District of Connecticut Blocks Pick-Off Attempt (Twice)

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In *Mey v. Frontier Communs. Corp*., No. 3:13-1191-MPS, 2014 U.S. Dist. LEXIS 161675 (D. Conn. Nov. 18, 2014), Plaintiff Diana Mey alleged that she received two calls to her cell phone from Frontier's automatic telephone dialing system. *Id*. at *2-3. Mey filed a complaint against Frontier and simultaneously moved for class certification. *Id*. at *4-5. Two months later, Frontier wrote to Mey and offered to settle her claims with a payment of $6,400 plus taxable costs and entry of prospective injunctive relief. Mey declined. *Id*. Frontier then moved to dismiss, arguing that the court lacked subject matter jurisdiction because Frontier's offer had "mooted Ms. Mey's individual claim and all potential class claims." *Id*.

The court denied that motion. It began by drawing a distinction between an "offer to settle" and an "offer of judgment," and concluded that the former will not moot a plaintiff's claims. *Id*. at *2, 7-11. Frontier's motion had relied upon *Doyle v. Midland Credit Management, Inc*., 722 F.3d 78 (2d Cir. 2013), which held that an unaccepted offer that fully satisfies a plaintiff's claim will still render a claim moot even if it does not strictly comply with Rule 68. (In *Doyle*, the defendant had made an oral offer of judgment rather than a written one.) Judge Shea looked instead to the Second Circuit's subsequent decision in *Cabala v. Crowley*, 736 F.3d 226 (2d Cir. 2013). According to Judge Shea, the "relaxing of the formalities of Rule 68 did not mean that a defendant could moot a case without offering to take judgment, only that mootness did not turn on compliance with the technical requirements of the rule." 2013 U.S. Dist. LEXIS 142527, at *8. In other words, the District Court reasoned "[t]o hold that an offer of judgment that fails to meet the technical procedural requirements of Rule 68 is nevertheless an offer of judgment is not equivalent to holding that an offer of an informal settlement without judgment is equivalent to a Rule 68 offer of judgment." *Id*. Applying *Cabala* to the case before him, Judge Shea ruled that Frontier's offer letter—which did not use the term "judgment," did not refer to Rule 68, and instead referred to a "settlement offer"—did not moot Mey's claims.*Id*. at *9-10. He also found that the Supreme Court's decision in *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523 (2013) would not require dismissal "even if her individual claims were moot." *Id.* at *9-10. He reasoned that "*Genesis* . . . does not govern cases brought under Rule 23" and instead addresses whether, under the FLSA, "conditional certification" creates a class "with an independent legal status."*Id*. at *12-13.

Frontier then moved for reconsideration, arguing the "the Court inadvertently overlooked a docket entry showing that Frontier did extend an offer of judgment pursuant to Rule 68 to Ms. Mey." Frontier conceded that "the Second Circuit decided *Cabala v. Crowley*, 736 F.3d 226 (2d Cir. 2013) [which] made clear that a settlement offer that does not provide for an entry of judgment is not equivalent to a

Rule 68 offer of judgment," but explained *Cabala* was handed-down *after* Frontier had filed its motion to dismiss (which is why Frontier subsequently made a formal Rule 68 offer of judgment). Frontier also contended that the District Court erroneously relied upon the relation back doctrine "in concluding that the class claims were not moot" and again asked for the entire action to be dismissed.

Judge Shea granted the motion in part, vacating the portion of the ruling that discusses the individual claims and conceding he overlooked the formal offer of judgment on the docket. But he found that the Mey's "claims on behalf of a proposed class—which she has pressed from the outset of this litigation by filing a motion for class certification with her original complaint—still present a live controversy." He gave several reasons.

First, Judge Shea reiterated his view that *Genesis Healthcare* "does not govern cases brought under Rule 23." This conclusion, however, ignores the Supreme Court's holding that once the named plaintiff's individual claim became moot, the entire action was moot and no longer justiciable under Article III because the plaintiff "has no personal interest in representing putative, unnamed claims, nor any other interest that would preserve her suit from mootness."

Second, Judge Shea explained that neither the Supreme Court nor the Second Circuit has addressed whether a Rule 68 offer made before a class is certified moots the entire action; according to Judge Shea, other District Courts in the Second Circuit are split on the issue.

Third, Judge Shea noted that several courts have created an exception for cases in which class certification had been pursued diligently. These cases hold that an offer of judgment made after a motion for class certification relates back to the filing of the complaint. (Judge Shea pointed out that Mey filed her motion for certification the same day she filed the complaint and three months prior to Frontier's offer of judgment.)

Finally, Judge Shea also distinguished *Genesis Healthcare* on the ground that, unlike the plaintiff in that case, Mey sought injunctive relief as well as statutory damages. He reasoned as follows:

If a corporate defendant was allowed to forestall a class-wide injunction that would require changes in nationwide company practices by "picking off" a named plaintiff with an offer to cease its conduct only with respect to her, then not only the policies of Rule 23 but the policies of the underlying statutes creating the legal rights at issue—here the TCPA—would go unredressed. Because there would be little incentive for any particular individual to incur the time and expense of going to court to seek an injunction against the annoyance of a few phone calls, there would likewise be little incentive for defendants to change company-wide practices that might violate those statutes. The practices at issue would thus "evade review" just as surely as if their duration were too short to last for the course of a litigation.

This last conclusion seems to reveal that Judge Shea's decision has more to do with policy concerns and his view of the "pick-off" maneuver in general than anything else.

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