



Illinois Supreme Court Rejects “Pick Off” Exception to Mootness-Based Dismissal

By: A. Kelly Turner

On March 24, 2011, the Illinois Supreme Court held that a class action complaint against American Airlines, Inc. was properly dismissed for mootness and that American had not improperly “picked off” named plaintiff and putative class representative Andrea Barber when it paid her the amount in dispute before she moved for class certification. *Barber v. American Airlines, Inc.*, Slip op., No. 110092 (Ill. Mar. 24, 2011).

Barber purchased an American Airlines ticket and, at the airport, paid an additional \$40 fee to check her suitcases. After the flight was canceled, Barber elected not to take another flight. Instead, Barber asked American to cancel her ticket and to refund her not only the ticket price but also the \$40 fee. American allegedly refused to refund the checked baggage fee, so Barber filed a class action complaint against American in the Circuit Court of Cook County, asserting a claim for breach of contract on behalf of herself and a putative class.

After Barber filed the class action complaint, American refunded her the \$40 checked baggage fee. American then filed a motion to dismiss the complaint, arguing that Barber’s claim was moot because American had refunded her the \$40 at issue. The circuit court agreed and granted the motion to dismiss. Barber never filed a motion for class certification.

The appellate court reversed and remanded, finding that Barber’s claim was not moot because American’s refund was an improper attempt to pick off Barber to avoid a class action. *Barber v. American Airlines, Inc.*, 398 Ill. App. 3d 868 (1st Dist. 2010). The Illinois Supreme Court granted American’s petition for leave to appeal.

The Supreme Court found *Wheatley v. Board of Education of Township High School District 205*, 99 Ill. 2d 481 (1984), controlling. In *Wheatley*, after the named plaintiffs filed a class action lawsuit arising from their dismissal, the defendant reinstated them, mooting their individual claims. The court found the class action complaint should be dismissed, as the named plaintiffs could not meet the class action requirement that they have a valid claim against the defendant. Slip op. at 4 (citing *Wheatley*, 99 Ill. 2d at 486-87). Importantly, the named plaintiffs had not moved for class certification, and no absent class member had moved to substitute in as a class representative in place of the named plaintiffs. Slip op. at 5 (citing *Wheatley*, 99 Ill. 2d at 487).



The *Barber* Court relied on *Wheatley*:

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.... [W]here the tender is made *before* the filing of a motion for class certification ... the interests of the other class members are not before the court, and the case may be properly dismissed.

Slip op. at 5 (citations omitted). There was no dispute that Barber did not move for class certification, so her claim was moot under *Wheatley*.

As for the "pick off" exception to dismissal due to mootness that the appellate court had applied, the Court concluded it "has no basis in the law," slip op. at 7 (citation omitted), and expressly rejected it. The Court explained that the earlier case from which the exception allegedly derived focused on the need for the *trial court*, not the named plaintiff, to have a reasonable opportunity to rule on a pending motion for class certification once a motion to dismiss was filed. The Court stated that, to the extent certain appellate court cases "contain[] language essentially acknowledging and recognizing the 'pick off' exception ... [t]his language is a clear departure from *Wheatley* and is therefore incorrect and should not be cited." Slip op. at 8.

Finally, the Court found unpersuasive Barber's asserted public policy concern that defendants could avoid class action litigation by tendering relief to the named plaintiffs. The Court noted that the law does not prohibit a defendant from settling with class members so long as the settlement does not affect the rights of nonsettling class members. Slip op. at 7. In Barber's case, the nonsettling class members either could have continued the class litigation by seeking to substitute in for Barber or could pursue their claims individually.

Chief Justice Kilbride specially concurred in the decision of the Court, writing his own opinion "to recognize authority supporting the pick-off exception and state expressly what the majority's holding implies." Slip op. at 8. Chief Justice Kilbride stated that, under the majority's holding, "the pick-off exception survives but is limited to circumstances when a motion for certification has been filed, or is otherwise pending, prior to the tender of relief." Slip op. at 9. In such a situation, the trial court should rule first on the motion for class certification before turning to the motion to dismiss based on mootness of the named plaintiff's claim. *Id.*

The decision in *Barber* has at least two practical consequences. First, named plaintiffs now are more likely to file a motion for class certification, even if just a bare-bones motion, when they file their initial complaint, thus precluding the trial court's consideration of any mootness-based motion (should the defendant tender the relief requested) until after the court rules on the certification motion. Second, if a class action complaint is filed without an accompanying motion for certification, the defendant should promptly review the named plaintiff's claims to determine whether to tender the relief the named plaintiff requests, aiming to make any such tender before the named plaintiff moves for class certification.

For more information on the matters discussed in this *Locke Lord's QuickStudy*, please contact the author:

A. Kelly Turner | T: 312-443-0356 | kturner@lockelord.com