Published on *The National Law Review* https://natlawreview.com

First Circuit Limits Defense Strategy of "Picking off" Named Plaintiff in Putative Class Action by Offer of Judgment

Article By:

Kara Thorvaldsen

In *Bais Yaakov of Spring Valley v. Act, Inc.*, 2015 U.S. App. (1st Cir. Aug. 21, 2015), the First Circuit held that a rejected and withdrawn offer of settlement of a named plaintiff's individual claims in a putative class action made before the plaintiff moved for class certification did not deprive the court of subject-matter jurisdiction. This case does not, however, hold that all pickoff attempts are *per se* invalid.

Background

In this putative class action brought pursuant to the Telephone Consumer Protection Act (TCPA), the named plaintiff was a private school that had allegedly received unsolicited communications by fax that did not contain required legal disclosures.

In the course of litigation, the parties agreed to a deadline for filing motions for class certification. As the deadline approached, the defendant made a Rule 68 offer of judgment in an amount representing the maximum that it believed the named plaintiff could hope to recover, along with an offer to be enjoined from sending further faxes to the plaintiff, and to pay plaintiff's costs and fees as determined by the court. Four days later, the plaintiff moved for class certification. Shortly thereafter, the 14-day period allowed under Rule 68 for a party to accept the offer of judgment elapsed; as plaintiff had not responded, the offer was deemed withdrawn under the language of Rule 68.

The defendant then moved to dismiss the case, arguing that the named plaintiff's claim was rendered moot because when the plaintiff was offered all relief that it could possibly expect to obtain from the court, there was no longer a case or controversy and the court was divested of subject-matter jurisdiction. The trial court denied the motion and the question was certified to the First Circuit on an interlocutory appeal.

Decision

Although the First Circuit affirmed the denial of the motion to dismiss, it did not follow the trial court's analysis. The trial court had relied on a Supreme Court case, *Deposit Guaranty National Bank v. Roper*, 445 U.S. 326, 340, 100 S. Ct. 1166, 63 L. Ed. 2d 427 (1980). In *Roper,* the Supreme Court had held that full payment of a plaintiff's individual claims after a motion for class certification had

been denied did not moot the case because the plaintiffs were entitled to appeal the denial of certification and therefore retained an interest in the outcome. The district court had noted that since the TCPA did not contain a fee-shifting provision and the Rule 68 offer had only offered to pay plaintiff's costs and fees if the court awarded them, the plaintiff still had an economic stake in the action because it had an interest in sharing the costs of attorneys' fees with other potential class members.

The First Circuit was critical of this analysis, noting that *Roper*'s continuing vitality had been called into question by *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523, 1532, n.5, 185 L. Ed. 2d 636 (2013). Its analysis began with its own precedent of *Cruz v. Farquharson*, 252 F.3d 530 (1st Cir. 2001), which held that a putative class action must be dismissed as moot if no decision on class certification has occurred by the time that the individual claims of named plaintiffs have been fully resolved. Accordingly, the Court held that the necessary inquiry was whether the Rule 68 offer of judgment had in fact "fully resolved" the named plaintiff's claims. Noting that all five circuit courts that had considered the question had rejected it, applying varying rationales, the Court held that the offer did not moot the plaintiff's individual claim and therefore the motion to dismiss was properly denied.

For its own part, the First Circuit focused on the fact that the Rule 68 offer in the case before it had been deemed withdrawn pursuant to Fed. R.Civ. P. 68(b). A "withdrawn" offer does not provide any relief, according to the Court's reasoning. Moreover, it noted that the plaintiff and defendants disagreed as to the maximum amount of relief to which the plaintiff could be entitled; specifically, whether the plaintiff could be entitled to a statutory damage award only for each volatile communication, or as to each violation in each such communication. Although that might be a question of law, the Court held that such a question would be properly resolved on a motion to dismiss for failure to state a claim or for judgment on the pleadings, not on a motion to dismiss for lack of subject-matter jurisdiction on mootness grounds.

The First Circuit held that an unaccepted and withdrawn Rule 68 offer did not moot the litigation because the defendant had not demonstrated that the plaintiff had received all relief that it had sought in the action. It left the broader question of whether the strategy could ever work unresolved.

Takeaways

This decision does not hold that all "pick off" attempts will be held ineffective. In fact, the Court offered several ideas of how actual mootness might be achieved, such as by allowing a default to enter, admitting liability or actually tendering funds in full relief of the plaintiff's individual claim. However, as the Court noted, the validity of this defense strategy in the class action context may be decided by the Supreme Court in the upcoming term in an appeal from the Ninth Circuit. Given that the "pick off" strategy has not gained significant traction in the appeals courts, and in light of previous Supreme Court decisions, it appears unlikely that this strategy will be given the Supreme Court's imprimatur.

National Law Review, Volume V, Number 266