"To be sure, a court has discretion to halt a lawsuit by entering judgment for the plaintiff when the defendant unconditionally surrenders and only the plaintiff's obstinacy or madness prevents her from accepting total victory," Kagan wrote. But, "[n]o more in a collective action brought under the FLSA than in any other class action may a court, prior to certification, eliminate the entire suit by acceding to a defendant's proposal to make only the named plaintiff whole."

"That course would short-circuit a collective action before it could begin, and thereby frustrate Congress's decision" to allow collective litigation of FLSA claims, Kagan wrote.

"The Court could have resolved this case (along with a Circuit split . . .) by correcting the Third Circuit's view that an unaccepted settlement offer mooted Symczyk's individual claim," the dissent wrote. "Instead, the Court chose to address an issue predicated on that misconception, in a way that aids no one, now or ever."

Ronald J. Mann in New York was counsel of record for Genesis. Gary F. Lynch of Carlson Lynch in Pittsburgh was counsel of record for Symczyk.

BY LAWRENCE E. DUBÉ

Text of the opinion is online at http://op.bna.com/dlrcases.nsf/r?Open=ldue-96tl93.

FLSA

Symczyk's Impact on Offer of Judgment Use In Class Actions Remains Murky, Experts Say

The U.S. Supreme Court's April 16 decision in *Genesis Healthcare Corp. v. Symczyk* decided a narrow labor-related issue and experts tell BNA that practitioners and lower courts will continue to wrestle over the impact of an offer of judgment on a class action claim.

Justice Clarence Thomas wrote for a 5-4 majority in *Symczyk*, No. 11-1059, 2013 BL 100947 (U.S., Apr. 16, 2013), that the plaintiff could no longer pursue a Fair Labor Standards Act collective action after her individual claim became moot (see related story).

Justice Elena Kagan argued in a spirited dissent that because the plaintiff never accepted defendant's offer of judgment, her claim had not been mooted. The majority's decision assumed without deciding that the plaintiff's individual claim was moot.

Kagan called the decision the "most one-off of one-offs, explaining only what (the majority thinks) should happen to a proposed collective FLSA action when something that in fact never happens to an individual FLSA claim is errantly thought to have done so."

Experts said in a series of recent interviews that the impact of the case on class actions is unclear. They said both plaintiffs' and defense counsel will have fodder for the still-open question of whether defendants can head off class actions early with an offer of judgment.

Limited Victory for Defendants. Adina H. Rosenbaum, who represented plaintiff Laura Symczyk before the Supreme Court and is an attorney at the Public Citizen Litigation Group in Washington, D.C., told BNA April 23 that the decision was disappointing but said its impact may be limited.

"Kagan makes a compelling case that an unaccepted offer does not moot individual claims and because of that the issue decided by the majority won't come up again—either for collective actions, or to be expanded to class actions," she said.

David N. Anthony, a partner at Troutman Sanders LLP in Richmond, Va., who specializes in class action defense, told BNA in phone and email interviews April 22 and April 23 that the case was a victory for class action defendants.

He said the case "strengthened the notion that the viability of a putative class depends on the named plaintiff's ability to demonstrate a personal, continuing interest in the case that is nearly identical to that of the putative class, as well as Article III standing."

Forecast Cloudy. Those interviewed agreed it was difficult to predict what impact the decision might have on class actions.

"The problem in forecasting the impact of *Symczyk* on class actions is that the majority and dissent took on totally different issues," Mary Kay Kane, emeritus dean and chancellor at the University of California Hastings College of the Law and a civil procedure expert, said in an April 22 email.

She said that Thomas accepted the fact that the plaintiff conceded mootness and focused on his conclusion that FLSA collective actions are not class actions. Thus he found that when the individual plaintiff's claim is moot the action must be dismissed.

Kane said Kagan wanted to reach the question of whether rejecting a settlement offer moots the named plaintiff's claim, and found that it did not.

"That reasoning clearly would apply to class actions as well, but we don't know what the other five justices think about that," Kane said.

Practical Impacts. Experts said that the decision gave both plaintiffs' and defense counsel a basis for arguing about the impact of offers of judgment in the class action context.

Paul G. Karlsgodt, a partner at Baker Hostetler in Denver, told BNA in an April 23 email that the majority opinion does not foreclose the possibility that an offer of judgment can moot a claim in a class action if it is done before certification.

"I think many class action defendants will see the majority opinion as an invitation to test the waters by making individual offers of judgment before certification," Karlsgodt said.

"Plaintiffs, of course, will point to the decision as merely creating a temporary loophole that the lower federal courts should close by addressing, or revisiting, the question of mootness that the majority opinion does not address," he continued.

"The case may not answer any questions definitively in the class action context, but it is very likely to have a practical impact on the tactics employed by both sides," Karlsgodt said. "On the defense side, you're likely to see more offers of judgment and on the plaintiffs' side, more class certification motions being filed at the time of the complaint."

Anthony, of Troutman Sanders, said that Kagan's dissent will provide support for district and appellate courts that believe an offer of judgment fails to moot a class. "However, her strong wording came from the court's minority, and must be understood as such," he said.

Ultimately, he said he expects most courts will fall in line with their respective appellate guidance, and will "use supporting language from the majority or dissent opinions in *Symczyk* to justify their view and find appropriate 'support.' "

No Resolution of Pre-Certification Offers. Courts of appeals have come to different conclusions as to whether an offer of judgment moots class actions before a class is certified, or even before a motion to certify a class is filed. The varying outcomes are seen in cases like *Pitts v. Terrible Herbst Inc.*, 653 F.3d 1081 (9th Cir. 2011) (12 CLASS 691, 8/12/11); *Lucero v. Bureau of Collection Recovery Inc.*, 639 F.3d 1239 (10th Cir. 2011) (12 CLASS 317, 4/22/11); and *Damasco v. Clearwire Corp.*, 662 F.3d 891 (7th Cir. 2011) (12 CLASS 1083, 11/25/11).

Those interviewed said that the majority opinion does not provide much guidance about whether offers of judgment before class certification should be treated differently than those proffered after certification.

"Justice Thomas's reference to class actions having special status once certified, does not answer how the class action law about mootness pre-certification should be handled," Kane said. "At best, what we know is that at least four justices are concerned about the underlying problem and are willing to allow actions to continue."

Anthony said that the "glaring issue" left undecided by the court—whether a sufficient Rule 68 offer of settlement will extinguish a representative plaintiff's class claim—will continue "to serve as a hinge point for cases left percolating in the lower courts."

"Indeed, given the monumental implications of this issue, the circuit split is likely to continue until the Supreme Court affirmatively takes up and decides the issue," Anthony said.

No Clarity for Practitioners. Anthony said it was disappointing that the court failed to provide any clarity on this issue. "Most lawyers when they take off their plaintiffs' hat or their defense hat, they want clarity. The Supreme Court did not provide the clarity people wanted on this issue."

BY JESSIE KOKRDA KAMENS

The U.S. Supreme Court's decision in Genesis Healthcare Corp. v. Symczyk *is at http://op.bna.com/dlrcases.nsf/r?Open=ldue-96tl93.*

Product Liability

SCOTUS Grants Stipulated Dismissal of Petition About *Daubert*'s Application at Certification

The U.S. Supreme Court April 11 dismissed a petition for a writ of certiorari in a product liability class action based on the parties' stipulation, depriving the court of another opportunity to consider whether a full *Daubert* hearing is required for expert evidence the court relies on at the class certification stage (*Zurn Pex Inc. v. Cox*, U.S., No. 11-740, 4/11/13).

The U.S. District Court for the District of Minnesota gave final approval to the parties' $20 million agreement in February, which settled several class actions that had been consolidated in the court, *In re Zurn Pex Plumbing Products Liability Litigation*, No. 08-md-1958 (13 CLASS 1255, 11/9/12). (40 PSLR 1229, 10/29/12).

The case involved allegations that defendant Zurn Pex Inc. designed, manufactured, and sold purportedly defective plumbing systems that caused water damage to class members' homes.

The district court certified a class under Fed. R. Civ. P. 23(b)(3). The U.S. Court of Appeals for the Eighth Circuit affirmed, holding that the district court did not err by conducting a "focused" analysis of the reliability of the expert testimony under *Daubert v. Merrell Dow Pharmaceuticals Inc.*, 509 U.S. 579 (1993), at the class certification stage, rather than a full *Daubert* analysis (12 CLASS 629, 7/22/11). (39 PSLR 751, 7/18/11).

Zurn Pex filed a petition for a writ of certiorari in December 2011 on the question of whether a court may rely on expert testimony at the class certification stage without conducting a full and conclusive examination of its admissibility under Federal Rule of Evidence 702 and *Daubert*.

The court granted numerous extensions for the plaintiffs to file their response brief before granting the parties' stipulated dismissal.

***Daubert* Issue Still Alive After *Comcast*.** Last year, the U.S. Supreme Court granted certiorari in *Comcast Corp. v. Behrend*, and altered the question presented to address whether a district court may certify a class action without resolving whether the plaintiff class had introduced admissible evidence, including expert testimony, to show that the case is susceptible to awarding damages on a classwide basis (13 CLASS 732, 7/13/12).

In its decision, the Supreme Court said the petitioners argued that the respondents had forfeited this issue by not objecting in the district court to the expert's testimony under the Federal Rules of Evidence (14 CLASS 411, 4/12/13).

The Supreme Court instead addressed whether the evidence failed to show that the case is susceptible to awarding damages on a classwide basis.

Kevin K. Russell of Goldstein & Russell PC in Washington, D.C., was counsel of record for plaintiffs.

Jonathan D. Hacker of O'Melveny & Myers LLP in Washington, D.C., was counsel of record for Zurn Pex.

BY JESSIE KOKRDA KAMENS

Labor

No SCOTUS Review of Preclusive Effect Of Unions' Cases on Retirees' Later Class Suit

The U.S. Supreme Court took a pass April 22 on considering whether a benefits-related issue decided in suits brought by three unions on behalf of retirees had a preclusive effect on a subsequent suit brought by the retirees themselves (*PPG Industries Inc. v. Amos*, U.S., No. 12-1089, *certiorari denied* 4/22/13).

Three labor unions brought separate suits in federal court in Pennsylvania on behalf of retirees. They alleged that the retirees' health benefits had already vested, and defendant PPG Industries Inc., a paints and coatings company, had violated collective bargaining agreements by modifying the retirees' health benefits.

The district court granted summary judgment to PPG in all three cases, finding that the agreements "unam-

ISSN 1529-0115