



Attorneys Discuss and Define Offers of Judgment - Episode #122

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Hosted by: John Czuba, Managing Editor

Guest Attorneys: Jim Steele and Matthew Berkowitz of [Carr Maloney P.C.](#)
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John Czuba: Welcome to "The Insurance Law Podcast," the broadcast about timely and important legal issues affecting the insurance industry. I'm John Czuba, Managing Editor of *Best's Recommended Insurance Attorneys*.

We're pleased to have with us today attorneys Jim Steele and Matthew Berkowitz from the law firm of [Carr Maloney](#) in Washington, D.C. Jim counsels insurers on complex coverage matter disputes.

He litigates and arbitrates coverage cases for insurance companies including construction mishaps, professional liability claims, uninsured/underinsured motorist policy provisions, subrogation claims, third party additional insurer disputes, lead paint exclusions, and other insurance provisions. He is a past president of the D.C. Defense Lawyers' Association and also a member of DRI.

Matthew Berkowitz has extensive class action experience at the trial and appellate level. He defends insurance companies in complex coverage disputes involving toxic tort and environmental cases and represents construction companies, auto dealerships, and national restaurant and retail chains in complex tort actions.

He recently coauthored an article on using Rule 68 Offers of Judgment to end class actions early and quickly in the legal process. We are very pleased to have you both with us today.

Matthew Berkowitz: Thank you very much.

Jim Steele: Thank you.

John: Today's discussion will be on offers of judgment, and we're going to lead off today's questions with Jim Steele. Jim, can you tell us this morning, what is an offer of judgment and how does it work?

Jim: Certainly. Rule 68 of the Federal Rules of Civil Procedure is an offer that allows a defendant or a party opposing a claim to, at least 14 days before the trial date that party can offer to have the plaintiff or other claimant take judgment against them for an amount on specified terms with cost then accrued.

The plaintiff then has 14 days to either accept the offer, reject the offer, or, if they ignore it, after 14 days it's considered withdrawn. The import of that is that if the plaintiff rejects the offer, then the plaintiff must receive a judgment in excess of what the offer amount was, or they have to pay the offerer's cost from the date of the offer going forward.

It's a fish or cut bait type of rule. That's the federal rule. Some states have their own versions of it. In my area, the District of Columbia has that rule, Virginia does not. Maryland only has it available in healthcare malpractice claims. Other states, such as Florida, allow plaintiffs to make a similar offer towards the defendant.

John: Jim, what does a party have to consider when deciding whether to make an offer of judgment? What are some common issues that arise when they are used?

Jim: Some of the considerations you have to go through, primarily your client is then offering to allow a judgment to be taken against them. You have to make sure your client is on board with that concept. You have to have a well-informed client to know what the consequences of that are.

Some other considerations going into whether to make one or not is, is it a case of disputed liability or is it a case where there's really no dispute as to liability but there's a big difference between the sides in terms of what the damages might be.

There's other situations. If you have, for example, a professional liability client, a judgment being taken against a lawyer, a doctor, or some other professional, it could affect their reputation in their professional community. These are all the kind of considerations you have to think about.

As far as the issues that arise, the primary one that comes up is you have to draft the offer very clearly to specify what it is you're actually offering.

There's a lot of case law out there where, if there was a claim that involved the fee shifting statute and the defendant makes the offer and thinks they've included the attorney's fees in the offer and the plaintiff accepts the offer and then turns around and files a petition for attorney's fees, there's a lot of case law out there over disputes on that.

The big thing is you have to draft it so that it's clear that the offer is intended to include all elements of the plaintiff's claim for relief.

John: Jim, one final question for you this morning. Can you give some examples of offers of judgment in action?

Jim: Sure. I've had a case where there were multiple defendants who made a joint offer of judgment but did not define the contributions of the respective parties. The plaintiff rejected the offer and then ended up getting less than one tenth of what the offer was.

As a result, the defendant won the trial but ended up owing the defendants about \$3,000 when all the costs were...the costs exceeded the judgment amount by \$3,000. The plaintiff ended up owing the defendant's money.

I've had other cases where the plaintiff does not accept the offer of judgment but it then creates pressure through the rest of the case, pressure on the plaintiff to settle. In those situations the plaintiffs have settled for a reasonable amount of money. It really is an effective tool for resolving cases.

John: Thank you, Jim. We'll turn it over to Matt now for some questions. Matt, how are offers of judgment used in class action cases?

Matthew: Very similar to the manner in which Jim described. Certainly the rule itself doesn't change. Most courts recognize that, when an offer of judgment is accepted, that offer is accepted by the lead plaintiff of a class. The offer is to be made and accepted prior to class certification.

The offer of judgment, once accepted, would moot the lead plaintiff's claims and ultimately the punitive class. Essentially you can get rid of a class action by making an offer of judgment that's accepted by a lead plaintiff. The courts have generally held, at that point, once it's accepted, the lead plaintiff no longer has a live case, controversy, or stake in the outcome of the litigation.

John: Matt, is it possible to potentially moot a punitive case with an unaccepted offer of judgment?

Matthew: It is possible. It's become much more difficult. There is still some dispute in the law. Recently the Supreme Court, in a case called *Gomez versus Campbell Ewald* held that an offer...basically the court applied contract principles rather than, perhaps, as I mentioned before, standing principles or whether there's a stake in the controversy.

The court said an unaccepted offer is just that. It's an unaccepted offer. The court applied contract principles. The Supreme Court recently held that an unaccepted offer does not moot the lead plaintiff's or the class's claims.

The minority in the Supreme Court, Justice Roberts, Justice Alito, they focused on the constitutional standing instead of the contract principles and essentially argued that at this point the plaintiff, if they're given everything that they could be entitled to on their best day, how would they have any stake in the outcome? How is there any case or controversy?

Like I said, the majority said that matters not. We're just focusing on contract principles. Of interest, the majority seemed to leave open the possibility, even under contract principles, that if the defendant made full payment or deposited the funds in the court registry, the results may have been different.

Since Campbell's decision, some courts have applied this exception and have mooted a lead plaintiff's case when the plaintiff has been afforded complete relief.

John: Matt, how can you potentially moot a punitive class by offering the lead plaintiff all the relief that he or she could be entitled to if you don't know all the attorney's fees that they may be entitled to at the time you make that offer of judgment?

Matthew: That's a good question, and I think Jim brought it up earlier, just making clear that you want to include attorney's fees. The first thing I'd tell you is, in a class action, just like in an individual case, attorney's fees are not necessarily being determined until after the judgment, until after the judgment is taken and it's being determined by the court.

As Jim alluded to, you want to be very, very clear in the offer of judgment that it would include all reasonable attorney's fees that the plaintiff could be entitled to as determined by the court. I think in that respect, although you may not know the specifics and you're trying to afford complete relief, you can still make it inclusive to effectively use in a class action.

John: Matt and Jim, thank you both so much for joining us today.

Matthew: Thank you very much.

Jim: Thank you very much.



John: We've just listened to attorneys Jim Steele and Matthew Berkowitz from the law firm of [Carr Maloney](#) in Washington D.C. Special thanks to today's producer, Frank Vowinkel. Thank you all for joining us for The Insurance Law Podcast.

To subscribe to this audio program, go to iTunes or our web page www.ambest.com/claimsresource. If you have any suggestions for a future topic regarding an insurance law case or issue, please email us at lawpodcast@ambest.com. I'm John Czuba, and now this message.

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