

From: Alan Schoenbaum <aschoenb@rackspace.com>
To: "Andrea_Kuperman@txs.uscourts.gov" <Andrea_Kuperman@txs.uscourts.gov>
Date: 02/15/2013 11:15 AM
Subject: FRCP changes

Dear Ms. Kuperman,

I am the general counsel of Rackspace Hosting, a hosting and cloud computing company based in San Antonio. I have been working with legislators, lawyers and Internet companies from around the country on how to reform the US patent laws, which is something that a wide range of society is interested in due to the proliferation of so-called "patent trolls." The President actually spoke about the problem yesterday. <http://arstechnica.com/tech-policy/2013/02/even-obama-knows-patent-trolls-are-extorting-money/>

One of my patent lawyers suggested that changes to Rule 68 could help level the playing field between trolls and their victims. The troll game relies heavily on the fact that the plaintiffs have no risk and minimal investment in bringing lawsuits, and that defendants are forced to pay millions of dollars in legal fees, discovery and expert witness fees to defend themselves. The plaintiffs extort settlements based on this asymmetrical advantage. According to my patent lawyer, Rule 68 which is effective in civil litigation is not effective in patent cases.

Rule 68, intended to promote settlement between parties in litigation, permits recoupment of costs and attorneys fees in some cases where a defendant makes a pre-trial settlement offer, which is rejected by the plaintiff, but ends up being more favorable than a resulting judgment in favor of the plaintiff. But currently it has three critical flaws as it stands:

- 1) Based on a SCOTUS interpretation, Rule 68 includes or excludes fees based on the underlying statutory system – in the case of the patent system fees are not awarded to a defendant who makes such offer. Revising Rule 68 to explicitly permit recoupment of fees incurred *after* a valid offer will incentivize early and fair settlement offers.
- 2) Rule 68 provides no value to a defendant who submits an offer, which is reject, if the defendant wins. Even though the defendant was essentially proven correct – there is no benefit from Rule 68, effectively vitiating this scheme.
- 3) There is no mechanism for a plaintiff to make a binding offer, which preclude Rule 68 from incentivizing plaintiffs to make early, and *reasonable* offers for settlement.

We have taken a crack at a revised Rule 68. Can you help me get this in front of the Advisory Committee?

Thank you,

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RULE 68. OFFER OF JUDGMENT

(a) MAKING AN OFFER; JUDGMENT ON AN ACCEPTED OFFER. At least 14 days before the date set for trial, a party defending against a claim may serve on an opposing party an offer to allow judgment on specified terms, with the costs, exclusive of attorney fees, then accrued. In a case involving multiple claims, an offer under this rule may be limited to a specific claim, or claims, less than all the claims in the case. If, within 14 days after being served, the opposing party serves written notice accepting the offer, either party may then file the offer and notice of acceptance, plus proof of service. The clerk must then enter judgment in accordance with the offer. To the extent a claim has potential prospective application; the offer must explicitly state the prospective effect of the offer¹.

(b) UNACCEPTED OFFER. An unaccepted offer is considered withdrawn, but it does not preclude a later offer. Evidence of an unaccepted offer is not admissible except in a proceeding to determine costs and reasonable attorney fees.

(c) OFFER AFTER LIABILITY IS DETERMINED. When one party's liability to another has been determined but the extent of liability remains to be determined by further proceedings, the party held liable may make an offer of judgment. It must be served within a reasonable time—but at least 14 days—before the date set for a hearing to determine the extent of liability.

(d) PAYING COSTS AFTER AN UNACCEPTED OFFER. If the judgment that the offeree finally obtains on the claim, or claims, in the offer is not more favorable than the unaccepted offer or if the offeror obtains judgement in its favor on the claim, or claims, in the offer, the offeree must pay the costs and reasonable attorney fees incurred by the offeror related to the claim, or claims, in the offer after the offer was made.

¹ For example, in a patent infringement case, the offer must state whether the offeror obtains a paid-up license, a running royalty license or agrees to a permanent injunction.