Settlement offer rejection doesn't bar class recovery

Plaintiffs can still get counsel fees

Published: 10:04 am Wed, June 26, 2013
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The rejection of a reasonable settlement offer by two tenants who served as the named plaintiffs in a putative class action did not preclude recovery of attorneys' fees under Chapter 93A by the rest of the class, a U.S. District Court judge has ruled in a case of first impression.

The defendant, Archstone Properties, argued that when the named plaintiffs turned down an offer to resolve their individual claims in full, the larger class lost the right to recover counsel fees in a suit accusing the landlord of charging improper amenity fees to tenants.

But Judge William G. Young disagreed, finding the plaintiffs' demand letter put Archstone on notice of the existence of the other tenants' claims.

‘‘This Court holds that a petitioner's rejection of a settlement offer to the individual petitioner alone does not limit the recovery of damages or attorneys' fees available to the class because the statute provides that the petitioner shall be awarded attorneys' fees in 'any action commenced hereunder,'" he wrote. "[I]nterpreting an offer to an individual claimant alone as preventing an entire putative class from recovering attorneys' fees is analogous to 'picking off' the named plaintiff in a putative class action."

Because there was no controlling precedent, Young said he would entertain a motion to certify the question to the Supreme Judicial Court should either party make such a request.

The 35-page decision is *Hermida, et al. v. Archstone, et al.,* Lawyers Weekly No. 02-293-13. The full text of the ruling can be found by clicking here.

'Pick off' attempt

Plaintiffs' co-counsel Kevin T. Peters of Arrowood Peters in Boston said he expects to accept Young's invitation to seek guidance from the SJC.

‘‘I have a number of these cases pending in state courts," Peters said. "It's a hot issue that needs to be interpreted by a court that all landlords will not only respect but obey."

Chapter 93A permits class actions, but requires plaintiffs to first send a demand letter. If a judge finds a Chapter 93A violation has occurred, the statute entitles petitioners to reasonable attorneys' fees and costs incurred in connection with "any action," Peters said.

‘‘In these cases, you have an individual plaintiff who's going to be the ostensible class representative, who sent out a demand personally and on behalf of the entire class," he said. "It's common for defendants receiving such a letter to offer to pay the putative class representative his demand and thereby pick off the lead plaintiff and kill the class action."

Peters said the question he posed to Young was what happens to the attorney's time from when the initial demand is rejected until the defendant ultimately offers a reasonable settlement on a class basis.

‘‘If we make a 93A demand and only get a single damages settlement offer, this ruling means that all the litigation that we do thereafter right up to the time of certification is recoverable under the statute," he said. "That's an important pronouncement."

Matthew J. Fogelman of Newton, co-counsel with Peters, said he has a related suit pending before U.S. District Court Judge Richard G. Stearns against all of Archstone's other properties. That case, which involves identical issues, was stayed over the plaintiffs' objection.

‘‘To the extent we could take rulings Judge Young made and try to apply it, we would,” he said. “We argued [to Stearns] that the new class shouldn’t have to have their cases held at bay while the other case was making its way through the system, but we didn’t prevail.”

Amy B. Hackett and Diane R. Rubin of Boston’s Prince, Lobel, Tye are local counsel for Archstone. They did not return calls for comment.

Robert Ditzion of Shapiro, Haber & Urmy in Boston litigated a 2010 Superior Court suit and a 2012 U.S. District Court case that were cited prominently by Young.

Ditzion, whose firm frequently deals with the issue, said a plaintiffs’ lawyer “absolutely” should be entitled to recover fees for the entire class as long as the defendant is put on notice in the demand letter of the possibility of a class action. Otherwise, the defendant could avoid responsibility by picking off the named plaintiff, and the ability of people to pursue class actions on behalf of consumers who have been wronged would be eviscerated.

‘‘If the defendant could just spend a little bit here and a little bit there by settling each one as they came in, and never have to face the music for the much broader wrong they might be doing, it would defeat much of the purpose behind Chapter 93A and the idea of the private attorney general model for addressing consumer injuries,” he said. “Most of these cases involve relatively small amounts of money for any individual, and it’s obviously in any prospective defendant’s interest to pick off the plaintiff by agreeing to settle an individual claim before the filing of a class action suit.”

To prevent that from happening, Ditzion said, lawyers should always include a statement in the demand letter that they are writing on behalf of a class of similarly situated individuals. Once that is done, it is no longer reasonable for the defendant to simply offer to resolve the individual plaintiff’s case, he said.

‘‘The purpose behind the 93A demand letter is to make the defendant aware of the entire claim and allow them a chance to make a fair and reasonable offer of settlement,” he said. “If the plaintiff is exercising his or her right under 93A and Massachusetts Rule of Civil Procedure 23 to pursue a class action and be a representative plaintiff, that would inform the defendant of the entire claim and put the defendant on sufficient notice of that issue.”

Rejected offer

When plaintiffs Maeve and Jefflee Hermida rented an apartment in 2007 in an Archstone-owned property, they paid a onetime amenity-use fee of $475.

Their lawyer sent a demand letter in 2010 alleging that the landlord had violated Massachusetts’ Security Deposit Statute and Chapter 93A. They sought actual damages of $475 plus statutory interest.

The Hermidas sent the demand letter on behalf of themselves and the class of people who have lived in Archstone properties from 2006 through 2010. The landlord responded with a timely offer to pay $665.67, which included actual damages and statutory interest.

Archstone stated that the offer was extended only to the Hermidas and expressly reserved the right to respond to any subsequent demand letter made on behalf of the “certified class.”

The next month, the Hermidas filed a class action complaint in Housing Court, which constituted an implied rejection of Archstone’s offer.

When Archstone removed the case to federal court under the Class Action Fairness Act, the Hermidas sent a second demand letter on behalf of the members of the certified class.

The landlord responded with a settlement offer of $155,447.47 to all of the class members but the Hermidas. The offer amounted to a full refund of all class members’ amenity-use fee plus interest.

In 2012, the Hermidas filed a motion for clarification, despite Archstone’s warnings that it would consider such a motion to be a rejection of the settlement offer.

In light of Chapter 93A fee-shifting policies, Young requested that the parties address whether the tender of the original settlement cut off the recovery of attorneys’ fees.

Resolving the split

In awarding plaintiffs' counsel more than $62,000 in costs and fees, Young noted that no Massachusetts court had ever decided whether the rejection of a reasonable offer to an individual claimant filing on behalf of a putative class could limit recovery of attorneys' fees.

The circuit courts are split on whether a defendant may "pick off" the named plaintiffs in a class action, the judge said.

‘‘It would be incongruent for Archstone … to tender a settlement offer to the Hermidas to refund their amenity-use fee but turn a blind eye to the rest of Archstone's tenants who also paid amenity-use fees and suffered a similar injury," he said. "After the Hermidas' demand letter, Archstone knew or had reason to know that its amenity-use fee violated the Massachusetts Security Deposit Statute as to not only the Hermidas but also the rest of the tenants."

During the period between the commencement of a suit as a class action and the court's determination that it may be so maintained, the suit should be treated as a class action, he wrote.

Young said it would be inappropriate for Archstone to expect the Hermidas' rejection would somehow limit recovery of the entire class. The offer was clearly insufficient to remedy the class-wide injury and did not provide them with a reasonable basis to encourage pre-suit negotiations, the judge wrote.

‘‘Archstone's contention that the Hermidas' counsel did not advance the interests of the class until it was certified contradicts First Circuit law establishing that during the period between the commencement of a suit and the class action certification 'the suit should be treated as a class action,'" he said.