Picking Off the Class Plaintiff: The Illinois Appellate Court's Latest Word on Settling With the Plaintiff Prior to Class Certification

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GR Review

Nothing justifies the use of a class action lawsuit as a tool to promote the greater good quite like the class action lawsuit depicted in the film *Erin Brockovich*. The film describes a class action lawsuit brought by the residents of Hinkley, California against Pacific Gas and Electric Company ("PG&E") for contaminating the town's water supply by allowing hexavalent chromium to seep into the groundwater and then attempting to conceal it from the residents. The chemical caused horrible illnesses among the residents of Hinkley.

Even the most cynical of us cannot help but cheer out loud during the scene depicting a settlement meeting between the lawyers for PG&E, the heroic class counsel, Ed Masry, and the film's heroine, Erin Brockovich. After Ms. Brockovich explains in colorful language why a $20 million offer made by PG&E is ridiculous, one of PG&E's lawyers nervously picks up a glass of water to drink. At that point, the following dialogue occurs:

Erin Brockovich: By the way, we had that water brought in especially for you folks. It came from a well in Hinkley.

PG&E's Lawyer (after putting the water down without drinking it): I think this meeting is over.

Ed Masry: Damn right it is.

On the other hand, businesses increasingly find themselves faced with a different type of class action lawsuit brought by a plaintiff who has suffered only a small loss in purchasing a product or service that did not conform to plaintiff's expectation. Rather than simply contact the business and attempt to work it out, class action lawsuits are filed which often result in a minimal benefit to the plaintiff class, substantial attorney fees for the class lawyers, and a large bill for legal services for the defendant. In those cases, the defendant client will often ask why the defendant simply cannot reimburse the plaintiff for his minimal loss and move forward.

The Illinois Appellate Court was recently faced with such a case. That case provides further insight into a tool which can be used by defense lawyers to force a settlement with the named class representative by paying the representative's minimal loss prior to the time that the court even certifies a class action.

Specifically, in *Cohen v. Compact Power Systems, LLC*, 382 Ill. App. 3d 104, 887 N.E. 2d 668 (1st Dist. 2008), plaintiff brought a class action as a result of his dissatisfaction with the purchase of cell phone batteries. Plaintiff had gone into a cellular phone store to buy a telephone. While at the store, he saw a display for certain batteries for portable devices. Each of the battery packages advertised a coupon offer of "Buy One Get One Free! - Limited Time Mail In Offer," with a coupon sealed inside. Plaintiff purchased three of these battery packages. However, after opening them, Plaintiff discovered that the coupons had an expiration date, which had passed before he bought the batteries. As a result of his $27.70 loss, he filed a class action lawsuit alleging unfair conduct, deceptive business practices, unjust enrichment, and conversion.

Shortly after the lawsuit was filed, the defendant sent a letter to Plaintiff explaining that at least since the date of the lawsuit, it had been informing its customers via its website and a toll-free "800" telephone number, both of which were listed on the coupons, that *it would be honoring all of the expired coupons through June of 2007*. The defendant also informed Plaintiff of its policy to honor the expired coupons and offered to send him a check for $29.08 (the cost of the three battery packages plus 5% interest). As an alternative, defendant offered to provide Plaintiff with three more batteries in lieu of payment. Plaintiff rejected all offers and returned the check to the defendant. In other words, the defendant offered to honor the expired coupons as to Plaintiff and all other customers and pay Plaintiff the amount he lost, or alternatively, to give him free products. Plaintiff rejected all offers, and went forward with the lawsuit.

However, since the Plaintiff had not yet moved to have the case certified as a class action lawsuit[1], defendant moved to dismiss the Complaint on the basis that it was moot, because they had offered to tender the entire amount lost by the named representative before a motion for class certification was made. The Illinois Appellate Court agreed and the lawsuit was dismissed.

The Court stated that: "The general rule has developed that if the defendant tenders the named plaintiff the relief requested before the class is certified, the underlying cause of action must be dismissed as moot, as there is no longer an actual controversy pending." *Cohen*, 382 Ill. App. 3d 104, 887 N.E. 2d 668 (1st Dist. 2008). The Court then noted it would use a reasonableness standard to determine whether the plaintiff acted in a diligent manner in seeking class certification. In *Cohen*, the Court found no reasonable diligence as Plaintiff never moved to certify the class despite the defendant waiting five months from the filing of the Complaint to move to dismiss after twice making its settlement tender.

While the latest decision by the Illinois Appellate Court certainly does not put an end to class actions of this type (class lawyers can attempt to substitute another plaintiff to serve as class representative in the action), it does provide a useful tool for defense counsel. For the class action described in *Erin Brockovich*, this tool would not be effective (and properly so). But in cases like *Cohen* where the harm to the proposed class plaintiff is minimal and easily determined, by allowing the defendant to simply pay the plaintiff's claimed total loss before the class has been certified, the defendant at least has the opportunity to prevent a needless

class action from going forward at tremendous expense.

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[1] This is a necessary step to allow a case to proceed under the class action rules.