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Post-Litigation Refund Strategies To Defeat Class Certification

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Class actions may often strike defendants out of nowhere, and well-meaning defendants who would have made a dissatisfied customer whole before a lawsuit is filed must instead face the prospect of lengthy and costly litigation.

When a class action is filed, defendants often wonder whether tendering a payment to a class representative can defeat the class action. The U.S. Supreme Court in Campbell-Ewald Company v. Gomez held that an attempt to make such an offer via an offer of judgment cannot moot the class representative's claims in 2016.[1]

But a recent U.S. Court of Appeals for the Third Circuit decision in Duncan v. Governor of the Virgin Islands may provide another path for defendants to use post-litigation refund offers to defeat class certification.

Tendering Payment After a Suit Is Filed Does Not Moot the Class Representative's Claims

As any company knows well, dissatisfied customers often come forward to contact companies with their disputes and request refunds. In fact, many companies require customers to attempt to resolve disputes informally before litigation begins.

These informal complaints can provide a golden opportunity for defendants to avoid a class action.

When a company provides full relief before a lawsuit was filed, courts have held that the pre-litigation refund deprives a plaintiff of Article III standing to sue.[2] And if no plaintiff has standing to sue, a class action cannot proceed.

The analysis usually changes when a lawsuit is filed. At that point, many defendants wonder if they can avoid a lawsuit by making a named plaintiff whole.

But once a suit is filed, putative class action plaintiffs and their lawyers are often less amenable to accepting a full refund. And attempts by defendants to tender the full amount of the requested relief are often unsuccessful at defeating a plaintiff's

claims.

For example, in Campbell-Ewald Co. v. Gomez, the defendant tendered a Rule 68 offer of judgment that offered the class representative complete relief. But because the class representative ultimately rejected the Rule 68 offer, the Supreme Court ruled that the offer did not moot his claims.[3] The class representative was permitted to proceed with his claims, and the parties settled before class certification briefing.

Class action defendants have since tried other procedural avenues to moot a class representative's claims by tendering a payment. In the wake of Campbell-Ewald, one popular method was to deposit with the district court, pursuant to Rule 67,[4] the monetary relief sought by the named plaintiff.

As one Fulton Dental LLC v. Bisco Inc. case defendant argued in the U.S. Court of Appeals for the Seventh Circuit in 2017, when a defendant "deposit[s] the funds and consent[s] to" judgment against it, it has provided "[no]thing less than [the class representative] was entitled to on its individual claim," and so the individual and class claims are moot.[5]

At least two federal appellate courts have rejected this maneuver, though, holding that depositing funds representing "the maximum possible damages [the class representative] could receive, plus ... fees and costs" does not moot the representative's claim.[6]

The Seventh Circuit saw "no principled distinction between attempting to force a settlement on an unwilling party through Rule 68, as in Campbell-Ewald, and attempting to force a settlement on an unwilling party through Rule 67."[7]

And the U.S. Court of Appeals for the Second Circuit held in Radha Geismann, M.D., P.C. v. ZocDoc Inc. in 2018 that a Rule 67 deposit cannot provide a plaintiff with complete relief because "a party's deposit of funds with the court does not entitle another party to collect those funds."[8]

Accordingly, neither Rule 67 nor Rule 68 enables class action defendants to moot a class representative's claim.

Cutting a Check: Losing the Battle but Winning the War

Some defendants have tried a different strategy — simply cutting the class representative a check. A recent Third Circuit decision suggests that this strategy might not knock out the named plaintiff's claim, but could help a defendant defeat class certification — even when the plaintiff declines to cash the check.

In Duncan v. Governor of the Virgin Islands, the named plaintiff alleged that she was owed a $7,104 tax refund from the U.S. Virgin Islands government for her 2016 tax return.[9]

She sought to represent a putative class consisting of the territory's residents who qualified for but had not yet received a tax refund from the territory's government. During litigation but before class certification, the government sent the plaintiff a check for $2,474, which it contended was the proper amount of her refund. She declined to cash the check.

The District Court of the Virgin Islands denied class certification on grounds that by virtue of receiving the refund check the plaintiff's claim was no longer typical of the class she sought to represent. The

court did not directly address Article III justiciability, though, instead merging that discussion with its class certification analysis.[10]

The Third Circuit found that merging to be in error, and so it first considered whether the territory's sending of a refund check to the class representative mooted her claims, before considering class certification.

In an unsurprising ruling on the Article III question, the Third Circuit held the plaintiff's claims were not moot simply because she was receiving the refund check.

Just as settlement offers cannot moot a case when they are not accepted, the government's sending of a check to the plaintiff cannot moot the case unless she accepts — cashes — it. Because she did not, her claims could not be moot.[11]

The U.S. Court of Appeals for the First Circuit reached the same conclusion last year in similar circumstances involving a nongovernmental defendant in Bais Yaakov of Spring Valley v. ACT Inc.:

The transmittal of an ordinary check does not differ for present purposes from an offer to pay: The recipient has a promise, but no funds. ... So, as best we can tell, [plaintiff's] damage claim is not moot.[12]

The U.S. Court of Appeals for the Eighth Circuit has agreed.[13]

But when it came to analyzing the impact of the tendered check on class certification, the Third Circuit found that sending a payment to the class representative rendered her claims atypical of those of the class of plaintiffs she sought to represent. The plaintiff tried to avoid this conclusion by arguing that the check she was sent was less than the amount she believed she was owed.

The Third Circuit's decision turned on this argument, which the court said meant the class representative would need to "'devote time and effort' to facts unique to her claim." Specifically, the plaintiff's individual claim — unlike those of putative class members — would require exploration of whether the government had sent her the correct amount of money. This finding defeated typicality[14] for the plaintiff's damages claim.[15]

The post-litigation refund check, however, did not prevent class certification on the plaintiff's claims for injunctive, mandamus and declaratory relief.

Instead, "the central point with respect to the claims for mandamus, declaratory relief, and injunctive relief is the question of systemic, arbitrary, and indefinite withholding of refunds, which is 'essentially the same' for every class member, regardless of whether he or she is the lucky recipient of a long-delayed refund check."[16]

A dissenting judge would have gone further: Judge Paul Brian Matey would have found all her claims atypical, including those for injunctive, mandamus and declaratory relief because the plaintiff's receipt of a refund check "is reason enough to 'motivate [her] to litigate against or settle with the defendants in a way that prejudices the absentees.'"[17]

What Comes Next?

Despite the Third Circuit's mootness ruling, the Duncan decision represents a victory for class action

defendants. The majority's typicality analysis gives that Rule 23 factor real teeth, and provides a path for future defendants to defeat class certification by tendering payment.

As the Duncan court explained, "[a]lthough [the class representative's] claim might be the same as [that] of the class in terms of ... the legal theory advanced[,] ... we are not concerned only with the legal theory of Duncan's claim; we are also concerned with the factual circumstances underlying that theory."[18]

And according to the Third Circuit those factual circumstances "have nothing to do with the rest of the class's refund claims, which ostensibly rely only on the factual premise that the class members are entitled to refund checks but haven't yet received them."[19]

In the wake of the Third Circuit's ruling in Duncan, class action defendants should strongly consider tendering refunds to class representatives even after they file suit.

Although doing so may not defeat the claims in their entirety, they could create a substantial obstacle to class certification — at least within the Third Circuit. Whether other circuits follow suit remains to be seen.

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[1] Campbell-Ewald Co. v. Gomez, 577 U.S. 153, 15/1-/28 (2016).

[2] E.g., Luman v. Theismann, 647 F. App'x 804, 807 (9th Cir. 2016) (no standing where plaintiff filed suit after receiving refund); Stanford v. Home Depot USA, Inc., 358 F. App'x 816, 81/1-/29 (9th Cir. 2009) (no standing where fee had been refunded because plaintiff "had no injury when this action was brought"); Air Espana v. Brien, 165 F.3d 148, 153 (2d Cir. 1999) (no standing to sue over "fines that were canceled" before suit filed).

[3] Campbell-Ewald, 577 U.S. at 16/1-/26 ("In sum, an unaccepted settlement offer or offer of judgment does not moot a plaintiff's case, so the District Court retained jurisdiction to adjudicate [class representative's] complaint.").

[4] See Fed. R. Civ. P. 67(a).

[5] Fulton Dental, LLC v. Bisco, Inc., No. 16-3574, Dkt. 14 (Appellee Brief), at 10 (7th Cir. Jan. 9, 2017).

[6] Fulton Dental, LLC v. Bisco, Inc., 860 F.3d 541, 543 (7th Cir. 2017).

[7] Id. at 545.

[8] Radha Geismann, M.D., P.C. v. ZocDoc, Inc., 909 F.3d 534, 542 (2d Cir. 2018).

[9] Duncan v. Governor of the Virgin Islands, 48 F.4th 195 (7th Cir. 2022).

[10] Id. at 20/1-/23.

[11] Id. at 20/1-/25. Even if the claims were moot, the court would apply the "picking-off exception," which "allows a plaintiff to continue representing a class, notwithstanding otherwise mooted claims" where it appears that the defendant had picked off the named plaintiff with the intention of mooting her claims. Id. at 206. That, the Third Circuit held, is exactly what happened in Duncan. Id.

[12] Bais Yaakov of Spring Valley v. ACT, Inc., 12 F.4th 81, 95 (1st Cir. 2021).

[13] See Hoekman v. Educ. Minnesota, 41 F.4th 969, 977 (8th Cir. 2022) ("an uncashed check is not materially different from an unaccepted offer of settlement").

[14] See Fed. R. Civ. P. 23(a)(3) (requiring that "the claims or defenses of the representative parties [be] typical of the claims or defenses of the class").

[15] Duncan, 48 F.4th at 208.

[16] Id. at 209.

[17] Id. at 214 (Matey, J. dissenting).

[18] Duncan, 48 F.4th at 208 (citations and quotation marks omitted).

[19] Id.