contract. The Posternak, Blankstein & Lund litigation partner envisioned a scenario in which both the plaintiff and defendant might understand that an offer was not meant to include attorneys' fees, only to have a judge tack them on in the absence of language in the offer addressing the issue.

Peter B. McGlynn agreed that the main lesson is to be explicit in drafting a Rule 68 offer. Marek makes clear that a

defendant need not specify which portion of a lump-sum offer is allocated for fees and costs, he noted. The only thing out of bounds is an explicit refusal to provide for costs.

He noted that Rule 68 is "rarely used," and that issues like the one in LaPierre may arise because attorneys are simply unfamiliar with its nuances.

However, the Bernkopf Goodman partner said that the court did not break new ground by finding the clarification of an offer would be hostile to Rule 68's goal of encouraging settlement and finality. Indeed, he said, allowing such a change would not only extend the original dispute but possibly lead to a secondary one over the attempted revision.

Hecker noted that if the withdrawal of the Rule 68 offer had been allowed, the plaintiff would have been no worse off than had the offer never been made, while the defendants now find themselves having to pay a sum considerably larger than they apparently ever contemplated offering. But he predicted the decision would only serve as a modest disincentive to using Rule 68.

"Will it make a huge difference? Probably not," he said. "But it certainly won't encourage settlement."

McGlynn said that §1983's inclusion of attorneys' fees is a game changer; in many cases "costs" will merely entail incidental expenses, such as the price of procuring transcripts. In those instances, "it's not a battle worth spending the time and money on," he said.

Kazarosian noted that the 1st Circuit decided a similar issue last August in a case out of Puerto Rico, Garayalde-Rijos v. Municipality of Carolina. There, the defendant tried to introduce evidence that the plaintiff had rejected an offer of judgment before accepting it.

Citing the purpose behind Rule 68, the court refused to examine that dispute, finding that "neither a rejection nor a counteroffer terminates the offeree's ability to accept a Rule 68 offer within the fourteen-day period."

Kazarosian said she is heartened that there is a "light at the end of the tunnel" for her client, who was assaulted in 2008 and then had to endure two criminal trials of her attacker because the first ended in a hung jury.

Lawrence City Attorney Charles D. Boddy had not returned a call seeking comment as of press time. Co-counsel Raquel D. Ruano of Georgetown said she was not authorized to speak to the media about the case. An email to Lawrence Mayor Daniel Rivera's chief of staff did not elicit a response.

Motion to strike

Back in 2008, uniformed police officer Kevin Sledge encountered a highly intoxicated Coeurd'Alene LaPierre wandering a Lawrence street after midnight. He told her she was not safe and suggested she get into his car so he could take her to the police station.

Instead, Sledge took LaPierre to a parking lot adjacent to the station. The parties dispute whether LaPierre was ordered to stay in the car, but that's where a friend eventually found her. LaPierre and her friend then went into the station to lodge a complaint against Sledge.

In January 2011, Sledge was convicted of rape and three counts of indecent assault and battery. That September, LaPierre sued Sledge, the city and Police Chief John Romero in Superior Court. Romero and the city removed the case to federal court two months later. Sledge never entered an appearance, and a default judgment was entered against him.

The city conveyed a Rule 68 settlement offer on Sept. 5, 2014, after the defendants had moved for summary judgment. The offer was for $300,000, payable over three years. It was silent on the issue of litigation costs and attorneys' fees.

The following day, the city tried to withdraw the offer through an email to LaPierre's counsel. Two days later, the city explained in another email that the offer needed to be "clarified," attaching an amended offer with a new sentence: "This $300,000.00 figure also inclusive of any costs and fees incurred to date, including attorney's fees."

The following day, LaPierre's counsel notified the city by email that she was accepting the original offer, adding that the client would be moving separately for "fees and costs incurred to date." LaPierre met the requirements of Rule 68 by filing the Sept. 5 offer letter along with a notice of acceptance and proof of service with the court.

The city moved to strike the filing, supporting its argument with the correspondence between the parties, including the attempt to withdraw the offer.

Zobel sided with the defendants, granting both the motion to strike and, later, a summary judgment on the grounds

that Sledge was not acting "under color of state law" at the time of the assault.

LaPierre's motion for reconsideration was denied, and she appealed.

Radecki rejected

To make the case that clarifying its original offer was permissible, the city cited a 1988 8th Circuit case, Radecki v. Amoco.

But the 1st Circuit said that casewas limited to "incomplete or ambiguous" offers.

In Radecki, what made the offer of "$525,000, including costs now accrued," ambiguous was the combination of the absence of a reference to attorneys' fees and the statute under which the lawsuit was brought, the Petroleum Marketing Practices Act, which does not define "costs" as including attorneys' fees.

In LaPierre, "by contrast, there is no dispute that 42 U.S.C. §1988 subsumes attorneys' fees within costs," the court said, and thus there was no justification for examining the city's extrinsic evidence.

As a result, the court remanded the case to the lower court with instructions to enter judgment in accordance with the offer of judgment that the plaintiff had filed.

LaPierre v. City of Lawrence, et al.

THE ISSUE: Can a defendant withdraw or otherwise clarify an offer of judgment made under Federal Rule of Civil Procedure 68, if the offer is silent on whether it includes litigation costs and attorneys' fees?

DECISION: No, if the plaintiff is suing under a statute that provides for the payment of such costs and fees (1st U.S. Circuit Court of Appeals)

LAWYERS: Marsha V. Kazarosian, Kazarosian Costello & O'Donnell, Haverhill (plaintiff-appellant); Raquel D. Ruano, Georgetown, with Charles D. Boddy, Lawrence, on brief (defendant-appellee, city of Lawrence); and Andrew J. Gambaccini, Reardon, Joyce & Akerson, Worcester (defendant-appellee John Romero).

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