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ILLINOIS STATE BAR ASSOCIATION

TRIAL BRIEFS

The newsletter of the Illinois State Bar Association's Section on Civil Practice & Procedure

Narrowing the scope and timeline for class certification: Let's see who gets to the courthouse first

By Justice James Fitzgerald Smith and Sonja Dimitrijevic

Gatreaux v. DKW Enterprises, LLC, No. 1-10-3482 (September 22, 2011), a recent opinion by the Illinois Appellate Court, First District, Fourth Division, is the first to spotlight the frantic race to the courthouse that has resulted between plaintiffs seeking class action certification and defendants hoping to avoid trial by tendering complete relief to each class representative, since the Illinois Supreme Court's decision in *Barber v. American Airlines, Inc.,* 241 Ill. 2d 450 (2011).

Experienced class action litigators have well known that to halt a class action lawsuit, it is best to tender immediate and complete relief to the representative plaintiff in a class action case, prior to class certification. This practice is known as "picking off" a class representative and has the effect of mooting the class action and compel-

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In a wrongful birth action, the Illinois Supreme Court curtails the available remedies finding that no damages are available for the care of a disabled, dependent child after the child reaches the age of majority

By Jessica A. Hegarty

Facts

Plaintiff parents' first son, Brandon, born in 1997, began showing signs consistent with Angelman Syndrome at 15 months of age. Angelman Syndrome is characterized by mental and developmental delays, lack of speech, problems with walking and balance as well as jerky movements such as frequent hand clapping. Persons with Angelman Syndrome tend to require life-long care. Angelman Syndrome can, but is not always, caused by a mutation in the UBE3A gene.

Before conceiving another child, plaintiffs sought genetic counseling and testing in the year 2000 to determine whether Brandon's condition was genetic in nature. Rush University Medical Center geneticist, Dr. Wong ordered chromosome sequencing tests at Baylor University and later advised plaintiffs that Brandon's condition was not caused by a genetic defect. Despite this assurance from Dr. Wong, plaintiffs

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Narrowing the scope and timeline for class certification: Let's see who gets to the courthouse first

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ling plaintiff's counsel to seek another class representative, which is frequently tricky.

In order to avoid mooting a class action each time a tender was offered to a class representative prior to certification, Illinois appellate courts gradually developed the so-called "pick off" exception, under which they would permit a class action to proceed so long as the plaintiffs pursued the action with "reasonable diligence." *Barber*, however, recently changed the landscape, by explicitly rejecting the "pick off" exception created by the appellate courts, and instead reaffirmed the viability of the "pick off" rule, under which a tender prior to certification automatically results in the mooting of the class action.

In *Barber*, a passenger who had purchased a plane ticket from American Airlines (AA) checked two suitcases prior to boarding and was charged a $40 checked baggage fee. When AA subsequently cancelled her flight and the passenger elected not to take another AA flight but instead requested a refund and a cancellation of her ticket, she was refunded the ticket price but not the $40 baggage fee. The passenger filed a class action lawsuit for breach of contract against AA. Before she had the opportunity to file a motion for class certification, AA offered to refund her the $40 fee, and, in spite of her refusal to accept it, deposited $40 to her credit card account. AA moved to dismiss the plaintiff's complaint as moot. The circuit court granted the motion, but the appellate court reversed.

Applying the "pick off" exception, the appellate court found that, even though the tender of settlement was made prior to any class certification, the plaintiff's claim could proceed because the plaintiff had exercised "reasonable diligence" in pursuing the action. Our supreme court disagreed and found that, even though the plaintiff had exercised "reasonable diligence," she could not proceed with her claim because she failed to seek certification of the class prior to being tendered the full relief she requested. In doing so, the supreme court in *Barber* relied on its prior decision in *Wheatley v. Board of Education of Township High School District 205*, 99 Ill. 2d 481, 484-85 (1984), noting:

> *Wheatley* teaches that the important consideration in determining whether a named representative's claim is moot is whether that representative filed a motion for class certification prior to the time when the defendant made its tender. [Citations.] Where the named representative has done so, and the motion is thus pending at the time the tender is made, the case is not moot, and the circuit court should hear and decide the motion for class certification before deciding whether the case is mooted by the tender. [Citations.] The reason is that a motion for class certification, while pending, sufficiently brings the interests of the other class members before the court 'so that the apparent conflict between their interests and those of the defendant will avoid a mootness artificially created by the defendant by making the named plaintiff whole.' [Citation.] The situation is different where the tender is made before the filing of a motion for class certification. [Citation.] There, the interests of the other class members are not before the court [citation], and the case may properly be dismissed. [Citation.]

In *Gatreaux v. DKW Enterprises, LLC, et al.*, No. 1-10-3482 (September 22, 2011), the first Illinois appellate court decision to address "picking off" since *Barber*, the plaintiffs, each former cashiers, cooks, or other hourly-paid employees of one of several Chicago-based McDonald's franchises, filed a class action complaint against the defendant-owners, alleging that they were not paid their hourly and overtime wages in violation of the Illinois Minimum Wage Law (820 ILCS 105/1 *et seq.* (West 2006)) and the Illinois Wage Payment and Collection Act (820 ILCS 115/1 *et seq.* (West 2006)).

In their complaint, the plaintiffs sought, among other things: (1) damages, including all owed overtime and regular wages plus interest; (2) costs and reasonable attorney fees; and (3) a declaration that the defendants willfully violated the two Illinois wage statutes. Before the plaintiffs had an opportunity to seek class certification, the defendants sent a letter of tender to each named class representative offering to pay "all amounts due" for owed wages, plus 2% interest, and reasonable attorney fees and costs incurred by the plaintiffs in pursuing the litigation. After the plaintiffs rejected the tender, the defendants moved for dismissal on mootness grounds. The circuit court granted the defendant's motion, finding that the plaintiffs had not acted with "reasonable diligence" in pursuing their class certification.

After the circuit court's dismissal but before the plaintiffs' filed their appeal, the Illinois Supreme Court decided *Barber*, rejecting the "reasonable diligence" exception to the "pick off" rule and imposing a rigid time line on class certification. See *Barber*, 241 Ill. 2d at 457. Although they acknowledged the decision in *Barber*, the plaintiffs urged the appellate court to reject *Barber* on public policy grounds or, in the alternative, find that even under *Barber* they could proceed with their class action, because the tender did not provide them with "full and complete relief."

The appellate court in *Gatreaux* adopted the decision in *Barber*, reiterating that the timing of the class certification was central to determining whether an action was moot. Citing to *Barber*, the *Gatreaux* court rejected the plaintiff's public policy concerns, explaining that the supreme court in *Barber* itself rejected similar arguments and held that "there is no prohibition against settlements with class members as long as the rights of nonsettling class members are not affected," and the remaining class members can pursue litigation or bring their claims individually. Applying *Barber* to the facts of that case, the appellate court in *Gatreaux*, therefore concluded that, since the defendant's tender was made before the plaintiffs sought class certification, the action was moot and dismissal was proper.

The appellate court further addressed the plaintiff's contention that even under *Barber* dismissal was improper because the tender failed to offer "full and complete relief." The plaintiffs specifically argued that unlike in *Barber* and *Wheatley* where the plaintiffs were "made whole" by the tenders (*i.e.*, in *Barber* a $40 refund was deposited into the same credit card account the plaintiff-passenger had used to purchase her airline ticket; and in *Wheatley,* a majority of the plaintiffs-teachers who had been dismissed from work, had been reinstated, prior to certification), here the plaintiffs never actually received or accepted the amounts offered to them.

Therefore, the appellate court was asked to decide what constitutes a full tender af-

ter *Barber*. The response was simple, the full amount of damages sought plus interest.

The court explained that a tender is an unconditional offer of payment by which a party receives all that he or she has sought. Acceptance of a tender is not a prerequisite to dismissing a case on mootness grounds. In addition, where the plaintiffs are offered the full amount of damages sought by their complaint plus a percentage of interest, the tender is sufficient, and the plaintiffs cannot "perpetuate the controversy by merely refusing the tender."

In coming to this decision, the appellate court relied on several decisions preceding *Barber*, including *Arriola v. Time Insurance Co.*, 323 Ill. App. 3d 138, 147 (2001), *Bruemmer v. Compaq Computer Corp.*, 329 Ill. App. 3d 755, 763 (2002), *Hillenbrand v. Meyer Medical Group, S.C.*, 308 Ill. App. 3d 381, 389 (1999)) and *Cohen v. Compact Power Systems, LLC*, 382 Ill. App. 3d 104, 109 (2008).

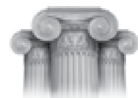
The *Gatreaux* court noted that, although *Barber* criticized these cases for utilizing the "reasonable diligence" exception to the "pick off" rule, it nowhere suggested that the general principle regarding the sufficiency of tenders, articulated by these cases, has been altered, or that a tender alone, without acceptance, is insufficient to moot a class action. Rather, as *Gatreaux* points out, in *Barber*, the Illinois Supreme Court found the plaintiff's class action was moot even though the plaintiff rejected AA's tender (*i.e.*, that she be refunded her $40 baggage fee and that AA "consider" paying her court costs). The fact that AA actually refunded the plaintiff, despite her rejection of the tender, by crediting $40 to her credit card, played no part in the court's decision that plaintiff's claim was moot. Rather, as *Gatreaux* noted, the Illinois Supreme Court focused on the timing of the tender and found that the plaintiff could not proceed with her claim because she failed to seek class certification prior to AA's tender.

As an aside, the *Gatreaux* court noted that any argument regarding the tender's insufficiency on the basis of its failure to include the plaintiffs' request for declaratory relief, had already been rejected by several Illinois decisions, including *Wheatley*, 99 Ill. 2d at 385, and more specifically *Gelb v. Air Con Refrigeration and Heating, Inc.*, 326 Ill. App. 3d 809, 814 (2001), *overruled on other grounds by Barber*, 241 Ill. 2d at 460.

As the *Gelb* court explained "while defendants did not supply a declaration that their practice of underpaying the workers was unlawful, it is also true that once the tender is made, plaintiff ostensibly would not be an underpaid worker who shared interests with other class members. As a result, defendants would have nothing illegal to admit with respect to plaintiff's individual claims, since technically, no wrong would be visited upon plaintiff once his monetary damages were tendered."

Under these principles, the appellate court in *Gatreaux* found that the defendants in that case had made a complete tender to the plaintiffs, since their tender exactly matched the request for relief made by the plaintiffs' complaint. Specifically, the complaint requested an award of compensatory damages, including all regular and overtime pay, owed "in an amount according to proof," plus interest, as well as an award of all costs and reasonable attorney fees incurred prosecuting the claim. The defendants' tender mirrored these demands and offered "full monetary relief" for the claims alleged in the plaintiffs' complaint, plus 2% interest, as well as the payment of all costs and reasonable attorney fees incurred by the plaintiffs in litigating the lawsuit. Under these facts, the court concluded that the tender offered the plaintiffs full relief, and that their failure to file a motion for certification prior to that tender, mooted the action.

Ultimately, *Gatreaux* illustrates the Illinois Supreme Court's narrowing of time line for future class certifications. Since a tender offer providing full relief (by offering the full amount of damages sought plus interest) acts to automatically moot a class action, in the future, plaintiffs would be advised to file their motions for class certification, as quickly as they can, possibly even on the same day they file their complaints. ■



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sought a second opinion from Dr. Burton at Children's Memorial Hospital who conducted further testing genetic testing, also at Baylor, to determine whether Brandon suffered from Angelman Syndrome due to a mutation in the UBE3A gene and whether the plaintiff mother carried the gene that caused the mutation. Dr. Burton assured plaintiffs that all genetic markers for Angelman Syndrome had been ruled out.

Neither of the geneticists actually obtained the test results from Baylor University before counseling plaintiffs.

Based on incomplete information from both physicians, plaintiffs did conceive another child, Timothy, who in 2002 at fifteen months of age began exhibiting the same deficiencies as the plaintiffs' first son. Timothy was later diagnosed with Angelman Syndrome.

After repeated attempts were made to obtain a copy of the genetic sequencing report from Dr. Wong, plaintiffs contacted Baylor University directly. The report, which was eventually produced, indicated that the first son, Brandon, did suffer from Angelman Syndrome due to a mutation in the UBE3A gene. Later testing showed that plaintiff mother was a carrier of the gene. Dr. Burton admitted that had she actually obtained and read the report from Baylor, she would have counseled the plaintiffs differently.

Plaintiffs filed a 16-count complaint against Children's Memorial Hospital, Baylor University Medical Center, Rush University Medical Center, Quest Diagnostics Clinical Laboratories and physicians Paul Wong, M.D., and Barbara Burton M.D., individually, and on behalf of Timothy, a minor. The plaintiffs' allegations included negligent failure to inform of genetic test results confirming that plaintiff mother was a carrier of the UBE3A gene that can cause Angelman Syndrome and that plaintiffs' first son, Brandon, had Angelman Syndrome caused by a mutant UB3A gene that he inherited from his mother.

Plaintiffs' theory of liability was premised on "wrongful birth," which creates a cause of action when defendant's negligence does not allow parents to make an informed decision about whether to conceive of or terminate a pregnancy.

Plaintiffs sought wrongful birth damages related to the extraordinary cost of Timothy's care, both as a minor and beyond the age of majority, as well as future lost wages. Plaintiffs alleged that Timothy would never be able to care for himself or lead an independent life, and as a result they would continue to care for him and were "legally liable" for costs associated with his care beyond the age of 18.

After one of the physicians settled, the case continued to trial against the remaining defendants. The trial court dismissed the case with prejudice finding that plaintiffs were not entitled to post-majority expenses incurred as a result of negligent genetic counseling or emotional distress damages. The appellate court reinstated the case, holding post-majority expenses for an adult, disabled, dependent child are available to plaintiff parents. The appellate court also reversed the dismissal of the emotional distress damages finding that the parents had adequately stated a cause of action for negligent infliction of emotional distress.

The Supreme Court reversed on the issue of post-majority damages finding they are unavailable to wrongful birth plaintiffs. The court's analysis hinged upon whether Illinois law imposes a "duty" or "obligation" on parents to support disabled, dependent children after the age of majority. Absent such a duty, the court reasoned that the costs and expenses associated with caring for a disabled, dependent adult child are not "legal harms" that parents suffer but are expenses that are "voluntarily" and "willingly" assumed. The court relied on the general common law rule established in 1896 that parents are not legally obligated to support an adult child as the basis for its ruling.

The court next addressed plaintiff's negligent infliction of emotional distress claim. Overruling *Siemieniec v. Lutheran General Hospital*, 117 Ill. 2d 230 (1987) which prohibited wrongful birth plaintiffs from obtaining damages related to the negligent infliction of emotional distress based on an inability to prove that defendant's negligence placed both parents and child in a "zone of danger," the court held that the "zone of danger" requirement only applies in cases where plaintiff's theory of liability is limited to the negligent infliction of emotional distress not in cases where the emotional distress is claimed to flow from another tort, such as wrongful birth. The "zone of danger" rule, therefore, does not apply in wrongful birth cases, and plaintiffs are eligible to recover emotional distress damages stemming from their wrongful birth claim.

The court remanded the case to the trial court so the complaint could be amended and for further proceedings. *Clark v. Children's Memorial Hospital*, Il. Supreme Court, Docket No. 108656, May 6, 2011. ■

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Wednesday, 11/2/11- Teleseminar—Middle Market M&A, Part 2. Presented by the Illinois State Bar Association. 12-1.

Thursday, 11/3/11- Lombard, Lindner Learning Center—Real Estate Law Update-2011. Presented by the ISBA Real Estate Section. 9-4:45.

Friday, 11/4/11- Chicago, ISBA Chicago Regional Office—2011 Federal Tax Conference. Presented by the ISBA Federal Taxation Section. 8:30-4:30.

Tuesday, 11/8/11- Teleseminar—Title Insurance in Real Estate. Presented by the Illinois State Bar Association. 12-1.

Thursday, 11/10/11- Teleseminar—Ethics of Working with Witnesses. Presented by the Illinois State Bar Association. 12-1.

Thursday, 11/10/11- Chicago, ISBA Chicago Regional Office—Family Law Nuts and Bolts Chicago 2011. Presented by the ISBA Family Law Section. 8-5.

Tuesday, 11/15/11- Webcast—Environmental Law for Non-Environmental Lawyers—Session 1: Permitting and Due Diligence Issues. Presented by the ISBA Environmental Law Section. 10-12.

Tuesday, 11/15/11- Teleseminar—UCC Article 9/Foreclosure of Personal Property Part 1. Presented by the Illinois State Bar Association. 12-1.

Wednesday, 11/16/11- Teleseminar—UCC Article 9/Foreclosure of Personal Property Part 2. Presented by the Illinois State Bar Association. 12-1.

Friday, 11/18/11- Chicago, John Marshall Law School—Economic Ramifications of Health Care Reform. Presented by the Illinois State Bar Association Health Care Section. 1:00-4:15.

Friday, 11/18/11- Chicago, ISBA Chicago Regional Office—Master Series- Forensics: Using Evidence to Build Your Case. Presented by the ISBA Criminal Justice Section Council. 8:50-5:00.

Tuesday, 11/22/11- Teleseminar—Estate Planning for Farms and Ranchland. Presented by the Illinois State Bar Association. 12-1.

Tuesday, 11/29/11- Teleseminar—Trust Alternatives. Presented by the Illinois State Bar Association. 12-1

Wednesday, 11/30/11- Teleseminar—Employment Tax Planning Across Entities. Presented by the Illinois State Bar Association. 12-1.

Wednesday, 11/30/11- Live Studio Webcast—Social Media Is Here To Stay. Presented by the ISBA Labor and Employment Section. 8:55-10:30.

Wednesday, 11/30/11- Studio Taping (DNP)—Green Building Ordinances. Presented by the ISBA Environmental Law Section. 1-2:30.

December

Thursday, 12/1/11- Chicago, ISBA Chicago Regional Office—Recent Developments in State and Local Tax- 2011. Presented by the ISBA State and Local Tax Committee. 9-12.

Thursday, 12/1/11- Teleseminar—Business Planning with S Corps, Part 1. Presented by the Illinois State Bar Association. 12-1.

Friday, 12/2/11- Teleseminar—Business Planning with S Corps, Part 2. Presented by the Illinois State Bar Association. 12-1.

Friday, 12/2/11- Chicago, ISBA Chicago Regional Office—Motion Practice- From Pleadings through Post-Trial. Presented by the ISBA Civil Practice & Procedure Section. 8:50-2:15.

Thursday, 12/6/11- Teleseminar—Estate Planning for Retirement Benefits. Presented by the Illinois State Bar Association. 12-1.

Wednesday, 12/7/11- Chicago, ISBA Chicago Regional Office—Guiding Your Client Through These Financially Turbulent Times. Presented by the ISBA Business Advice and Financial Planning Section. 9:00-1:00.

Friday, 12/9/11- Chicago, Sheraton Hotel—Master Series: Divine Ethics: Avoiding the Chasm of Incivility. Presented by the Illinois State Bar Association. 1:00-4:14.

Tuesday, 12/13/11- Teleseminar—Individual Liability for Corporate Obligations: Piercing the Corporate Veil. Presented by the Illinois State Bar Association. 12-1.

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Wednesday, 12/21/11- Teleseminar—Tax Efficient Methods of Getting Money out of a Business. Presented by the Illinois State Bar Association. 12-1.

January

Friday, 1/20/12- Chicago, ISBA Chicago Regional Office—Practical Professional Responsibility for Health Care, Life Sciences and Corporate Attorneys and their Outside Counsel. Presented by the ISBA Health Care Section. 1-4:15.

Thursday, 1/26/12- Chicago, Union League Club—Making the Record on Appeal and Ethics and Civility in the Court Room. Presented by the Illinois State Bar Association, the Illinois Judges Association and the Women's Bar Association of Illinois. 1:30-4:55 CLE; 5-6:30 Reception.

Friday, 1/27/12- Collinsville, Gateway Center—Motion Practice. Presented by the ISBA Tort Law Section. 9-12. Max 75. ■

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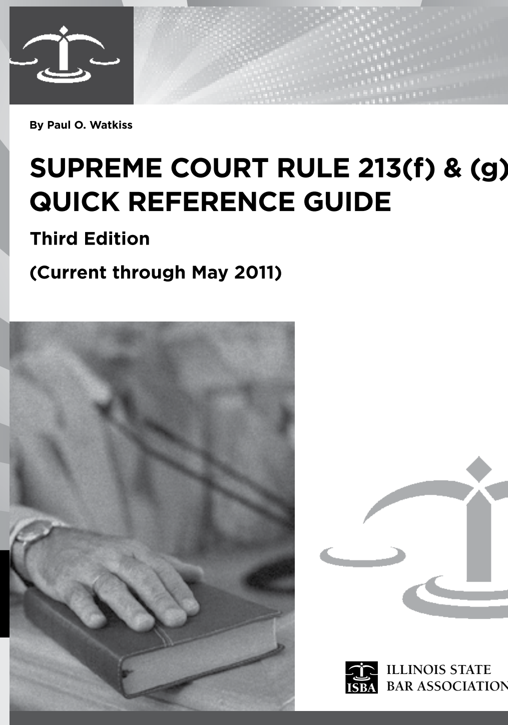

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