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Class Action Settlements: Rule 68 Offers of Judgment and Other Strategic Tools

Leveraging Rule 68 and Structuring Class Settlements to Obtain Court Approval

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Today's faculty features:

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Rule 68 Offers of Judgment in Class Litigation post *Genesis*

Presented by:
George Tzanetopoulos

Genesis Healthcare Corp. v. Symczyk

Factual Background

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- Symczyk brought a collective action under the Fair Labor Standards Act on behalf of herself and other employees similarly situation.
- Symczyk ignored Genesis Healthcare's Rule 68 offer for $7,500 for alleged unpaid wages, in addition to "such reasonably attorneys' fees, costs and expenses . . . as the Court may determine."
- Genesis Healthcare stated that if Symczyk did not accept the offer within10 days, it would be withdrawn.
- After Symczyk failed to respond to the offer, Genesis Healthcare filed a motion to dismiss for lack of subject matter jurisdiction.

Genesis Healthcare Corp. v. Symczyk
Procedural Background

- The District Court held that it was undisputed that no other individuals had joined Symczyk's suit and that the Rule 68 offer of judgment fully satisfied the individual claim, thereby mooting Symczyk's suit.

- The court dismissed the case for lack of subject-matter jurisdiction.

  – *Symczyk v. Genesis Healthcare Corp.*, 2010 WL 2038676 (E.D. Pa. May 19, 2010)

Genesis Healthcare Corp. v. Symczyk

Procedural Background

- To understand what happens next, we begin with the 3rd Circuit's holding in *Weiss v. Regal Collections*, 385 F.3d 337 (3d Cir. 2004).
- In *Weiss*, the 3rd Circuit held that mootness of a named plaintiff's claim generally moots a putative class action, but in the context of a defendant's tender in a putative class action, due to policy concerns, doctrine of relation back will apply.
- Therefore, where a Rule 68 offer is made before a motion for class certification is filed, the subsequent filing of the motion for class certification will relate back to the filing of the class complaint, absent "undue delay" in filing the motion.

Genesis Healthcare Corp. v. Symczyk
Procedural Background

- In the 3rd Circuit, Genesis Healthcare Corp. sought to distinguish *Weiss* on the grounds that *Weiss* was a class action and *Genesis* was a collective action under the FLSA.

- The 3rd Circuit held that the distinction is not enough to change the rule in *Weiss* and remanded the case to permit Symczyk to file a motion for conditional class certification which would relate back, and therefore render the Rule 68 offer ineffective to moot Symczyk's claim.
  - *Symczyk v. Genesis Healthcare Corp.*, 656 F.3d 189 (3d Cir. 2011)

Genesis Healthcare Corp. v. Symczyk
The Holding In The Supreme Court

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- What the Supreme Court held:
  - "Because [Symczyk] had no personal interest in representing putative, unnamed claimants, nor any other continuing interest that would preserve her suit from mootness, her suit was appropriately dismissed for lack of subject-matter jurisdiction."
  - Essentially, that the relation back doctrine does not apply to prevent Symczyk's claim from being mooted by the Rule 68 offer.
- What the Supreme Court did <u>not</u> hold:
  - The Court expressly declined to decide whether an unaccepted Rule 68 offer that fully satisfies a plaintiff's individual claim is sufficient to render that claim moot.

Genesis Healthcare Corp. v. Symczyk
The Majority's Reasoning

- The Court assumed, without deciding, that the Rule 68 offer mooted Symczyk's individual claim because:
  - (1) Symczyk accepted the 3rd Circuit's ruling in her briefs;
  - (2) Symczyk failed to challenge the ruling in her brief in opposition to the petition for certiorari;
  - (3) Symczyk did not file a cross-petition for certiorari objecting to the Third Circuit's decision.

Genesis Healthcare Corp. v. Symczyk

The Majority's Reasoning

- The Court then conducted a "straightforward application of well-settled mootness principles," based on the assumption that the individual claim was moot.

- The Court held that "in the absence of any claimant's opting in, [Symczyk's] suit became moot when her individual claim became moot, because she lacked any personal interest in representing others in this action."

Genesis Healthcare Corp. v. Symczyk
The Dissent

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- Instead of addressing the relation back doctrine issue, the dissent chides the majority for failing to decide the issue of whether the individual claim became moot.
- States that "As every first-year law student learns, the recipient's rejection of an offer 'leaves the matter as if no offer had ever been made.' Nothing in Rule 68 alters that basic principle; to the contrary that rule specifics that '[a]n unaccepted offer is considered withdrawn.'"
- Under this reasoning, the Dissent would have held that an unaccepted offer does not moot a claim.
- The Dissent warns, "[s]o a friendly suggestion to the Third Circuit: Rethink your mootness-by-unaccepted-offer theory. And a note to all other courts of appeals: Don't try this at home."

Genesis Healthcare Corp. v. Symczyk

The Effect

- For those Circuits where a Rule 68 offer moots a claim, the offer moots a claim and there is no relation back.
- For those Circuits where a Rule 68 offer does not moot a claim, the offer still does not moot a claim.
- For the 3rd Circuit, the result is unclear.

The Circuit Split on Unaccepted Offers

- An unaccepted Rule 68 offer that would fully satisfy a plaintiff's claim is sufficient to render the claim moot in the 2nd and 7th Circuits:
  - *Doyle v. Midland Credit Management, Inc.*, 722 F.3d 78 (2d Cir. 2013)
  - *Damasco v. Clearwire Corp*., 662 F.3d 891 (7th Cir. 2011)

The Circuit Split on Unaccepted Offers

- An unaccepted Rule 68 offer that would fully satisfy a plaintiff's claim is insufficient to render the claim moot in the 9th and 10th Circuits:
  - *Diaz v. First Am. Home Buyers Protection Corp.*, 2013 WL 5495702 (9th Cir. Oct. 4, 2013)
  - *Lucero v. Bureau of Collection Recovery, Inc.*, 639 F.3d 1239 (10th Cir. 2011)

The Circuit Split on Unaccepted Offers

- The 11th Circuit is undecided on the issue. *See Lobianco v. Hayter*, 2013 WL 2097414 (N.D. Fla. May 14, 2013) ("There is a split among the Courts of Appeal as to whether an unaccepted offer of judgment that fully satisfies a plaintiff's claim will render the claim moot. The Eleventh Circuit Court of Appeals has not addressed this precise issue").

- The 6th Circuit doesn't definitively address the issue but the ruling in *Hrivnak v. NCO Portfolio Mgmt., Inc. et al.,* 719 F.3d 564 (6th Cir. 2013), could be read to mean that an unaccepted offer that provides every form of individual relief is sufficient to moot a claim.
  - *Id.* ("[M]ootness occurs only when the offer is accepted or the defendant indeed offers to provide every form of individual relief the claimant seeks in the complaint.")

The Circuit Split on Unaccepted Offers

- There are no definitive cases on the issue in the 1st, 4th, 5th. and 8th Circuits, but several district courts in those Circuits have addressed the issue:
  - *Nash v. CVS Caremark Corp.*, 683 F. Supp. 2d 195, 196 (D.R.I. 2010) ("Nothing in the text of Rule 68 compels dismissal of a case for lack of subject matter jurisdiction when a plaintiff rejects an adequate offer of judgment.")
  - *Goans Acquisition, Inc v. Merchant Solutions, LLC*, 2013 WL 5408460 (W.D. Mo. Sept. 26, 2013) (holding unaccepted Rule 68 offer made prior to class certification motion being filed mooted claim)
  - *Masters v. Wells Fargo Bank South Central*, 2013 WL 3713492 (W.D. Tex. July 11, 2013) ("The Fifth Circuit holds an unaccepted offer fully satisfying a claim does moot the claim"). *But see Sandoz v. Cingular Wireless, LLC,* 553 F.3d 913 (5th Cir. 2008)
  - *White v. Ally Financial, Inc.* 2012 WL 2994302 (S.D. W. Va. 2012) ("Although Rule 68 does not normally permit parties to submit evidence of an unaccepted offer . . . a Rule 68 offer can be used to show that a court lacks subject matter jurisdiction in the 4th Circuit. . . . If a Rule 68 offer of judgment unequivocally offers a plaintiff all of the relief she sought to obtain, [then] the offer renders the plaintiff's action moot.")

Strategic Considerations
What Constitutes Complete Relief

- Some courts require an offer of judgment to constitute an offer of complete relief, while in other courts a mere settlement offer, contained in something as informal as an email is sufficient:
  - The 11th Circuit requires a Rule 68 offer to moot a claim. *Zinni v. ER Solutions, Inc.*, 692 F.3d 1162, 1163, 1168 (11th Cir.2012) (holding that a settlement offer for the full amount of damages minus judgment was not a full offer of relief that would moot a case because the offer was not in the form of a Rule 68 offer of judgment that included entry of judgment against the defendant)
  - A district court in the 5th Circuit held that the precise form of the offer is immaterial, such that a settlement offer is sufficient. *Masters v. Wells Fargo Bank South Central*, 2013 WL 3713492 (W.D. Tex. July 11, 2013)
- Injunctive relief, statutory damages, actual damages
- Attorney's fees and costs

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Class Action Settlements: Rule 68 Offers of Judgment and Other Strategic Tools

Christina Guerola Sarchio

October 2013

Structuring Settlements to Obtain Court Approval

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I. Fair, Reasonable and Adequate Requirement
II. Notice Requirements and Use of Alternative Media
III. Conditional Incentive Awards
IV. Cy Pres Awards
V. Attorneys' Fees
VI. Defending a Settlement and Maximizing its Advantages

I. Fair, Reasonable and Adequate

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The district court needs to examine the facts and the law relevant to the proposed settlement.

The district court must support the conclusions flowing from this analysis by memorandum opinion or otherwise in the record so as to provide an appellate court with a basis to judge the district court's exercise of discretion should an appeal follow.

How Courts Evaluate Fairness, Reasonableness and Adequacy

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1) The strength of the plaintiffs' case;
2) the risk, expense, complexity, and duration of further litigation;
3) the extent of discovery completed and the stage of the proceedings;
4) the risks of maintaining the class action through the trial;
5) the range of reasonableness of the settlement fund;
6) the presence of a governmental participant;
7) the reaction of the class members;
8) and whether collusion among the parties.

II. Notice Requirements under Rule 23(b)(3)

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"The court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice must clearly and concisely state in plain, easily understood language:"

(i) the nature of the action;

(ii) the definition of the class certified;

(iii) the class claims, issues, or defenses;

(iv) that a class member may enter an appearance through an attorney if the member so desires;

(v) that the court will exclude from the class any member who requests exclusion;

(vi) the time and manner for requesting exclusion; and

(vii) the binding effect of a class judgment on members.

II. Notice Requirements

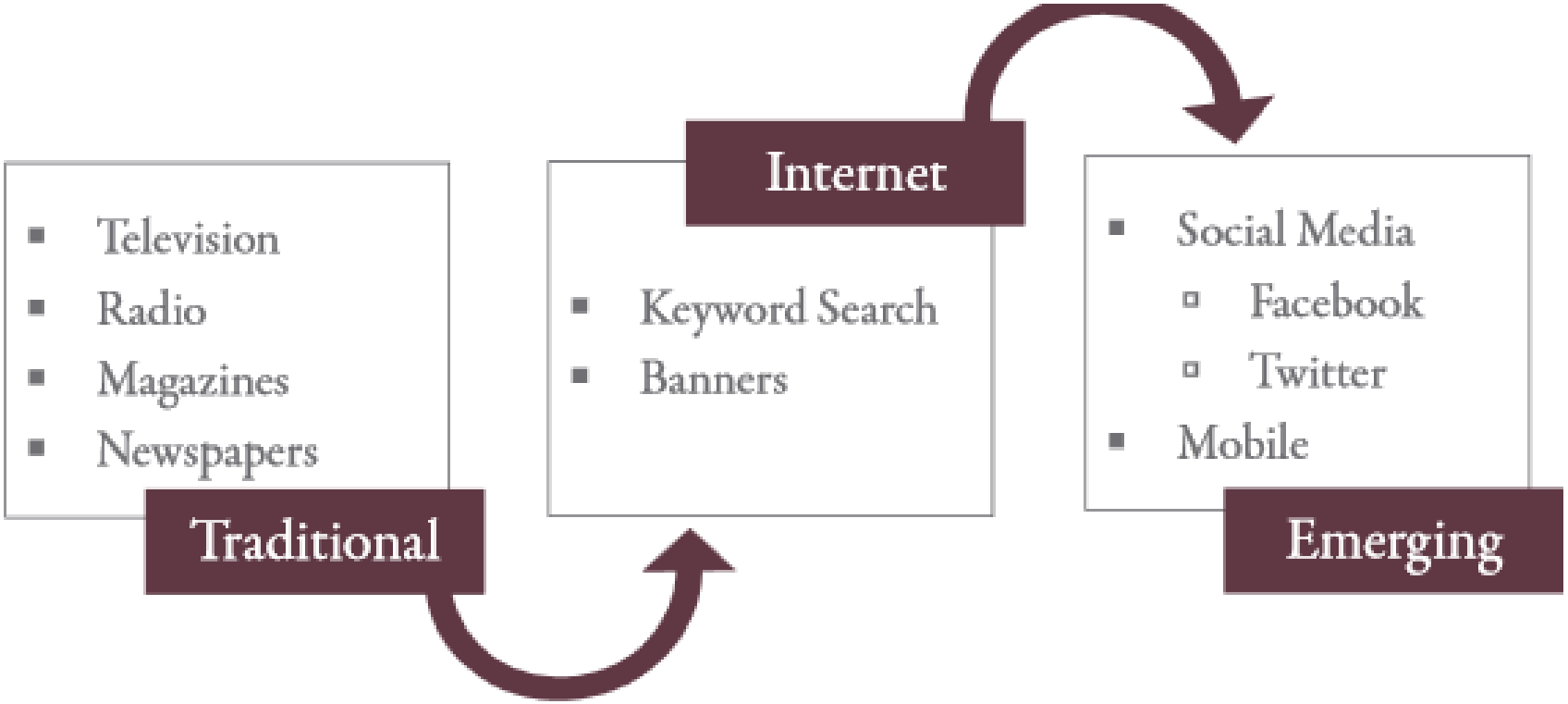
1) Direct notice to known class members
2) Publication notice to unknown class members
3) Increasing use of social media to target unknown class members
4) Include Spanish-language notice
5) CAFA notice to government entities
6) Retain services of Class Action Administrator to execute Notice Plan
7) Provide Court with “Reach Rate”

Judges' Class Action Notice and Claims Process Checklist and Plain Language Guide 2010

Major Checkpoints

- ❑ ***Will notice effectively reach the class?***
  The percentage of the class that will be exposed to a notice based on a proposed notice plan can always be calculated by experts. A high percentage (e.g., between 70–95%) can often reasonably be reached by a notice campaign.
- ❑ ***Will the notices come to the attention of the class?***
  Notices should be designed using page-layout techniques (e.g., headlines) to command class members' attention when the notices arrive in the mail or appear on the Internet or in printed media.
- ❑ ***Are the notices informative and easy to understand?***
  Notices should carry all of the information required by Rule 23 and should be written in clear, concise, easily understood language.
- ❑ ***Are all of the rights and options easy to act upon?***
  There should be no unnecessary hurdles that make it difficult for class members to exercise their rights to opt out, object, submit a claim, or make an appearance.

Notice: Use of Alternative Media



Source: The Kinsella Group, Traditional and New Media in Class Action Notice: The State of Play — Fall 2011
http://www.kinsellamedia.com/LinkClick.aspx?fileticket=lpWeKj2lcMc%3D

III. Conditional Incentive Awards

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Incentive awards are intended to compensate class representatives for work done on behalf of the class, to make up for financial or reputational risk undertaken in bringing the action, and, sometimes, to recognize their willingness to act as a private attorney general.

Typical awards range from $5,000-$10,000

III. Conditional Incentive Awards -Caution

Settlements with “incentive rewards” for named class members will be rejected – and plaintiffs’ counsel may in fact breach ethical duties – **if these awards are explicitly conditioned upon their acceptance of the settlement**.

IV. Cy Pres Awards

In the

United States Court of Appeals

For the Seventh Circuit

POSNER, *Circuit Judge*.

Hughes v. Kore of Ind. Enter., Inc., No. 13-8018 (7th Cir., Sept. 10, 2013).

"A time saving alternative might be a class action with the stated purpose, at the outset of the suit, of a collective award to a specific charity. We are not aware of such a case, but mention the possibility of it for future reference."

IV. Cy Pres Awards - Recommendation

Link organization's mission to class claims
or
make other arrangements for unclaimed funds
(such as second distribution to class members)

V. Attorneys' Fees

The common fund approach arises in a class action where an attorney fee may be based on a reasonable percentage of the fund created for the benefit of the class members by the efforts of the lawyer involved.

The second method used to determine fees is commonly called a "lodestar" method and is derived from a review of the hours spent by the attorney involved and a decision as to what a reasonable hourly fee is for the work performed.

V. Attorneys' Fees – Recent Headlines

"Washington, D.C., March 28, 2013 – In a victory for shareholders over baseless class actions, a Texas appeals court has ruled that trial lawyers were wrongly awarded several hundred thousand dollars in attorney fees in return for making trivial changes to a proxy statement."

"'Slashing $26M in Legal Fees from Citigroup Case, Judge Cites $550/hr Charge for $15/hr Contract Work' reports that a federal judge has slashed by 27 percent the attorney fees awarded to the winning lawyers in a $590 million settlement of a Citigroup Inc. securities class action because of 'waste and inefficiency' and billable hourly rates that were 'significantly inflated.'"

"'Fight Continues Over Attorney Fees in BAR/BRI Lawsuit,' reports that fee objectors to two settlements involving antitrust claims against the makers of the BAR/BRI bar review preparatory course materials have moved to recover their attorney fees, claiming they were instrumental in unraveling the original deals in favor of new agreements that better benefit class members."

VI. Defending a Settlement

- Educating the Court
- Dealing with Objectors

Who is Objecting?

- Other Counsel

- Professional Objectors

- Government Agencies

- Public Interest Groups

Public Interest Groups

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Center for Class Action Fairness

From Wikipedia, the free encyclopedia

The **Center for Class Action Fairness** (**CCAF**) is a Washington, D.C.-based public-interest law firm, founded by Ted Frank in June 2009 to represent consumers dissatisfied with their counsel in class actions and class action settlements.[1][2] It is a program of the 501(c)(3) organization, DonorsTrust, a non-profit firm which relies on donors from charitable foundations and independent individuals to fund it.

According to *The American Lawyer*, as of March 2011, the CCAF had filed objections to 17 settlements, with eight objections pending in federal district courts, and had been successful on six of them. The CCAF has objected to settlements throughout the United States, particularly in cases where class action lawyers receive cash payments but the plaintiff class receives only discount coupons for further products and services from the defendant company. It has distanced itself from other firms that make money by holding up class action settlements until they themselves are paid off. The CCAF has raised objections to class action settlements involving the Grand Theft Auto "Hot Coffee" minigame, Honda Civic Hybrids, Apple backdating, A.G. Edwards, Bluetooth headsets, and the Cobell Indian Trust.

What is the Objection?

- ✓Attorney's Fees too High
- ✓Reimbursement Process Not Easy
- ✓Coupon Settlement Inadequate
- ✓Claims of Collusion
- ✓Reversionary Fund Benefits Defendant

Eliminate Objections

Consider Taking Discovery

- Depose objectors
- Request records from previous objections and objector's counsel
- Be prepared for discovery propounded to you

Appeal Bond

- Request district court impose an appeal bond on non-named class member objectors that reflect the full expected cost of appeal, including attorneys' fees and the cost of delay incurred by class members and their attorneys.

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Christina Guerola Sarchio, based out of Orrick's DC and NY offices, has received national recognition for both her legal skills and business acumen. A former prosecutor, Ms. Sarchio concentrates her practice on commercial litigation, antitrust and white collar criminal defense matters. She has successfully tried as lead counsel more than a dozen cases in federal and state courts, and has represented Fortune 500 and other clients in both criminal and civil litigation, including class actions. Ms. Sarchio has extensive experience in antitrust, contract, business torts, employment, intellectual property, environmental and franchise/dealer issues. Her representation spans several industries, including oil and gas, chemical, pharmaceutical, alcoholic beverages, transportation, tobacco and consumer products. She also serves on the national roster for the American Arbitration Association. She is a graduate of Cornell University and the George Washington Law School.