

CLIENT ALERT

Citizen Suit Watch: Third Circuit Allows Defendants to Employ Rule 68 Offers Of Judgment To Resolve Attorneys' Fee Disputes

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The U.S. Court of Appeals for the Third Circuit has confirmed the availability of a potentially useful tool in resolving attorneys' fee disputes in environmental citizen suits—offers of judgment under Federal Rule of Civil Procedure 68, which permits a defendant to serve on a plaintiff an offer of judgment on specified terms and, if the judgment is not more favorable than the unaccepted offer, the plaintiff must pay the fees and costs incurred after the offer was made. Fed. R. Civ. P. 68. In *Interfaith Community Organization v. Honeywell International*, -- F.3d --, Nos. 11-3813 and 11-3814, 2013 WL 2397338 (3d Cir. June 4, 2013), a unanimous Third Circuit panel reversed the U.S. District Court for the District of New Jersey's decision declaring the defendant's offers of judgment in the context of an attorneys' fee dispute under the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901, *et seq.* (RCRA), null and void.

Although the district court believed that the application of Rule 68 in the context of a fee-shifting citizen-suit provision would discourage the very kind of suit that Congress wanted to promote and violated the Rules Enabling Act's prohibition against using rules of procedure to affect substantive rights, 28 U.S.C. § 2072, the Third Circuit disagreed based on the plain language of the relevant rules of procedure and its determination that Rule 68 did not abridge, enlarge, or modify any substantive right. The court also recognized "Rule 68's laudatory purpose of facilitating settlement,"¹ and held that there was no conflict between that goal and the statutory fee shifting provision encouraging plaintiffs to bring meritorious suits to enforce environmental laws, allowing defendants to use Rule 68 to attempt to settle attorneys' fee disputes in citizen suit cases.

Background

This case involves the cleanup of a contaminated area along the Hackensack River in New Jersey, where dumping occurred from 1895 to 1954. Honeywell International (Honeywell), the successor to the entity that had purchased the subject property, was first ordered to clean up the site in a decision resolving a 1995 suit brought under RCRA's citizen suit provision.² Companion citizen cases were then filed in 2005, and Honeywell entered into a number of consent decrees in which it agreed to remediate additional nearby contaminated sites. As part of those consent decrees, Honeywell agreed to pay \$5 million in fees and costs incurred prior to the decrees and to pay "reasonable" future fees and expenses incurred by counsel for the citizen groups, Terris, Pravlik & Millian, LLP (Terris), in their ongoing monitoring of Honeywell's remediation efforts.

Although the decree provided that the parties were to reach agreement on future fees and expenses, the parties' initial ability to agree gave way to deadlock in the fall of 2009. Terris filed two fee petitions with the district court, seeking \$700,000 for monitoring efforts connected to the 1995 suit and almost \$2.5 million for its monitoring efforts stemming from the 2005 cases. Honeywell objected to the use of Washington, D.C. rates in New Jersey and contested the reasonableness of the hours and expenses. Honeywell also served offers of judgment pursuant to Rule 68 for the disputed fees. In response, the citizen groups asked the district court to issue a declaratory judgment that Honeywell's Rule 68 offers were null and void in the context of RCRA citizen suits.

In relevant part, the district court held that Rule 68 offers of judgment could not be made in RCRA citizen suits because Rule 68's application in that context would violate the Rules Enabling Act, 28 U.S.C. § 2072, discouraging the very citizen suits that Congress intended to promote.³ *Interfaith Cmty. Org. v. Honeywell Int'l, Inc.*, 808 F. Supp. 2d 744, 751-55 (D.N.J. 2011).

The Court's Decision

The Third Circuit reversed. It held, first, that Rule 68 by its terms did not exempt any type of civil action from its scope. Moreover, the court determined that Rule 1 of the Federal Rules of Civil Procedure states that the rules apply to *all* suits of civil nature unless exempted by Rule 81, which in turn did not restrict Rule 68's applicability to RCRA citizen suits. *See* Fed. R. Civ. P. 1, 68, 81.

The Third Circuit also determined that Rule 68 did not run afoul of the Rules Enabling Act because its use did not abridge, enlarge, or modify any substantive right. Under the Supreme Court's plurality opinion in *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Company*, 130 S. Ct. 1431, 1442 (2010) (Scalia, J., writing for the plurality), a rule of procedure violates the Rules Enabling Act only if it alters the rules used to adjudicate a litigant's rights. The court determined that Rule 68 did not do so. Instead, the amount of the fee awarded is governed by the same rules of decision regardless of the interposition of an offer of judgment.

"At best," the court explained, "the only impact that Rule 68 has on the ultimate outcome of the attorneys' fee dispute is to require Appellees to bear their post-offer costs, including counsel fees, if the fee award is less favorable than the offer of judgment."⁴ And "[i]n light of Rule 68's laudatory purpose of facilitating settlement, the requirement that a plaintiff bear the fees incurred after it rejects an offer of judgment simply cannot be said to abridge some substantive right."⁵ In the court's view, any fees incurred after a party rejects a Rule 68 offer and recovers less than that offer are properly seen as unreasonable.

The court rejected the district court's public policy concerns, reasoning that the decision whether or not to pursue citizen-suit litigation has nothing to do with whether an offer of judgment made down the road abridges or modifies some substantive right. In addition, the panel noted, the Supreme Court has held that Rule 68 could be employed in the context of the fee-shifting statute applicable to civil rights litigation, 42 U.S.C. § 1988, despite the risk that it could chill the pursuit of such litigation, and that that decision was not meaningfully different from the environmental case at hand.⁶

The court also held that Rule 68 could be applied in proceedings after judgment has been rendered on liability because the ordinary meaning of "liability" encompassed *all* legal responsibilities, including responsibility for the cleanup as well as for attorneys' fees.

And finally (in relevant part), the court was persuaded by the policies underlying Rule 68 that encourage the settlement of litigation, including settlement of claims for attorneys' fees so that they do not result in a second major litigation. For those reasons, the Third Circuit held that a Rule 68 offer of judgment could be employed by defendants to attempt to resolve a dispute under the fee-shifting provision of RCRA.

Implications

As the Third Circuit confirmed, defendants may use Rule 68 offers of judgment to attempt to speed the resolution of attorneys' fee disputes in environmental fee-shifting citizen suits. Although in deciding whether to make a Rule 68 offer, defendants should

weigh the benefits of an early settlement against the risk that an accepted offer of judgment may be higher than what the court would have awarded absent such an offer, it is significant that defendants now can make that decision for themselves. Moreover, if defendants choose to employ Rule 68 and their offer is rejected, they can avoid paying additional fees and costs to litigate the dispute should the court eventually award fees in an amount less than the rejected offer.

To read the Third Circuit's opinion, [click here](#).

¹ *Interfaith Cmty. Org. v. Honeywell Int'l*, -- F.3d --, Nos. 11-3813 and 11-3814, 2013 WL 2397338, at *5 (3d Cir. June 4, 2013).

² 42 U.S.C. § 6972(a)(1)(B).

³ The Rules Enabling Act gives the Supreme Court the power to "prescribe general rules of practice and procedure and rules of evidence" provided that "such rules [do] not abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(a)-(b).

⁴ *Interfaith Cmty. Org. v. Honeywell Int'l*, 2013 WL 2397338, at *4.

⁵ *Id.* at *5.

⁶ *See id.* at *5-6 (discussing *Marek v. Chesny*, 473 U.S. 1 (1985)).

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