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A Strategy for Defeating Auto Industry Class Actions

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Law360, New York (June 02, 2014, 3:26 PM ET) -- Class actions continue to be an area of significant risk for many companies, particularly in the automotive industry with spikes in class actions often following closely on the heels of recall announcements. These class actions tend to involve large numbers of class members and can lead to astronomical damages figures, even when the case is settled on favorable terms. In addition to the financial burden, class actions can also place the company's brand and reputation at risk. With potential exposure so high, automakers should consider every available tool for managing class action liability. One such option may be making the class representative an offer of judgment under Federal Rule of Civil Procedure 68, thereby mooting the case.

Pre-Genesis: A Nation Divided

The law has been settled for quite some time regarding the rules post-certification: after the grant or denial of class certification, the mooting of the class representative's claims (through an offer of judgment or otherwise) does not moot the class action.[1] Instead, the class has a continued interest in pursuing the litigation or appealing the denial of certification. The rules regarding unaccepted offers of judgment and their impact pre-certification are less clear. Specifically, there is a split of authority as to whether an unaccepted offer of judgment can moot the class representative's individual claims and, if so, whether mooting the class representative's claims will moot the entire class action.

On the first issue (whether a Rule 68 offer can moot a class representative's individual claims), many jurisdictions have held that an unaccepted Rule 68 offer that would have given a plaintiff everything she asked for moots her claim, which should therefore be dismissed.[2] Others have adopted an approach with the same practical effect, entering judgment for the plaintiff providing all of the offered relief (even over the plaintiff's objection).[3] While there are a few circuits that have not squarely addressed the issue, the vast majority have allowed an unaccepted offer of judgment to moot a plaintiff's claims.

The big divide, at least prior to Genesis, was the second issue (whether an unaccepted offer of judgment would also moot the class action if done prior to the filing of the class certification motion). On this point, the Seventh Circuit adopted a bright line rule in Damasco v. Clearwire Corp., holding that a putative class action must be dismissed as moot if the defendant makes a Rule 68 offer to the plaintiff before she files a motion for class certification.[4] Under this approach, a class representative must file a motion for class certification at the same time as the class complaint in order to ensure that her case is not thwarted by a Rule 68 offer.

Other circuits followed the Third Circuit's approach in Weiss v. Regal Collections and adopted a more flexible rule, holding that so long as the plaintiff was not dilatory in filing her motion for class certification, the motion would "relate back" to the date the complaint was filed and therefore preclude dismissal based on an offer of judgment.[5] By contrast, in Lucero v. Bureau of Collection Recovery, the Tenth Circuit held that a Rule 68 offer to the class representative that only offered relief for her individual claims could not moot the class action, reasoning that "a nascent interest attached to the proposed class upon filing of a class complaint such that a rejected offer of judgment ... to a named plaintiff does not render the case moot under Article III."[6] And in those circuits that had not directly addressed this issue, district courts were divided.

The Supreme Court's Ruling in Genesis: Leaving Many Questions Unanswered

Many thought this split would be resolved by the Supreme Court in Genesis Healthcare Corp. v. Symczyk.[7] Instead, Genesis has introduced more uncertainty. In Genesis, which involved a collective action under the Fair Labor Standards Act, the court assumed without deciding that defendant's unaccepted offer mooted the plaintiff's individual claims and went on to hold that, at least in the FLSA collective action context, mooting individual claims pre-certification mooted the entire case. Because of the court's emphasis on the distinctions between FLSA collective actions and Rule 23 class actions, it has

raised questions as to whether its holding applies to class actions. Courts were left wondering whether, in the context of Rule 23 class actions (and assuming, as the court did, that an unaccepted offer of judgment moots the class representative's claim) Genesis mandates a finding that a pre-certification Rule 68 offer moots the entire case.

This uncertainty was further compounded by the Genesis dissent. Justice Elena Kagan, writing for Justices Ruth Bader Ginsburg, Stephen Breyer and Sonia Sotomayor, addressed the issue that the majority sidestepped, arguing that an unaccepted offer is a "legal nullity" and that it is "wrong, wrong, and wrong again" to find that an unaccepted offer would moot a plaintiff's claims.[8] The dissent casts doubt on whether an unaccepted Rule 68 offer can ever moot individual or class claims.

And the Split Goes On: Case Developments Post-Genesis

Not surprisingly, there continues to be great uncertainty in the lower courts. It appears, however, that the view expressed by Justice Kagan in dissent may be gaining traction. Citing the Genesis dissent, a number of district courts have expressed skepticism whether an unaccepted offer can moot claims, but have held that they are nonetheless bound by circuit precedent. This issue is currently working its way up through the circuits.

In Diaz v. First American Home Buyers Protection, the Ninth Circuit adopted Kagan's view, holding that an unaccepted offer of judgment, even if offers the plaintiff everything she seeks, does not moot the plaintiff's individual claims (and presumably would not moot the putative class action either).[9] The First Circuit, which had not previously decided the impact of an unaccepted offer of judgment, may soon address the issue in Yaakov v. ACT Inc. There, the District of Massachusetts, in the absence of controlling authority from the First Circuit, followed the Genesis dissent, but granted defendant's motion to certify the issue for interlocutory appeal. The Seventh Circuit has acknowledged that, in light of the Genesis dissent, "there are reasons to question our approach to the problem."[10] However, at least for now, the law in the Seventh Circuit continues to be that an offer of judgment made before a class certification motion is filed will moot the case.[11]

It remains to be seen whether other circuits will follow the lead of the Ninth Circuit on this issue, but even in the Ninth Circuit, there may still be an opportunity for defendants to moot class actions. In Lumen v. Theismann, the Eastern District of California opened the door for such a possibility. There, in response to presuit CLRA notification letters, the defendant gave the plaintiffs full refunds as requested. As a result, this was not the situation feared by Justice Kagan where the plaintiff's claim was mooted by an unaccepted offer that did not actually provide anything to the plaintiff; nor was the defendant forcing a remedy on the plaintiff that had not been sought; nor did the defendant's actions suggest a strategy of selectively "picking off" class representatives. The Lumen court held that the refunds mooted the class representatives' individual claims and also declined to apply the "relation back" doctrine to save the class claims, dismissing the entire suit. Whether this approach takes hold may depend on the outcome of an appeal in another case: Chen v. Allstate Insurance.

Prior to Genesis, the Ninth Circuit applied the relation back rule in Pitts v. Terrible Herbst, holding that even if the class representative's claims are mooted before a certification motion is filed, the motion would relate back to the date of the complaint preventing the class claims from being mooted.[12] In Chen, the Northern District of California questioned whether Pitts was overruled by Genesis and certified the issue for interlocutory appeal. The Ninth Circuit granted the petition for permission to appeal, and the appeal is still pending. Thus, under Lumen, even if the Ninth Circuit refuses to allow unaccepted offers of judgment to moot claims, it may still be possible to moot a class representative's claim through a refund or injunctive relief offered in response to a presuit demand letter; and, if Pitts was effectively overruled by Genesis, the entire class action should therefore be dismissed as moot.

Not all, or even a majority of, jurisdictions have adopted the Genesis dissent, but, even in these jurisdictions, there remains significant uncertainty regarding application of the Genesis majority opinion to class actions. Defendants frequently argue that the court's rejection of the "relation back" doctrine in the FLSA collective action context calls for rejection of that doctrine in class actions as well — in other words, that courts should follow the Seventh Circuit's Damasco rule (i.e. any offer of judgment made before the class motion is filed will moot the case) instead of the Third Circuit's more flexible Weiss rule (i.e., an offer of judgment made pre-certification will only moot class claims if there was undue delay). Some district

courts have declined to apply Genesis to class actions, holding that Genesis is limited to collective actions and therefore mooting the class representative's claims will not necessarily moot the class action.[13] However, at least some district courts have agreed with this argument.

For example, in Masters v. Wells Fargo Bank South Central, the Western District of Texas rejected the Genesis dissent in holding that an unaccepted offer can moot individual claims, and also held that under the Genesis majority the class claims were mooted as well. In Weitzner v. Sanofi Pasteur Inc., the Eastern District of Pennsylvania continued to apply the Third Circuit's relation-back/undue delay rule announced in Weiss, but certified for interlocutory appeal the issue of whether Weiss remains good law in light of Genesis's rejection of the cases on which Weiss based its holding. Courts in the Southern District of New York, the Eastern District of Michigan, and the Southern District of Florida have also recently held that under Genesis, the mooting of the class representative's claim moots the entire class case.

Practical Implications Post-Genesis

Rather than clarifying the law in this area, Genesis has introduced additional uncertainty. Over the next year, as various appeals are sorted out, there is likely to be more clarity. Until then, whether a Rule 68 offer remains a viable strategy for defendants will depend greatly on the jurisdiction and, in some cases, the specific judge assigned. Plaintiffs, fearful that courts may find their entire case mooted by a Rule 68 offer, may rush to file "placeholder" class certification motions. For defendants in those courts following the Damasco rule, a Rule 68 offer made before a class certification motion is filed will still dismiss the entire action and defendants should strongly consider making an offer of judgment as soon as they are served with the complaint.

In contrast, defendants are better served in other circuits by waiting until they can make a reasonable argument that a class representative has been dilatory in moving for class certification, since making a premature Rule 68 offer is likely to cause the plaintiff to quickly move for class certification and take away any opportunity to make an effective Rule 68 offer. And this strategy may yet have legs even in those jurisdictions that have adopted Justice Kagan's reasoning in the Genesis dissent. Following the approach in Lumen, defendants may still be able to moot class claims by giving plaintiffs what they seek in in presuit demand letters. It remains to be seen whether this approach will be applied by other courts, but it is another option that defendants may want to include in their arsenal for defending against class actions.

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[1] See Sosna v. Iowa, 419 U.S. 393 (1975); Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326 (1980); U.S. Parole Comm'n v. Geraghty, 445 U.S. 388 (1980).

[2] See Weiss v. Regal Collections, 385 F.3d 337 (3d Cir. 2004); Warren v. Sessoms & Rogers, P.A., 676 F.3d 365 (4th Cir. 2012); Sandoz v. Cingular Wireless LLC, 553 F.3d 913 (5th Cir. 2008); Damasco v. Clearwire Corp., 662 F.3d 891 (7th Cir. 2011).

[3] See McCauley v. Trans Union, L.L.C., 402 F.3d 340 (2d Cir. 2005); O'Brien v. Ed Donnelly Enters., Inc., 575 F.3d 567 (6th Cir. 2009); Hartis v. Chicago Title Ins. Co., 694 F.3d 935 (8th Cir. 2012).

[4] 662 F.3d 891, 895-96 (7th Cir. 2011).

[5] Weiss v. Regal Collections, 385 F.3d 337 (3d Cir. 2004); Sandoz v. Cingular Wireless LLC, 553 F.3d 913 (5th Cir. 2008); Pitts v. Terrible Herbst, Inc., 653 F.3d 1081 (9th Cir. 2011).

[6] Lucero v. Bureau of Collection Recovery, Inc., 639 F.3d 1239, 1249 (10th Cir. 2011)

[7] 133 S. Ct. 1523, 185 L. Ed. 2d 636 (2013).

[8] Id. at 1533.

[9] Diaz v. First Am. Home Buyers Prot. Corp., 732 F.3d 948 (9th Cir. 2013)

[10] Scott v. Westlake Servs. LLC, 740 F.3d 1124, 1126 (7th Cir. 2014) (citing Genesis, 133 S.Ct. at 1533-34 (Kagan, J., dissenting)).

[11] McMahon v. LVNV Funding, LLC, 744 F.3d 1010, 1018 (7th Cir. 2014) (noting that the Damasco rule is consistent with Genesis, but that they need not resolve the split in authority in this case).

[12] 653 F.3d 1081 (9th Cir. 2011).

[13] See, e.g., Kensington Physical Therapy, Inc. v. Jackson Therapy Partners, LLC, 974 F. Supp. 2d 856 (D. Md. 2013).