

10-CV-D

"Gregg R. Zegarelli"	Dear Secretary of the Committee on Rules of...	12/08/2010 10:21:54 AM
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From: "Gregg R. Zegarelli" <gregg.zegarelli@zegarelli.com>
To: <Rules_Support@ao.uscourts.gov>
Date: 12/08/2010 10:21 AM
Subject: Rule 68 Offer of Judgment

Dear Secretary of the Committee on Rules of Practice and Procedure:

I suggest a change to the Rule 68 Offer of Judgment. I will explain the scenario briefly. I am generally available to testify to the Committee as appropriate.

I represented Aaron and Christine Boring in a case against Google in the Western District of Pennsylvania 2:08-cv-00694-CB, now resolved by consent judgment against Google for nominal damages. This was a proverbial mom and pop versus behemoth company. The case arose from a trespass to land by Google and claimed invasion of privacy from Google's Street View service, past signage. The claim for damages was an important part of the case, since the case was dismissed for failing to plead nominal damages and the trial court holding as a matter of law that compensatory damages were not available without physical injury to land. That issue was reversed by the Third Circuit, with reinstatement of the trespass count and the availability of the compensatory damage claim with or without physical damage to land. [The dismissal of the punitive damage claim was upheld by the Third Circuit, with asserted logic that yet defies me, but Certiorari was not granted. You may want to visit <http://www.zegarelli.com/Cases/Borings%20v%20Google/Borings%20v%20Google%20Certiorari%20Petition.pdf>]

When back at the trial court, plaintiffs then added a nominal damage claim for relief, as belt and suspenders. Compensatory damages could be proved in two ways, fact testimony such as costs and time associated with removal of improper Street View pictures, and expert testimony such as the value of the pictures acquired by Google in its hands and use of the land. Because of Google's power, and in light of the then-current magistrate judge's apparent inclinations, a Google Daubert might eliminate (rightly or wrongly) our expert. The risk of losing the expert testimony without a supportive nominal damage claim might actually bait Google to file a Daubert motion on that basis alone. Therefore, a nominal damage claim could keep plaintiffs in the game for a trial, even if plaintiffs could not prove compensatory damages.

In light of this posture, Google sent us a Rule 68 Offer for \$10. I will state some conjecture, but it is relevant to your consideration. I believe that Google read Rule 68 with the interpretation that it could not be filed and/or publicized. Therefore, as a matter of strategy, Google could send the notice, which I would have to show to the client, and it would scare the client into conceding the case for the risk of having to pay all the costs a \$34B company could accrue — and as if they need the money. At the same time, Google could do so without being publicly accountable for such a mean harassing head game. Just play out the attorney-client conversation in committee: you sue for nominal damages of \$1 to prove an important point of right v. wrong (in the traditional American sense), and you receive a \$10 or \$1.01 offer. You win your \$1 and still have to pay.

I interpreted the act by Google to be an improper use of Rule 68. I filed it with the trial court for a purpose other than intended by Rule 68 itself, that being to prove a point related to the merits of the stay, that is, as an item of supportive public evidence like any other. I can tell this Committee, that my intention in filing was in good faith, because we researched diligently and could not find controlling authority that the *recipient* could not file for a tangential purpose. I also openly raised the issue in my Petition to the

Supreme Court.

In any case, Google took the position that a Rule 68 Offer cannot be filed, and possibly that it is confidential. Our position was that Rule 68 must still be used by a defendant for a proper purpose and not to harass. Also, that the offer is able to be filed with the Court for some reasons other than the primary purpose intended by the Rule itself; otherwise, you could not file a Rule 11 motion resulting from a bad faith use of Rule 68. In any case, the trial court never ruled on Google's related sanction motion.

<http://www.zegarelli.com/Cases/Borings%20v%20Google/Brief%20in%20Support%20of%20Motion%20to%20Stay%2020100406W.pdf>

<http://www.zegarelli.com/Cases/Borings%20v%20Google/Google%20Response%20to%20Motion%20web.pdf>

<http://www.zegarelli.com/Cases/Borings%20v%20Google/Reply%20Motion%20to%20Stay%20Web.pdf>

Again, please watch how the Rule works with nominal damages: You sue with a non-frivolous case. The law provides only nominal damages of \$1 for the proper symbolic purpose of vindication of the legal right itself. You properly recover nominal damages of \$1. However, \$1 is by formula less than the \$10 offer of judgment; therefore, defendant gets costs. In other words, a \$1.01 offer of judgment could always be used in a nominal damages case to harass a proper plaintiff vindicating its right. It vitiates the concept of nominal damages, which is a proper symbolic victory and vindication.

As a result of the above posture and strategic use of Rule 68, I believe the Rule should not be applicable if nominal damages are awarded, or if punitive damages are awarded. Confidentiality and filing issues should also be clarified. E.g.:

(e) Offers of judgment are not settlements, nor are offers confidential settlement communications, as such. [This clarifies that a proponent of the offer may make the offer, but will not escape any public scrutiny that is appurtenant to the act itself. Offers can lead to a settlement discussion, but the offer itself is not confidential settlement communication. Offers of judgment are a "cram down," not an inspired settlement discussion.]

(f) Offers of judgment are not applicable to nominal damages or punitive damages. A judgment granting nominal or punitive damages nullifies the effectiveness of an unaccepted offer. [Nominal damages are \$1 and symbolic; therefore, it is not appropriate for an offer of judgment. Punitive damages are not calculable and are socially imposed in discretion, and therefore not subject to offers. An award in such other categories must nullify the offer otherwise the limitation would be ineffective.] (It might be better to state that offers are applicable only to damages otherwise reasonably calculable. The point for nominal damages is distinct from punitive damages, but punitive damages exist for a reason, and it is not fair to make a recipient try to calculate punishment value. Offers should be for "rational" damages, not symbolic, exemplary, punitive, etc.)

(g) Attorneys fees reimbursements are not within the scope of offers.

(h) Nothing prevents the filing or admissability of an offer for a purpose other than to constrain the liability otherwise determined, as provided above in Sections (c)-(d).

I appreciate your consideration in this regard and offer the suggestion for the purpose of clarifying applicability of a rule that goes directly to the heart of all federal lawsuits. If I can be of further assistance, please contact me.

Very truly yours,
s/Gregg Zegarelli/

Gregg R. Zegarelli

Direct Dial: 412.765.0401
gregg.zegarelli@zegarelli.com
www.zegarelli.com/staff/grz

Z E G A R E L L I

Technology & Entrepreneurial
Ventures Law Group, P.C.

South Hills Administrative Office:
2585 Washington Road, Building 100
131 Summerfield Commons Office Park
Pittsburgh, PA 15241-2565, USA
f.412.765.0531 www.zegarelli.com