LOS ANGELES
Daily Journal
www.dailyjournal.com
WEDNESDAY, JANUARY 22, 2014

High court makes plaintiffs an offer they can't refuse

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In recent landmark decisions, the U.S. Supreme Court has drastically limited the availability of class action litigation as a vehicle for plaintiffs to prosecute civil actions on a representative basis. In 2010, the court decided *Stolt-Nielsen v. Animal Feeds Int'l Corp.*, foreclosing plaintiffs who had contractually agreed to arbitrate their disputes under the Federal Arbitration Act (FAA) from pursuing class-wide relief in any capacity unless the parties agreed to class arbitration. In 2011, the court preempted California's longstanding *Discover Bank* rule that class action waivers were per se unenforceable, holding that class waivers in consumer arbitration agreements are enforceable under the FAA in *AT&T Mobility LLC v. Concepcion*. That same year, the court also decided *Dukes v. Wal-Mart Stores Inc.*, a nationwide gender discrimination class action, wherein the court raised the certification threshold for nationwide or large-scale class cases.

These decisions have since been relied upon by state and federal judges throughout the nation to end class litigation in high stakes consumer and non-consumer cases before reaching the merits of plaintiffs' claims. Prior to these decisions, these and scores of other cases likely would have ended in significant class settlements.

The U.S. Supreme Court appears to continue to chip away at the efficacy of class litigation in *Genesis Healthcare v. Symczyk*, decided just last year and which, through dicta, stands for the proposition that a defendant's *unaccepted* Rule 68 "offer of judgment" can eviscerate a named plaintiff's standing to proceed as a class representative, effectively ending the class action litigation. Like California's Section 998 "offers to compromise," Rule 68 offers of judgment allow "any party defending against a claim" to "serve on an opposing party an offer to allow judgment on specified terms, with the costs then accrued." Normally, when such an offer is made but rejected, the unaccepted offer is considered withdrawn, and will harm the plaintiff only if he or she fails to recover a more favorable judgment on the merits. Both mechanisms promote settlement and give defendants some leverage in resolving cases early, particularly those that are perceived as nominal or "shakedown lawsuits" — filed by plaintiffs and their counsel with the presumption that a defendant at least will consider, at the preliminary stages of litigation, the cost of defense as a starting point for settlement negotiations. Unaccepted offers in both state and federal court are often seen as toothless unless the case proceeds to final judgment.

Genesis Healthcare may have significantly changed the impact of Rule 68 offers of judgment on class litigation in federal court. In *Genesis Healthcare*, the majority implicitly held, through dicta, that because the defendant's offer would have fully satisfied the plaintiff's Fair Labor Standards Act (FLSA) claim, the plaintiff lost any personal stake in the outcome, *whether or not the plaintiff accepted the offer*. Thus, the plaintiff was divested of representative standing, either ending the case or forcing class counsel to replace that named plaintiff.

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The dissent disagreed, interpreting Rule 68 as a voluntary mechanism to end litigation "only when a plaintiff accepts an offer." Given that the majority did not "reach this question, or resolve the split" among the courts of appeal, the dissent called the decision "the most one-off of one-offs," and suggested that lower courts rethink the "mootness-by-unaccepted-offer theory."

The 9th U.S. Circuit Court of Appeals recently followed the dissent's reasoning in *Genesis Healthcare*, ignoring the majority's decision in deciding *Diaz v. First American Home Buyers Protection Corp.*, 2013 DJDAR 13348 (Oct. 4, 2013). In that case, the owner of a home warranty plan filed a class action complaint alleging misrepresentation, breach of contract, and breach of the implied covenant of good faith and fair dealing. After the disposition of various motions that limited Diaz's claims, the defendant made a Rule 68 offer of judgment that Diaz refused. The district court then dismissed Diaz's claims as mooted by the unaccepted Rule 68 offer on a motion by defendants for lack of subject matter jurisdiction. The 9th Circuit vacated this dismissal and held that "an unaccepted Rule 68 offer that would have fully satisfied a plaintiff's claim does not render that claim moot." This decision runs contrary to "the majority of courts and commentators," but the 9th Circuit was "persuaded that Justice Elena Kagan has articulated the correct approach" in her *Genesis Healthcare* dissent.

The circuit courts are indeed split on this issue of mooting a plaintiff's claim. The 2nd, 5th and 9th Circuits have rejected the "mootness-by-unaccepted-offer" theory, as applied in the collective or class action context. In contrast, the 3rd, 4th, 6th, 7th, 10th and Federal Circuits have acknowledged that complete offers of relief may moot a claim, even if unaccepted, following the majority view in *Genesis Healthcare*, thereby ending class litigation as to that named plaintiff.

The 9th Circuit will revisit this issue in a case titled *Chen v. Allstate Ins. Co.*, No. 13-16816, which was certified for interlocutory permissive review in late 2013. *Chen* was filed as a class action asserting violations of the Telephone Consumer Protection Act. When Allstate made a Rule 68 offer of judgment to the two named plaintiffs, Chen and Pacleb, Chen accepted the offer, but Pacleb did not. Allstate argued that its unaccepted offer to Pacleb should moot Pacleb's remaining claims pursuant to *Genesis Healthcare*, and end the class litigation because no named plaintiff remained with standing to sue. Pacleb argued that Genesis Healthcare is inapplicable given its limited holding.

Chen will be decided by a different 9th Circuit panel than the one that decided Diaz, so it remains to be seen what effect, if any, the *Genesis Healthcare* decision will have in *Chen*. Of course, *Chen* may simply follow *Diaz* and adopt the dissent's reasoning in *Genesis Healthcare*. On the other hand, the *Chen* panel may conclude that *Diaz* was wrongly decided and refuse to follow it. Briefing has yet to be completed by the real parties in interest, however, multiple amicus briefs have been filed by third parties, underscoring the impact many believe the *Chen* decision will have on class action litigation in the 9th Circuit. An oral argument date has not yet been set.

Under current law, and given the circuit split, class action plaintiffs should consider the "mootness-by-unaccepted-offer" rule in deciding where to file suit, including the decision of whether to file in state or federal court, and defendants sued in federal circuits following the majority's rationale in *Genesis Healthcare* should consider whether Rule 68 offers of judgment make strategic sense. No matter how *Chen* is decided, it seems likely the Supreme Court will need to resolve this important and divisive question of law — and *Chen* may be the case in which the Supreme Court decides to do so.

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