Offers of Judgment in Employment Litigation: Guidance Since Genesis

Leveraging Rule 68 as a Strategic Tool to Minimize Damages and Moot Claims

TUESDAY, SEPTEMBER 30, 2014

1pm Eastern   |   12pm Central   |   11am Mountain   |   10am Pacific

Today’s faculty features:

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Offers of Judgment in Employment Litigation

After the *Genesis* Ruling

Leveraging Rule 68 as a Strategic Tool to Minimize Damages and Moot Claims

**Strafford Webinars**

**September 30, 2014**

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Agenda

- Overview
- Rule 68 Offers of Judgment
- Why Employers Don’t Use Offers of Judgment
- Mootness—Case or Controversy
- The *Genesis* Decision
- Circuit Court Cases Before and Since *Genesis*
- Rule 68 Offers in Class/Collective Actions
- Practice Pointers for Rule 68 Offers
- Q&A
Overview

• Offer of judgment under Rule 68 forces plaintiff to either accept offer or risk being responsible for employer’s post-offer costs if ultimate judgment does not exceed offer.

• In some jurisdictions, if offer is equal to/exceeds relief sought by plaintiff, but is rejected by plaintiff, controversy is mooted.
Rule 68 (Text)

• (a) A party defending against a claim may serve opposing party with an offer to allow judgment on specified terms, which may be accepted within 14 days of service
  – Offer is not settlement proposal
  – Must be unconditional and unambiguous
  – Confidentiality not possible

• (b) An unaccepted offer is considered withdrawn but does not preclude a later offer
Rule 68 (Text)

• (c) a party whose liability—but not the extent thereof—has been determined may make an offer of judgment

• (d) if judgment that offeree obtains is not more favorable than unaccepted offer, offeree must pay costs incurred after offer made
Rule 68—Costs

• Rule 68 has played minor role in federal civil litigation since enactment because of “costs”
  – Clerk, marshal, court reporter and witness fees, printing, copying, court-appointed experts (28 USC Sec. 1920)

• More impactful, however, for class of claims brought under statutes that include attorneys’ fees as part of recoverable costs

• *Marek v. Chesny*: “Costs” include attorneys’ fees when fees awarded under relevant statute
  – Civil Rights statutes; Title VII (but not ADEA or ADA); Environmental statutes
Rule 68—Outcomes re Rejected Offer

- Defendant verdict—employer not entitled to reimbursement of costs accrued post-offer
- Plaintiff verdict (equal to or greater than offer of judgment)—tantamount to no offer having been made
- Plaintiff verdict (less favorable than offer)—employer entitled to post-offer costs
Why Employers Don’t Use Offers of Judgment

• Negative word association—“judgment”

• Employer’s confidence that it will prevail on merits (especially on summary judgment)

• Difficulty of placing valuation on claim early in litigation
Why Employers Don’t Use Offers of Judgment (con’d)

• Economic conflict of interest
• No *res judicata* (claim preclusion) effect
• No collateral estoppel (issue preclusion) effect
• Continued uncertainty of effect in Rule 23 cases
• Framing offer in light of demands for relief
Why Employers Don’t Use Offers of Judgment (con’d)

• Fair Pay and Safe Workplace Executive Order
  – August 2014 (effective 2016 (three-year look-back))
  – Bidders for federal contracts > $500K, and their subcontractors, must disclose “any administrative merits determination, arbitral award, decision, or civil judgment” of violation of any one of 14 federal employment laws and their state law counterparts
Why Employers Don’t Use Offers of Judgment (con’d)

<table>
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<tr>
<th>14 Federal Laws Requiring Disclosure</th>
<th>Equivalent State Laws</th>
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<td>EO 11246 (Equal Employment)</td>
<td>EO 13658 (Minimum Wage)</td>
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Mootness—Case or Controversy

• Article III of Constitution limits federal courts’ jurisdiction to “cases and controversies”

• When issues presented are no longer “live” or parties lack a cognizable interest in outcome
  – Case is “moot” and courts no longer have subject matter jurisdiction
  – County of Los Angeles v. Davis, 440 U.S. 625, 631 (U.S. 1979)
Mootness—Case or Controversy (cont’d)

• Offers of complete relief will generally moot a Plaintiff’s claims
  – Plaintiff retains no personal interest in outcome of litigation
  – Subject to Rule 12(b)(1) dismissal because no remaining dispute or stake in outcome
Genesis v. Symczyk

• Plaintiff, a former nurse-employee, raised FLSA claim on behalf of herself and “all other persons similarly situated”
  – Claimed Genesis improperly deducted 30 minutes per shift for meal breaks despite fact that employees continued to work

• Genesis answered and served a Rule 68 offer of judgment

• After Symczyk failed to respond timely, Genesis filed motion to dismiss for lack of subject matter jurisdiction \( (i.e., \text{controversy was moot}) \)
**Genesis v. Symczyk**

- District Court found Symczyk never disputed that the Rule 68 offer of judgment fully satisfied her individual claim
  - Concluded it mooted lawsuit and dismissed for lack of subject matter jurisdiction

- Third Circuit reversed
  - Agreed individual claim moot
  - Found collective action not moot
  - Concluded attempts to “pick off” named plaintiff(s) before certification could frustrate goals of collective actions
**Genesis v. Symczyk**

- In her Supreme Court appeal, Symczyk never contested “mootness” of her individual claim
  - Majority opinion found it was waived
  - Court expressed no opinion whether unaccepted Rule 68 offers that fully satisfy a claim render it moot
  - Court found mere presence of collective action allegations in complaint cannot salvage suit from mootness once individual claim is satisfied
**Genesis v. Symczyk**

- Noted distinction between Rule 23 class actions and FLSA collective actions under §216(b)
  - Rule 23 putative class acquires independent status once certified
  - FLSA “conditional certification” does not produce class with independent legal status or join additional parties to the action
Genesis v. Symczyk

• Held Symczyk’s claim not subject to exception for “inherently transitory” class action claims
  – Noted complaint only sought statutory damages – not injunctive relief for ongoing conduct
  – Full settlement offer made plaintiff whole
  – Unjoined claimants were free to bring their own lawsuits

• Finally, found using Rule 68 to “pick off” named plaintiffs would not frustrate purposes of §216(b)
Genesis v. Symczyk

• Section 216(b) “conditional certification” not tantamount to Rule 23 class certification
  – No continuing economic interest in shifting attorneys’ fees and costs to others

• Genesis is a very limited holding
  – Does conclusively hold conditional certification precluded where all named individuals’ claims mooted – not salvaged by mere presence of class allegations
Genesis v. Symczyk

• Court never addressed mootness of individual claims
  – Waived

• Suggests requests for continuing injunctive relief may preclude dismissal of class claims
  – Result might be different for a “current” employee
Cases Before & Since *Genesis*

• First Circuit—Not yet addressed, but ...
  – *Nash v. CVS Caremark Corp.* (D.R.I. 2010)
    • Allowing unaccepted, full-satisfaction offers to moot a claim “would impair the Congressional preference for collective actions embodied in 216(b).”
    • “If allowed to use Rule 68 as a weapon, defendants can torpedo complaint after complaint, leaving opt-ins to swim for the nearest viable action as their claims leak value.”
Cases Before and Since Genesis

• Second Circuit—No, but …
  • *Velasquez v. Digital Page Inc.* (E.D. N.Y. 2012)
    • Held offer of judgment does not moot a case “[w]here additional plaintiffs have opted into the matter, and the Rule 68 offer does not include those [other] plaintiffs.”
    • *Genesis* not dispositive when plaintiffs bringing §216(b) collective action rejected a Rule 68 offer prior to moving for conditional certification
Cases Before & Since *Genesis*

• Second Circuit (con’d) — No, but ...
  
    
    • “[T]he [Second Circuit] Court of Appeals has made clear (the suggestions of the *Genesis Healthcare* majority notwithstanding ...) that an unaccepted offer of judgment can moot a plaintiff’s claim.”
  
  — *Ritz v. Mike Rory Corp.* (E.D. N.Y. 2013).
    
    • “While the Second Circuit has yet to rule on this issue, district courts in this circuit have held that a Rule 68 offer of full damages [to the named plaintiff on her FLSA claim], even if rejected, may render the case moot and subject to dismissal.”
Cases Before & Since Genesis

• Third Circuit—Yes and No
  – Weiss v. Regal Collections (3d Cir. 2004)
    • “An offer of complete relief will generally moot the plaintiff’s claim, as at that point the plaintiff retains no personal interest.”
    • Plaintiffs filed complaint for violations of Telephone Consumer Protection Act (Rule 23)
    • Defendant make Rule 68 Offer before plaintiff moved to certify, and moved to dismiss; court holds claim not mooted because it relates back to original filing
Cases Before & Since *Genesis*

• Fourth Circuit—Yes, but ...
  
    
    • Defendants sent Rule 68 Offers to 9 named FLSA plaintiffs—5 accepted and 4 rejected
    
    • “… [W]here a defendant has offered a plaintiff the full amount of damages to which he claimed individually to be entitled, there is no longer any ‘case or controversy.’”
    
    • But, plaintiffs’ claims were not moot because parties had not yet agreed upon scope of plaintiffs’ alleged damages
Cases Before & Since *Genesis*

• Fifth Circuit—Yes, but …
  – *Sandoz v. Cingular Wireless* (5th Cir. 2008)
    • Finding claim moot, but applying relation-back theory from *Geraghty*
    • “This means that when Cingular made its offer of judgment, Sandoz represented only herself, and the offer of judgment fully satisfied her individual claims.”
  • Abrogated in part by *Genesis*
Cases Before & Since *Genesis*

- Fifth Circuit (con’d)—Yes, but ...
  - *Silva v. Tegrity Personal Services* (S.D. Tx. 2013)
    - Plaintiff brought wage/hour FLSA and retaliation claims.
    - Defendant made offer of judgment (but did not offer any $$ for retaliation claim) and moved to dismiss.
    - Court rejected motion to dismiss, finding that Plaintiff “has continuing interest that would preserve her suit from mootness ... [because she remains] capable of obtaining redress from a jury that she was not offered by Defendant, ... keep[ing] the case alive.”
Cases Before & Since *Genesis*

• Sixth Circuit—Yes
    • Plaintiff sued for wrong charges associated with discharge of mortgage
    • Defendant made Rule 68 Offer providing all relief sought in 1\textsuperscript{st} Amended Complaint and moved to dismiss—after which Plaintiff sought to file 2\textsuperscript{nd} Amended Complaint
    • Recognizing 6\textsuperscript{th} Circuit law that an unaccepted Rule 68 Offer can moot a case, court denied motion to amend and entered judgment consistent with Rule 68 Offer
Cases Before & Since _Genesis_

• Seventh Circuit—Yes
  – _Greisz v. Household Bank (Ill.), N.A._ (7th Cir. 1999)
    • “Such an offer, by giving the plaintiff the equivalent of a default judgment ..., eliminates a legal dispute upon which federal jurisdiction can be based. ... You cannot persist in suing after you’ve won.”
  – _Rand v. Monsanto Co._ (7th Cir. 1991)
    • “Once the defendant offers to satisfy the plaintiff’s entire demand, there is no dispute ... and a plaintiff who refuses to acknowledge this loses outright ... because he has no remaining stake.”
Cases Before & Since *Genesis*

- Eighth Circuit—Yes, but …
  - *Hartis v. Chicago Title Ins. Co.* (8th Cir. 2012).
    - District court ordered judgment in plaintiff’s favor in accordance with defendant’s Rule 68 Offer.
    - But case dismissed because of clerical error granting defendant’s motion to dismiss.
    - Plaintiffs may move to correct judgment on remand, and district court may consider whether to correct record.
Cases Before & Since *Genesis*

• Ninth Circuit—No
  
  — *Diaz v. First. Am Home Buyers Prot. Corp.* (9th Cir. 2013)
    
    • “We are persuaded that Justice Kagan has articulated the correct approach. We therefore hold that an unaccepted rule 68 offer that would have fully satisfied a plaintiff’s claim does not render that claim moot.”

    • *Id.* (recognizing that in individual and class cases decided before *Genesis*, “the majority of courts ... appear to agree ... that an unaccepted offer will moot a plaintiff’s claim”).
Cases Before & Since Genesis

• Tenth Circuit—Not addressed, but ...
  – Lucero v. Bureau of Collection Recovery, Inc. (10th Cir. 2011)
    • “While we have yet to address the question squarely, other circuits have concluded that if a defendant makes an offer of judgment in complete satisfaction of a plaintiff’s claims in a non-class action, the plaintiff’s claims are rendered moot because he lacks a remaining interest in the outcome of the case.”
Cases Before & Since *Genesis*

- Eleventh Circuit—Not addressed, but ...
  - *Zinni v. ER Solutions, Inc.* (11th Cir. 2012)
    - Avoiding “issue of whether the offer was accepted or rejected ... because Appellees never offered full relief.”
    - Unless a settlement offer includes an offer of judgment against defendant, an offer of maximum damages plus reasonable fees and costs does not offer full relief, does not qualify as a Rule 68 offer and does not moot the case because live controversy remains over issue of judgment
Cases Before & Since *Genesis*

- Eleventh Circuit (con’d) — Not addressed, but ...
  - *Dionne v. Floormasters Enterprise, Inc.* (11th Cir. 2012)
    - Affirming district court’s refusal to award attorneys’ fees where employer tendered full amount of overtime claimed and moved to dismiss for mootness where employee *conceded* that overtime claim was moot
Cases Before & Since *Genesis*

• Eleventh Circuit (con’d)—Not addressed, but ...
    • Individual plaintiff’s FLSA claim became moot, and court lost subject-matter jurisdiction, when defendant sent cashier’s check to plaintiff for amount of actual and liquidated damages that plaintiff had demanded before filing suit
    • “[D]efendant’s offer of full relief ... rendered ... case moot, even though the plaintiff did not accept that offer,” but proper procedure was to enter judgment in plaintiff’s favor
Cases Before & Since *Genesis*

- Eleventh Circuit (con’d)—Not addressed, but ...
    - “Defendant’s offer of judgment was not sufficient to moot Plaintiff’s claim because the offer of judgment excluded post-offer attorney’s fees that Plaintiff would otherwise be entitled to receive and therefore did not offer complete relief to Plaintiff.”
Cases Before & Since *Genesis*

- D. C. Circuit—Not yet addressed
Cases Before & Since *Genesis*

• Federal Circuit—Yes
    • Plaintiff’s individual claim was fully satisfied after government made payment to him in an amount more than he claimed was owed
    • Plaintiff’s not “accepting” this payment by cashing the check is not sufficient to prevent his claim from being mooted
Rule 68 Offers in Class/Collective Actions

- Language of Rule 68
- Offers in Rule 23 class actions
  - Mootness doctrine in class actions
  - Should Rule 68 apply where court must approve settlements?
  - Effect of offer covering only named plaintiff’s individual claim—circuit split
  - Relation-back for inherently transitory claims
- Plaintiffs’ motions to strike
- Timing of offer
Rule 68 Offers in Class/Collective Actions (con’d)

• *Weiss v. Regal Collections* (3d Cir. 2004)
  
  – “As sound as is Rule 68 when applied to individual plaintiffs, its application is strained when an offer of judgment is made to a class representative.”
  
  – Allowing defendants to “pick off” putative class representatives “contravenes one of the primary purposes of class actions—the aggregation of numerous (especially small) claims in a single action.”
Rule 68 Offers in Class/Collective Actions (con’d)

• *Pitts v. Terrible Herbst, Inc.* (9th Cir. 2011).
  – “Only once the denial of class certification is final does the defendant’s offer—if still available—moot the merits of the case because the plaintiff has been offered all that he can possibly recover through litigation.”
Rule 68 Offers & Class/Collective Actions (con’d)

• *Lucero v. Bureau of Collection Recovery* (10th Cir. 2011)
  
  “[A] named plaintiff in a proposed class action need not accept an offer of judgment or risk having his or her case dismissed as moot before the court has had a reasonable time to consider the class certification motion. Instead, we conclude that a nascent interest attaches to the proposed class upon the filing of a class complaint such that a rejected offer of judgment for statutory damages and costs made to a named plaintiff does not render the case moot under Article III.”
Rule 68 Offers & Class/Collective Actions (con’d)

- *Damasco v. Clearwire Corp.* (7th Cir. 2011)
  
  “To allow a case, not certified as a class action and with no motion for class certification even 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. That the complaint identifies the case as a class action is not enough by itself to keep the case in federal court.”
• Offers in collective actions
  – *Genesis*: “[T]he mere presence of collective-action allegations in the complaint cannot save the suit from mootness once the individual claim is satisfied…. [E]ven if [plaintiff] were to secure a conditional certification ruling on remand, nothing in that ruling would preserve her suit from mootness.”
  – Opt-ins and offers to opt-in
  – Disputes about validity of offers
Practice Pointers

• Employers should make offer of judgment—if at all—early in case
  – In collective action, effort should be made prior to initiation of conditional certification process

• Plaintiff should seek some kind of non-monetary relief

• Impact of *Genesis* going forward

• Law of your jurisdiction
  – Reliance on conflicts among circuits
Practice Pointers (con’d)

• Requirements for and drafting offers of judgment
• Accepting offers of judgment
• Failing to accept offers of judgment
• Timing of offers of judgment
• Judgment more or less favorable
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