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Second Circuit to Decide Rule 68 Offers' Application to Class Actions

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Rule 68 of the Federal Rules of Civil Procedure ("Rule 68") and its application to class actions pursuant to Rule 23 of the Federal Rules of Civil Procedure have become a hot topic in recent news. In addition to the Supreme Court granted certiorari in *Campbell-Ewald v. Gomez*, No. 13-55486, the Second Circuit is hearing *Lary v. Rexall Sundown, Inc.*, 2015 WL 590301 (E.D.N.Y. Feb. 10, 2015) on appeal. This has been a controversial topic because the circuit courts are split on this issue. The district courts within New York are as well.

By way of brief background, Rule 68 states that a defending party, at any time more than 14 days before the commencement of trial, may serve the opposing party with an offer permitting the entry of judgment against the defendant. The offer must be upon specific terms and allow for the payment of court costs accrued to that date. Complications often arise when determining whether a putative class action is dismissed when a Rule 68 offer of judgment accords the putative class representative full and final individual relief.

In *Lary*, a class action was brought pursuant to the Telephone Consumer Protection Act of 1991 ("TCPA"), which is commonly referred to as the "junk fax" law. The case was brought as a putative class action and sought statutory damages under the TCPA. After one of the defendants served its Rule 68 offer of judgment, the plaintiff sought to have the putative class certified. Eastern District Judge Feuerstein held that the Rule 68 offer afforded full and final relief to the putative class representative and all controversy ended. Thus, without a live case, the putative class action was dismissed. Notably, Judge Feuerstein pointed out that in 1984 the Advisory Committee on the Federal Rules had proposed a specific change to Rule 68 that would have made it inapplicable to class actions, but Congress rejected the idea. Therefore, Rule 68 applies to Rule 23 class actions.

On the other hand, in *Jones-Bartley v. McCabe, Weisberg and Conway*, 2014 WL 5795564 (S.D.N.Y. 2014), the plaintiff brought a Fair Debt Collections Practice action on behalf of a putative class of individuals allegedly harmed by the defendant's violations. Prior to the class being certified, the defendant made a Rule 68 offer and then argued that the offer made the case nonjusticiable because the putative class representative was afforded more relief that she was entitled to. The Southern District (Karas, J.) concluded that a Rule 68 offer must be one for judgment, not merely to settle, and the offer must extinguish all possible individual claims of the plaintiff. If not, the case is still "live." Interestingly, the court found it "unclear whether [the d]efendant still consents to the entry of a default judgment in its favor," that the defendant had never renewed its Rule 68 offer, "and no part of the record … indicates that [the d]efendant's offer remains viable." The Court thus ruled that there was still a need for adjudication.

In addition, the Third, Fifth, Ninth, Tenth and Eleventh Circuits have held that the "relation-back" doctrine may be used to keep a class action alive where an individual claim has become nonjusticiable. However, the Fourth, Seventh, and Eighth Circuits have held that the entire class action suit becomes nonjusticiable when a defendant makes an offer of full and final relief before class certification.

In sum, a decision on this issue by the Supreme Court could eradicate conflict between the lower courts and the Second Circuit will give interim guidance to the courts in the circuit while awaiting guidance from the Supreme Court.

If you or your institution has any questions or concerns regarding related issues, please contact James G. Ryan at jryan@cullenanddykman.com or at 516-357-3750.

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