

## **Illinois Supreme Court Rules That Tender of Complete Relief to Class Representative Before Class Certification Motion Moots Putative Class Action**

### ***Class Action Alert***

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A hot topic in class action jurisprudence is whether tender of complete relief to the proposed class representative prior to seeking class certification moots the case. In recent years, defendants have increasingly sought to end class litigation by offering plaintiffs (suing on behalf of putative classes of similarly situated persons) complete relief on their individual claims. Federal courts have struggled to define the extent to which a Rule 68 offer of judgment can be used to "pick off" a plaintiff suing in a representative capacity. Some federal courts have indicated that, in situations where class representatives (and counsel) do not act expeditiously in seeking class certification, an offer of judgment under Rule 68 will deprive plaintiffs of standing. By contrast, other courts have expressed reluctance to allow defendants to moot class claims by "picking off" the class representative and have observed that allowing offers of judgment to moot class actions will result in races to the courthouse with plaintiffs trying to file (largely boilerplate) motions for class certification before defendants tender offers of relief.

A recent decision from the Illinois Supreme Court provides some clarity to the issue, at least on the state level. In *Barber v. American Airlines, Inc.*, No. 110092, slip op. (Ill. Mar. 24, 2011), the Illinois Supreme Court ruled that a defendant may moot a proposed class representative's claims by tendering complete relief prior to the filing of a motion for class certification. In so holding, the court highlighted a distinction between offers of complete relief made before class certification is sought and those made after such a motion is filed. The distinction is based on the court's observation that a "motion for class certification, while pending, sufficiently brings the interests of the other class members before the court 'so that the apparent conflict between their members and those of the defendant will avoid a mootness artificially created by the defendant by making the named plaintiff whole.'" *Barber*, No. 110092, slip op. at \*5 (citing *Susman v. Lincoln Am. Corp.*, 587 F.2d 866, 870 (7th Cir. 1978)). The motion for class certification, the *Barber* court reasoned, creates at least a

theoretical class of persons whose claims are not affected by the offer of complete relief to the representative plaintiff and thus the tender is ineffectual.

On August 11, 2008, Andrea Barber purchased a ticket for a flight from Chicago to White Plains, N.Y. After American Airlines later canceled the flight, Barber elected not to take another flight and requested refunds of both her ticket price and checked baggage fee. American Airlines allegedly refunded the cost of the flight but declined to refund the \$40 checked baggage fee because it was not its policy to refund baggage fees when passengers do not take other flights. Four days later, Barber filed a putative class action complaint in the Circuit Court of Cook County asserting claims for breach of contract on behalf of a class of similarly situated persons. Two weeks after being served with the complaint and prior to plaintiff filing a motion for class certification, American Airlines offered to provide Barber a refund of the \$40 checked baggage fee.

Three weeks later (and after Barber's counsel had declined the refund offer), American Airlines refunded the baggage fee directly to Barber's credit card. The circuit court dismissed the class action suit as moot based on American Airlines' tender of complete relief. In a split decision, the appellate court reversed the dismissal, ruling that Barber should have been provided a "reasonable opportunity" in which to seek class certification.

The Illinois Supreme Court reversed the appellate court and affirmed the circuit court's dismissal based on, in large measure, its earlier decision in *Wheatley v. Board of Education Township High School District 205*, 99 Ill. 2d 481 (1984). In *Wheatley*, a case involving teachers who had been dismissed by the defendant board of education, the Supreme Court held that dismissal of the putative class action was warranted because as a result of the school board's offer to reinstate the two named plaintiffs, "[t]here was no longer a controversy between the named plaintiffs and the board." *Id.* at 485. According to the Barber court, "*Wheatley* teaches that the important consideration in determining whether a named representative's claim is moot is whether that representative filed a motion for class certification prior to the time when the defendant made its tender." *Barber*, No. 110092, slip op. at \*5 (citations omitted). When defendant has done so, the *Barber* court reasoned, "the interests of other class members are not before the court, and the case may properly be dismissed." *Id.* As it was undisputed that Barber had not sought class certification

prior to American Airlines' refund of her baggage fee, the Supreme Court reversed the appellate court's decision and affirmed the circuit court's dismissal order.

In so doing, the *Barber* court examined the "pick off" exception to *Wheatley* by which Illinois courts generally prevented defendants from "picking off" a named plaintiff even when a motion for class certification had not yet been filed. The court held that this exception to the general rule "ha[d] no basis in the law" and plaintiffs were not automatically entitled to a "reasonable opportunity to move for certification of the class." *Barber*, No. 110092, slip op. at \*\*6-7. The Illinois Supreme Court also rejected the public policy concerns underlying the "pick off" exception by noting that "there is no prohibition against settlements with class members as long as the rights of non-settling class members are not affected." *Id.* at \*7.

*Barber* provides some much-needed clarity regarding the dispositive effect of offers of complete relief in the class action context. As a result of *Barber*, defendants faced with putative class actions may be able to moot proposed class representatives by tendering complete relief before class certification is sought (class allegations in the complaint generally do not suffice). Defendants should carefully consider the affirmative use of such offers to avoid potentially protracted class litigation.

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