Mooting Plaintiff's Case Might Not End Class Action

Law360, New York (October 19, 2012, 12:17 PM ET) -- Defendants in class actions frequently wonder how, and whether, they can resolve the individual named plaintiff's case and thus get rid of the class action all together. Sometimes these issues arise at the start of a class action. Defendants wonder whether they can just make an offer of judgment and be done with the case. Sometimes, after a motion for class certification is denied, or after a certified class is decertified for some reason (which a district court has authority to do), defendants wonder whether they can end the class action by simply settling with the named plaintiff. The answer to both questions is, as with so many things in the law, maybe.

The Requirement of Standing

It is well known that under Article III of the United States Constitution, federal courts only have jurisdiction over live "cases and controversies." See, e.g., Spencer v. Kemna, 523 U.S. 1, 7 (1998); A.M. v. Butler, 360 F.3d 787, 790 (7th Cir. 2004). The cases and controversy requirement demands that parties in a federal case always maintain a personal stake in the outcome of the litigation. See United States v. Juvenile Male, 131 S. Ct. 2860, 2864 (2011); Spencer, 523 U.S. at 7. One standing issue that often arises in a class action is whether an offer of judgment to, or settlement with, the named plaintiff moots his or her claims and thus destroys standing.

What many parties are finding out is that there are limits to mooting a class action through offers of judgment or settlement.[1] This term, the U.S. Supreme Court will weigh in on whether an offer of judgment under Federal Rule of Civil Procedure 68 moots a collective action under the Fair Labor Standards Act (for these purposes, actions that are analogous to class actions). See Genesis Healthcare Corp. v. Symczyk, No. 11-1059 (U.S.); see also Symczyk v. Genesis Healthcare Corp., 656 F.3d 189 (3d Cir. 2011). Below is a brief summary of the current law relating to whether an offer of judgment or a settlement with a named plaintiff will effectively end the particular class action.

Offers of Judgment

Federal Rule of Civil Procedure 68 allows a defending party, at least 14 days before the date set for trial, to serve on an opposing party "an offer to allow judgment on specified terms, with the costs then accrued." Fed. R. Civ. P. 68(a). In general, an offer of judgment for full relief moots an individual plaintiff's claims because "[o]nce the defendant offers to satisfy the plaintiff's entire demand, there is no dispute over which to litigate, and a plaintiff who refuses to acknowledge this loses outright, under Fed. R. Civ. P. 12(b)(1), because he has no remaining stake." See Damasco v. Clearwire Corp., 662 F.3d 891, 894-895 (7th Cir. 2011). However, class actions present unique issues and the courts of appeals are split on whether an individual offer of judgment can moot the entire class action.

Under the majority view, held by the Ninth, Tenth, Fifth and Third Circuits, offers of judgment to a named plaintiff do not moot the class action so long as a motion for class certification is filed without undue delay after the offer is made. See, e.g., Pitts v. Terrible Herbst Inc., 653 F.3d 1081, 1091-92 (9th Cir. 2011); Lucero v. Bureau of Collection Recovery Inc., 639 F.3d 1239, 1249-50 (10th Cir. 2011); Sandoz v. Cingular Wireless LLC, 553 F.3d 913, 920-21 (5th Cir. 2008); Symczyk v. Genesis Healthcare Corp., 656 F.3d 189 (3d Cir. 2011); Weiss v. Regal Collections, 385 F.3d 337, 348 (3d Cir. 2004); see also Stewart v. Cheek & Zeehandelar LLP, 252 F.R.D. 384, 386 (S.D. Ohio 2008).

In so holding, the Tenth Circuit, for example, explained that the named plaintiff still had "a nascent interest attache[d] to the proposed class upon the filing of a class complaint such that a rejected offer of judgment for statutory damages and costs made to a named plaintiff does not render the case moot under Article III." See Lucero, 639 F.3d at 1249.

The Seventh Circuit has held that complete offers of judgment provided prior to the filing of a motion for class certification leaves the named plaintiff without a stake in the litigation, mooting the case (including the class claims). See Damasco v. Clearwire Corp., 662 F.3d 891 (7th Cir. 2011). The Sixth Circuit heard arguments in June 2012 on a district court ruling finding that an offer of judgment made prior to the filing

of a class certification motion did not render the plaintiff's claims moot, but it has held its decision in abeyance until the Supreme Court decides Genesis Healthcare. See Hrivnak v. NCO Portfolio Mgmt., No. 11-4132 (6th Cir. June 8, 2012); see also Hrivnak v. NCO Portfolio Mgmt. 2010 U.S. Dist. LEXIS 135426 (N.D. Ohio Dec. 22, 2010).

Though it involves a "collective action" under the Fair Labor Standards Act, not a Rule 23 class action, the Supreme Court's upcoming ruling this term in Genesis Healthcare will likely resolve this issue. In General Healthcare, the defendant made a Rule 68 offer of judgment to the plaintiff. Symczyk v. Genesis Healthcare Corp., 656 F.3d 189, 190 (3d Cir. 2011). The Third Circuit held that the offer of judgment did not destroy the ability of the named plaintiff to pursue certification of the collective action. Id. at 201. Oral arguments are set for December. See Genesis Healthcare Corp. v. Symczyk v., No. 11-1059 (U.S.).

Settlement With the Named Plaintiffs

Another way to resolve an individual named plaintiff's claim is to enter into a settlement agreement with only the named plaintiff. This often occurs after a motion for class certification is denied, or when a previously certified class is "decertified." Such an agreement does not impact the rights of the proposed class, but could effectively end that particular class action. Sometimes, however, the named plaintiff wants to settle his or her claim, but also wants to preserve the right to appeal any adverse class certification rulings. While it may seem on its face that a settling plaintiff no longer has a stake in the litigation, and thus no standing to pursue an appeal, that is not always the case.

In Espenscheid v. DirectSat USA LLC, the Seventh Circuit examined whether plaintiffs in a wage dispute case had standing to appeal the district court's denial of class certification even after they settled with defendant-employers or, as defendants claimed, the case was moot. See Espenscheid v. DirectSat USA LLC, 688 F.3d 872 (7th Cir. 2012).

Three employees brought a class action (and a collective action) alleging that their employer violated the Fair Labor Standards Act and parallel state laws. See id. at 874. The district court certified several classes but later decertified all of them. After the class was decertified the named plaintiffs settled with the defendants and the suits were dismissed. Id. The settlement reserved the plaintiffs' right to appeal decertification, which they exercised. Id.

The dispute before the Seventh Circuit turned on whether the named plaintiffs still had a "stake in the continuation of the suit," which they must have in order to have standing to appeal the denial of class certification. Id. (citing Premium Plus Partners LP v. Goldman, Sachs & Co., 648 F.3d 533, 534-38 (7th Cir. 2011); Pettrey v. Enterprise Title Agency Inc., 584 F.3d 701, 705-07 (6th Cir. 2009)). The plaintiffs argued that they did have a "stake" in the continuation of the suit because a provision of the settlement agreement provided for an "incentive reward" or "enhancement fee" for their risks, time, and services as class representatives but was conditioned on certification of the class. Id. at 874-75.

Therefore, the plaintiffs asserted they had a sufficient financial stake to appeal the denial of class certification. Id. at 875. The Seventh Circuit agreed and held that the prospect of an incentive award was "akin to a damages payment agreed in a settlement to be contingent on the outcome of appeal" and therefore sufficient to confer standing to appeal class decertification. Id.

This recent decision highlights a string of cases that assess whether a named plaintiff has standing to appeal the denial of class certification after they have settled. On the one hand are cases, like Espenscheid, which find that a plaintiff still has standing to challenge the denial of class certification after he or she has settled their claim. For example, in Richards v. Delta Air Lines, Inc., 453 F.3d 525, 529 (D.C. Cir. 2006), the court found that the requisite "personal stake" remained on appeal of the class certification motion when the named plaintiff reserved the claim of putative class members, because this was "sufficient for [the plaintiff] to retain a personal stake in the class claim, including the interest in shifting attorney fees and other litigation costs." See Richards, 453 F.3d at 529.

On the other hand, courts do not always find that this personal stake exists. For example, in Potter v. Norwest Mortg. Inc., 329 F.3d 608 (8th Cir. 2003), the settling plaintiff's appeal of the denial of class certification was held to be moot because the settling plaintiff had released "all" of his claims and he did not establish a "a clear interest in attorney fees." Id. at 614; see also Dugas v. Trans Union Corp. 99 F.3d 724, 728-29 (5th Cir. 1996) (When a class plaintiff lost his motion for certification and then settled "the action," the appeal was moot because the named plaintiff "voluntarily settled the entire action with Trans Union, consented to entry of judgment, and did not indicate that he was settling only his individual claims.").

The California Court of Appeals similarly held that the named plaintiff's appeal of an order denying class certification was moot. See Larner v. Los Angeles Doctors Hospital Associates LP, 86 Cal. Rptr. 3d 324 (Cal. App. Ct. 2008). In Larner, the court denied class certification, and the parties reached a voluntary settlement which reserved the right to appeal. Id. at 330. The court held that after settlement, the plaintiff had a "lack of continuing personal stake in this litigation," with the court noting that other than appeal, the named plaintiff did not reserve any right to shifting costs and attorneys fees. Id. at 335

These cases demonstrate that any offer of settlement must be carefully crafted with an eye toward whether a "personal stake" remains. Depending on the court, and the exact terms of the settlement, the settling plaintiff may or may not have standing to appeal adverse class certification rulings.

Conclusion

Parties should be aware that, at least until the Supreme Court issues its opinion in Genesis Healthcare, offers of judgment before class certification may or may not result in the dismissal of all class claims in that particular action. Once a court has denied a motion for class certification (or decertified a class), Espenscheid reminds parties that they must precisely construct any settlement agreement to ensure that they are actually permitting (or destroying) any right to appeal adverse class certification rulings.

--By Michael D. Leffel and Kate G. Henningsen, Foley & Lardner LLP

Michael Leffel is the chairman of Foley & Lardner's class action group and a partner in the firm's Madison, Wis., office. Kate Henningsen is an associate in the firm's Madison office.

The opinions expressed are those of the authors and do not necessarily reflect the views of the firm, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

[1] Prior to a class being certified (or after decertification of a class), Federal Rule of Civil Procedure 23 permits an individual named plaintiff to settle with the defendant without receiving approval from a court. Fed R. Civ. P. 23(e). Of course, neither an offer of judgment to, nor settlement with, only the named plaintiff impacts the ability of any putative absent class members to pursue their claims.