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New York ZocDoc Treats Doctor With Some Rule 68 Medicine

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We have discussed several TCPA mootness decisions, mainly those coming out of the federal courts in Florida. Those cases hold that plaintiffs should not file "placeholder" class certification motions solely for the purpose of thwarting an attempted Rule 68 offer of judgment "pick-off." We now turn our attention to the Southern District of New York, which recently found a TCPA plaintiff's claim mooted by an offer of judgment made *after* the plaintiff's "placeholder" motion for class certification was filed and *before* that motion was ruled upon.

The case is *Geismann v. ZocDoc, Inc.*, No. 14 Civ. 7009 (LLS), 2014 U.S. Dist. LEXIS 143272 (S.D.N.Y. Sept. 26, 2014). Plaintiff Radha Geismann, M.D., P.C., a Missouri based doctor's office, **brought a putative TCPA class action in Missouri state court against ZocDoc, Inc.** (ZocDoc), a New York-based online medical scheduling service that (among other things) **provides patients with information about medical practices** and an individual doctor's availability for appointments.

Dr. Geismann simultaneously filed her complaint and placeholder motion for class certification on January 10, 2014. She alleged that she received two unsolicited fax advertisements from ZocDoc that did not contain an opt-out notice. The case was removed to federal court in Missouri and ZocDoc immediately moved to dismiss. ZocDoc alternatively moved to have the matter transferred to New York, arguing that (i) its executives are located in New York, and (ii) Intellicomm – its fax service provider – is located in King of Prussia, Pennsylvania and within the subpoena power of the Southern District of New York (but not the Eastern District of Missouri). On August 26, 2014, the Eastern District Court of Missouri found that transfer was appropriate under 28 U.S.C. § 1404(a) because, among other things, the only nonparty, nonexpert witnesses (defendants' executives and personnel) live within the Southern District of New York or are subject to its subpoena power. The motion to dismiss was denied as – you guessed it – moot.

Once in New York, ZocDoc renewed its motion to dismiss. The motion principally asserted that a Rule 68 offer of judgment mooted the named plaintiff's claims and by doing so required dismissal of the putative class action. On March 27, 2014, ZocDoc had made a Rule 68 offer of $6,000 plus reasonable attorneys' fees; ZocDoc also offered to refrain from sending advertisement faxes to Dr. Geismann's fax number. Geismann, predictably, rejected the offer.

In its motion to dismiss, ZocDoc was quick to point out that "[Dr. Geismann] apparently supplements the income of its [single doctor] medical practice by being a serial plaintiff in this District and across

the country." ZocDoc also anticipated that Geismann would argue that her filing of a class certification shortly after the offer of settlement "staves off offers of judgment." ZocDoc also maintained that while "[s]ome federal courts have held that a plaintiff can avoid mooting simply by ***moving*** for class certification," those "decisions are not supported by the relevant Supreme Court case law or common sense."

Judge Louis. L. Stanton agreed. On September 26, 2014, he granted ZocDoc's motion to dismiss. He gave several reasons for doing so.

First, given that the monetary damages Geismann can recover individually under the TCPA for two unsolicited faxes is $1,000, Judge Stanton found ZocDoc's offer of judgment of $6,000 (or "twice the trebled amount") to be more than satisfactory.

Second, Judge Stanton found Dr. Geismann's "rejection" of that offer to be "immaterial" because "the offer makes available to her all of the relief to which she would be entitled if she won her case."

Third, Judge Stanton relied on the decisions in *Doyle v. Midland Credit Mgt., Inc.*, 722 F.3d 78 (2d Cir. 2013) and *Franco v. Allied Interstate LLC*, No. 13 Civ. 4053 (KBF), 2014 U.S. Dist. LEXIS 47077 (S.D.N.Y. Apr. 2, 2014) to support his decision and rationale.

In *Doyle*, the plaintiff filed suit under the Fair Debt Collection Practices Act (FDCPA) because a debt collector called his cell phone approximately twenty-eight times. The Second Circuit held that the plaintiff's "refusal to settle the case in return for Midland's offer of $1,011 (plus costs, disbursements, and attorney's fees), notwithstanding Doyle's acknowledgement that he could win no more, was sufficient ground to dismiss this case for lack of subject matter jurisdiction."

The *Franco* court likewise dismissed the case as moot where the individual class plaintiff refused a full offer of relief in connection with a FDCPA class action. In doing so, the *Franco* court looked to the Supreme Court's decision in *Genesis Healthcare Corp.*, which discussed (without deciding) whether an unaccepted Rule 68 offer in a FLSA collective action that fully satisfies a plaintiff's individual claim is sufficient to render the case moot. (A discussion of*Genesis Healthcare* can be found *here*.)

The *Franco* court picked up on the Supreme Court's distinction between "inherently transitory" cases and statutory damages cases: "While settlement may have the collateral effect of foreclosing unjoined claimants from having their rights vindicated in respondent's suit, such putative plaintiffs remain free to vindicate their rights in their own suits. They are no less able to have their claims settled or adjudicated following respondent's suit than if her suit had never been filed at all."

Judge Stanton followed suit in *Geismann*. He concluded that "[t]he dismissal of Geismann's individual claim in no way impairs the ability of other actual or potential members of the proper class to seek appropriate recompense for any illegal calls they may have received, in proceedings other than this action." As a result, Geismann's case was dismissed "for lack of jurisdiction since there remains no case or controversy." The court's order granted Dr. Geismann relief as offered in ZocDoc's Rule 68 offer of judgment.

Dr. Geismann has appealed the decision to the Second Circuit. We will monitor the appeal and report on any important developments.

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