BARNES & THORNBURG LLP

NEWSLETTERS

Supreme Court Finds An Unaccepted Offer For Complete Relief Does Not Moot Individual Or Class Claims, But Leaves The Door Ajar

February 25, 2016 | Atlanta | Chicago | Columbus | Dallas | Delaware | Elkhart | Fort Wayne | Grand Rapids | Indianapolis | Los Angeles | Minneapolis | South Bend

In a 6-3 decision, the United States Supreme Court ruled that an unaccepted settlement offer under Rule 68 of the Federal Rules of Civil Procedure does not moot a named plaintiff's claim in a class action lawsuit, even when the offer is made before class certification. *Campbell-Ewald Co. v. Gomez,* 2016 WL 228345, at * 8 (U.S. Jan. 20, 2016). In doing so, the Court resolved a split among the Courts of Appeal, which was trending in this direction. However, the debate is not completely over. In its ruling, the Court left open the possibility that a defendant may be able to end a class action by "actually paying" representative plaintiffs or depositing settlement funds with a court.

Background on Rule 68 Settlement Offers

Federal Rule of Procedure 68 helps parties reach a settlement and avoid litigation. It allows a defendant to make an "offer of judgment" to a plaintiff, after which the plaintiff has fourteen days to decide whether to accept or reject the offer. If the plaintiff accepts the offer, the court enters judgment against the defendant and the case is over. However, if the plaintiff declines the offer but does not receive a better result at trial, the plaintiff will be required to pay the defendant's litigation costs. As a result, Rule 68 attempts to encourage parties to "evaluate the risks and costs of litigation" and the likelihood of success at trial. *Marek v. Chesney*, 473 U.S. 1, 5 (1985).

Historically, defendants used Rule 68 as an avenue to quickly end class action lawsuits. The defendant offered the named plaintiff complete relief before class certification, meaning the plaintiff could not receive any more money if the case went to trial. If the plaintiff declined the offer, the defendant argued the plaintiff's claim was moot because there was no possible way a plaintiff could receive a better result. Additionally, because the offer was made prior to certification, the class claim itself was also considered moot. In this way, the defendant could terminate the individual and class claims by "picking off" the named class representative or representatives.

The Rule 68 Debate

Initially, a large number of courts ruled in favor of the defendants. Before 2013, the Third, Fourth, Fifth, Sixth, Seventh, Tenth, and Federal Circuits all concluded that a Rule 68 offer of complete relief to an individual renders a case moot, regardless of whether judgment is entered against the defendant. See *Tanasi v. New All. Bank*, 786 F.3d 195, 199 (2d Cir. 2015), *as amd.*, (May 21, 2015), *cert. den'd*, No. 15-84, 2016 WL 280831

RELATED PEOPLE

David A. Frazee
Partner
Washington, D.C.

P 202-408-6929
F 202-289-1330
david.frazee@btlaw.com

RELATED PRACTICE AREAS

Commercial Litigation

(U.S. Jan. 25, 2016) (recognizing and listing the courts that recognize a full settlement offer moots the individual and class claims); see also *Diaz v. First Am. Home Buyers Prot. Corp.,* 732 F.3d 948, 952 (9th Cir. 2013) (same).

In 2013, when the issue reached the United States Supreme Court in *Genesis Healthcare Corp. v. Symczyk*, many believed the Court would finally determine whether this strategy, to end class action lawsuits under Rule 68, was permissible. Symczyk brought an individual and class claim under the Fair Labor Standards Act against her employer. Symczyk's employer presented her a complete firm settlement offer expiring in ten days. Symczyk effectively rejected the offer by failing to respond and her employer moved to dismiss her claim. Her employer argued that Symczyk's failure to accept the offer meant she no longer had a personal stake in the outcome of the suit, rendering the action moot. Symczyk however argued that she had a sufficient stake in the case based on a statutorily created interest in representing similarly-situated employees. The District Court for the Eastern District of Pennsylvania agreed with Symczyk's employer and, despite reversing on separate grounds, the Third Circuit also held that Symczyk's individual claim was moot. *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523, 1529 (2013).

The Court had an opportunity to directly address whether the "pick off" strategy was viable; however, the majority punted on the issue. It assumed, without deciding, that Symczyk's individual claim was moot following her employer's complete settlement offer. Then it narrowly ruled that she had no personal interest in representing putative, unnamed claimants. Therefore, the lower courts appropriately dismissed the class claim as moot.

In her dissent, Justice Kagan addressed what the majority failed to resolve. She disagreed with the majority's assumption that the individual claim was moot. Justice Kagan analogized Rule 68 offers to contract law and noted that, like an unaccepted contract offer, an unaccepted settlement offer has "no operative effect" and leaves intact the plaintiff's interest in the lawsuit. *Id*. at 1534 (Kagan J. dissent). "Rule 68 . . . specifies that '[a]n unaccepted offer is considered withdrawn.'" *Id*. To decide otherwise would send the plaintiff away "empty-handed." *Id.* Justice Kagan relayed a "friendly suggestion to the Third Circuit: Rethink your mootness-by-unaccepted-offer theory." *Id.* She then warned the other circuit courts of appeal with a simple statement: "Don't try this at home." *Id.*

A few circuits heeded Justice Kagan's warning. The Fifth Circuit in, *Hooks v. Landmark Indus., Inc.,* agreed with Justice Kagan. See 797 F.3d 309, 315 (5th Cir. 2015) ("We . . . hold that an unaccepted offer of judgment to a named plaintiff in a class action is a legal ity with no operative effect.") In doing so, *Hooks* like Justice Kagan, expressed concern that the "pick off" strategy would leave plaintiffs with no actual relief despite their meritorious claims. See *id.* ("A contrary ruling would serve to allow defendants to unilaterally moot named-plaintiffs' claims in the class action context—even though the plaintiff, having turned the offer down, would receive no actual relief."). Though still skeptical that a plaintiff who rejects a full settlement offer is a suitable class representative, the Seventh Circuit also agreed with Justice Kagan and reversed its own precedent in *Chapman v. First Index, Inc.* See 796 F.3d 783, 787 (7th Cir. 2015) ("We overrule [our prior case law] to the extent they hold that a defendant's

offer of full compensation moots the litigation or otherwise ends the Article III case or controversy."). The Ninth Circuit in *Diaz v. First Am. Home Buyers Prot. Corp.* was "persuaded that Justice Kagan has articulated the correct approach." 732 F.3d 948, 954 (9th Cir. 2013). The Eleventh Circuit, in *Stein v. Buccaneers Ltd. P'ship*, also answered Justice Kagan's warning not to "try this at home." 772 F.3d 698, 703 (11th Cir. 2014). The court noted, "[Defendant] invites us to try this at home. We decline." *Id.*

With all this activity in the Circuits following *Genesis Healthcare*, it was inevitable that one case would successfully ask the Court to directly address the "pick off" strategy issue. This time, however, the Court addressed the issue.

The Supreme Court Finally Determined the Viability of the "Pick Off" Strategy, But Left the Door Ajar

Defendant-Petitioner Campbell-Ewald Company (Campbell) was engaged to develop a nationwide marketing strategy for a governmental entity. *Campbell-Ewald Co.* 2016 WL 228345, at *3. As a part of that strategy, Campbell was to send text messages "only to individuals who had 'opted-in'" to receiving the solicitation, targeting individuals between eighteen to twenty-four years old. *Id.*

Jose Gomez, the class representative, was among the text message recipients. Gomez claimed he had not consented to receive the messages and, as a result, filed a class action lawsuit in 2010 alleging that Campbell's text messages violated the Telephone Consumer Protection Act (TCPA), which prohibits any person, without prior consent, to "make any call . . . using any automatic telephone dialing system . . . to any telephone number assigned to a paging service [or] cellular telephone service.") It was undisputed that text messages are covered by the TCPA. *Campbell-Ewald Co.*, 2016 WL 228345, at *3.

Prior to the deadline to file a motion to certify the class, Campbell offered to pay Gomez his court costs and $1,503 per message received under Rule 68, "thereby satisfying his personal treble-damages claim." *Id.* at *4. Gomez did not accept the offer. *Id.* Campbell moved to dismiss Gomez's individual claim and putative class claim as moot because Campbell offered Gomez complete relief prior to class certification. *Id.*

Justice Ginsburg, writing for the majority, did not agree with Campbell. *Id.* at *7. The Court adopted Justice Kagan's analysis of the issue in her *Genesis Healthcare* dissent. Rule 68 does not change the basic principle that "every first-year law student learns[:] the recipient's rejection of an offer 'leaves the matter as if no offer had ever been made.'" *Id. (citing Genesis Healthcare Corp.*, 133 S. Ct. at 1533 (Kagan, J. dissent). Rendering a plaintiff's claim moot is not the remedy provided under Rule 68. *Id*. Rather, Rule 68 contains a "sole built-in sanction: 'If the [ultimate] judgment . . . is not more favorable than the unaccepted offer, the offeree must pay the costs incurred after the offer was made.'" *Id*. Therefore, without Gomez's acceptance, the Court held Campbell's offer remained a proposal, "binding neither on Campbell nor Gomez." *Id.* The controversy remains live and parties adverse. *Id.* Even though a class is devoid of "independent status until certified," with a live claim and no relief actually being provided to Plaintiff, the Court held that "a would-be class representative . . . must be accorded a fair opportunity to show that [class] certification is warranted." *Id.*

In his dissent, Chief Justice Roberts disagreed with the majority that contract principles were at issue. Instead, the question is whether there is a case or controversy giving the Court jurisdiction. *Id.* at *18 (Roberts, C.J. dissent). Chief Justice Roberts found that there is not. He reasoned that when the "defendant is willing to remedy the plaintiff's injury without forcing him to litigate, the plaintiff cannot demonstrate an injury in need of redress by the court, and the defendant's interests are not adverse to the plaintiff." *Id.* at *15 (Roberts, C.J. dissent). While Chief Justice Roberts found that the majority's ruling impermissibly allowed the plaintiff to take the place of the judge in deciding whether jurisdiction exists, *id*. at *16, Justice Ginsburg stated the dissent would allow the defendant to do the same, *id.* at *8.

The Distinction Between an "Offer" and "Actual Payment" May Make All The Difference

The Court did not completely shut the door on Rule 68's ability to end a class action lawsuit. While the Court found that an offer of settlement cannot moot a class action plaintiff's claim prior to certification, the Court left open for another time whether there was a different between an *offer* and *actual payment*. Both Justice Ginsburg and Chief Justice Roberts agreed that the Court's ruling is not intended to decide cases where the defendant actually pays the plaintiff relief or "deposits the full amount of the plaintiff's individual claim in an account payable, and the court then enters judgement for the plaintiff in that amount." *Compare id.* at *8 *with id.* at *18. Therefore, the Court suggested that a defendant may be able to end a class action by actually paying the named representative or depositing settlement funds with the court. It did not take long before defendants would heed the Court's suggestion.

The day after the Supreme Court's ruling in Gomez, the defendants in *Brady v. Basic Research, LLC*, et al. filed a motion to deposit complete relief with the court under Rule 67(a). No. 2:13-cv-07169, Dkt. #81 (EDNY, Feb. 3, 2016). In relevant part, Rule 67 reads:

> (a) DEPOSITING PROPERTY. If any part of the relief sought is a money judgment or the disposition of a sum of money or some other deliverable thing, a party . . . may deposit with the court all or part of the money or thing, whether or not that party claims any of it.

The defendants cited *Gomez* and argued that "depositing of funds sufficient to cover the full amount of a plaintiff's individual claims, in an account payable to the plaintiff prior to the Court entering judgment, may provide the basis for mooting a plaintiff's case." *Id.* In response, the plaintiffs stated that the Supreme Court did not make this determination in *Gomez*, the defendants were "misus[ing] Rule 67," and "depositing monies with the Court does not provide complete relief as 'it does not address the class claims, it does not admit liability, and it fails to address the Plaintiff's claims for injunctive relief.'" *Id*. (citation omitted).

The U.S. District Court for the Eastern District of New York (EDNY) disagreed with the defendants and ruled depositing money with the court is not the right avenue to moot a plaintiff's claim, at least not prior to an opportunity for class certification. The court found that Rule 67 was not the proper mechanism for mooting a named plaintiff's class claim. Rule 67

was “intended to relieve a depositor of the burden of administering an asset[,]” not to moot a plaintiff’s claim. Furthermore, the court relied upon the *Gomez* majority opinion stating that “a would-be class representative with a live claim of her own must be accorded a fair opportunity to show that certification is warranted.” *Id.* (emphasis in original).

Undeterred by the denial of their motion, the defendants notified the court that they placed the full amount of the plaintiffs’ claim into an Interest on Lawyer Trust Account (IOLTA) “segregated and held for the benefit of the Plaintiffs.” *Brady v. Basic Research, LLC*, *et al.,* No. 2:13-cv-07169, Dkt. #82 (EDNY, Feb. 4, 2016). The defendants argued that Chief Justice Roberts’ dissenting opinion in *Gomez* “made clear that paying [complete relief] into an account will moot a plaintiff’s claim.” *Id.* The court has not yet ruled on whether the defendants’ deposit of complete relief into an IOLTA is sufficient to moot the plaintiffs’ individual and class claim.

While the EDNY is the first court since *Gomez* to rule whether a deposit under Rule 67 can moot a plaintiff’s claim, the debate is far from over, even within the EDNY. The court will still need to decide whether the defendants’ deposit of complete relief within an IOLTA account is sufficient. Moreover, the court suggested a defendant may have more success mooting a plaintiff’s class claim, once the plaintiff has had a “fair opportunity” to certify the class. Therefore, it may not be if a defendant can moot the plaintiff’s claim, but a matter of *when*. This ambiguity left open by the Supreme Court will continue to be debated by the lower courts and could be in front of the Supreme Court again in a short order.

David Frazee and Adeyemi “Adey” Adenrele, members of the Firm’s Commercial Litigation Practice Group, practice in the Firm’s Indianapolis office. If you have questions about this article, David can be reached by telephone at (317) 231-7541 or by email at david.frazee@btlaw.com. Adey may be reached by telephone at (317) 231-7365 or by email at adey.adenrele@btlaw.com.