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Seventh Circuit Rules Unaccepted Offer of Judgment Cannot Moot TCPA Class Action

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Whether the use of an offer of judgment under Rule 68 of the Federal Rules of Civil Procedure to "pick off" a named plaintiff can moot a purported class action is an issue that has divided the various circuit courts of appeal and is set to be decided by the U.S. Supreme Court in its next term. With an eye toward that upcoming decision, the influential Seventh Circuit Court of Appeals based in Chicago last week overturned its own precedent and ruled that an unaccepted Rule 68 offer of judgment cannot moot a proposed class action under the Telephone Consumer Protection Act (TCPA). See *Chapman v. First Index, Inc.*, Nos. 14-2773 & 14-2775 (7th Cir. Aug. 6, 2015). The *Chapman* decision raises more questions than it answers, however, and until the Supreme Court speaks, a Rule 68 offer of judgment remains a potentially lethal weapon for companies targeted as defendants in TCPA and other consumer class actions to use to cut off a case at its early stages.

Rule 68 Offers of Judgment

Rule 68 provides that "[a]t least 14 days before the date set for trial, a party defending against a claim may serve on an opposing party an offer to allow judgment on specified terms, with the cost then accrued." Fed. R. Civ. P. 68(a). If the offer is not accepted, the offeree risks being liable for all costs incurred after the date of the offer unless it obtains a judgment more favorable than the unaccepted offer. Fed. R. Civ. P. 68(d).

In the context of class action litigation, defendants have utilized Rule 68 not just as a cost-shifting device, but as a tool for picking off a representative plaintiff. Especially in consumer class actions, the damages and other relief sought by an individual plaintiff may be low enough that an economically rational defendant will attempt to "pick off" that representative by offering the plaintiff more than he or she could possibly recover if the case were litigated to conclusion. The argument goes that by doing so, the defendant "moots" the named plaintiff's case and thus deprives the court of jurisdiction to hear the remainder of the case. No more claim, no more case.

Under the TCPA, for instance, a successful plaintiff can recover either actual damages or statutory damages ranging from $500 to $1,500 per violation, costs and injunctive relief (the TCPA does not provide for recovery of attorney's fees). Say a representative plaintiff claims that she individually received three junk faxes or robocalls in violation of the TCPA. If prior to class certification, the defendant company makes a Rule 68 offer of judgment for $5,000 (3 violations x $1,500 and an extra $500 for good measure) plus costs and whatever injunctive relief the plaintiff seeks, then the plaintiff will receive more than she could possibly recover by further litigation. The argument is that regardless of whether the plaintiff accepts the offer, her claims have been mooted, and there is

nothing further for the court to consider as to her. And because no class has been certified, there are no claims of class members to consider, either. The case must be dismissed.

The *Chapman* Decision

In *Chapman*, the plaintiff brought a purported class action arising from receipt of unwanted junk faxes. He alleged that he personally received two of the faxes. After the plaintiff moved for class certification, the defendant made a Rule 68 offer of judgment of $3,002: $1,500 for each of the two faxes the plaintiff allegedly received plus $2 for paper and toner. The defendant also agreed to payment of costs and an injunction against sending further faxes. The offer said it would expire 14 days after the trial court ruled on class certification. The plaintiff never responded to the offer. Upon motion by the defendant, the trial court dismissed plaintiff's personal claim as moot. In other words, the court found that it no longer had jurisdiction over the suit.

Although it ultimately upheld dismissal of the case on other grounds, the Seventh Circuit disagreed that the unaccepted offer of judgment mooted the plaintiff's case, overruling a line of its own previous cases. The appeals court found somewhat cryptically that because "relief remains possible," the case was not moot, although it is unclear what further monetary or equitable relief the plaintiff could have achieved. What is evident is that the decision was driven by the court's desire "to clean up the law of this circuit promptly" rather than wait for the outcome of the Supreme Court's *Gomez* case, and raises more questions than it answers. For instance, would it make a difference if the offer of judgment is made prior to any motion for class certification? Would it matter if the trial court actually entered judgment for the plaintiff in accordance with the offer rather than a zero judgment, then dismissed the remainder of the case (as seems to be the law in other circuits)? Would the defendant have been better served by arguing that under no circumstances could the plaintiff have enjoyed a better outcome than the Rule 68 offer provided? The rather simplistic *Chapman* decision does not address any of these issues, and it remains to be seen how lower courts will deal with them. Interestingly, while rejecting Rule 68 as a vehicle to moot a plaintiff's claim, the *Chapman* court does suggest that an unaccepted Rule 68 offer might be raised as an affirmative defense such as estoppel or waiver.

The Continued Vitality of Rule 68 Offers in Class Actions

While *Chapman* clouds the waters of using an unaccepted Rule 68 offer to dispose of a potential class action by mooting the lead plaintiff's claims, it by no means provides the final word. Subject to the anticipated decision by the Supreme Court in *Gomez* in 2016, defendants facing purported TCPA and other consumer class actions should still consider early Rule 68 "pick-off" offers of judgment as part of their defense arsenal. It is critical that the offer be structured and made properly. It should made before any class certification decision and, preferably, before any attempt to certify a class. It should not have a definite time limit. It should unquestionably provide the plaintiff as much if not more monetary and/or injunctive relief than he could get through litigation. The defendant also should ask the trial court to actually enter the judgment before dismissing the remainder of the plaintiff's case. And even if a court is unwilling to dismiss a case as moot based on a Rule 68 offer, a defendant should still look to assert it as an affirmative defense and a possible basis for summary judgment.

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