Early Resolution Strategies In Warranty Litigation

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Introduction

The Magnuson-Moss Act's fee-shift provision, 15 U.S.C. § 2310(d)(2), may, in some cases, make it more difficult, or sometimes impossible, to settle a case prior to, or early in, the litigation. As a consequence, warrantors may be needlessly forced to litigate, incur substantial defense costs, and face increasing exposure for the plaintiff's attorney's fees and costs. Avoidable or unnecessary litigation also burdens the court system. Here, we briefly explore three strategies for attempting to bring about expedited resolution of a case: an offer of judgment; a motion to enforce a pre-filing offer; and a motion for entry of judgment.

Offers of Judgment

Perhaps the most effective, and easiest, strategy to execute is an offer of judgment. Rule 68 of the Federal Rules of Civil Procedure governs offers of judgment made in actions pending in federal district courts. Many states have codified similar procedures.

Under Rule 68,

> At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against the defending party for the money or property or to the effect specified in the offer, with costs then accrued. If within 10 days after the service of the offer the adverse party served written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the clerk shall enter judgment. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs. If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree is must pay the costs incurred after the making of the offer. . . .

Rule 68, Fed. R. Civ. Proc., 28 U.S.C. Under the Magnuson-Moss Act, a prevailing consumer:

> may be allowed by the court to recover as part of the judgment a sum equal to the aggregate amount of cost and expenses (including attorneys' fees based on actual time expended) determined by the court to have been reasonably incurred by the plaintiff...

15 U.S.C. § 2310 (d)(2). Where a plaintiff brings an action that provides for recovery of attorney's fees as part of her costs, "a plaintiff who declines a Rule 68 offer and fails to obtain a more favorable judgment may not recover attorney's fees for postoffer legal work, just as it may not recover other postoffer costs." Wright, Miller & Marcus, *Federal Practice and Procedure*: Civil 2d §3006.2, p. 129 (West 1997). By making a "reasonable" and technically proper offer early in the case, a defendant can exert significant pressure on a plaintiff and her counsel to terminate the litigation, rather than risk recovering very little on a claim for attorney's fees after trial.

Even if a plaintiff accepts an offer of judgment including costs, she may not be allowed to recover her attorney's fees. In order to recover attorney's fees as part of her costs, the plaintiff must be the "prevailing party." Merely because a plaintiff receives some recovery does not automatically make her a prevailing party. *Fisher v. Kelly*, 150 F.3d 350 (7th Cir.1997) (offer of judgment accepted in a civil rights case in which fees were sought under 42 U.S.C. § 1988 and denied). Even if plaintiff is a prevailing party, where the offer accepted is technical or *de minimis*, the court may deny fees on the ground that it would be unreasonable to make such an award. *Fisher*.

Beyond being denied fees, there is another risk a Magnuson-Moss plaintiff faces when an offer of judgment is made. Where she rejects an offer and obtains a judgment less favorable than the offer, *she may be required to pay the defendant's post-offer costs and attorney's fees*. In *Marek v. Chesny,* 105 S.Ct. 3012, 473 U.S. 1, 87 L.Ed.2d 1 (1985), on remand 775 F.2d 160, the Supreme Court held that where an underlying statute defines "costs" to include attorneys fees, such fees are to be included as costs for purposes of Rule 68, which shifts responsibility to plaintiff for all "costs" incurred after the making of the offer of judgment. *See also Phillips v. Bartoo,* 161 F.R.D. 352 (U.S.D.C. N.D. Ill. 1995). Under *Marek's* construction of Rule 68, a plaintiff who rejects an offer of judgment and obtains a less favorable judgment shall be held responsible for payment of defendant's costs and attorneys' fees from the date of the Rule 68 offer. As explained by the Court in *Marek*:

> Thus, absent congressional expressions to the contrary, where the underlying statute defines "costs" to include attorney's fees, we are satisfied such fees are to be included as costs for purposes of Rule 68.

Marek, 105 S.Ct. at 3016.

In Illinois and the other states within the Seventh Circuit (Indiana and Wisconsin), Magnuson-Moss claims involving motorhomes and other higher priced vehicles are most likely to be filed in, or removed to, federal court. In *Gardynski-Leschuck v. Ford Motor Co.*, 142 F.3d 955 (7th Cir.1998), the court held that in order to satisfy Magnuson-Moss' $ 50,000 federal jurisdictional amount in controversy requirement, the purchase price of the vehicle must meet or exceed that amount. Other federal Circuits may elect to follow the Seventh Circuit's reasoning, although they are not obligated to do so. However, in states with offer of judgment provisions similar to Rule 68, federal cases

construing the rule may provide guidance for the interpretation and construction of the state provisions.

It should be emphasized that one of the key factors to maximizing the effectiveness of an offer of judgment is timing. The earlier the offer is made, the greater the risk to the plaintiff (and counsel) that an attorney's fees award will be relatively minimal, and that the plaintiff will be found liable for defendant's costs and fees. Another key factor is the amount of the offer. Placing a value on a warranty case is complicated by the divergent views among the courts of the nature and extent of damages recoverable. The Uniform Commercial Code and the Magnuson-Moss Act, allow incidental and consequential damages to be excluded. *See e.g. Sorce v. Naperville Jeep-Eagle, Inc.*, 309 Ill.App.3d 313, 242 Ill.Dec. 738, 722 N.E.2d 227 (1999) (an exclusion of consequential damages under § 2-719(3) of the UCC is enforceable provided it is conscionable); 15 U.S.C. § 2304(a)(3) (full warranty may limit or exclude consequential damages for breach of written or implied warranty provided the limitation or exclusion appears conspicuously on the face of the warranty). But, some states hold such an exclusion unenforceable where the warranty's limited remedy—usually repair or replacement of defective parts or workmanship–"fails of its essential purpose." *See e.g. King v. Taylor Chrysler-Plymouth, Inc.*, 184 Mich.App. 204, 457 N.W.2d 42 (1990). An analysis of the jurisdiction's damages law is essential to formulating an offer of judgment likely to be effective.

Motion to Enforce Pre-Filing Offers

A recent Illinois appellate court decision affirmed the entry of summary judgment in favor of a warrantor and sanctions against the consumer's attorney in a Magnuson-Moss action where the attorney ignored a pre-filing offer to replace a car damaged by a fire. In *Belfour v. Schaumburg Auto*, 306 Ill.App.3d 234, 239 Ill.Dec. 383, 713 N.E.2d 1233 (2nd Dist.1999), the plaintiff purchased a 1990 Audi and received a limited new car warranty under which Audi promised to repair or replace defective parts or workmanship for 3 years or 50,000 miles. The limited warranty expressly excluded incidental and consequential damages.

On May 2, 1992, after plaintiff owned and operated the car for approximately 16 months, it malfunctioned, began to smoke, and was declared a total loss. Plaintiff's automobile insurer contacted Audi and attempted to schedule a vehicle inspection. Before the inspection could proceed, plaintiff advised his insurer that he intended to sue Audi and not longer wanted the insurance company involved in the claim.

Subsequently, the consumer's attorney sent a letter to Audi and the other defendants demanding a return of the car's purchase price and all payments made on the car, and that plaintiff be compensated for his damages. Audi's general counsel responded to the letter, advising that an Audi representative would contact plaintiff's counsel. The representative placed 3 calls to the plaintiff's attorney which went unreturned. The representative then wrote to the attorney asking that he be allowed to inspect the car and honor the limited warranty. Plaintiff's counsel wrote back indicating that suit would

be filed within 7 days unless Audi honored plaintiff's revocation of acceptance and compensated plaintiff for his damages. After 2 more attempts reach plaintiff's attorney, the representative finally spoke to him and scheduled an inspection. After inspecting the car, Audi offered, in writing, to replace plaintiff's 1990 model with a 1993 model and pay all related costs. Plaintiff's counsel did not respond to the offer. Audi sent two additional letters reiterating its offer. Again, plaintiff's counsel did not respond. Plaintiff's counsel then wrote to Audi demanding that Audi put its offer in writing. Audi sent a fourth letter detailing its offer. Plaintiff's counsel again ignored the letter and proceeded to file suit under the Magnuson-Moss Act.

After suit was filed, Audi offered to settle the matter by either paying-off the balance due under the financing contract or replacing plaintiff's car with a newer model. Audi also advised plaintiff's counsel that, in its view, plaintiff's counsel engaged in sanctionable conduct by making false allegations in the complaint, namely, that plaintiff provided Audi with an opportunity to replace the car and that Audi refused. Plaintiff did not respond to the offer. Audi then moved for summary judgment and sanctions.

The trial court granted the motions. It found that Audi had fully complied with its warranty obligations by offering to pay-off or replace the car (*i.e.*, by making perfect tender), that plaintiff was obligated to accept the offer, and that plaintiff's failure to accept the offer defeated any and all claims, and entered judgment in defendants' favor on plaintiff's Magnuson-Moss and UCC claims. It awarded sanctions against plaintiff's counsel finding that he "acted obstreperously in having frustrated defendants' efforts to achieve prompt resolution, forcing all parties to pursue this litigation which was otherwise unnecessary." Plaintiff and his counsel appealed.

The appellate court affirmed the summary judgment and the sanctions. It found that Audi's warranty properly limited plaintiff's remedy to repair or replacement and that by offering replacement, Audi fully complied with its obligations under its warranty and the Magnuson-Moss Act; hence; there "simply [was] no breach." The court next rejected plaintiff's revocation claim, finding that before revocation can be effective, the defendant must be given an opportunity to cure. Plaintiff's attempted revocation was ineffective, the court found, because Audi offered a proper cure. The court rejected plaintiff's claim that even if the seller has the right to cure, tendering another car was not proper because of plaintiff's subjective psychological aversion to owning another Audi.

The court affirmed the sanctions, finding that plaintiff's allegations that he offered defendant sufficient opportunity to replace the car, but that defendants failed to replace it, were false.

The *Belfour* decision should prove helpful in those cases where an offer to replace an allegedly defective vehicle, or pay-off the remaining lien balance, is made during pre-filing negotiations. Discussions should be well documented, and firm offers should be made in writing. However, the potential distinguishing point is that in *Belfour*, there was one event which gave rise to the claim, rather than a series of repair attempts. Where a series of repair attempts are made, plaintiffs will argue that the limited warranty's repair

or replacement remedy has failed of its essential purpose, thus entitling her to seek alternative remedies as provided under the UCC, including incidental and consequential damages. The majority of Illinois reported decisions recognize the "failure of its essential purpose" exception to the exclusion of incidental and consequential damages. Two recent cases, one state and one federal, call the exception into question. In *Sorce v. Naperville Jeep Eagle, Inc.*, 309 Ill.App.3d 313, 242 Ill.Dec. 738, 722 N.E.2d 227 (1999), the court affirmed summary judgment on plaintiff's claim for incidental and consequential damages in a Magnuson-Moss case, finding that the Act's requirement that a disclaimer of such damages must appear on the face of the warranty and be conspicuous does not apply to "limited warranties." The court concluded that under the UCC, an incidental damages disclaimer is enforceable so long as its conscionable. In *Gardynski-Leschuck*, cited above, the Seventh Circuit noted a division among Illinois courts about whether to recognize the exception.

So, too, the relevant UCC provision, § 2-719, 810 ILCS 5/2-719, it can be argued, allows enforcement of a consequential/incidental damage exclusion even where a limited warranty fails of its essential purpose. Subsection (1) of § 2-719 provides that, subject to subsection (2), a warrantor may limit the remedy provided to, *inter alia*, repair and replacement of defective components. Subsection (2) provides that where a limited remedy fails of its essential purpose, recovery may be had as provided in the Code. Subsection (3) allows a warrantor to exclude consequential damages but is not expressly subject to either of the preceding subsections; its stands alone. Had the legislature intended to make subsection (3) subject to subsection (2), it would have done so. Since it did not, the courts should not effectively amend the statute by application.

Motion for Entry of Judgment

In *Smith v. Navistar International Trans. Corp*., 957 F.2d 1439 (7th Cir.1992), the defendant moved for the entry of judgment against itself under Rule 1 of the Federal Rules of Civil Procedure in the amount plaintiff paid under the financing contract. The district court had previously determined that the warrantor's exclusion of incidental and consequential damages was enforceable and that, as a result, the amounts paid under the financing contract was the maximum amount plaintiff could recover in the event he prevailed at trial. The appellate court affirmed.

> Rule 1 provides:
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> These rules govern the procedure in the United States district courts in all suits . . . They shall be construed to secure the just, speedy, and inexpensive determination of every action.

In affirming the novel application of Rule 1, the Seventh Circuit wrote:

> But we believe the district court's decision to grant the defendants' Rule 1 motion to have judgment entered against them in the total amount that a jury could award [plaintiff] was a "just, speedy and inexpensive" resolution

> of the case. Even though [plaintiff's] damages had effectively been capped, [plaintiff] remained desirous of a trial. The district court's grant of defendants' motion for judgment in favor of [plaintiff] not only promoted judicial efficiency, it also served to protect [plaintiff's] interest because he received the maximum amount he could recover after a trial. In fact, [plaintiff] quite possibly recovered more than he was entitled to, given the fact that the defendant Navistar would have had the opportunity at trial to present evidence of [plaintiff's] extensive use of the truck (48,488 miles) to offset any relief [plaintiff] received.

Id. 957 F.2d at 1445-46.

> The Illinois Code of Civil Procedure contains a provision similar to Rule 1:
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> § 1-106. Act to be liberally construed. This Act shall be liberally construed, to the end that controversies may be speedily and finally determined according to the substantive rights of the parties . . .

735 ILCS 5/2-106. Most other states will also have similar provisions in their rules or statutes governing civil actions. In an appropriate case (obvious liability, unreasonable plaintiff), a warrantor may invoke Rule 1 or a similar state code provision based on the rationale of *Smith.* Of course, one key to the *Smith* decision was the court's ruling that the warrantor's disclaimer was enforceable and prevented plaintiff from recovering incidental and consequential damages, thus allowing a precise maximum amount of recoverable damages to be ascertained.

In the event a motion for entry of judgment were granted, plaintiff's counsel would, no doubt, file a petition for fees claiming that the plaintiff is the "prevailing" party as defined under the Magnuson-Moss Act. A court would most likely agree with this proposition. The benefit in making the motion, however, is to cut off the plaintiff's attorney's ability to churn the file, or force a trial. The earlier in the litigation the motion is made, the greater the potential savings in defense costs as well as the reduction in exposure for plaintiff's attorney's fees.

Conclusion

In today's climate, it is imperative for warrantors of consumer products and their attorneys to develop and implement new and innovative strategies for resolving Magnuson-Moss and similar types of claims on as cost-effective a basis as possible. It is hoped the suggestions offered here prove beneficial and lead to development of other strategies for disposing of warranty claims on an efficient and cost effective basis.