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APPELLATE ALERT

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Recent Supreme Court Decision Highlights Some Pitfalls of Federal Appellate Procedure

By Nancy Winkelman and Aaron J. Fickes

Rarely do dissenting Justices advise practitioners to ignore a majority opinion. But, because the five-Justice majority in *Genesis Healthcare Corp. v. Symczyk*, No. 11-1059, 569 U.S. __ (2013), assumed without deciding an issue that the plaintiff-respondent did not challenge in a cross-petition for a writ of certiorari and had conceded below, the majority addressed a situation that the dissenting Justices said will never arise again. Notwithstanding the advice of the dissenters (Justice Kagan, joined by Justices Ginsburg, Breyer, and Sotomayor) to "[f]eel free to relegate the majority's decision to the furthest reaches of your mind," *Genesis Healthcare* should be remembered as a cautionary tale on the dangers of waiver, at all levels of the judicial system, including failing to file a cross-petition for certiorari.

Plaintiff-respondent Symczyk sued Genesis, alleging violations of the Fair Labor Standards Act, ("FLSA"). She sought both individual relief and relief on behalf of similarly situated employees — a "collective action," in FLSA parlance. Genesis made Symczyk an offer of judgment under Federal Rule of Civil Procedure 68, offering all the relief that she would be entitled to under the FLSA. When Symczyk did not respond to the offer, it lapsed. Genesis then filed a motion to dismiss for lack of subject-matter jurisdiction, arguing that because it had offered Symczyk complete relief, Symczyk no longer had a personal stake in the case, rendering ***both*** her individual action ***and*** the collective action moot. Symczyk opposed the motion, arguing that even if her individual action was moot, her collective action survived.

The Eastern District of Pennsylvania held that because no other individuals had joined Symczyk's suit, the Rule 68 offer of judgment not only satisfied her individual claim, but also the claims of others similarly situated. The Third Circuit agreed that because Symczyk did not accept the Rule 68 offer, the offer of judgment mooted her individual claim. However, it reversed on the collective aspect of the case, holding that the collective action was not moot because defendants cannot "pick off" named plaintiffs under the FLSA with strategic Rule 68 offers. The Supreme Court granted Genesis' petition for a writ of certiorari.

Justice Thomas, joined by Chief Justice Roberts and Justices Scalia, Kennedy, and Alito, observed that although the circuits are split on whether an unaccepted offer of judgment that fully satisfies a plaintiff's individual claim renders that claim moot, that issue was not properly before the Court because Symczyk had not filed a cross-petition for certiorari. And, the Court continued, even if she had filed a cross-petition, she waived any argument that her individual claim was not moot by conceding the point in both courts below and not raising it in her opposition to Genesis' certiorari petition. After applying the cross-petition and waiver rules, the majority assumed, without deciding, that Genesis' unaccepted offer of judgment mooted Symczyk's individual claim. With that issue decided, the majority proceeded to resolve the collective-action issue and held that the collective action also was moot.

Justice Kagan's strongly-worded dissent faulted the majority for assuming (without deciding) that Symczyk's individual claim was moot. The dissent declared "[t]hat thrice-asserted view … wrong, wrong, and wrong again." The majority's application of the waiver and cross-petition rules to assume otherwise was an error, according to the dissent, because that assumption ensured that the majority would reach the wrong decision. The dissent also stated that Symczyk could ***not*** have filed a cross-petition because she won in the Court of Appeals. And even if she could have cross-petitioned, her failure to do so would not prevent the Court from considering the individual-claim issue because the cross-petition requirement is not jurisdictional.

Genesis Healthcare provides some important lessons in federal appellate procedure:

1. Even though the Court has never held that the cross-petition rule is jurisdictional, failing to file a cross-petition can have an outcome-determinative effect on the merits

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of the underlying case. The Court granted certiorari on the question "[w]hether a case becomes moot … when the lone plaintiff receives an offer from the defendants to satisfy all of the plaintiff's claims." In finding that the individual-claim issue was not properly before the Court, the question presented was transformed by the majority to "whether [an FLSA individual and collective action] is justiciable when the plaintiff's individual complaint becomes moot." Symczyk's failure to file a cross-petition precluded her from making arguments that could have been important to her case.

2. As the dissent observed, "a party satisfied with the action of a lower court should not have to appeal from it in order to defend a judgment in his or her favor on any ground." However, one must be on alert that an argument that a court erred in its ruling on one issue may be deemed conceded by failing to seek Supreme Court review. In such a situation, if the opposing party files a petition for a writ of certiorari, *Genesis Healthcare* counsels that one should file a cross-petition to preserve one's appellate rights. One option is to file a "conditional cross-petition," which a party may do up to 30 days after the clerk dockets the case. Sup. Ct. R. 12.5. Doing so will help ensure that the Court will reach the merits of the issue.

3. Conceding an argument, even if due to binding circuit precedent, may well result in a court finding that the argument is waived. As the majority observed, the circuits are split on whether an unaccepted offer of judgment that fully satisfies a plaintiff's claim renders that claim moot. Because the Third Circuit previously had held that it did, Symczyk conceded this point in the district court and the Court of Appeals, to her later detriment. Of course, one must always acknowledge relevant binding precedent, but in order to argue at a later stage (either on rehearing en banc, or certiorari) that that precedent is wrong, one must raise the argument at every possible juncture (while being transparent that this is being done for preservation purposes only).

4. Sometimes, an appellate court will review arguments or claims that might otherwise be deemed waived. As the dissent highlighted, where a question is predicate to a larger issue underlying the entire case, that question may be reviewed by the court. *See, e.g., Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 382 (1995). Although this reasoning did not carry the day in *Genesis Healthcare*, it is worth asserting if one is placed in the unfortunate position of having to contest a point that arguably was waived below. ◆

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