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SPEAKERS

Jeff Redfern, Anthony Sanders, Will Aronin

A Anthony Sanders 00:06

Hello, and welcome to Short Circuit, your podcast on the federal courts of appeals. I'm your host, Anthony Sanders, Director of the Center for Judicial Engagement at the Institute for Justice. We're recording this on Wednesday, May 18, 2022. It's actually the 12th anniversary of my first IJ press conference, when I filed my first IJ case. What advice did I receive after that press conference? Don't just read your notes off of a piece of paper. It's not very impressive for the cameras. I think that portion of the press conference did not make its way to TV. That was the start of a case. But today, we're going to focus on how cases end. First, what happens if you offer to settle a case, but then before you hear back from the other side, the judge rules in your favor? You might think that moots the settlement, but not if you tried to settle it the wrong way. We're gonna get deep into some counterintuitive practice procedures in a case from the Ninth Circuit. It's a reminder to all the lawyers listening that it pays to read the rules. Second, when is the case moot? Well, we're learning that with our still somewhat ongoing pandemic, there's an argument that mootness kind of isn't a thing anymore. It's like lawsuits over health restrictions are either always moot, or they're never moot, because everything is always changing. Well, the Eighth Circuit just ruled that something was moot, although there was a dissenting judge who disagreed, and it might not make much of a difference anyway. Well, here to speak about the end of times and the end of these cases, are IJ's Will Aronin and Jeff Redfern, who are also trial partners in an upcoming trial. And so they're going to give us their best practice pointers. Welcome, gentlemen.

W Will Aronin 01:56

Thanks so much for having me, Anthony. And Anthony, you're saying we're not supposed to just like read off a piece of paper today?

A Anthony Sanders 02:03

Well, no one's going to be able to see you. So I think that's okay. I won't tell anybody. But what I would like to hear from you, Will, is about this dispute in Ravalli County, Montana. So first of

all, have you ever been to Ravalli County?

W Will Aronin 02:20

I have not. But I would like to. It sounds nice.

A Anthony Sanders 02:23

It is. I actually don't think I've been there either. It is just south of Missoula, Montana. There's not a lot of people who live there. And as you might imagine, it's an absolutely gorgeous area. It's way up in the Rocky Mountains.

W Will Aronin 02:37

Montana is one of those states I really do want to visit.

A Anthony Sanders 02:41

Well, when you go there, you should of course check out this area the state. It's a hard stateof course to check out all that much. I should also say Short Circuit will be checking out Montana later this year. And we will be doing some recording there. But I don't have much more details on that at this point. A little teaser to our Montana listeners. But please tell us; there was someone in Ravalli County who it seems like didn't have the best relationship with either an ex or law enforcement.

W Will Aronin 03:15

Yeah. So the underlying issue, just because you brought it up, is pretty interesting. There was an order of protection, and he served a motion on the other side via mail and was arrested for violating the order. Pretty clearly, although the case doesn't say it, the case was dismissed. And then he sued and brought an 1983 case. But that's sort of an interesting side note. The case itself, I think you mentioned, is Kubiak v. Ravalli. And reading it, I realized that my brain is absolutely broken. Because this was a fascinating case about the rules of civil procedure. So it's like how you know when you go to law school, and you start making those really, really, really bad lawyer jokes, but they're hilarious to you. This case is proof that IJ has just made that worse for me. So anyway, this case is about Rule 68, or offers of judgment. And basically, a Rule 68 offer is a settlement offer. But it has real consequences for both sides. And it pretty much forces the receiving party, the plaintiff, to make some absolute and some real choices. So to paraphrase the rule, it allows parties to serve an offer to allow judgment on specified terms. And usually that's some amount of money, but it actually can be more detailed than that. Once the offer is served, the receiving party has 14 days. And they can either accept it, and if they do either side files and notice with the clerk and the clerk absolutely must enter judgment. It's not discretionary. And importantly for this case, by the terms of the rules, the offer stays open for 14 days. It's either accepted; it's not accepted, it's considered rejected. You have 14 days. The reason Rule 68 are such a big deal is that if the receiving party doesn't accept and

ultimately recovers less than the offer, then they have to pay the other side's costs from after the offer is made. It's even a bigger deal in cases where attorneys' fees are at issue, cases like civil rights suits, because if you don't get more than the Rule 68 offer, you actually lose the ability to recover fees. So it really does have legitimate consequences for litigation. With that, back to the case: the reason this case is amazing is just because the timing is so perfect, and just so unlikely. So it's a civil rights suit. And defendant, the government, files for summary judgment, which sits pending for a few months, it's pretty normal. But while the summary judgment motion is pending, the county actually makes the Rule 68 offer of 50 grand plus fees, so the plaintiff then has 14 days to decide one way or the other. But six days later, the court grants summary judgment for the government, basically saying, Government you've won, you're probably not going to have to pay. Importantly, this was just an ECF entry, there isn't an actual decision. And the order itself says that there will be a judgment to follow.

A Anthony Sanders 05:57

ECF entry just meaning it was just on the docket saying government's going to win, but didn't have more details than that and it also wasn't a final judgment.

W Will Aronin 06:07

Exactly right. Like I said, my brain is broken.

A Anthony Sanders 06:11

EFC being the electronic filing system.

W Will Aronin 06:14

Yes. So six minutes, literally six minutes after the ECF entry gets emailed to everybody, the government emails to withdraw the Rule 68 offer and then within an hour, the plaintiff says he accepts the offer and instructs the clerk to enter judgment. And just for a second, we should just note that was a really good move by the lawyer and it took some cojonies. It's just good lawyering. And I think we should acknowledge that because it makes a big difference. So that probably forecasts what the court did, or at least what I think about the case, but basically, the questions were, A, could defendant withdraw the offer? And B, does the offer survive the summary judgment order? And the Ninth Circuit ruled, as you probably can guess now, that, no, a Rule 68 offer cannot be withdrawn. They went through the actual wording of the rule. It's really not an overly complicated legal analysis, the offer stays open for 14 days, and it cannot be withdrawn. The rule says what it says. And I like that they also pointed out that because the Rule 68 always has real consequences for the receiving party, it should and does have consequences for the one making the offer. And someone making that offer really needs to think through those consequences and be thoughtful about it. Here defendant made the decision to make an offer while the summary judgment motion was pending. That was their choice. The case was made a little bit easier by the fact that it was an ECF notice and not a final judgment. There is still an open question and a circuit split on whether it would have survived an actual judgment, the final decision closing at least the trial portion of this case, but

on these facts, it was pretty clean. The rule said what it did. And one of the reasons I like it, other than the timing is amazing, I like it because it actually gives some real litigation guidance. Honestly, I feel like I have a better understanding of how to use and what to do about Rule 68 than I did before. And it also shows the importance of good and gutsy lawyering frankly. The only other thing I want to talk about from it was an interesting issue that I didn't realize that they talked about. And they've cited a case called Lang. And it's actually very good to keep in mind. So Lang, there was Rule 68 offer issued at some point in the litigation a long time before. It was for whatever amount of money, for X amount of dollars. The case continued on, the parties continued to litigate. And at some point the parties settled for the same amount of money, just a normal settlement agreement as the Rule 68 offer. After it was accepted, the case was dismissed with prejudice and the defendant actually sought costs for after the Rule 68. And the court actually ruled that because the number was not more favorable than the Rule 68 offer, that ultimately the defendant was entitled to costs even though it really wasn't part of like, what was the common sense part that was contemplated in the settlement agreement. It's just sort of a nice red flag to be aware of that if you ever settle a case on the same terms as a Rule 68 offer, demand at least a couple of dollars more.

A Anthony Sanders 09:23

That's a really good point. I hadn't even thought of that part of it. Jeff, in private practice did you ever serve a Rule 68 offer or recieve one?

J Jeff Redfern 09:35

Well, I've received them in my IJ practice, but before I was at IJ, I had no experience with them. You know, they tend not to come into play in most of our cases here because, you know, we're usually suing for injunctive relief or declaratory relief. And it's not really the kind of case where, you know, there's a compromise about a number.

A Anthony Sanders 09:58

Yeah, I had a case when I was in private practice. We were defending a corporation and the corporation was suing the corporation, normal corporate stuff. And we did talk about sending an offer of judgment, as Rule 68 is called, and, you know, how that would work and how it plays. And I do remember reading the rule, and these are guys who have been litigating for a very long time, but their understanding of how the rule worked was not what the law actually said. And so if we had gone down that road, I realized we would have had to have been very careful about how it works and dotting our I's and crossing our T's. I'm betting some of the lawyers involved in this case probably didn't understand. I did not understand that you can't withdraw, that you send it out and unlike any other contract offer on Earth, right? You can't get that back within 14 days. It seems like the only exception and as you said, Will, there's a circuit split, is if there actually is a final ruling in the case, then maybe you can get it back. Maybe you can't because one circuit has said even then you can't. But the other thing was the attorneys' fees. So it says costs. So at the time, I remember when we looked into this, they said costs well, okay, you know, cost that aren't attorneys' fees can vary in cases. So for non-lawyers listening, you often can get cost for, like, your filing fee with the court, which is just a few hundred bucks, usually not very much. But there can be a lot of costs, like experts and transcripts for

depositions. It's not nothing, but in a lot of cases, it's not very much. But that costs in certain parts of the federal rules can mean attorneys' fees. Sometimes they do, sometimes they don't. And so if you're in a case where by statute you can get attorneys' fees, like a civil rights case, that word costs can mean attorneys' fees. And like in this case, I'm just supposing here, so no besmirching anyone involved in this case or reading their minds, but like, considering the offer that was made, I wonder if they realized that cost meant attorneys' fees. Even regardless of of the timing issue, because $50,000 sounds like, you know, getting close to like a nuisance settlement. But I bet there were a lot more than that attorneys' fees coughed up in this case, if they went all the way to summary judgment and had all kinds of depositions perhaps. So, you know, maybe that was part of the calculus, maybe it wasn't.

W Will Aronin 12:51

So I think this one, the offer actually included attorneys' fees. But that's also a cool thing about the way the offer is written is, and it comes up in the case in sort of an interesting way, you can craft a pretty tailored and unique Rule 68 offer. You still have to be careful to stick within the confines of the rule. It needs to be something that can be entered as a judgment. It can't be like something some party needs to do. But it gives a lot of flexibility. It's a pretty powerful rule if you know how to use it. But it seems like there's always new pitfalls, like I did not know about the Lang rule. I just did not know that.

A Anthony Sanders 13:31

And it also seems like something it pays you to do earlier in the case, especially with attorneys' fees and not, like, I mean the other side hadn't moved for summary judgment. The government moved for summary judgment, and then they're trying to like nuke their own motion with this offer. Which unfortunately for them was maybe some bad timing. So Jeff, you have a case where there's also some bad timing, or just kind of weird timing or timing all over the place with this school in Iowa. So what's going on there? And is this case moot?

J Jeff Redfern 14:10

Well, this is yet another COVID case. And as in all COVID cases, timing is everything. So this is out of the Eighth Circuit. It's called Arc of Iowa V. Reynolds. And this is a case that was brought by parents of kids who were at heightened risk from COVID, either, you know, they had some pre-existing conditions or, you know, they were particularly susceptible to infection or something like that.

A Anthony Sanders 14:38

Asthma or that that kind of thing.

J Jeff Redfern 14:40

Yeah, so they were challenging an Iowa statute that made it illegal for school districts to impose, implement, enforce their own mask mandates. But somewhat importantly for this case

impose, implement, enforce their own mask mandates. But somewhat importantly for this case, there was also a provision in the law that said that schools can enforce mass requirements if the requirements are, quote, otherwise imposed by law. So I think what that means is just that, you know, the district can't have a policy, but if, you know, the local government, federal government, whatever says you need to have masks, then that law would still apply. It just takes it out of the hands of the district. So, these plaintiffs sued under the Americans with Disabilities Act. And the ADA requires schools to make reasonable accommodations for students with disabilities. So I guess the argument here is that the children had a unique vulnerability to COVID. That was a disability, and a mask mandate, for their schools, at least, would have been a reasonable accommodation that would have protected them because of their disability. Now, the district court actually enjoined the enforcement of this Iowa law. And, you know, they said, You're likely to win. He entered a preliminary injunction and said, you know, you have a strong ADA claim. So Iowa appeals this up to the Eighth Circuit. Now, the district court order was entered in September of 2021. So just recently, the Eighth Circuit dismisses the appeal. And what happened here is really weird. It's hard to wrap your head around. A two judge majority, in a per curiam opinion, held that the preliminary injunction was moot because intervening events, such as vaccine approval for children and the new prevalence of less dangerous variants of COVID had basically made COVID less dangerous. So it was no longer important for these kids, supposedly, to get the relief that the preliminary injunction gave them. Now, it's really unclear what the majority is talking about when they say that the preliminary injunction is moot. Normally, when we talk about mootness, we're talking about Article Three case or controversy mootness, where there literally is no longer a case because the court is incapable of granting the requested relief. So the classic example of that would be if these children at issue in the case had graduated from school. So you know, the mass mandate no longer has any impact on them one way or another, they're off to college, the case would be moot. But that's not what happened here. The court just said that the relief that you requested, that you were getting at one point, is no longer that important to you. And that's not normally the way mootness works. So here's the quote: "No court could grant effective relief as sought for the preliminary injunction because enjoining Defendants' enforcement of Section 280.31 has no effect on Plaintiffs' children, whose risk of contracting COVID-10 at school is now low even without mask requirements." And I just noticed that the COVID-10 is clearly a typo in the opinion. To me, that sounds like a quintessentially merits determination about how you would do the ADA analysis, not a determination that the case itself is moot. And then it's not clear, though, what happens next. So the court says to the extent that this case continues, the court below should pay attention to the provision that says that this Iowa statute does not apply where any other provision of law requires masks. And the majority implies that the ADA would be such a requirement. So that this whole fight is really a tempest in a teacup, as my former judge would say. Now, there's a fairly lengthy dissent from Judge Kelly, and she flagged the weirdness of this mootness analysis right off the bat. She says in a footnote here, I assume that the majority was not using the term moot to refer to Article Three mootness. She says. I'm going to assume that what they meant is that the circumstances have changed so much, that the merits of the preliminary injunction need to be reconsidered in the first instance, that, you know, the litigation has to continue, new evidence has to be weighed. It would be pointless for us to weigh this because the facts that we would be weighing are out of date. And that seems reasonable to me. But what's weird is that the majority didn't clarify its position in response to this footnote. You know, judicial opinions,when you have a majority and a dissent, it's not like their poker hands where they drop them at the same time and then you see where the chips fall. These gets circulated between chambers. So you would expect that if the dissenting judge says it's totally unclear whether you're talking about Article Three mootness or something else, that the majority would say, No, yeah, we are talking about Article Three mootness or no, we're definitely not. And then having clarified their position, the

dissent would not need to have that footnote. So the reason that didn't get clarified is, well, that's anyone's guess. But it is awfully confusing, because as I noted above, it's hard to see this as a true Article Three mootness problem, like clearly, they could have mask made mandates or they could not have mass mandates. Whether they are important or justified seems to be more of a merits decision. So I'm with the dissent on that one. And another solid point she makes is that, you know, if we're looking at the cases about dissolving or modifying injunctions due to changed circumstances, which happens all the time, normally, the burden is on the party that wants the injunction changed, to show evidence, to demonstrate that this injunction is no longer appropriate because of the changed circumstances. And that didn't happen in this case. What happened is just the majority said, Oh, we are going to essentially take judicial notice, based on what we're reading in the news, that everything is different now, without actually looking at, you know, litigated facts. So at least that far, I'm definitely on the dissent's side. But then Judge Kelly walks through the ADA analysis and ultimately concludes the plaintiffs were entitled to their preliminary injunction. Now, I am not an ADA lawyer, so my opinion in this regard is worth almost nothing. But my kneejerk reaction is that requiring everyone in an institution to wear a mask because someone else has a susceptibility to infection is a pretty aggressive accommodation, under at least the ADA cases that I've seen. And the ADA only requires reasonable accommodations. Of course, you know, reasonableness is in the eye of the beholder. And I am not an ADA lawyer, as I said before, but it does seem like a bit of a stretch to me. And then the the last point that the Judge Kelly makes is that she does agree that the injunction was too broad because it applied statewide. And she said, look, the ADA is about reasonable accommodations for particular people with particular disabilities. So if there's going to be an injunction it has to apply to these particular students in their particular schools, not to every single school. So she at least shows a little bit of sympathy for, I think, the majority's lack of patience with the breadth of the remedy below. But yeah, for me, the weird thing about this case is just the the lack of clarity about what is going on with mootness here. And I I think it is really disappointing when a judge flags a potentially crucial issue in a case, like if you're going to read this case and know what it means, you have to know, are they talking about Article Three mootness? Or are they just saying that this is changed circumstances for preliminary injunction? And there's just no way from reading the majority's opinion to know which they're talking about. So to me, that's the most frustrating thing about this. I think that the majority is right that, at least at some point, you know, these cases are going to be done. And it's probably going to be sooner rather than later. But, you know, precedents about what Article Three mootness means will be on the books for a long time. And it's important that we as litigants understand it.

A Anthony Sanders 24:06

Will, do you understand this case?

W Will Aronin 24:08

I can't wait for pandemic law to be over. That's what I understand. That is genuinely what I understand. I also think we probably need more clarity on the preliminary injunction standards. It does feel like a lot of courts are talking around each other. I know there's been a lot of criticism about the use of the quote unquote, Shadow docket for it. So I do think some greater clarity as to like what it means for likely success on the merits. And just like I said, better clarity would be warranted but not in pandemic cases. And please, these need to stop now.

A Anthony Sanders 24:44

Yeah, having litigated preliminary injunctions in the Eighth Circuit a couple of times, I know that they have a rule that isn't even announced in this case. Well, it's at least in constitutional cases that you have to have a likelihood to have success on the merits, and then they go through the other factors. Because the two most important things for a preliminary injunction is that you have a likelihood that you'll win at the end of the day on the case and that you're going to be harmed. Now in a way that can't be made up later, right? We're getting money damages later. And often, you might have just really, really, really strong irreparable harm, but who knows about the merits? And in a private lawsuit, sometimes that makes sense. But in the Eighth Circuit, essentially everything boils down to the the likelihood, and the Supreme Court has been a little more cagey about that. And that would be nice for it to say one way or the other. And I'm not really voicing which way it should be. I think there's arguments on either sides of that. But, yeah, what I get from this case, Jeff, is that this appeal is just about this preliminary injunction. So this case, like, is still around. So they could come to a final judgment on the case and provide more evidence and God knows, maybe there's going to be another, you know, a surge of some kind or some new variant. And then they could say, Okay, now we get our injunction, permanent injunction, and perhaps they should get that. But the majority's opinion here kind of shows that maybe that can never be true, because things keep changing. Or maybe you could get an injunction for like a month, but then you need to come back. And it almost makes the whole nature of a lawsuit in this area pointless, whether you're challenging a mask mandate or whether you're trying to impose a mask mandate, like is going on here.

J Jeff Redfern 27:01

Yeah. And I think if Judge Kelly in dissent is right, then I think they could still get a preliminary injunction, they would just have to litigate it again, on the current facts.

W Will Aronin 27:16

Which will be moot by the time it comes.

J Jeff Redfern 27:19

Exactly. So there won't be appellate review. And I think that, at least, sort of justifies the rule that normally the burden is on the party that wants to change the injunction to demonstrate the changed facts, because it sure puts a high burden on plaintiffs to say you have to prove that you're entitled to an injunction now, and then continue proving it every single day, affirmatively, or else we're just going to, you know, essentially assume that things have changed.

W Will Aronin 27:52

I know, I'm mixing my mythologies here, but I'm pretty sure that Dante's third circle of hell was Sisyphus litigating mask mandate injunctions for all of eternity.

A Anthony Sanders 28:05

Yeah, kind of seems like that.

W Will Aronin 28:08

That's my role here. I add a lot to the legal analysis. You're welcome.

J Jeff Redfern 28:13

I mean, of course, in this case, I think at the end of the day, it really doesn't matter because of the majorities' last paragraph. You know, the majority said, this law doesn't trump the ADA. So if you demonstrate, you know, that you're entitled to an ADA, you don't need an injunction against this law's enforcement. We are in normal ADA land.

A Anthony Sanders 28:40

Well, but you do need a rule. I mean, through a declaratory judgment maybe, which is different than an injunction, that there's a violation of the ADA to not have a mass mandate, which, again, is a pretty aggressive argument, but that's their argument.

J Jeff Redfern 28:57

I mean, whatever Iowa law says because it's a federal law and the Supremacy Clause. But my understanding is that the defendants' position was essentially that the ADA did not trump because the ADA certainly doesn't impose a mask mandate in explicit terms, it doesn't say that schools have to have them. It just says you have to have reasonable accommodations, and according to Iowa, that was not the kind of law that trumps this. The majority said, Oh, sure, it does. If you go through the ADA analysis, and it says you have to have masks, then that does trump this law.

W Will Aronin 29:43

I also thought when you looked at the facts that the dissent was laying out, the dissent was talking about one of the students had asthma and the nurse refused to wear a mask directly in front while giving that student her asthma medication. I feel like that is a much more reasonable accomdation, or much more narrowly tailored than saying every person in this building every for every moment that they're in this building must wear a mask. And I think the ADA would have greater tailoring than that, than just everyone must do it all the time.

J Jeff Redfern 30:13

I think that's right. And I think that's why judge Kelly was flagging that, you know, even though

I think that's right. And I think that's why Judge Kelly was flagging that, you know, even though she disagreed with the majority. She thought the injunction was too broad. And that, you know, if you look at ADA cases, they do typically involve a lot of careful tailoring like that. And I could easily see the result being something like, you know, the people who are directly interacting with the students, who are in their classroom with them have to do it, but not necessarily everyone in every other classroom or something like that. And that's the kind of give and take that you get in ADA litigation typically.

A Anthony Sanders 30:49

Well, I'm glad we figured this out for the parties and perhaps on remand they could do something that sounded pretty sensible, what you guys just had to say. This will probably not be the last pandemic law case that we have. But I am hoping we're getting there. Maybe the federal courts won't be quite as full up with these questions a year from now. Most of them have gone to meet their maker, but we'll see how many more we have to come. But there's lots of interesting quirks of the federal courts in the Constitution that we've learned along the way. I'd like to thank our guests for coming today. Good luck on your upcoming trial, guys. Maybe we'll hear about that at a later Short Circuit. But for now, I want everyone to have a beautiful May afternoon, or whenever and wherever you are listening to this podcast, and for everyone to get engaged.