Creative Settlement Strategies

Mediation, Loss Mitigation and Offers of Judgment

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I. Mediation

A. Court-Ordered Mediation

In an effort to alleviate the growing congestion of court dockets around the country, judges increasingly require parties to engage in alternative dispute resolution, particularly mediation, prior to trial. Mediation is designed to be a confidential process lacking the formality and adversarial nature of court proceedings. However, participation in any court-ordered mediation is ultimately monitored by a judge. As a general rule, courts require parties to participate in mediation in good faith, and judges have the authority to sanction parties that fail to do so. The judge's authority to impose sanctions for mediation conduct is grounded in the court's inherent authority to regulate proceedings before it, and is further supported by local rules, Federal Rule of Civil Procedure 16(f) (requiring good faith participation) and statutes such as 28 U.S.C. § 1927 (prohibiting unreasonable or vexatious litigation).[1] As in other areas of the law, however, "good faith" is not well defined.

While 28 U.S.C. § 1927 provides a bright-line test for litigating in "good faith", a brief survey of the jurisdiction in question provides real guidance in defining the parameters of good-faith mediation. For example, in New York, some federal courts also codify in their local rules the requirement of good faith participation in mediation. The Western and Northern Districts have an explicit requirement that the parties participate in mediation in good faith. *See, e.g.*, NDNY L.R. 83.11-5(c)[2]; WDNY ADR Plan 5.8(G)[3]. In March 2011, the Southern District of New York shed some light on the good faith requirement. *See In re A.T. Reynolds & Sons, Inc.,* 452 B.R. 374 (S.D.N.Y. 2011). In *A.T. Reynolds*, the Bankruptcy Court had ordered the parties to participate in mediation. The mediator informed the Court that one of the parties, Wells Fargo, was participating in bad faith. *Id.* In particular, the mediator pointed to Wells Fargo's demands to clarify the issues in dispute prior to mediation, and to know in advance the identity of party representatives that would be attending. The mediator also noted that the Wells Fargo representative apparently lacked

[1] "Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct."

[2] "Parties and counsel shall participate in good faith, without any time constraints, and put forth their best efforts toward settlement."

[3] "All parties and counsel shall participate in mediation in good faith. Failure to do so shall be sanctionable by the Court."

authority to settle, and failed to engage in risk analysis regarding the available options. *Id.* The Court found that Wells Fargo violated the good faith requirement for three reasons: (1) the representative sent by Wells Fargo lacked sufficient authority to settle the case; (2) while the Court acknowledged that parties are free to adopt a "no pay" position, he faulted Wells Fargo for "enter[ing] the mediation to assert the supremacy of its legal argument, and not to contemplate risk analysis." *Id.* at 91; and (3) Wells Fargo attempted to improperly control the mediation by demanding, prior to the mediation, that the discussion be limited to specific topics and that the identities of the representatives attending be disclosed in advance. *Id.* at 91-92.

As can be seen, the common tactic of attending court-ordered mediation "without authority" can be construed as not negotiating in good faith. The *A.T. Reynolds* case provides a good blue-print for attempting a successful, court-ordered mediation. Above all else, the client must always negotiate in good faith which necessarily includes fairly evaluating the case and entering mediation with reasonable authority to settle.

B. Private Mediation

In contrast to court-ordered mediation, private mediation is not necessarily bound by statutory of precedential good-faith requirements. For a variety of reasons, parties choose private mediation, including cost and control over the mediator(s). What all clients must keep in mind is that the attorneys and, by proxy, the parties, are bound by specific rules of professional conduct.

Similarly, certified mediators should be bound by the American Bar Association's Model Standard of Conduct for Mediators.[4] Like the Rules of Professional Conduct, these standards provide a universal set of guidelines that aim to provide a fair playing field to all mediations. The relevant standards all potential mediators should meet are: (1) self-determination[5], (2) impartiality; (3) conflicts of interest; (4) competence; (5) confidentiality; and (6) quality of the process. Importantly, should any impropriety in the decision of a mediator be suspected, having a case heard by a certified mediator provides a reviewing court with model standards with which to base its determinations.

II. Loss Mitigation – An Apology

Loss mitigation is a term commonly used in the bankruptcy and mortgage foreclosure areas. However, loss mitigation is often an effective and creative settlement strategy in litigation. One of the most basic, and most overlooked, forms of loss mitigation is a simple apology. Often, this simple admission of wrongdoing or harm can foster a lower and more palatable settlement for a client. However, caution must be used when utilizing an apology as a loss mitigation tool. As a general matter, of course, an apology by a party to litigation is potentially admissible under the exception to the hearsay rule that allows admission of a party's own statements. Other rules of evidence may prevent the admission of certain apologetic statements in some circumstances – for example, statements made in settlement discussions may be protected under Federal Rule of

[4] http://www.americanbar.org/content/dam/aba/migrated/dispute/documents/model_standards_conduct_april2007.authcheckdam.pdf

[5] Id. "Self-determination is the act of coming to a voluntary, uncoerced decision in which each party makes free and informed choices as to process and outcome"

Evidence 408.[6] Indeed, many states have recently enacted statutes that are intended to encourage and protect certain apologetic expressions by making them inadmissible in court. Massachusetts enacted the first statute preventing the admission of some apologies in 1986.[7] Since then, over two-thirds of the states have followed suit and have enacted statutes that explicitly provide some apologies with evidentiary protection.[8] Accordingly, a well-timed and appropriately placed apology can be a viable creative settlement strategy.

III. Offers of Judgment

A. Introduction

A creative and powerful tool for any civil litigator are Offers of Judgment. When a case is pending in federal court, an important consideration for a defendant may be making an "offer of judgment" pursuant to Rule 68 of the Federal Rules of Civil Procedure. The practical outcome of an offer of judgment, if accepted, is a judgment entered against the defendant for the offered amount. However, a Rule 68 offer of Judgment works as an effective settlement tool by putting pressure on a Plaintiff to settle a claim. Namely, an unaccepted Rule 68 offer and shift subsequent litigation costs and cut off a Plaintiff's right to attorney's fees. In the extreme, a well-planned Rule 68 offer can even moot a Plaintiff's claim entirely.

B. Rule 68 Offers of Judgment

i. Text of the Rule

Rule 68. Offer of Judgment

(a) Making an Offer; Judgment on an Accepted Offer. At least 14 days before the date set for trial, a party defending against a claim may serve on an opposing party an offer to allow judgment on specified terms, with the costs then accrued. If, within 14 days after being served, the opposing party serves written notice accepting the offer, either party may then file the offer and notice of acceptance, plus proof of service. The clerk must then enter judgment.

(b) Unaccepted Offer. An unaccepted offer is considered withdrawn, but it does not preclude a later offer. Evidence of an unaccepted offer is not admissible except in a proceeding to determine costs.

(c) Offer After Liability is Determined. When one party's liability to another has been determined but the extent of liability remains to be determined by further proceedings, the party held liable may make an offer of judgment. It must be served within a reasonable time—but at least 14 days—before the date set for a hearing to determine the extent of liability.

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[6] "Evidence of…conduct or a statement made during compromise negotiations about the claim — except when offered in a criminal case and when the negotiations related to a claim by a public office in the exercise of its regulatory, investigative, or enforcement authority…is not admissible…"

[7] MASS. GEN. LAWS ANN. CH. 233, § 23D (West 1986).

[8] *See, e.g.,* CAL. EVID. CODE § 1160(a); COLO. REV. STAT. § 13-25-135; FLA. STAT. § 90.4026(2); MASS. GEN. LAWS CH. 233 §23D; N.C. GEN. STAT. § 8C-4, Rule 413; OHIO REV. CODE ANN. §2317.43; OKLA. STAT. ANN. tit. 63, § 1-1708.1H; OR. REV. STAT. §677.082.

(d) Paying Costs After an Unaccepted Offer. 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.[9]

ii. Purpose of the Rule

Rule 68 is "intended to encourage settlements and avoid protracted litigation."[10] Settlements are largely accomplished through the cost-shifting provision provided for in section (d). Generally, the prevailing party recovers its own costs.[11] When a valid offer of judgment is refused, and the plaintiff fails to obtain a judgment "more favorable" than the unaccepted offer, then the plaintiff "must pay the costs incurred after the offer was made."[12] Accordingly, a well-designed Rule 68 offer should provide the offering defendant with a palatable number to resolve the case at while also forcing the plaintiff to seriously consider that offer at the risk of paying potentially large litigation costs. It should be emphasized that for the cost-shifting portion of Rule 68 to apply, a Plaintiff *must* prevail at trial. This provision avoids the potentially abusive tacit of a defendant offering a low Rule 68 offer at the beginning of litigation with the possibility of a defense verdict would replace the court's discretion to award costs to a prevailing party to the prevailing defendant's absolute right to costs incurred after the offer.

iii. Attorney's Fees as Recoverable Costs

An important consideration in a strategic offer of judgment is whether attorney's fees are a recoverable cost. Indeed, perhaps the most important consideration in making an offer of judgment is whether it has a potential to cut off attorney's fees. The Supreme Court in *Marek v. Chesny* held that "where the underlying statute defines 'costs' to include attorney's fees . . . such fees are to be included as costs for purposes of Rule 68."[13] Accordingly, one needs to understand fully whether the litigation at issue allows for attorney's fees as costs and, if so, this can be a powerful consideration for making a Rule 68 offer of judgment.

C. Structuring an Effective Offer of Judgment

i. Possibility of a Judgment and Amount of the Offer

Several variables need to be weighed by a defendant prior to propounding a Rule 68 offer of judgment. First and most obvious whether the defendant is comfortable with having a potential judgment levied against it, should the offer be accepted. While this consideration is an implicit portion of the discussion, that threshold question and its implications need to be thoroughly considered. Assuming the decision to accept a potential judgment is made, the amount of the judgment is the largest controlling factor in the decision. This decision is obviously very fact-

[9] Fed. R. Civ. P. 68.
[10] 12 WRIGHT, MILLER & MARCUS, FEDERAL PRACTICE AND PROCEDURE, CIVIL 2D § 3001 (1997). See also Marek v. Chesny, 473 U.S. 1, 5 (1985) ("The plain purpose of Rule 68 is to encourage settlement and avoid litigation.").
[11] See FED. R. CIV. P. 54(d).
[12] FED. R. CIV. P. 68(d).
[13] *Marek v. Chesny*, 473 U.S. 1, 5 (1985).

dependent but needs to be a figure that is both low enough to be palatable to the defendant and high enough that the plaintiff must consider the cost-shifting and costs risks it presents.

ii. Timing of the Offer

A Rule 68 offer can be made any time after the plaintiff's lawsuit is filed, so long as it is served at least fourteen days before the trial date.[14] Generally, the earlier a case can be evaluated for liability and damages potential, the better. Concurrent with that is the earlier an offer of judgment can be communicated the better. There are two rationales for this First, if an unaccepted offer is intended to shift costs to a plaintiff and/or stop a plaintiff's right to recover its attorneys' fees, the earlier an offer is issued, the lower the costs and fees that will have been incurred by the plaintiff before the cut-off date. Second, if there are circumstances of which the plaintiff is not yet fully aware, an offer of judgment—because of the risks it creates for plaintiffs—may prompt a settlement on more favorable terms than would be possible after discovery begins or even an answer is filed.

[14] FED. R. CIV. P. 68(a). See also WRIGHT, MILLER & MARCUS, FEDERAL PRACTICE AND PROCEDURE, CIVIL 2D § 3003 ("[O]nce the suit is filed, defendant may make a Rule 68 offer, and it need not wait until plaintiff has completed any discovery.").