

Moot Point: Ninth Circuit Rules Rejected Offer of Judgment to Class Representative Does Not Moot Class Claims

August 19, 2011

In its recent decision in *Pitts v. Terrible Herbst, Inc.*, 2011 WL 3449437 (9th Cir. Aug. 9, 2011), the Ninth Circuit faced the issue of whether a rejected offer of judgment for the full amount of a putative class representative's individual claim moots a class action complaint where the offer precedes the filing of a motion for class certification. The Court held the rejection does not moot the class claims. The Ninth Circuit's decision creates the potential for a future circuit split on the issue and possible involvement by the Supreme Court.

What Happened

In April 2009, the named plaintiff filed a class action complaint in Nevada against his employer alleging causes of action for violation of the Fair Labor Standards Act, violation of Nevada state labor laws, and breach of contract. During the discovery period, Terrible made the named plaintiff an offer of judgment pursuant to Federal Rule of Civil Procedure 68. The offer of judgment amounted to \$900.00, plus costs, and reasonable attorney's fees, despite the named plaintiff's individual claim totaling \$88.00 in damages. Because Terrible's offer fully compensated the named plaintiff for his individual monetary claim, Terrible filed a motion to dismiss the claim for lack of subject matter jurisdiction. Specifically, Terrible argued that its offer of judgment rendered the entire case moot. The district court held that a Rule 68 offer of judgment does not moot a putative class action so long as the named plaintiff can still file a timely motion for class certification. Nevertheless, the district court then held that Terrible's offer mooted the action because the named plaintiff failed to timely seek class certification. The named plaintiff appealed the ruling.

The Ninth Circuit held that where a defendant makes an unaccepted Rule 68 offer of judgment that fully satisfies a named plaintiff's individual claim before the named plaintiff files a motion for class certification, the offer does not moot the case so long as the named plaintiff may still file a timely motion for class certification. Once filed, a timely motion for class certification relates back to the time of the filing of the complaint. The Court further held that the district court abused its discretion in finding that the named plaintiff could no longer file a timely motion of class certification.



In making its decision, the Court was guided by the following principles: (1) if the district court had certified a class, mooting the putative class representative's claim would not moot the class action, (2) if the district court had denied class certification, mooting the putative class representative's claim would not necessarily moot the class action due to the right to appeal, and (3) even if the district court had not yet addressed the class certification issue, mooting the putative class representative's claims would not necessarily moot the class action due to the transitory nature of certain claims. The Court held that where, as in *Pitts*, a defendant seeks to "buy off" the small individual claims of the named plaintiffs, the analogous claims of the class—though not *inherently* transitory—become no less transitory than inherently transitory claims. Thus, although the named plaintiff's claims were not "inherently transitory" as a result of being time sensitive, they were "acutely susceptible to mootness" in light of the defendant's tactic of "picking off" lead plaintiffs with a Rule 68 offer to avoid a class action. The Court reasoned that a rule allowing a class action to become moot simply because the defendant has sought to "buy off" the individual private claims of the named plaintiffs before the named plaintiffs have a chance to file a motion for class certification would contravene Rule 23's core concern: the aggregation of similar, small, but otherwise doomed claims.

What It Means

The Court's decision in *Pitts* limits a class action defendant's ability to moot a class through an offer of judgment to the named plaintiff. More importantly, the case sets the stage for a possible future ruling by the Supreme Court on the issue. The Seventh Circuit faces the same issue presented in *Pitts* in *Damasco v. Clearwire Corp.*, Court of Appeals Docket No. 10-3934, setting up the possibility of a circuit split if its ruling differs from the Ninth Circuit's.

What You Should Do

If you have any questions about how the *Pitts* decision might impact your company or if you have any other questions about class action defense, contact your Lathrop Gage attorney, or one of the attorneys listed above.