

## Seventh Circuit: Offer of Full Relief Still Moots Plaintiff's Claim – Even in a Class Action

December 9, 2011

In its recent decision in *Damasco v. Clearwire Corporation*, Case No. 10-3934, the 7th U.S. Circuit Court of Appeals has affirmed that a class representative cannot continue with class claims after receiving an offer of full relief. This decision is consistent with the Seventh Circuit's prior rulings on this issue, but it is at odds with the holdings of four other circuit courts and could set the stage for a Supreme Court battle.

### What Happened

In *Damasco*, the plaintiff brought a putative class action against Clearwire Corporation, alleging that Clearwire violated the Telephone Consumer Protection Act, 47 U.S.C. 227 ("TCPA") by sending unsolicited text messages to cell phone users. Before the plaintiff moved for class certification, Clearwire sent a letter to plaintiff's counsel, offering the plaintiff (and up to 10 other affected individuals) the maximum statutory damages under the TCPA of \$1,500 per unsolicited text message, plus court costs. The plaintiff never responded to the letter and four days after sending it, Clearwire removed the case to federal court. The plaintiff immediately moved for class certification, and Clearwire responded by filing a motion to dismiss, arguing that the plaintiff's individual claim was mooted by Clearwire's offer. Citing *Holstein v. City of Chicago*, 29 F.3d 1145 (7th Cir.), the district court granted the motion to dismiss, holding that "[t]he rule in the Seventh Circuit is clear - a complete offer of settlement made prior to the filing for class certification moots the plaintiff's claim."

On appeal, the Seventh Circuit affirmed, declining to create an exception to mootness in putative class actions where defendants offer relief to named plaintiffs before they have a reasonable opportunity to seek certification. The court held that "[t]o allow a case, not certified as a class action and with no motion for class certification pending, to continue in federal court when the sole plaintiff no longer maintains a personal stake defies the limits on federal jurisdiction expressed in Article III." Moreover, the court held that simply identifying a case as a class action in the complaint is not enough to keep it in federal court after full relief has been offered to the class representative. The plaintiff raised concerns that the court's ruling would allow defendants to "buy off" class representatives, but the court held that there was a simple solution: "Class-action plaintiffs can move to certify the class at the same time that they file their complaint." Although the plaintiff argued that this would lead to premature motions for class certification, the court noted that the



district court has the ability to delay its ruling to provide for additional discovery or investigation.

The plaintiff also noted that some district courts in the Seventh Circuit have allowed plaintiffs to avoid mootness when served with offers of judgment under Federal Rule of Civil Procedure 68 by seeking class certification within the rule's timeframe for accepting or rejecting the offer. However, the Seventh Circuit declined to address this issue in *Damasco* because Clearwire's settlement letter was sent while the matter was pending in state court and therefore was not a Rule 68 offer of judgment.

### **What It Means**

The *Damasco* decision establishes a clear circuit split on the issue of mootness in class actions and opens the door for Supreme Court consideration of this issue. As the Seventh Circuit noted in its opinion, four circuits (Third, Fifth, Ninth and Tenth) have held that, absent undue delay, a plaintiff may move to certify a class and avoid mootness even after being offered complete relief. These courts have relied on the flexible nature of the mootness doctrine and concerns about class representative buy-offs. However, the Seventh Circuit expressly declined to adopt this approach. Supreme Court consideration of this issue could have a significant impact on class-action litigation strategy and defense.

### **What You Should Do**

It is important for attorneys and businesses defending class actions in different jurisdictions to understand how each circuit has addressed this issue and take the appropriate steps to preserve any mootness arguments that may be available.

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