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Illinois Supreme Court Clarifies Rules Around "Picking-Off" Named Plaintiffs in Putative Class Actions

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The Illinois Supreme Court issued an opinion yesterday clarifying the level of detail plaintiffs must include in a motion for class certification in order to avoid dismissal of claims as moot based on a defendant's tender of the full amount sought by the named plaintiff. The decision, *Ballard RN Center, Inc. v. Kohll's Pharmacy & Homecare, Inc.*, 2015 IL 118644, is available here. In short, while some detail is required, minimal detail is sufficient. The opinion will make it more difficult for defendants to moot individual plaintiffs' claims in putative class actions—sometimes referred to as "picking off" named plaintiffs—by voluntarily affording them complete relief prior to certification of any class.

Ballard Files A Placeholder Motion for Class Certification At The Same Time As Its Complaint

Ballard RN Center (Ballard) filed suit against Kohll's Pharmacy & Homecare (Kohll's) in April 2010, alleging violations of the federal Telephone Consumer Protection Act (TCPA) arising out of Ballard's receipt of unsolicited fax advertisements.[1] Ballard sought to represent a class of similarly situated individuals and businesses who also received unsolicited fax advertisements from Kohll's. At the same time, Ballard filed a motion for class certification, noting that it would file a supporting memorandum "in due course" after obtaining discovery necessary to flesh out its satisfaction of the certification requirements.[2]

Kohll's Tenders A Check For The Full Amount of Ballard's TCPA Damages

The case proceeded through discovery, and Kohll's filed a motion for summary judgment in June 2012. In the motion for summary judgment, Kohll's argued that the TCPA claim was moot because Kohll's had tendered a check to Ballard for more than the amount it could hope to recover three separate times. Each time, Ballard refused the offer and returned the check.[3]

At the time of the motion for summary judgment in June 2012, Ballard still had not filed any memorandum in support of its motion for class certification or otherwise pushed for a certification ruling. Kohll's argued that Ballard's failure to submit and pursue a "complete" motion for class certification was akin to not filing any motion at all, such that the tender of a check for all potential damages rendered Ballard's TCPA claim moot under the Illinois Supreme Court's 2011 ruling in *Barber v. American Airlines, Inc.*, 241 Ill. 2d 450 (2011). Ballard countered that the motion for class certification filed at the same time as the complaint was sufficient to avoid mootness under *Barber*, arguing that any delay in proceeding on class certification was "a direct result" of Kohll's "obfuscation of discovery."[4]

The Circuit Court and the Appellate Court Disagree As To Whether The Placeholder Motion Was Sufficient To Invoke Protection Under *Barber*

The Circuit Court denied Kohll's motion for summary judgment on the TCPA claim, finding that Kohll's did not send the checks to Ballard until after Ballard filed its motion for class certification and, therefore, the claim was not mood under Barber. On interlocutory appeal, the Appellate Court reversed. Holding that Barber—implicitly—required a motion for class certification to "contain sufficient factual allegations" to "bring the interest of the other class members before the court," the Appellate Court determined that Ballard's "shell" of a motion did not suffice.[5]

The Supreme Court Finds the Placeholder Motion Sufficient

After reviewing the Barber decision in detail, the Illinois Supreme Court concluded that it did not "impose any sort of threshold evidentiary or factual basis" for class certification motions—only a timing requirement. While agreeing with the Appellate Court that a "contentless shell motion or other frivolous pleading would be insufficient," the Supreme Court found that the placeholder motion filed by Ballard surpassed this baseline. Ballard's motion, though short, was not a "frivolous shell motion" because it "contains a general outline of plaintiff's class membership, class action allegations, and effectively communicates the fundamental nature of the putative class action." This is true even though the placeholder motion may not have been, on its own, sufficient to demonstrate class certification was appropriate under 735 ILCS 5/2-801, *et seq*.[6]

The Illinois Supreme Court noted that this approach, favoring focus "on the timing of the filing of the motion for class certification rather than on its ultimate merit," is consistent with the approach adopted by the Seventh Circuit Court of Appeals.[7]

The Bottom Line for Class Action Defendants in Illinois

The Illinois Supreme Court's decision in *Ballard* is another step in the trend—started in the federal courts but apparent in the state courts as well—toward eliminating opportunities for defendants to "pick off" lead plaintiffs in putative class actions by offering full settlements. With *Ballard*, the Illinois Supreme Court established a low threshold for the information that must be contained in a motion for class certification to avoid a claim of mootness based on tender. The ruling is likely to inspire more plaintiffs filing putative class actions in Illinois to file motions for class certification concurrently with their complaints, and will make it more difficult for defendants to successfully challenge the sufficiency of such placeholder motions.

Endnotes

1 *2015 IL 118644, ¶ 5. Ballard also brought claims for violation of Illinois' Consumer Fraud and Deceptive Business Practices Act, and common-law conversion arising out of Ballard's receipt of unsolicited fax advertisements.*
2 *Id. ¶¶ 8-9.*
3 *Id. ¶¶ 10-11.*
4 *Id. ¶¶ 10-14. Ballard eventually filed an amended motion for class certification in November 2012. Id. ¶ 15.*
5 *Id. ¶¶ 17, 20-21.*
6 *Id. ¶¶ 36, 38-39.*
7 *Id. ¶¶ 40-44; see also Damasco v. Clearwire Corp., 662 F.3d 891, 896-97 (7th Cir. 2011) (recommending that plaintiffs file a motion for class certification at the time their complaints are filed, to avoid having claims mooted by tender of full amount claimed), overruled in part by Chapman v. First Index, Inc., 796 F.3d 783, 787 (7th Cir. 2015) (finding that a defendant's mere offer of full compensation before motion for class certification is filed, if unaccepted or rejected, does not moot the litigation). Chapman does not address whether the actual tender of full compensation—rather than an offer standing alone—would lead to a different result. Chapman, 796 F.3d at 787. The Illinois Supreme Court, for its part, believes that to be an open question in the Seventh Circuit. 2015 IL 118644, ¶ 40 n.1.*

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