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CLIENT BULLETIN

Two Recent Seventh Circuit Decisions Address Critical Issues of Jurisdiction and Mootness

Craig M. Bargher | *cbargher@cmn-law.com*

The Seventh Circuit recently issued decisions affecting two common defense strategies. Now, in class actions especially, defendants' offers of full compensation under Fed. R. Civ. P. 68 will not moot the litigation or otherwise end the Article III case or controversy in the Seventh Circuit. *See Chapman v. First Index, Inc.*, Nos. 14-2773, 14-2775, 2015 WL 4652878, at *1 (7th Cir. Aug. 6, 2015). In addition, *McCormick v. Independence Life & Annuity Co.*, No. 14-2959, 2015 WL 4492854, at *1 (7th Cir. Jul. 24, 2015) reminds defendants that careful consideration of the minimum amount in controversy is crucial when removing actions to federal court.

Class Actions – Rule 68 Offer of Judgment

In a decision especially significant for class action defendants, the Seventh Circuit in *Chapman* held that a defendant's unaccepted offer of judgment under Fed. R. Civ. P. 68 will not moot the litigation, overruling prior Seventh Circuit precedent. *See, e.g., Damasco v. Clearwire Corp.*, 662 F.3d 891, 895 (7th Cir. 2011); *Thorogood v. Sears, Roebuck & Co.*, 595 F.3d 750, 752 (7th Cir. 2010); *Rand v. Monsanto Co.*, 926 F.2d 596, 598 (7th Cir. 1991). The decision will hinder attempts by defendants in class actions (as well as other cases) in the Seventh Circuit to moot litigation with offers of full compensation to named plaintiffs.

The plaintiff in *Chapman* proposed to represent a class of people to whom the defendant sent faxes, allegedly in violation of the Telephone Consumer Protection Act (47 U.S.C. § 227). The defendant made a Rule 68 offer of judgment, with a deadline of 14 days after the district court ruled on the plaintiff's motion for class certification. *Chapman*, Nos. 14-2773, 14-2775, 2015 WL 4652878, at *2. Rule 68 provides, in pertinent part, that:

> [i]f, within 14 days after being served [with an offer of judgment], the opposing party serves written notice accepting the offer, either party may then file the offer and notice of acceptance … [and] [t]he clerk must then enter judgment. … An unaccepted offer is considered withdrawn, but it does not preclude a later offer. … If the judgment that the offeree finally obtains is not more favorable than the unaccepted offer, the offeree must pay the costs incurred after the offer was made.

Fed. R. Civ. P. 68. The plaintiff never accepted the offer of judgment, which expired. The district court then granted the defendant's motion to dismiss the plaintiff's personal claim as moot.

Vacating the order, Judge Easterbrook relied on Justice Kagan's dissent in *Genesis Healthcare Corp. v. Symczyk*, 133 S.Ct. 1523, 1532-37 (2013) (joined by Ginsburg, Breyer & Sotomayor, JJ.), which "shows that an expired (and unaccepted) offer of a judgment does not satisfy the Court's definition of mootness, because relief remains possible." *Chapman*, Nos. 14-2773, 14-2775, 2015 WL 4652878, at *2; *but see* Newberg on Class Actions § 2:15 (5th ed. 2015) ("Justice Kagan's point runs counter to the idea that mootness is based in the constitutional concerns of Article III and hence cannot be trumped by the provisions of Rule 68 nor contract law – if, as a constitutional matter, there is no longer a case or controversy by virtue of the full settlement offer, the fact that Rule 68 or contract law considers the offer unaccepted would seem immaterial"). Judge Easterbrook reasoned that if such an offer of judgment moots a case, then there is no case left in which a court could enter judgment. *Id.* at *3. Rather, the court noted that even if the plaintiff had accepted the offer of judgment, "the district court could not have ordered [the defendant] to

pay [and] could have done nothing but dismiss the suit." *Id.* The Seventh Circuit overruled "*Damasco, Thorogood, Rand,* and similar decisions 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." *Id.*

Judge Easterbrook also noted that although this "issue had not been presented for decision" in *Genesis Healthcare Corp.*, courts of appeals that subsequently considered the issue, including the Second and Ninth Circuits, "uniformly agree with Justice Kagan." *Chapman*, Nos. 14-2773, 14-2775, 2015 WL 4652878, at *3 (*citing Ta-nasi v. New Alliance Bank*, 786 F.3d 195 (2d Cir. 2015); *Gomez v. Campbell-Ewald Co.*, 768 F.3d 871 (9th Cir. 2014), cert. granted, 135 S.Ct. 2311 (2015)). Evidently assuming that *Gomez* will be decided consistent with Justice Kagan's dissent, the Seventh Circuit noted that "we think it best to clean up the law of this circuit promptly …."

The court did identify alternate defenses and arguments that defendants could make when plaintiffs reject "a fully compensatory offer." Citing *Greisz v. Household Bank*, 176 F.3d 1012, 1015 (7th Cir. 1999), in which the Seventh Circuit noted, "'you cannot persist in suing after you've won,'" the court suggested that whether such unaccepted offers "should be deemed an affirmative defense, perhaps in the nature of an estoppel or a waiver" remains an open question. The court also recognized that in class actions, there is an argument against continuing the case for an individual plaintiff, "for even a settlement offer after the district judge has declined to certify a class" may result in the waste of judicial resources, but noted that the "defendants do not make an argument along these lines." *Chapman*, Nos. 14-2773, 14-2775, 2015 WL 4652878, at *4. The court further noted the defendants' offer did not remain open, "so a court could not say (as may well be true) that there is no sum currently in dispute. A fleeting offer could not be reasonably equated to full compensation." *Id.* In addition, despite the minimum of 14 days to accept an offer of judgment expressly allowed by Fed. R. Civ. P. 68(a), the court questioned whether 14 days is long enough to consider an offer. Judge Easterbrook concluded, "[h]ow a court should deal with these situations can be left for another day, when the parties have addressed them." *Id.*

Accordingly, the Seventh Circuit closed the door on defendants' attempts to moot litigation with Rule 68 offers of full compensation. It left open the possibility, however, for certain defenses that could lead to summary judgment for such defendants. Going forward, defendants should consider such defenses, as well as whether they might benefit from imposing longer deadlines on accepting offers of judgment.

Diversity Jurisdiction – Amount in Controversy

The decision in *McCormick*, No. 14-2959, 2015 WL 4492854, at *1, is a reminder that careful analysis of the amount in controversy required for diversity jurisdiction *before* removing a case to federal court will avoid a costly post-appeal remand.

In *McCormick*, the insureds sued in Wisconsin state court, seeking a declaration that they did not owe $44,000 in interest on their variable life insurance policy loan. Independence Life removed the case to the U.S. District Court for the Eastern District of Wisconsin, based on diversity of citizenship, and obtained a judgment on the pleadings. Plaintiff promptly appealed.

When the Seventh Circuit questioned the minimum amount in controversy, both parties argued the removal was proper. The complaint requested cancellation of the entire loan balance of approximately $70,000, in addition to the declaration regarding the interest. The Seventh Circuit rejected this estimate of the stakes, which combined the loan balance and the interest owed, because "[c]ancellation of the principal balance as a remedy for excessive interest is legally impossible in Wisconsin, whose law supplies the rule of decision." *Id.* It noted that a good-faith estimate of the amount in controversy controls, absent a legal impossibility of the demanded award. *Id.* (*citing Dart Cherokee Basin Operating Co. v. Owens*, 135 S.Ct. 547, 553-54 (2014)). The Seventh Circuit also rejected Independence Life's argument that the policy itself allowed "cancellation if a loan's unpaid balance equals or exceeds the policy's cash value," which was the case. *Id.* at *2. It noted that in that situation, "the difference between [the policy's] continuance and its cancellation has a correspondingly small value." *Id.* Even, for example, if the policy's value were over $75,000, the Seventh Circuit noted, the amount in controversy still would have been $44,000, which was the amount required to satisfy Independence Life's demand in order to avoid the risk of cancellation.

Independence Life's argument that the insureds created federal question jurisdiction by filing a federal securities law claim after removal failed as well. The Seventh Circuit noted that not only did the insureds' claim

under Section 12 of the Securities Act of 19933 (15 U.S.C. § 77***l***) fail to allege a false statement, as required, but the claim was time-barred by 24 years. *See Id.* at *3 ("The securities claim is wacky, so far beyond the pale that it cannot support federal jurisdiction"). The Seventh Circuit vacated the judgment on the pleadings and remanded the case "with instructions to dismiss for lack of subject-matter jurisdiction." *Id.*

This case is significant not only with respect to cases involving insurance policy loans, but also regarding any initial filings in or removals of actions to federal court based on an assertion of diversity jurisdiction. In some cases, amounts in controversy that seem to be obviously in excess of the $75,000 minimum might not stand up to closer scrutiny under applicable statutes or case law.

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Chittenden, Murday & Novotny LLC
303 W. Madison St. Suite 1400
Chicago, Illinois 60606
312.281.3600
www.cmn-law.com