RULE 68 OFFERS OF JUDGMENT: PROBLEMS CREATED BY DUKE V. COCHISE COUNTY

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Parties contemplating an offer of judgment pursuant to Rule 68, Arizona Rules of Civil Procedure, now face a potentially complex problem as the result of a case published by Division 2 of Arizona's Court of Appeals. The case makes it clear that offers of judgment comprising multiple parties must be apportioned to each party. However, the case also holds that offers involving multiple claims must also be apportioned vis-à-vis each claim. If this is the case, Arizona attorneys litigating multiple-party lawsuits will be hard-pressed to meet this new requirement.

In *Duke v. Cochise County*, 189 Ariz. 35, 938 P.2d 84 (App. 1996), *review denied*, the Arizona Court of Appeals fell in line with the many jurisdictions which have held that unapportioned offers of judgment to multiple parties are not operative for purposes of "Offer of Judgment" statutes such as Arizona's Rule of Civil Procedure 68. *Duke*, however, went one step further in holding that "unapportioned joint offers comprising multiple parties ***or claims*** are invalid for purposes of Rule 68".[i] *Duke*, 938 P.2d at 89. At best, requiring apportionment between claims makes the utilization of Rule 68 difficult in complex cases involving multiple parties and claims. At worst, it renders Rule 68 a strategical nightmare.

In *Duke*, Plaintiff Mary Duke sued Cochise County on behalf of herself and her two adult children for the wrongful death of her husband, who had been killed by an escapee from a

Cochise County Jail. Mary Duke, who had been held captive for several hours during the ordeal, also brought claims for false imprisonment and emotional distress. Prior to trial, the plaintiffs made a lump settlement offer of $2 million, which was rejected.

The jury returned a verdict awarding Mary Duke $2.3 million for the wrongful death claim, $350,000 for her emotional distress and $200,000 for false imprisonment. Mary Duke's two children, Sylvia and Daniel, were awarded $600,000 and $100,000, respectively, for their portions of the wrongful death claim.[ii]

The plaintiffs were awarded Rule 68 sanctions. The County appealed, arguing that the offer was invalid for Rule 68 purposes because it failed to apportion among the multiple parties or claims.

The Court of Appeals agreed, based on the rationale that it would be unfair to penalize a party for not accepting an offer when it did not have the opportunity to evaluate that offer in terms of how it might fare against each opposing party. The Court stated:

> An offeree presented with an unapportioned joint offer cannot make a meaningful choice between accepting the offer on any single claim or continuing the litigation to judgment on all claims. Imposing sanctions for failing to accept what is in effect an unspecified and unapportioned offer of judgment deprives the offeree of the opportunity to assess his or her chances of doing better at trial against one or more of the parties covered by the joint offer.

Duke, 938 P.2d at 90. While this may be true, the Court went on to state: "[o]n the other hand, requiring joint offers to be specifically allocated between multiple parties or claims places no greater burden on the party making the offer". This, unfortunately is not true.

It is important to note at the outset that the *Duke* opinion does not make it clear whether "apportionment" of an offer means that each offeree must be able to separately accept their portion of the offer, or whether the offer may be made apportioned, but conditioned on acceptance by all offerees or on all claims. It seems likely, however, that the proper

interpretation of *Duke* is that conditional offers are invalid. None of the cases cited in *Duke* explicitly allow conditional offers of judgment, and there is good reason to prohibit them: conditional offers would allow punishment of a party who wanted to accept the offer, but could not because its co-offerees would not. See Bergmann v. Boyce, 856 P.2d 560, 565 n.5 (Nev. 1985) (recognizing that unapportioned offers require acceptance by all offerees, making them "conditional", a result which is prohibited); Taylor v. Clark, 883 P.2d 569, 571 (Col.Ct.App. 1994) (stating that unapportioned offers make each offeree's assessment of the offer difficult, **and** require all offerees acting in unison, thereby taking "meaningful choice" away from each individual).

One problem with requiring apportionment of offers of judgment is that one of the primary reasons for settling a case is that one is then spared the expense of litigation. By being forced to make separate offers of judgment to each party, offerors face the very real proposition of having to pay the value of their offer to one opposing party but still litigate against a non-accepting opposing party. Economies of scale apply even in litigation. Even though the matter may get pared down to fewer claims or parties, the attorneys may still have to pick a jury, make detailed opening and closing arguments, and present the same witnesses in order to build a complete case. In other words, the cost of eliminating one or two of the parties in a matter does not necessarily correspond to a dollar-for-dollar savings at trial. Hence, a large incentive for filing an offer of judgment is removed: one cannot guarantee oneself freedom from litigation. While an informal settlement offer could, of course, be made instead, the point of having Rule 68 is that it be utilized.

While there is good reason to tolerate this dilemma with regard to offers to different parties, the same is not true of separate claims to a single party. Each party must be given the

freedom to independently determine whether the offer is one that they should or should not accept, because Party A certainly should not be penalized for failing to accept an offer of judgment which required Party B's acceptance. Party A may have been willing to accept the offer, but unable to act on that, because Party B refused. On the other hand, it is enough if a party can look at the total value of the offer made to it to determine whether to settle or not. If that party does not do better at trial, the penalties contemplated by Rule 68 are appropriate.

If the offeree is allowed to choose from a list of apportioned offers, and litigate those that are left behind, the natural reaction of the offeror will be to either adjust the amount of the offer to take account of the added risk that the matter will not be settled in full, or to simply not make any offer of judgment at all, because the calculation simply becomes too complicated.

That this calculation quickly becomes complicated is easily understood. No longer would it be enough to figure out what it would be worth to end a matter entirely. It would become necessary to work into the total dollar amount that is offered figures which could be accepted by the other side and still allow enough money in the budget for defense of those unaccepted claims.

Other complications arise as well. First, in a case where multiple defendants would like to pool their resources in order to make a global settlement offer to multiple plaintiffs, for **every** claim they would have to apportion their offer into slices for **every** defendant as to **every** plaintiff. With three plaintiffs, two defendants, and three claims, this makes for 18 different offers. Added to that is the complication that if attorneys' fees are sought, Rule 68(c)(1) mandates separate offers of a monetary award and a fee award,[iii] leaving a grand total of **36 separate offers.**

There are other questions left open by *Duke*. For instance, what exactly did the Court mean by apportionment of "claims"? In other words, does the offering party have to make an apportioned offer as to each theory of liability (negligence vis-à-vis strict liability), or each element of damages (medical bills vis-à-vis pain and suffering)? If "claims" means theories of recovery, what happens when there are separate theories of recovery for the same damages, such as pain and suffering, under negligence and under strict liability? If "claims" means elements of damages, then the parties could feasibly still have to litigate each and every legal theory brought, despite having settling portions of each count.

While the penalties of Rule 68 should not be exacted upon an offeree who, due to the unwillingness of a co-offeree, was unable to accept an offer of judgment, this recent holding by the Court of Appeals takes this policy too far. Requiring apportioned offers which can be accepted in part renders Rule 68 an unusable settlement tool in any complex matter. Not only will a party wishing to make an offer of judgment have to decide whether it is worth risking settlement with one party while continuing litigation with another, parties will now also have to decide whether they can risk settling in part with a party and then still having to litigate against that very same party!

Fortunately, *Duke* does not expressly state that apportioned offers to individual parties may not be made contingent on complete acceptance. Furthermore, as the failure of the Dukes to apportion their offer by party was, in itself, enough for the Court of Appeals to hold the offer invalid, those aspects of the opinion dealing with apportionment as to claims is, arguably, dicta. These two points allow for the possibility and hope that future Arizona case law will shun *Duke*'s requirement of apportionment as to claims, thereby providing for the continued viability of the use of Rule 68 in matters involving multiple parties and multiple claims.

1. None of the cases cited in ***Duke*** stand for the proposition that offers of judgment must be apportioned as to each **claim** by or against a single party. See Brinkerhoff v. Swearington Aviation Corp., 663 P.2d 937 (Ala. 1983) (no error found where trial court did not apply offer of judgment rule where defendant had made joint offer to plaintiffs); Hurlbut v. Sonora Community Hospital, 207 Cal.App.3d 388 (holding offer from multiple plaintiffs to defendant invalid under California's offer of judgment statute); Taylor v. Clark, 883 P.2d 569 (Colo. Ct. App. 1994) (holding joint offer invalid due to inability of each offeree to independently accept offer); Gilbert v. City of Caldwell, 732 P.2d 355 (Idaho Ct. App. 1987) (holding that "Rule 68 should be read to test the offer and recovery from each party independently"); Morgan v. Demille, 799 P.2d 561 (Nev. 1990) (holding unapportioned offer by multiple plaintiffs to defendant invalid under NRCP 68); True v. T & W Textile Machinery, Inc., 435 S.E.2d 551 (N.C. Ct. App. 1993) *affirmed* 448 S.E.2d 514 (N.C. 1994) (holding that offers to plaintiffs with multiple claims for relief are valid only if offer to each plaintiff is specified); D'Huyvetter v. A.O. Smith Harvestore Products, 475 N.W.2d 587 (Wis. Ct. App. 1991) (single, aggregate settlement figure did not satisfy offer of judgment rule, because each defendant could not assess its own potential liability).

2. Although the trial court granted j.n.o.v. with regard to aspects of this award and ordered a new trial based upon the County's claim of excessive damages, these dollar awards were ultimately upheld by the Court of Appeals in ***Duke***.

iii. Furthermore, Rule 68(c)(3) explicitly permits the offeree to accept the monetary portion of the award while leaving open the fee determination.