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LEGAL ALERT

April 16, 2013

Supreme Court Dodges Offer of Judgment Mootness Question; Holds that Moot Claim Ends FLSA Collective Action

A sharply divided Supreme Court held today in *Genesis HealthCare Corp. v. Symczyk* that if an unaccepted offer of judgment does indeed moot an individual claim (a question the Court expressly declined to reach) then the individual's would-be collective action under the federal Fair Labor Standards Act of 1938 (FLSA) is also moot. The narrowly framed 5-4 majority opinion by Justice Thomas drew distinctions between FLSA collective actions and Fed. R. Civ. P. 23 class actions that will likely further limit the ruling's precedential value. A link to the opinion is here.

The plaintiff in *Symczyk* worked as a registered nurse for Genesis HealthCare. She brought a FLSA action claiming that her employer automatically charged her for meal breaks without regard to whether she took an uninterrupted break. She purported to bring the action on behalf of herself and other similarly situated individuals under the FLSA's collective action provision, § 29 U.S.C. 216(b). Genesis answered the complaint and served an offer of judgment under Fed. R. Civ. P. 68 for $7,500 in alleged unpaid wages, as well as attorney's fees, costs and expenses as determined by the court. Symczyk did not respond to the offer. Genesis then filed a motion to dismiss on the ground that the offer left her without an ongoing personal stake in the litigation. The district court granted the motion, noting that no other plaintiff had joined the action and that there was no pending motion for collective action status.

The Third Circuit reversed on the ground that it "would frustrate the objectives of class actions" to allow a defendant's tender of judgment to "pick[] off" multiple plaintiffs. *Symczyk v. Genesis HealthCare Corp.*, 656 F.3d 189, 195 (3d Cir. 2011) (quoting *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 339 (1980)). In the Supreme Court, Genesis argued that the offer of judgment vitiated Symczyk's personal stake in the matter, and that no steps toward a collective process had been taken at the time of the offer of judgment. Genesis also argued that, because the case arose under the FLSA, the interests of hypothetical claimants were even more remote than in a class action.

The Supreme Court held that Symczyk's collective action became moot when her individual claim did. The Court began by ducking what had seemed to be a key question presented by the case: does an unaccepted Rule 68 offer moot an individual claim? The Court acknowledged the circuit split on this question, but noted that all parties had assumed in the lower courts that the answer to the question was yes. Thus, the Court assumed, without deciding, that Symczyk's individual claim was mooted by an offer of judgment to which she did not reply. (Slip op. at 5.)

From that premise, the Court stated that whether the action remained justiciable turned on "straightforward application of well-settled mootness principles…." (*Id.*) The Court held that Symczyk lacked any cognizable personal interest in representing others in the action. The Court distinguished *United States Parol Comm'n v. Geraghty*, 445 U.S. 388 (1980), which held that a named plaintiff whose claim became moot after denial of class certification still could appeal the denial, on the ground that in *Geraghty* the appeal could relate back to a decision on class certification made while the named plaintiff's claim was alive. Here, there was not even a conditional certification under FLSA to which to relate back. Moreover, the Court held that "a putative class acquires an independent legal status once it is certified under Rule 23." (Slip. op. at 8.) FLSA conditional certification confers no such status, the Court explained, and only authorizes the sending of notice to employees. The Court also held that Symczyk's claim was not of an "inherently transitory" nature, like a pretrial detention challenge, that would warrant relating back

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to the filing of the complaint. Finally, the Court distinguished *Deposit Guar. Nat. Bank v. Roper,* on which the Third Circuit had relied. That case held that named plaintiffs who had prevailed by offer of judgment could still appeal the denial of certification as both limited to its facts—in which the plaintiffs retained an economic interest in shifting attorneys' fees and expenses to successful class litigants—and as "tethered to the unique significance of certification decisions in class-action proceedings." (Slip. op. at 11.)

Justice Kagan's notably brusque dissent, joined by Justices Ginsburg, Breyer and Sotomayor, derided the majority as resolving "an imaginary question….Feel free to relegate the majority's decision to the furthest reaches of your mind: The situation it addresses should never again arise." (Dissent slip op. at 1-2.) The dissent took the majority to task for not deciding whether an unaccepted offer of a full-relief judgment renders a claim moot, and then delivered an admonition: "So 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." (*Id*. at 4.)

Symczyk highlights what appears to be a hardening ideological split in the Court on class action issues, seen also earlier this term in *Comcast Corp. v. Behrend*. (A link to our *Comcast* Legal Alert is here.) Although the case does not determine the effect of an unaccepted Rule 68 offer, the majority's express reservation combined with the vehement four-justice dissent may undermine the view that an unaccepted Rule 68 offer of full relief moots a named plaintiff's claim and moots her class action as well.

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