

CLASS ACTION BLOG

Class Rep's Inadequacy Kills Class Action, Not Defendant's "Pick Off" Attempt

The 7th Circuit affirmed the district court's finding that a proposed class representative was inadequate, justifying the class certification denial. However, the 7th Circuit reversed the ruling that the Rule 67 payment into the Court's treasury of more than what Plaintiff was entitled to recover mooted the case thus justifying its dismissal. The court also emphasized that district courts have many tools available to respond to abusive litigation practices.

Conrad v. Boiron, Inc.

Chad Conrad filed a putative class action suit against homeopathic product manufacturer, Boiron, in 2013. Earlier, a similar class action suit had been filed against Boiron in California alleging deceptive marketing, but which settled in October 2012. Conrad was one of the persons who opted out of the California settlement. Persons who opted out began pursuing competing class action cases on similar theories in California and in Illinois. Boiron prevailed in the competing California case after the 9th Circuit affirmed the approval of the October 2012 settlement.

The initial Illinois class representative was deemed inadequate causing prospective class counsel to substitute Conrad. Before that substitution, Boiron made an offer of judgment which the then Illinois lead-Plaintiff accepted, thereby terminating that case. Thereafter, Conrad filed his separate suit.

The district court found Conrad was an inadequate class representative "because his suit would provide little benefit beyond Boiron's existing refund guaranty," i.e., the result of the initial 2011 class action litigation in California. At that point Boiron deposited \$5,025 with the court under Rule 67; an amount the court said was "above the maximum Conrad could recover." After Boiron deposited the funds, the district court dismissed his case as moot.

The 7th Circuit first reviewed the rules regarding adequacy of class representatives. It noted *Amchem's* statement that an adequate representative must "be part of the class and possess the same interest and suffer the same injury as the class members." *Amchem Prod., Inc. v. Windsor*, 521 U.S. 591, 625-26 (1997). In addition, an adequate representative has to be a plaintiff willing to "keep the interests of the entire class at the forefront." *Conrad, supra*, 869 F.3d at 539. A prospective class "'representative who proposes that high transaction costs (notice and attorneys' fees) be incurred at the class members' expense to obtain a refund that already is on offer is not adequately protecting the class members' interests.'" *Id.*; *In re Aqua Dots Products Liability Litigation*, 654 F.3d 748, 752 (7th Cir. 2011). After noting that most of the purchasers of the product were "protected" by the earlier California class action settlement and "also by the refund process Boiron now offers on its website," the court failed to see what benefit Conrad's proposed class action could bring to the proposed members of the class. *Id.* at 540. Furthermore, the proposed classes had to be relatively small causing the court to observe that the "combination of low value claims and small class size is likely to make this another case in which 'high transaction costs...' will leave class members with a negligible award. Indeed, it is hard to see how the proposed class action benefits anyone but the attorneys who file it, especially since this suit (to say nothing of its failed predecessor) has been rumbling on for years. Class actions driven by attorneys' fees are notoriously troublesome." *Id.* (Citation omitted.) Based upon these and similar findings, the 7th Circuit concluded that the district court was "well within its rights to refuse to certify Conrad's proposed class." *Id.* at 591.

Even so, the 7th Circuit disagreed that the defendant's deposit into the court's registry mooted the case, even though it was for substantially more than the value of Conrad's claim. In so ruling, the 7th Circuit followed *Fulton Dental, LLC v. Bisco, Inc.*, 860 F.3d 541 (7th Cir. 2017). *Fulton Dental's* reasoning was comparable with *Campbell-Ewald Co. v. Gomez*, 136 S.Ct. 663 (2016). Both cases were "based on the law of contract." The court in *Campbell-Ewald* stated "an unaccepted settlement offer or offer of judgment does not moot a plaintiff's case." 136 S.Ct. at 672. The court in *Fulton Dental* noted that a Rule 67 offer was essentially equivalent to the Rule 68 offer the Supreme Court ruled was insufficient to moot a plaintiff's case whenever that offer was not accepted. The court further emphasized that "the process of depositing funds with the court and later withdrawing them in favor of a party is not a mechanical one." *Conrad, supra*, at 541.

The 7th Circuit also addressed abusive litigation tactics. The court noted that district courts have many options to deal with abusive litigation tactics, including Rule 11 and 28 U.S.C. § 1927 (which authorizes the imposition of sanctions upon any attorney who multiplies the proceedings in any case unreasonably and vexatiously.) *Conrad, supra*, at 542. In addition, Rule 68 provides that if the judgment is for less money than "the unaccepted offer, the offeree must pay the costs incurred after the offer was made." Rule 68(d); *Id.* Furthermore, courts have inherent powers to punish abuses of process. *Chambers v. NASCO, Inc.*, 501 U.S. 32, (1991). The court made clear that it had not found any of those measures appropriate in Conrad's case, but wanted to make sure courts and litigators know there are tools in place for "the person who abuses the litigation process, but the tools do not include deemed acceptance of a proposed offer of settlement." *Id.*

As a final point, the court found that the district court properly denied Conrad's request for injunctive relief under the Illinois Consumer Fraud Act. Essentially, Conrad had no standing to prosecute such a claim both because he knew about Boiron's refund program and he knew that the products he was complaining about would not help him. Accordingly, no injunctive relief could "re-dress any potential injury for him, and that lack of re-dressability defeats standing." *Id.*; *Spokeo, Inc. v. Robins*, 136 S.Ct. 1540, 1547 (2016). The case was remanded to allow the district court to resolve Conrad's individual claim.

The 7th Circuit's ruling in *Conrad* reminds litigators of the numerous sanctions district courts have available for abusive litigation tactics. It further demonstrates that the *Campbell-Ewald* ruling pretty much eliminated the "pick-off rule's" viability (previously observed in several circuits). The *Conrad* case also makes it clear that the 7th Circuit has very little appetite for low value claims with small class sizes and high transaction costs which leave the class members with small awards. Such cases can lead to findings of class representative inadequacy which the 7th Circuit seems prepared to affirm.