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*Privacy*

## 7th Circuit Backs Off on Mootness Issue In Ruling Likely to Muddle SCOTUS Review

BY PERRY COOPER

A rejected offer of judgment now has the same effect in the Seventh Circuit that it does in other federal appeals courts that have recently considered its implications for class actions: it does not moot the plaintiffs' claims (*Chapman v. First Index Inc.*, 2015 BL 252784, 7th Cir., No. 14-2773, 8/6/15).

The court also indicated that such an offer shouldn't cut off the class action mechanism, defense attorney Mark S. Eisen told Bloomberg BNA in a Aug. 7 e-mail.

''This appears solely to be the [Seventh Circuit's] attempt at hedging any future potential Supreme Court flak, given that *Damasco* started a nationwide trend toward filing placeholder class certification motions with every class action complaint,'' Eisen, who specializes in class action and privacy law at Sheppard, Mullin, Richter & Hampton LLP in Chicago, said.

The court backed away from its prior position in *Damasco v. Clearwire Corp.*, 662 F.3d 891 (7th Cir. 2011) (12 CLASS 1083, 11/25/11), where it held that a complete offer of judgment before a class certification motion moots the entire class action.

But that decision ''was a bit of an outlier'' because ''whether [an offer of judgment] would moot the putative class action depended on whether a motion for class certification was filed,'' class defense attorney Archis A. Parasharami, partner at Mayer Brown in Washington, told Bloomberg BNA in an Aug. 7 e-mail.

''Judges and practitioners alike have largely criticized *Damasco*,'' he said.

**Adds to Unanimity.** The U.S. Court of Appeals for the Seventh Circuit's Aug. 6 ruling, which came in a purported class action over unsolicited faxes, falls in line with other courts that have considered the issue since a 2013 U.S. Supreme Court dissent by Justice Elena Kagan in a Fair Labor Standards Act case.

There, Kagan advocated for the position that an unaccepted offer of judgment can't moot a case, in *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523 (2013) (14 CLASS 477, 4/26/13).

Judge Frank H. Easterbrook, writing for the Seventh Circuit, acknowledged that the Supreme Court is poised to consider the issue in a case that will be argued Oct. 14, *Gomez v. Campbell-Ewald Co.*, U.S. No. 14-857, *oral argument* 10/14/15.

But, ''We think it best to clean up the law of this circuit promptly, rather than require Chapman and others in his position to wait another year for the Supreme Court's decision,'' the Seventh Circuit said.

Eisen noted that the opinion was ''apparently circulated for en banc review, but the judges all decided against it, which allowed this panel to overrule the prior panel'' in *Damasco*.

That move ''presumably saved some time to get this out prior to the *Campbell-Ewald* oral argument,'' he said.

**Posner's Shift on Issue.** ''Courts of appeals often will wait for a pending Supreme Court decision on an issue before them, but not always,'' Scott L. Nelson, an attorney with the pro-consumer Public Citizen Litigation Group in Washington, told Bloomberg BNA in an Aug. 7 e-mail.

''The opinion here is interesting in that it explicitly says why it doesn't do so: The court wants to 'clean up' the law without waiting for a decision from above,'' he said. ''The result is that its corrected view is now part of the conversation.''

Nelson also noted that the composition of the panel is significant ''not only its authorship but that it was joined by Judge Posner.''

Judge Richard A. Posner ''earlier pioneered the now-disavowed view that a rejected offer of judgment may moot a plaintiff's claim'' in decisions like *Damasco*, Nelson wrote in a post on Public Citizen's Consumer Law & Policy Blog.

**Rule 68 as Affirmative Defense.** Eisen said the court ''reiterated the underlying theme of *Damasco*—that one should not be able to continue litigating after he or she has won.''

''As the Court eloquently put it, district courts are not to be treated like 'subsidized dispute-resolution services' when a full and complete offer 'means that there's no need for judicial assistance,' '' he said.

The court said it viewed Rule 68 as an affirmative defense, ''thus separating it from how it had been viewed—as a jurisdictional bar,'' Eisen said.

''The Court does not formally opine on how Rule 68 would be used as an affirmative defense, but indicates that it could still be used 'in the nature of an estoppel or a waiver,' '' he said.

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**Junk Faxes.** Arnold Chapman brought a putative class action in 2009, alleging First Index Inc. violated the Telephone Consumer Protection Act, 47 U.S.C. § 227, by sending junk faxes without the recipients' consent. The statute authorizes damages of $500 per fax, which can be tripled if the violation is willful.

The district court declined twice to certify the class.

While Chapman's second class certification motion was pending, First Index made him an offer of judgment under Fed. R. Civ. P. 68: $3,002, an injunction and costs.

Chapman never replied to the offer, which lapsed after 14 days.

The district court dismissed his personal claim as moot.

But a ''case becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party,'' the Seventh Circuit said. ''By that standard, Chapman's case is not moot.''

The court acknowledged that its earlier decisions and those from other courts have mooted claims in this situation. But it reversed course in light of Kagan's *Genesis Healthcare* dissent.

''None of the other Justices in *Genesis Healthcare* disagreed with Justice Kagan's analysis,'' the court said. ''Instead the majority thought that the issue had not been presented for decision.''

Judge Daniel A. Manion also served on the panel.

Phillip A. Bock, Tod A. Lewis, Robert M. Hatch and James Michael Smith of Bock & Hatch in Chicago; and Brian J. Wanca of Anderson & Wanca in Rolling Meadows, Ill., represented Chapman.

Molly Arranz, Albert Bower, Michael L. Resis and Eric Samore of Smithamundsen LLC in Chicago represented First Index.

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*The opinion is at http://www.bloomberglaw.com/public/document/ARNOLD_CHAPMAN_Plaintiff_Appellant_and_ALLAMERICANPAINTING_INC_Pu.*



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