

Litigation Alert

June 30, 2017

Key Points

- Defendants to putative class actions cannot moot a lead plaintiff's claims by depositing with the court the maximum amount of damages the individual plaintiff may recover.
- Defendants likely cannot force upon plaintiffs a settlement, even where defendants offer plaintiffs the highest recovery available to plaintiffs under the relevant statute.
- Defendants likely cannot "pick-off" the lead plaintiff in a putative class without negotiating an agreement with the lead plaintiff.



7th Circuit Balks At Class Action Defendant's Attempt To Pick-Off Lead Plaintiff

On June 20, 2017, the U.S. Court of Appeals for the 7th Circuit provided guidance on attempts by defendants to moot a plaintiff's claim by depositing with the court damages sufficient to make the plaintiff whole. The practice is commonly referred to as a "pick-off" because it is often attempted by defendants to putative class actions as a means to settle the lead plaintiff's claim. In *Fulton Dental, LLC v. Bisco, Inc.*, No. 16-3574, the 7th Circuit held that the pick-off attempted by defendant Bisco, Inc. was substantially similar to the pick-off attempt that the U.S. Supreme Court held improper in its recent *Campbell-Ewald Co. v. Gomez* opinion. The 7th Circuit's opinion reinforces the need for defendants of putative class actions to seek advice from counsel and negotiate a settlement with the lead counsel, rather than attempting to flank the plaintiff and deposit with the court an amount sufficient to satisfy a plaintiff's claims.

Background

Plaintiff Fulton Dental filed on December 8, 2015, a putative class action alleging that Bisco violated the Telephone Consumer Protection Act of 1991 (TCPA) by faxing to Fulton Dental a generic unsolicited advertisement for Bisco's dental products. Under the TCPA, such contacts are prohibited, unless one of several exceptions allows the communication. While the harm to Fulton Dental was *de minimis*, the TCPA provides for recovery of statutory damages.

On January 18, 2016, before Fulton Dental filed a motion for class certification, Bisco made a settlement offer to Fulton Dental of \$3,005 plus accrued costs—an amount sufficient to make Fulton Dental whole. On January 24, 2017, Fulton Dental rejected Bisco's offer because the offer did not provide relief for the rest of the putative class. Following Fulton Dental's refusal of its offer, Bisco filed a motion for leave of court to deposit \$3,600 with the court, pursuant to Rule 67 of the Federal Rules of Civil Procedure. Bisco then argued that the \$3,600 was the maximum recovery available to Fulton Dental, making Fulton Dental

whole and thus mooting its claim. Fulton Dental opposed Bisco's motion, arguing that this was an improper use of Rule 67 and that its claims were not mooted by Bisco's deposit. The district court granted Bisco's motion, ruling that Bisco's depositing the funds with the court was equivalent to giving the funds to Fulton Dental. Fulton Dental appealed to the 7th Circuit.

The 7th Circuit's Opinion

The 7th Circuit reversed the district court, holding that Bisco's deposit with the Court was an improper use of Rule 67. According to the 7th Circuit, Bisco's deposit did not moot, or otherwise end, Fulton Dental's claims.

The 7th Circuit began its analysis by stating that mootness is not the correct legal concept for analyzing Bisco's deposit. Instead, the Seventh Circuit characterized Bisco's deposit and motion as tantamount to accord and satisfaction or payment, affirmative defenses recognized by Rule 8(c)(1) of the Federal Rules of Civil Procedure.

The Seventh Circuit then analyzed Rule 67, which, according to the opinion and the authority cited therein, was created for the purpose of allowing a party that holds a contested fund to deposit it with the court, thus relinquishing responsibility for the disbursement of the fund. According to the 7th Circuit, this, along with Bisco's indicating that it might later request a return of any funds not distributed to Fulton Dental, suggests that Bisco did not deposit the full amount of plaintiff's possible recovery—at least not in an account payable to Fulton Dental.

Contact Information

If you have any questions concerning this alert, please contact:

Neal Ross Marder

nmarder@akingump.com

310.728.3740

Los Angeles

Garrett Llewellyn

gllewellyn@akingump.com

310.552.6615

Los Angeles

Zak Franklin

zfranklin@akingump.com

310.728.3281

Los Angeles