November 22, 2013

New Jersey Trial Court Prohibits Offers of Judgment in Putative Class Actions

In a recently filed opinion, a New Jersey trial court held that a defendant in a putative class action could not "pick off" a class representative by filing an offer of judgment that would effectively satisfy the representative's individual monetary claim. The decision, *Gambrell v. Hess Corporation, Inc.*, No. L-7761-12, slip op. (N.J. Super. Law. Div. Oct. 31, 2013), aligns state court practice with prevailing authority within the U.S. Court of Appeals for the Third Circuit, which curbs defense strategies to moot class claims by offering a judgment in full to named plaintiffs before class certification motion practice.

Factual Background

In *Gambrell*, plaintiffs filed a putative class action alleging that defendant Hess mislabeled diesel fuel as regular gasoline and sold it to consumers, causing damage to their vehicles. After the complaint was filed, but before any motion to certify the class was made,[1][1] Hess tendered offers of judgment pursuant to New Jersey Court Rule 4:58-1 to the two named plaintiffs, in the amount of $20,000 each?- sufficient to satisfy or otherwise moot their claims. In response, plaintiffs' counsel filed a motion to strike the offers of judgment and to implement sanctions against Hess, contending Hess's offers of judgment were improper in light of plaintiffs' claims for declaratory and injunctive relief, which could not be disposed of through an offer of judgment. Plaintiffs' counsel further demanded the offers of judgment be withdrawn as contrary to the public policy underpinning the rules governing class actions.

Hess refused to withdraw the offers of judgment, and instead it filed a cross motion to strike plaintiffs' requests for declaratory and injunctive relief. Hess also contended the offers of judgment were not improper, because no New Jersey state court authority directly foreclosed their use in state class action proceedings. Judge Travis L. Francis granted plaintiffs' motion to strike, concluding that "from this point forward no offers of judgment may be tendered in class actions, whether putative or certified, for reasons of public policy." The court, however, denied plaintiffs' application for sanctions as well as Hess's cross motion to strike the claims for declaratory and injunctive relief.

The Court's Analysis

In striking down the offers of judgment rule in class actions, Judge Francis balanced New Jersey's strong public policy favoring settlement and conservation of judicial resources with the need to enforce legislatively enacted remedial statutes through the class action process. In so doing, the court relied heavily on the Third Circuit's decision in *Weiss v. Regal Collections*, 385 F.3d 337, 344 (3d Cir. 2004), as well as a number of other authorities, which held that allowing defendants to "pick off" putative class representatives would undercut the objectives of the class action mechanism for aggregating small claims and placed a representative's own personal interests at odds with those of its class members.

Judge Francis initially determined the issue could be resolved by reference to the limited scope of the offers of judgment procedure, which is expressly unavailable in cases in which plaintiff seeks nonmonetary relief. Rule 4:58-1. Because plaintiffs' complaint included claims for declaratory and injunctive relief, which the court refused to strike pursuant to Hess's cross motion, the offers of judgment were deemed improper.

Additionally, Judge Francis stated that he found a "more compelling" reason to strike the offers of judgment. He reasoned that allowing the offers to stand would place plaintiffs in the unenviable position of either accepting the offers?- thus rendering the class claims moot?- or rejecting the offers and facing the possibility of being responsible for defendants' attorney fees.

Concluding that offers of judgment have no place in class actions, Judge Francis reasoned that "[a]llowing defendants to engage in the judicial equivalent of 'Whac-A-Mole' by tendering offers of judgment on successive named representatives...undermines [remedial statutes] enacted by the Legislature because it gives rise to conflicts of interest between the representative and the class they represent." This conflict is especially poignant when a class representative's potential liability for costs far exceeds that representative's personal stake in the litigation.

A Split in Authorities Remains

Gambrell is the first time a New Jersey state court authority has foreclosed the use of offers of judgment in putative class action litigation. It thus makes New Jersey state court practice consistent with Third Circuit practice under *Weiss, supra.* However, treatment of the issue is not uniform nationwide; authorities in a number of other federal circuits have upheld offers of judgment served before class certification motion practice. Currently, the Fourth, Sixth, Seventh and Eighth Circuits generally allow offers of judgment to moot the claims of a putative class representative, provided that a motion for class certification has not been filed prior to the tender of the offers. See, e.g., *Damasco v. Clearwire Corp.*, 662 F.3d 891, 896 (7th Cir. 2011).

Earlier this year, the Supreme Court was presented with a similar issue in *Genesis Healthcare Corp. v. Symczyk,* ___ U.S. ___, 133 S. Ct. 1523, 185 L.Ed. 2d 636 (2013). In *Genesis,* an individual filed a collective action under the Fair Labor Standards Act ("FLSA") on behalf of herself and similarly situated employees. The defendant tendered an offer of judgment which plaintiff ignored. The Supreme Court found under those circumstances that the lawsuit became moot because plaintiff lacked a personal interest in representing others in the action. The Court, however, expressly distinguished its holding from cases involving class actions under Rule 23, which it found to be "inherently different" from collective actions under the FLSA. Accordingly, the Court avoided a ruling that could have helped resolve divided authority on the apparent conflict between Federal Rules of Civil Procedure 23, governing class actions, and 68, outlining the procedure for offers of judgment.

Conclusion

Given the prior lack of New Jersey authority on the propriety of offers of judgment in class actions, Judge Francis declined to sanction Hess for its refusal to withdraw the offers of judgment. Although only a trial court-level opinion, *Gambrell* now offers litigants in New Jersey state court unambiguous direction on whether offers of judgment have any place in class action proceedings. Consistent with federal practice within New Jersey, defendants in state court cannot seek to moot a class action by filing offers of judgment resolving the class representative's individual claim.

---

[1] Although the opinion does not expressly indicate whether a motion to certify had been filed before service and filing of the offers of judgment, a review of the court's docket confirms no certification motion practice had been initiated.