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October 15, 2015

No amended complaint needed to change proposed class

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Arnold Chapman filed a federal lawsuit, proposing to represent a class of persons who received faxes from First Index Inc. despite not having given consent, and he moved to certify a class of all persons who had received faxes from First Index since August 2005 without their consent.

First Index claimed some individuals gave oral consent.

The district court declined to certify Chapman's proposed class, ruling that the difficulty of determining who had provided consent made it infeasible to determine who would be a class member.

Chapman then moved to certify a class of all persons whose faxes from First Index either omitted an opt-out notice or that contained one of three different notices that Chapman believed violated the FCC's regulations. The district court refused to certify the class because Chapman's request came too late — more than 18 months after discovery had closed.

The judge dismissed Chapman's personal claim as moot and entered a final judgment.

Chapman took an appeal. The 7th U.S. Circuit Court of Appeals observed that both the parties and the district judge proceeded as if Chapman's proposal to certify the second class required an amendment to the complaint. It didn't.

A complaint must contain three things: a statement of subject-matter jurisdiction, a claim for relief and a demand for a remedy. It is the judge's obligation to define a class, and this does not require an amended complaint.

Even so, the district judge had discretion to reject Chapman's attempt to "remake" his suit more than four years after it was filed. Chapman knew about the potential opt-out issue from the

beginning but did not propose a class related to this point until the parties had borne the expense of discovery into the consent issue and the judge had resolved motions addressing that topic.

The appeals court turned to Chapman's personal claim. While Chapman's motion to certify the first proposed class was pending, First Index made Chapman an offer of judgment under Federal Rule of Civil Procedure 68. The offer stated that it would expire 14 days after the district court ruled on the motion for class certification. Chapman never replied. First Index thereafter moved to dismiss Chapman's personal claim as moot, and the court granted that motion.

Chapman's case, however, was not moot. The district court could have awarded damages and entered an injunction.

The appellate court overruled *Damasco v. Clearwire Corp.*, 662 F.3d 891 (7th Cir. 2011), and similar decisions to the extent they held that a defendant's offer of full compensation moots the litigation or otherwise ends the case or controversy.

This having been said, the court explained that rejecting a fully compensatory offer may have consequences other than mootness. Colorfully, the court said, "You cannot persist in suing after you've won." One question is whether an unaccepted offer of complete compensation should be deemed an affirmative defense, perhaps in the nature of an estoppel or a waiver.

Cost-shifting under Rule 68(d) is not necessarily the only consequence of rejecting an offer, when the plaintiff does not even request that the court award more than the defendant is prepared to provide.

The court pointed out the distinction between Rule 68 offers in a class action, versus an individual claim. Settlement proposals designed to "decapitate" the class upset the incentive structure of the litigation by separating the representative's interests from those of other class members.

In contrast, where there is only one plaintiff, the defendant's offer suggests that there is no need for further judicial assistance. This is particularly a matter of concern when other litigants, who do need the court's aid, are waiting for their cases to reach the court's attention.

The case is *Chapman v. First Index Inc.*, 796 F.3d 783 (7th Cir. 2015).