The Master of the Offer: Utilizing Liability Disclaimers in ORCP 54 E Offers of Judgment

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The offer of judgment rule, ORCP 54 E, is a potentially powerful tool for mitigating attorney fee exposure,[1] and is particularly useful in cases involving minimal actual damages.[2] An early offer of judgment for the amount of the actual damages, plus reasonable attorney fees incurred to date, will often be difficult (if not impossible) for the plaintiff to improve upon at trial. Offers of judgment should also be considered in commercial disputes where liability is likely but damages are disputed.

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Still, an offer of judgment, if accepted, results in entry of judgment against the defendant. For many defendants, entry of an adverse judgment is undesirable because it might later be deemed a judicial determination that the defendant's conduct was improper. To mitigate this concern, defendants should consider including a disclaimer of liability within the offer. Cautious litigants may wonder whether such a disclaimer impacts the validity of the offer of judgment.

ORCP 54 E Permits Defendants to Define Their Offers

ORCP 54 E does not mention liability disclaimers. The rule states only that the defendant must "offer to allow judgment to be entered against" it "for the sum" or "to the effect therein specified."[3] The Oregon Supreme Court has recognized that "the nature and content of offers of compromise are unrestricted[,]" and the words "'to the effect therein specified' are broad[.]"[4] Since the plain language is broad and unrestrictive, to insert a requirement that the defendant refrain from disclaiming liability would arguably violate the mandate of ORS 174.010 "not to insert what has been omitted" from a statute.

The Court of Appeals recently applied this plain meaning approach to ORCP 54 E in *Miller v. Am. Family Mut. Ins. Co.,*[5] a case involving a dispute over unpaid PIP and UIM benefits for a surgery. The defendant insurer made an ORCP 54 E offer of judgment for the full amount of the PIP benefits. The offer was expressly limited to the PIP benefits and stated the UIM claim would endure.[6] After accepting the offer, the plaintiff argued (and the trial court agreed) that since the necessity of the surgery was at issue on the PIP claim, the accepted offer of judgment precluded defendant from relitigating that same issue on the UIM claim.[7]

The Court of Appeals reversed. It began by noting that an offer of judgment is "an agreement between the parties and is 'in the nature of a contract, approved by the court.'"[8] The Court then observed the "accepted principle that ORCP 54 E permits a defendant to define the terms of an offer of judgment[.]"[9] Since the offer stated it did not apply to the UIM claim, the defendant was entitled to litigate that claim.[10] The *Miller* decision is in line with the hornbook rule of contract law that the offeror is the "master of the offer."[11] The defendant, as the master of its offer, should be entitled to include a liability disclaimer within the offer.

Federal Case Law

Case law interpreting FRCP 68—the federal analogue to ORCP 54 E—supports the viability of liability disclaimers in offers of judgment.[12] For example, in *Fisher*

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v. Kelly,[13] the Seventh Circuit addressed an offer of judgment containing a liability disclaimer in the context of a Section 1983 claim. The plaintiff accepted the offer and requested her attorney fees as the "prevailing party." The District Court denied plaintiff's request, and the Seventh Circuit affirmed, holding the plaintiff was not a "prevailing party" based, in part, on the liability disclaimer.[14]

Mite v. Falstaff Brewing Corp.[15] is also helpful. There, the defendant served an offer of judgment disclaiming liability, and the plaintiff moved to strike the offer as insufficient. The district court held the offer of judgment was sufficient.[16] The *Mite* Court based its decision on the United States Supreme Court case of *Delta Air Lines v. August,*[17] in which the Supreme Court addressed an offer of judgment containing a similar liability disclaimer and decided the case "without any hint the offer was insufficient for Rule 68 purposes."[18] One federal court characterized liability disclaimers as "a common practice with Rule 68 offers."[19] Some courts have even held that a rejected offer of judgment for the full relief demanded by the plaintiff moots the case, regardless of whether the offer disclaims liability.[20]

While it seems virtually undisputed that offers of judgment may disclaim liability, such a disclaimer might, in certain cases, impact the later determination of whether the plaintiff improved upon a rejected offer.[21] However, in a typical case involving only monetary relief, a liability disclaimer is not likely to impact this determination.

Conclusion

Defendants, as the masters of their offers, should consider including liability disclaimers in their offers of judgment. This is particularly true when the defendant risks issue preclusion arguments by future claimants.[22] With this safeguard in place, offers of judgment may be utilized more effectively to encourage settlement and mitigate attorney fee exposure.

Endnotes

1. ORCP 54 E(1) provides that a party may, up to 14 days before trial, offer to allow judgment to be taken against it for a particular sum, inclusive or exclusive of attorney fees. If the offer is accepted, judgment is entered per the offer. *Id.* If the offer is rejected, the case proceeds to trial. If the claimant fails to recover more than the amount of the offer, the claimant is not entitled to its post-offer attorney fees or costs. ORCP 54 E(3).
2. *E.g.,* the Oregon consumer protection laws permit recovery of attorney fees, plus a small civil penalty, for violations often involving minimal (or no) actual damages. *See, e.g.,* ORS 646.638 (Unlawful Trade Practices Act); ORS 646.641 (Fair Debt Collection Practices Act).
3. ORCP 54 E(1).
4. *For Counsel, Inc. v. Nw. Web Co.,* 329 Or 246, 253 (1999).
5. 262 Or App 730 (2014).
6. *Id.* at 733 (quoting the defendant's offer of judgment).
7. *Id.* at 733-34.
8. *Id.* at 737 (citing *Nieminen v. Pitzer,* 281 Or 53, 57 [1978]).
9. *Id.* at 738.
10. *Id.* at 740-41.
11. *Hollywood Fantasy Corp. v. Gabor,* 151 F3d 203, 210 (5th Cir 1998) (quoting 1 Farnsworth on Contracts, § 3.13, at 229 [1990]).
12. Oregon courts regularly look to federal case law interpreting federal rules substantially similar to Oregon rules. *See, e.g.*, *Fisher v. Bowman,* 97 Or App 357, 360 (1989); *State ex rel. Zidell v. Jones,* 301 Or 79, 89, (1986).
13. 105 F3d 350, 352 n1 (7th Cir 1997) (quoting defendant's offer of judgment).
14. *Id.* at 353-54.
15. 106 FRD 434 (ND Ill 1985).
16. *Id.* at 435.
17. 450 US 346, 101 S Ct 1146 (1981).
18. *Mite,* 106 FRD at 435.
19. *Aynes v. Space Guard Prods.,* 201 FRD 445, 450 (SD Ind 2001).
20. *See, e.g., McCauley v. Trans Union, L.L.C.,* 402 F3d 340, 341 (2d Cir 2005) (Defendant's "unwillingness to admit liability is insufficient, standing alone, to make this case a live controversy."); *Chathas v. Local 134 IBEW,* 233 F3d 508, 512 (7th Cir 2000) ("A winning party cannot appeal merely because the court that gave him his victory did not say things that he would have liked to hear, such as that his opponent is a lawbreaker.").
21. *See, e.g., Lish v. Harper's Magazine Found.,* 148 FRD 516, 519-20 (SDNY 1993) (judgment in plaintiff's favor for $0 on copyright claim deemed more favorable than $250 offer of judgment disclaiming liability because vindication of plaintiff's copyright was more favorable than the nominal money offer).
22. The recent *Miller* decision expressly left open the possibility of issue preclusion in a subsequent case based on an accepted offer of judgment. *Miller,* 262 Or App at 742 n7.