

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND**

JOYCE BOND, on behalf of herself
and all others similarly situated,

v.

C.A. No. 01 - 177 L

FLEET BANK (RI), N.A.

Report and Recommendation

Jacob Hagopian, United States Magistrate Judge

Plaintiff Joyce Bond filed a Complaint, styled as a class action, on April 11, 2001, and named as a defendant Fleet Bank (RI), N.A. (“Fleet” or “Fleet Bank”). Six days after the filing of the complaint, prior to the defendant’s entry of appearance and prior to the defendant’s filing of a responsive pleading, Fleet served on Bond an offer to satisfy her individual claims, pursuant to Fed.R.Civ.P. 68. The Rule 68 offer did not extend to the class of individuals which the plaintiff sought to represent. On May 1, 2001, plaintiff made a counteroffer, which defendant did not accept.

Plaintiff thereafter filed an Amended Complaint, moved successfully for class certification of her injunctive claims, and moved to bar enforcement of Fed.R.Civ.P. 68.

Currently before the Court is Bond’s motion to bar enforcement of Rule 68. Fleet has not objected. This matter has been referred to me pursuant to 28 U.S.C. §636(b)(1)(B) for a report and recommendation. For the reasons that follow, I recommend that the plaintiff’s motion to bar enforcement of Rule 68 be granted.

Discussion

Rule 68, of the Federal Rules of Civil Procedure provides, in relevant part:

At any time more than ten days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgement to be taken against the defending party for the money... specified in the offer. ... If the judgement finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer. See Fed.R.Civ.P. 68.

Rule 68 is a procedural device in which a party defending against a civil action may compel an adverse party to settle an action or risk exposure to the offering party's cost. See id. An offer of judgement imposes on the offeree the choice of accepting the offer within ten days. If it is not accepted and the outcome of the case is less favorable than the offer, the offeree is required to pay the cost subsequently incurred by the offeror. The rule is intended to be coercive.

However, in the class action context, an offer to the class representative, as here, raises difficulties: it introduces a potential conflict between the named party's self interest and his fiduciary duty to the class.

See Gay v. Waiters' and Dairy Lunchmen's Union, 86 F.R.D. 500 (N.D. Cal. 1980).

If this same procedure were imposed in class actions, the representative as offeree would be forced to balance [her] personal liability for costs against the prospects of sharing with the class in any recovery. [Her] evaluation of the offer would therefore be tinged by self-interest and would tend to differ from that of absent class members. Where the class representative's potential liability for costs is substantial compared to [her] personal stake in a successful outcome, an inherent conflict is created by the mandatory operation of Rule 68. ...[I]t would create a strong incentive on the part of the class representative to accept an offer which, had [her] exposure been fully shared by the entire class, [she] would have rejected. Id. at 502.

Thus, I find enforcement of Rule 68 conflicts with the principles underlying the class action mechanism. Id; Nadar v. JAS Collection Agency Inc., No. 97-CV-6857, 1999 WL 33268061 (E.D.N.Y.

July 6, 1999). Accordingly, plaintiff's motion to bar enforcement should be granted. I so recommend.

Conclusion

For the reasons stated above, I recommend that plaintiff's motion to bar enforcement of Fed.R.Civ.P. 68 be granted. Any objection to this Report and Recommendation must be specific and must be filed with the Clerk of Court within ten days of its receipt. Fed. R. Civ. P. 72(b); Local Rule 32. Failure to file timely, specific objections to this report constitutes a waiver of both the right to review by the district court and the right to appeal the district court's decision. United States v. Valencia-Copete, 792 F.2d 4 (1st Cir. 1986)(per curiam); Park Motor Mart, Inc. v. Ford Motor Co., 616 F.2d 603 (1st Cir. 1980).

Jacob Hagopian
United States Magistrate Judge
January 16, 2003