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April 2013

Genesis Healthcare Corp. v. Symczyk: The "Collective" Aspect of FLSA Collective Actions Has No Independent Legal Standing

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Both sides of the bar had high hopes for the outcome of the Supreme Court's recent decision in *Genesis Healthcare Corp. v. Symczyk*, No. 11-1059 (Apr. 16, 2013), as to a specific issue — whether an unaccepted Rule 68 "offer of judgment" that would have fully satisfied the named plaintiff's claims is sufficient by itself to moot a putative collective action under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 216(b). In a 5-4 decision, however, the Court evaded resolving this particular circuit split on technical grounds.

But the Court did resolve another split that should provide employers confidence in the proper disposition of FLSA collective actions in the event that the named plaintiff's claim does become moot. Several circuits had erroneously strained an analogy between traditional class actions and collective actions to keep collective actions alive where no live controversy survived with the named plaintiff. The Supreme Court rejected their reasoning and clarified that there can be no "headless class" (i.e., a class without a representative plaintiff) in the context of the FLSA. Declaring what some might say is the obvious, the Supreme Court noted that Rule 23 class actions and FLSA collective actions are fundamentally different. While a Rule 23 class has an independent legal status that exists beyond the claims of the class representatives, an FLSA collective action without a plaintiff who has a live controversy is no case at all. Without a live case or controversy, such matters must be dismissed as moot.

I. Background

Laura Symczyk worked as a registered nurse at a facility owned by a subsidiary of Genesis Healthcare Corporation. Symczyk filed a collective action under the FLSA, alleging that Genesis Healthcare and its subsidiary (collectively, "Genesis Healthcare") violated the FLSA by automatically deducting meal breaks from employee pay, whether or not the employees took their breaks.

Genesis Healthcare answered the complaint and simultaneously served an offer of judgment under Rule 68 of the Federal Rules of Civil Procedure for full individual relief — the $7,500 she claimed in alleged unpaid wages, as well as "attorneys' fees, costs and expenses as determined by the Court." Under Rule 68, the offer was left open for 10 days and then deemed withdrawn. Symczyk allowed the offer to expire without response.

Contending that Symczyk's failure to accept the Rule 68 offer of full relief (and Symczyk admitted that the offer indeed provided full relief on her individual claims) mooted her claims by removing any live controversy, Genesis Healthcare promptly moved to dismiss the entire action for lack of subject-matter jurisdiction. The district court agreed with Genesis Healthcare and dismissed the action. The Third Circuit reversed — holding that, although the Rule 68 offer of judgment fully satisfied and mooted Symczyk's individual claims, the collective action aspect of the case survived under a "relation back" doctrine endorsed by the Supreme Court in other contexts (discussed in more depth below). Reversing dismissal, the Third Circuit expressed concern with the tactic of "picking off" lead plaintiffs by making Rule 68 offers of full relief in order to avoid facing a class, which the court of appeals viewed as "facilitat[ing] an outcome antithetical to the purposes behind § 216(b)."

II. *Certiorari* Granted

In June 2012, the Supreme Court granted review of the Third Circuit's decision on the following question:

Whether a case becomes moot, and thus beyond the judicial power of Article III, when the lone plaintiff receives an offer from the defendants to satisfy all of the plaintiff's claims.

III. What the Court Did *Not* Decide

Given the grant of review, the employment community anticipated that the Court would resolve the circuit split as to whether an unaccepted Rule 68 offer of judgment that would have fully satisfied a plaintiff's claim is sufficient to render the claim moot. That did not happen. In *Genesis Healthcare*, the Court reversed the Third Circuit — but did not decide whether an unaccepted Rule 68 offer of judgment for full individual relief could moot a collective action.

The majority, in an opinion authored by Justice Clarence Thomas, concluded that it could not resolve the mootness issue because the issue was not properly brought before the Court. Its basis was two-fold. It first observed that the Third Circuit had "clearly held" that Symczyk's individual claim was moot. Absent a cross-petition from Symczyk, the majority concluded, it could not review a challenge to or otherwise alter the Third Circuit's holding. Further, the majority concluded that Symczyk had waived the issue by conceding it at the district court and appellate level, and failing to raise the issue in opposition to Genesis Healthcare's petition for certiorari. Accordingly, the majority assumed without deciding that the Rule 68 offer mooted Symczyk's individual claim.

IV. What the Court Decided

Assuming mootness, the majority addressed the issue of whether any justiciable collective action remains when the named plaintiff's personal claims become moot. Over a spirited dissent by Justice Kagan (joined by Justices Ginsburg, Breyer, and Sotomayor), the Court held that no justiciable FLSA collective action remains in such a situation. *Genesis Healthcare* therefore was properly dismissed by the district court, the Court held.

The Court reasoned as follows:

Article III of the Constitution limits federal-court jurisdiction to "Cases" or "Controversies." The doctrine of mootness, which is incorporated within Article III's case or controversy requirement, demands that an actual, ongoing controversy exist at all stages of federal court proceedings. Typically, if the basis for the claim has been resolved or if the plaintiff is no longer subject to the challenged conduct, the claim is moot.

"Collective" actions are different from "class" actions. The relation-back doctrine arises uniquely in the class-action context, preserving the claims of named plaintiffs for class certification purposes that might otherwise be moot if asserted purely as individual claims. Justice Thomas explained that the relation-back doctrine "was developed in the context of class actions under Rule 23 to address the circumstance in which a named plaintiff's claim becomes moot prior to certification of the class." He identified two circumstances in which the Court has applied this doctrine.

The first circumstance arises where a plaintiff's claim becomes moot after a certification motion is denied but is subsequently reversed on appeal. In *United States Parole Commission v. Geraghty*, 445 U.S. 388 (1980), the plaintiff prisoner challenged parole release guidelines, but his substantive claims became moot — after the district court denied class certification and ruled against him on the merits — when he was subsequently released from prison. In such a putative class action the Court held, a plaintiff brings two separate issues for judicial resolution. One is the claim on the merits; the other is the claim that the plaintiff is entitled to represent a class. The Court looked beyond the mootness of the plaintiff's individual claims and focused instead on his wholly separate procedural right to represent a class, concluding that the named plaintiff retained a sufficient personal stake in the procedural claim.

The Court in *Genesis Healthcare* distinguished *Geraghty* primarily on the fundamental difference between a Rule 23 class action and an FLSA collective action. *Geraghty* and other precedents establish that a putative class acquires an independent legal status once it is certified under Rule 23. Justice Thomas explained that conditional certification of an FLSA collective action, however, does not have the same legal effect. In an FLSA action, potential opt-in plaintiffs do not obtain independent legal status until they have actually opted in by filing a written consent with the court.

The second circumstance in which the relation-back doctrine has been applied occurs when a named plaintiff's claim becomes moot before certification but the underlying substantive claim is "inherently transitory." Justice Thomas explained that an "inherently transitory" claim is one that involves a challenge to conduct that is effectively unreviewable because no plaintiff can possess a personal stake in the suit long enough for litigation to run its course, (e.g., a class action challenging the constitutionality of temporary pretrial detentions where, almost by definition, the plaintiff's pretrial detention will have come to an end before the case can be fully litigated). But in a situation such as Symczyk's, there is no "inherently transitory" claim. Indeed, a claim for damages remains alive until "it is settled, judicially resolved, or barred by a statute of limitations."

Justice Thomas closed the majority's opinion by addressing the Third Circuit's concern about abuse by defendants in the form of "picking off" named plaintiffs. The Third Circuit cited support for its protection against "pick off" attempts in *Deposit Guaranty National Bank v. Roper*, 445 U.S. 326 (1980). The Court in *Genesis Healthcare* distinguished *Roper*, however, much as it distinguished *Geraghty*: Rule 23 class actions are different from FLSA collective actions. Justice Thomas dismissed *Roper's* language on "pick off" attempts as "dictum . . . tethered to the unique significance of certification decisions in class-action proceedings." Unjoined potential plaintiffs, the Court noted, "remain free to vindicate their rights in their own suits. They are no less able to have their claims settled or adjudicated following respondent's suit than if her suit had never been filed at all."

V. Four Justices Disagreed

Four justices, led by Justice Kagan, delivered a spirited dissent both as to what the majority did and did not decide. The dissent did not find the distinctions between collective and class actions sufficient

to warrant limiting the relation-back doctrine to traditional class actions. Indeed, to do so, the dissent explained, would allow defendants to short-circuit collective actions and frustrate the objectives of the FLSA.

The dissent also disagreed with the majority's choice to evade ruling on the impact of an unaccepted Rule 68 offer of judgment. It considered this issue to be "inextricably intertwined" with the issue the majority did address, making both appropriate for the Court's consideration.

Justice Kagan focused her dissent on arguing that an unaccepted Rule 68 offer can never moot an individual claim. She relied upon traditional contract principles, arguing that an unaccepted offer of judgment, like any withdrawn offer, is a "legal nullity" that cannot moot a case. She also grounded the dissent in Rule 68 itself, stressing that it permits entry of judgment (thus mooting the plaintiff's claim) only when the offer is accepted. If the offer is not accepted, the offer is deemed withdrawn, so a live controversy does — and always will in those circumstances — remain.

The majority, as noted above, did not weigh in on this latter question (whether a case becomes moot after an unaccepted Rule 68 offer of full relief). Should the issue be brought before the Court, one can only speculate as to how a majority of the Court would resolve it.

VI. What Does the Decision Mean to Employers?

Although the Court did not decide the issue (mootness) much anticipated, employers do have some useful takeaways from what the Court did decide — despite the dissent's prediction that the Court's decision in *Genesis Healthcare* "aids no one, now or ever."

First, the Court did not reject, and indeed neutralized some of the opposition to, a strategy by which employers may eliminate purported FLSA collective actions early by mooting claims of the named plaintiff through offers of full relief. Contesting the dissent's position, the majority commented that "nothing in the nature of FLSA actions precludes satisfaction — and thus the mooting — of the individual's claim before the collective-action component of the suit has run its course." Where there remains no named plaintiff with a live controversy, the collective action would have to be dismissed. In jurisdictions where unaccepted offers of judgment have been held to moot claims (presently, the Third, Fourth, Seventh, and potentially Fifth Circuits) — and unless and until the dissent's argument gains acceptance — employers may continue to successfully resolve matters promptly by making the representative plaintiff a Rule 68 offer, thereby avoiding costly conditional certification proceedings, notices, and opt-in windows. Those employers should move expeditiously, as this approach has generally been upheld in cases where the following factors are satisfied: 1) no other individuals have already opted in to join the collective action, 2) the plaintiff has not filed a motion for conditional certification, and 3) there is no dispute that the Rule 68 offer fully satisfies the plaintiff's claims.

Second, *Genesis Healthcare* resolved an important circuit split over the relation-back doctrine. If the individual claim of the named plaintiff in a collective action becomes moot (as a result of an offer of judgment or otherwise), and no other plaintiffs have opted in, the putative class has no independent legal status and the entire lawsuit is properly dismissed. The relation-back doctrine adopted in some circumstances by the Supreme Court for Rule 23 class actions has no applicability to FLSA collective actions.

In the end, *Genesis Healthcare* resolved fewer issues than most people anticipated, but it nevertheless is a win for employers.

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