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Client Alert

National Class Action Practice Group

December 3, 2014

Eleventh Circuit: Rule 68 Offers of Judgment Do Not Moot Putative Class Actions

On December 2, 2014, the United States Court of Appeals for the Eleventh Circuit reversed a district court order dismissing a putative class action as moot, holding that: (1) an unaccepted Rule 68 offer of judgment does not moot a plaintiff's individual claims; and (2) even if a Rule 68 offer were to moot individual claims, the putative class action would remain justiciable, irrespective of whether a motion to certify the class had been filed at the time of the offer. *See Stein v. Buccaneers Ltd. P'ship*, No. 13-15417, -- F.3d --, 2014 WL 6734819 (11th Cir. 2014); *see also Keim v. ADF Midatlantic, LLC*, No. 13-13619 (11th Cir. Dec. 2, 2014) (unpublished) (reversing dismissal of class action based on decision in *Stein*).

While *Stein* provides some much-needed clarity regarding the effect of Rule 68 offers on putative class actions in the Eleventh Circuit and aligns the Circuit with most others that have considered the issue, the court's decision eliminates a strategic option class-action defendants have used to obtain early dismissals, and it may have the unintended consequence of rendering early resolutions of class actions less likely.

The District Court's Dismissal of the Case

In *Stein*, six named Plaintiffs filed a putative class action in Florida state court, alleging that Buccaneers Limited Partnership ("BLP") faxed unsolicited advertisements to the named plaintiffs and class of over 100,000 others, in violation of the Telephone Consumer Protection Act, 47 U.S.C. § 227(b)(1)(C) ("TCPA"). The complaint demanded statutory damages of $500 per violation, trebled to $1,500 based on BLP's alleged willfulness, and an injunction against further TCPA violations.

After removing the case to federal court, BLP served each named Plaintiff with an offer of judgment pursuant to Rule 68 of the Federal Rules of Civil Procedure. The offers included monetary payments to each Plaintiff based on the number of faxes that the offeree had allegedly received and provided that a stipulated injunction would be entered against BLP.

Shortly thereafter, BLP moved to dismiss on grounds that the outstanding Rule 68 offers rendered the case moot. Plaintiffs moved to certify the proposed class the next day and ultimately allowed the deadline for acceptance of the offers to lapse. The district court subsequently granted

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BLP's motion to dismiss, concluding that the unaccepted Rule 68 offers rendered the action moot.

The Eleventh Circuit's Decision

A panel of the Eleventh Circuit—which included two judges sitting by designation—heard Plaintiffs' appeal of the district court's dismissal.

Turning first to Plaintiffs' individual claims, the court noted that the Second and Sixth Circuits have held that an unaccepted Rule 68 offer for full relief moots an individual claim. The court, however, adopted a contrary view, following the reasoning of the Ninth Circuit and the four dissenting justices in *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523 (2013). The court explained that once the deadline for accepting BLP's Rule 68 offers had elapsed, the offers were "considered withdrawn" and "not admissible," such that Plaintiffs could "no longer accept the offers or require the court to enter judgment." As a result, according to the court, the "plaintiffs still had their claims, and BLP still had its defenses," just as they did before the Rule 68 offers. The court, therefore, concluded that the offers did not render the individual Plaintiffs' claims moot.

The court next considered the effect of the Rule 68 offers on the class claims, relying largely on the former Fifth Circuit's decision (binding on the Eleventh Circuit) in *Zeidman v. J. Ray McDermott & Co.*, 651 F. 2d 1030 (5th Cir. 1981). In *Zeidman*, the court held that a tender of the full amount of the named plaintiffs' claims mooted the individual claims, but did not moot the class claims, where there was a "timely filed and diligently pursued pending motion for class certification."

The Eleventh Circuit found *Zeidman* controlling, even though the plaintiffs in *Zeidman* had filed their motion for certification before the offer of full judgment, while the named Plaintiffs in *Stein* had moved to certify the class after BLP served its Rule 68 offers. The court found the timing of Plaintiffs' motion for certification immaterial to the mootness analysis and concluded that the class action remained justiciable on several grounds. First, regardless of whether there was a pending motion for certification, the parties remained in dispute over whether BLP violated the Telephone Consumer Protection Act and whether the putative class members were entitled to relief, thereby giving rise to a live controversy between the parties. Second, the court noted that the Supreme Court has previously recognized, albeit under different circumstances, that the mootness of a named plaintiff's individual claims does not always extinguish the plaintiff's requisite personal stake in the class action. Accordingly, the court held that the class action could not be presumed moot simply by virtue of the mootness of the individual claims. Third, the court reasoned that because the mere *filing* of a motion for certification has no effect on the legal status of a putative class, it would be illogical to determine the mootness of class claims based on the timing of such a motion. The relevant question, according to the court, is not whether a motion for certification is pending, but whether the named plaintiffs have acted "diligently to pursue the class claims."

Based on this analysis, the Eleventh Circuit held that a Rule 68 offer of judgment to named plaintiffs does not moot a class action, regardless of whether the offer precedes a motion for class certification, so long as the named plaintiffs have diligently pursued class certification.

Why Does This Decision Matter to Class Action Defendants?

Prior to *Stein*, district courts within the Eleventh Circuit were divided on the effect of a Rule 68 offer of judgment made before the filing of a class certification motion. *Compare Krzykwa v. Phusion Projects, LLC*, 920 F. Supp. 2d 1279, 1284 (S.D. Fla. 2012) (defendant's offer to settle named plaintiff's claims mooted putative class action), *with Mullinax v. United Marketing Grp.*, LLC, 1:10-cv-03585, 2011 WL 4085933 (N.D. Ga. Sept. 13, 2011) (declining "to find the

class action moot, even though plaintiff's personal claims have been rendered moot"). The court's *Stein* decision clearly establishes that unaccepted Rule 68 offers do not moot individual or class claims in the Eleventh Circuit.

The court's decision reflects a growing majority view that includes the Third, Fifth, Ninth, and Tenth Circuits. But disagreement among the circuits remains. As the Eleventh Circuit acknowledged, its decision conflicts with the Seventh Circuit's approach and Supreme Court dicta in *Symczyk*.

This majority view, as a practical matter, is unfavorable to class action defendants because it limits their ability to obtain early dismissals of putative class actions, even when they offer complete relief to named plaintiffs in fixed damages cases. And it leaves the decision of whether to continue litigating a putative class action largely at the plaintiffs' discretion, regardless of whether the defendants have offered to remedy the plaintiffs' claims. While *Stein* involved claims under the TCPA, the Eleventh Circuit's decision contains no limiting language to suggest that its ruling applies only in cases involving alleged statutory violations. Accordingly, the Eleventh Circuit's decision in *Stein* will likely make resolving putative class actions early on more difficult and increase the likelihood that class litigation will weigh down district court dockets, particularly in cases involving statutory or liquidated damages.

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