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Back to Article

Offers of Judgment in Federal Ct. Allowed in Citizen Suits

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Earlier this month, in *Interfaith Community Organization v. Honeywell International,* No. 11-3813 (3d Cir. July 8, 2013), the U.S. Court of Appeals for the Third Circuit decided that a defendant in a federal environmental citizen suit may make an offer of judgment under Federal Rule of Civil Procedure 68, at least as to the plaintiff's claim for attorney fees. That may be a change and, if it is, it favors defendants. It may also favor certain kinds of plaintiffs in cases brought by multiple parties.

Most federal environmental statutes include a citizen suit provision. The citizen suit provision allows a party other than the United States with constitutional standing to bring an action against the United States for failure to implement a nondiscretionary duty. The citizen suit provision also authorizes the same set of parties to enforce an obligation under the statute privately when the government has not instituted and diligently prosecuted its own enforcement action. Most statutes provide for recovery by the prevailing party of its litigation costs, including reasonable attorney and expert witness fees.

So, an environmental group that identifies a statutory violation either by the Environmental Protection Agency or by a regulated entity may sue under most of the federal environmental statutes. In the case of a claim against the regulated entity, the plaintiff can recover (1) declaratory relief setting out the defendant's obligations; (2) an injunction if one is appropriate; (3) statutory civil penalties; and (4) litigation costs.

As I discussed last month in this space, even if it can prove a violation of an environmental law, a plaintiff may not always recover an injunction, as in *Monsanto v. Geertson Seed Farms*, 130 S. Ct. 2743 (2010), *Winter v. Natural Resources Defense Council,* 555 U.S. 7, 20, 32 (2008), *Weinberger v. Romero-Barcelo*, 456 U.S. 305 (1982), and *eBay v. MercExchange*, 547 U.S. 388, 391 (2006). Any civil penalties are due to the United States, not to the citizen suit plaintiff. Therefore, other than vindication, what a citizen suit plaintiff gets out of its lawsuit is its litigation costs.

Rule 68 permits a "party defending a claim" to serve a written "offer to allow judgment on specified terms, with the costs then accrued" at least 14 days before trial. The plaintiff then has 14 days to accept that offer in writing. If the plaintiff does not accept the offer and "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."

In an environmental citizen suit, the "costs" are defined by the underlying environmental statute to include attorney and expert witness fees. Accordingly, a citizen suit plaintiff would face exposure to the defendant's legal fees if the plaintiff rejected a Rule 68 offer of judgment.

Congress intended the availability of citizen suits to empower private attorneys general to obtain environmental compliance. Those citizen suit plaintiffs do not recover; the public does. Accordingly, some have argued that Rule 68 imposes too significant a disincentive for full vindication of the public's rights.

Indeed, in an old Clean Water Act case, *Public Interest Research Group of New Jersey v. Struthers-Dunn*, 28 Env't Rep. Cas. (BNA) 1218 (D.N.J. Aug. 17, 1988), U.S. District Judge Stanley S. Brotman for the District of New Jersey held that offers of judgment in citizen suits were "null and void." The Rules Enabling Act prohibits the federal rules of procedure and evidence from abridging, enlarging or modifying "any substantive right." Brotman reasoned that the uneven incentives posed by Rule 68 in the citizen suit context abridged the plaintiff's substantive right to full compliance with the Clean Water Act. He analogized a Clean Water Act citizen suit to the private claim under the Reconstruction era Civil Rights Act considered in *Marek v. Chesney*, 473 U.S. 1 (1985), in which the Supreme Court held that a civil rights defendant could not recover attorney fees under Section 1988 after the plaintiff rejected an offer of judgment but failed to recover more at trial. A few other district courts agreed, such as in *North Carolina* Shellfish Growers Association v. Holly Ridge Associates, 278 F. Supp. 2d 654 (E.D.N.C. 2003), and *Friends of the Earth v. Chevron Chemical*, 885 F. Supp. 934 (E.D. Tex. 1995).

Nevertheless, in *Public Interest Research Group of New Jersey v. Windall,* 51 F.3d 1179 (3d Cir. 1995), the court implied that an offer of judgment might be relevant to the award of attorney fees in a Clean Water Act case. The offer of judgment in Windall was made by the Air Force, which was defending the attorney fees petition after having lost the underlying dispute. Because the whole litigation costs portion of the case was remanded, the court merely instructed the district court to consider offer of judgment in making a final award.

Honeywell, by contrast, directly addressed the Struthers-Dunn challenge to an offer of judgment made in a citizen suit under the Resource Conservation and Recovery Act. To be sure, that offer also arose in the litigation costs portion of the case. The court observed that procedural rules always affect substantive rights to some extent. Congress favors vindication of rights, but it also favors settlement of cases. Rule 68 promotes settlement and therefore it may be used in citizen suits.

The court of appeals has not yet considered an offer of judgment on the underlying substantive portion of a citizen suit. We do not yet know whether a defendant that offered a declaratory judgment but no injunction or no civil penalty would recover its defense costs if the plaintiff continued to litigate and did not obtain that injunction or penalties in excess of the offer. However, the logic of Honeywell suggests that Rule 68 would apply with full force.

That, then, becomes a tool for defendants for precisely the reasons that motivated the original decision in Struthers-Dunn. A citizen suit plaintiff may well settle for partial vindication of its interest in environmental compliance rather than continue to litigate at risk of paying the defendants' lawyers. A plaintiff may think twice before going to trial in order to recover penalties to be paid to the Treasury, for example.

Defendants can also use this set of incentives for settlement to divide a group of plaintiffs. Many citizen suits, including most of the cases cited above, were brought by multiple plaintiffs. Sometimes, the plaintiffs are all national environmental groups represented by a single lawyer.

Sometimes, however, while they may have aligned interests in achieving environmental compliance, they have very different overall agendas. A local group or a municipality may really want different things than a national organization seeking to promote a national agenda. A defendant may craft an offer of judgment — like any settlement offer — to appeal to some of the plaintiffs more than others. Rule 68 strengthens the

voice of the pro-settlement plaintiffs. A plaintiff with specific interests — like a municipality or local group — can similarly use Rule 68 to strengthen its own hand in pushing a settlement to its liking.

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