

Rule 68 Cannot Derail Class Over Maximum Relief Offer

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Bad news for class action defense lawyers: Not only is Rule 68 not a silver bullet, it isn't even a bulletproof vest.

That's the upshot of a recent 10-page decision by Chief U.S. District Judge Harvey Bartle III in *Zeigenfuse v. Apex Asset Management* in which he granted a motion by the plaintiff to strike the defendant's Rule 68 offer.

Bartle's decision extends the logic of a 2004 decision by the 3rd U.S. Circuit Court of

Appeals that said Rule 68 cannot be used by defendants to derail a class action by making an offer of maximum relief to the lead plaintiff prior to the filing of a motion for class certification and then

demanding dismissal of the case as moot. In *Weiss v. Regal Collections*, the 3rd Circuit said



BARTLE

it was resolving a tension between two rules of civil procedure — Rule 23, which governs class actions, and Rule 68, which allows for offers of judgment — and found that the tension should be resolved in favor of Rule 23.

"Allowing defendants to 'pick off' putative lead plaintiffs contravenes one of the primary purposes of class actions — the aggregation of numerous similar (especially small) claims in a single action," Chief U.S. Circuit Judge Anthony J. Scirica wrote.

By reversing a New Jersey judge's decision

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that said the Rule 68 offer of maximum relief had mooted the case, the 3rd Circuit foreclosed the notion that Rule 68 could be used as a silver bullet in some class actions.

But the defense lawyer in *Zeigenfuse* thought that Rule 68 might still have some use.

Plaintiff Rebecca Zeigenfuse had filed a proposed class action alleging violations of the Fair Debt Collections Practices Act. The suit accuses Apex Asset Management, a debt-collection agency, of violating the law by routinely failing to notify credit-reporting agencies that a debt is disputed.

Apex's lawyer, Andrew M. Schwartz of Marshall Dennehey Warner Coleman & Goggin made Zeigenfuse a Rule 68 offer of judgment of \$1,001 plus reasonable costs and attorney fees — one dollar more than the statutory maximum for her individual claim.

But plaintiff's lawyers David A. Searles of Donovan Searles and James A. Francis of Francis & Mailman cried foul, claiming such a move violated the central holding in *Weiss*.

In response, Schwartz argued that *Weiss* was inapplicable because Apex was not seeking to moot Zeigenfuse's individual claim.

Instead, he argued, the defense was simply seeking to shift the risk of costs to her in the

event that her claim was unsuccessful.

Schwartz was relying on the portion of Rule 68 that says: "If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after making the offer."

Bartle found that "few cases have dealt with this type of clash between Rule 68 and Rule 23" and that "no consensus has emerged" among the courts that have tackled the question.

In *Janikowski v. Lynch Ford*, a judge in the Northern District of Illinois sided with the plaintiff and struck the defendant's Rule 68 offer. But in *McDowall v. Cogan*, an Eastern District of New York judge refused to do so, saying there was "nothing to strike" because an offer of judgment is not filed with the court until it is accepted or until it is presented by the winning party seeking to collect its costs.

But Bartle found that the 3rd Circuit's *Weiss* decision provided significant guidance.

Although the *Weiss* court did not specifically order that the Rule 68 offer of judgment should be stricken, Bartle concluded that the logic of the decision suggests that it should.

"Here the defendant is attempting to apply Rule 68, which fits for individual actions, to undermine a putative class action," Bartle wrote.

"Instead of forcing the named representative to accept the carrot of full individual relief which cannot be done under *Weiss*, defendant is threatening the stick, that is, imposing costs against

plaintiff if she is unsuccessful," Bartle wrote.

Either way, Bartle said, the tactic is an attempt to "pick off" the named representative in a proposed class action.

"Whichever approach a defendant takes under Rule 68, the purpose is to dampen the efforts of the putative representative in pursuing the class action, if not to cause her to withdraw," Bartle wrote.

"It is an attempt to inject a conflict of interest between her and those she seeks to represent. The use of Rule 68 to shift the risk of costs is simply a more indirect and perhaps somewhat more subtle means to undermine Rule 23 and the procedural and substantive benefits it affords," Bartle wrote.

As a result, Bartle concluded that "Rule 68 cannot be invoked to shift costs where a plaintiff has filed a class action complaint unless the motion for class certification is unduly delayed."

Bartle concluded that *Janikowski* was correct in holding that the offer of judgment must be stricken to prevent it from undermining the use of the class action device.

Following *McDowall*, Bartle said, "would allow the defendant to achieve what *Weiss* seems to forbid."

(Copies of the 10-page opinion in *Zeigenfuse v. Apex Asset Management*, PICS No. 06-1825, are available from The Legal Intelligencer. Please call the Pennsylvania Instant Case Service at 800-276-PICS to order or for information. Some cases are not available until 1 p.m.) •