No. 13-20211

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Lisa Mabary,
Plaintiff-Appellant,

v.

Home Town Bank, N.A,
Defendant-Appellee.

On Appeal from the United States District Court
for the Southern District of Texas, Houston Division

PLAINTIFF-APPELLANT'S RESPONSE TO DEFENDANT-APPELLEE'S PETITION FOR REHEARING EN BANC

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CERTIFICATE OF INTERESTED PERSONS

No. 13-20211

Lisa Mabary, Plaintiff-Appellant,

v.

Home Town Bank, N.A, Defendant-Appellee.

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

Lisa Mabary—plaintiff-appellant

All non-customers who made an electronic fund transfer, from any account used primarily for personal or household purposes, between May 23, 2009, through the date on which Defendant came into compliance with the ATM Fee posting requirements of the EFTA, at any of the ATMs operated by Defendant at 1406 West Main, League City, TX 77573; 1050 North Bypass 35, Alvin, TX 77573; 13701 Farm to Market 3005, Galveston, TX 77554; and, 4424 Seawall Blvd., Galveston, TX 77550 and who were charged a "Terminal Fee."—putative class members

Home Town Bank, N.A.—defendant-appellee

Moody Bancshares, Inc.—parent of Home Town Bank, N.A.

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Adina H. Rosenbaum

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES AND RULES

INTRODUCTION

Defendant-Appellee Home Town Bank (HTB) has sought rehearing on two issues. First, it contends that this Court erred when it held that "a litigant, who has suffered no actual injury in fact, has standing under Art. III, U.S. Const." Pet. 1. The Court, however, did not hold that a plaintiff who has suffered no injury-in-fact has standing. It held that the plaintiff here suffered an injury-in-fact when HTB failed to provide her with the statutorily required on-machine notice informing her, before she initiated her transaction, that she would be charged a fee. It is well-established that a plaintiff suffers an injury-in-fact when she is deprived of information that must be provided to her under law, and the Court's holding that Ms. Mabary suffered such an injury, regardless of whether she later received a different fee notice, was well-reasoned and correct.

Second, HTB seeks rehearing of the Court's determination that an unaccepted offer of judgment that HTB made to Ms. Mabary did not render the case moot. However, this Court has long applied the relation-back doctrine "to prevent[] a defendant from 'picking off' a named plaintiff by mooting her individual claim before the court has an opportunity to rule on the question of class certification." Slip op. at *6. And the panel correctly rejected HTB's argument that *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523 (2013), required a different outcome here. As the panel noted, *Genesis* concerned

mootness in the context of a Fair Labor Standards Act (FLSA) collective action, not a Rule 23 class action, and the Supreme Court specifically noted that "'Rule 23 class actions are fundamentally different from collective actions under the FLSA.'" Slip op. at *7 (quoting *Genesis*, 133 S. Ct. at 1529).

The panel's holdings on standing and mootness are consistent with this Court's decisions, unexceptional, and correct. This case does not warrant rehearing en banc.

STATEMENT OF THE COURSE OF PROCEEDINGS AND FACTS

The Electronic Fund Transfer Act (EFTA), 15 U.S.C. § 1693 *et seq.*, "provide[s] a basic framework establishing the rights, liabilities, and responsibilities of participants in electronic fund and remittance transfer systems." *Id*. § 1693(b). At the time of the events at issue, EFTA required any ATM operator that imposed a fee on a consumer to post a notice that a fee was being imposed "in a prominent and conspicuous location on or at the [ATM]." 15 U.S.C. § 1693b(d)(3)(B)(i) (2010). It also required notice of both the fee and its amount to "appear on the screen of the [ATM], or on a paper notice issued from such machine, after the transaction [was] initiated and before the consumer [was] irrevocably committed to completing the transaction." *Id*. § 1693b(d)(3)(B)(ii). EFTA specified that if a consumer did not receive notice in accordance with these

requirements, the ATM operator could not impose a fee. *Id*. § 1693b(d)(3)(C)(i).

On May 23, 2010, Lisa Mabary made two withdrawals at ATMs operated by HTB. USCA5 89. Neither of the ATMs from which Ms. Mabary withdrew money contained a notice on or at the machine apprising consumers that a fee would be charged. USCA5 90, 113. Nonetheless, HTB charged Ms. Mabary a $2.00 fee in connection with each of the transactions. USCA5 89, 133-34. On October 19, 2010, Ms. Mabary filed this lawsuit on behalf of herself and similarly situated ATM users, alleging that HTB violated EFTA's notice requirement. USCA5 10.

On February 3, 2011, HTB made Ms. Mabary an offer of judgment under Federal Rule of Civil Procedure 68, offering her $1,000 along with costs and reasonable attorneys' fees accrued to that date. USCA5 205. Ms. Mabary did not accept the offer and moved for class certification. USCA5 97. On February 21 and September 29, 2011, HTB moved to dismiss for, respectively, lack of jurisdiction on the ground that the Rule 68 offer rendered the case moot, and lack of standing. The district court denied both motions. USCA5 495-520, 1994-2000.

On December 20, 2012, an amendment to EFTA eliminated the requirement that ATM operators post notice of fees on or at the ATM in addition to on the screen or on paper. *Amendment – Electronic Fund Transfer Act*, P.L. No. 112-216, 126 Stat. 1590 (Dec. 20, 2012). Based on that amendment, the district court denied

class certification and dismissed the case. USCA5 2154-2160. Ms. Mabary appealed to this Court, explaining that the 2012 amendment did not apply retroactively to this case. In its response, HTB resurrected its standing and mootness arguments as alternative grounds for affirmance.

This Court held for Ms. Mabary on all grounds. First, the Court rejected HTB's argument that Ms. Mabary "suffered no concrete injury-in-fact as required by Article III." Slip op. at *4. The Court explained that an ATM user "is not in the same position to decline an ATM transaction at the initial point, where she walks by the ATM and sees the posted notice that Congress required, as she is at a later point, when she receives on-screen notice only after having retrieved her ATM card, entered personal information such as a Personal Identification Number, and initiated a transaction." *Id*. at *4-*5. "Congress's determination that consumers were entitled to the fee information they need to decline a transaction before investing the time needed to initiate it protects a substantive, if small, right, and its deprivation is an injury-in-fact that allows Mabary to pursue her claim here." *Id*. at *5.

Next, the Court rejected HTB's argument that the unaccepted Rule 68 offer mooted the case. The Court held that this case "fit[s] within the 'relation back' exception," which "prevents a defendant from 'picking off' a named plaintiff by

mooting her individual claim before the court has an opportunity to rule on the question of class certification." *Id*. at *6. The Court specifically disagreed with HTB's "contention that this Court's 'relation back' rationale does not survive the Supreme Court's recent decision in *Genesis Health Corp. v. Symczyk*." *Id*. It explained that *Genesis* did not resolve a circuit split over "'whether an unaccepted offer that fully satisfies a plaintiff's claim is sufficient to render the claim moot' when the collective action class has not yet been certified," and that *Genesis* "rejected the plaintiff's reliance on Rule 23 class action cases, explaining that 'Rule 23 actions are fundamentally different from collective actions under the FLSA.'" *Id*. at *7 (quoting *Genesis*, 133 S. Ct. at 1529-30).

Finally, the Court held that the 2012 EFTA amendment does not apply to this case. The Court reversed the dismissal of Ms. Mabary's claim, vacated the denial of class certification, and remanded for the district court to decide whether the class should be certified. Judge Jolly dissented on the standing issue.

ARGUMENT

I. The Panel's Holding on Standing Was Correct, Unexceptional, and Consistent with the Holdings of This Court and Other Federal Courts.

HTB claims that rehearing en banc is warranted to consider whether "the panel opinion erred in holding that a litigant can establish standing for Art. III

purposes without establishing an injury in fact." Pet. 4. But the panel did not hold that an injury-in-fact is not necessary for standing, nor did it hold that HTB's violation of a statutory requirement alone provided Ms. Mabary with standing. Accordingly, the panel's decision does not conflict with cases requiring an injury-in-fact, *see, e.g.*, *Summers v. Earth Island Inst.*, 555 U.S. 488, 497 (2009), nor does it implicate cases on the issue whether violation of a statutory right constitutes a sufficient injury for standing purposes, *see, e.g.*, *David v. Alphin*, 704 F.3d 327, 338 (4th Cir. 2013).

The panel held that Ms. Mabary suffered an injury-in-fact when she was deprived of "fee information [consumers] need to decline a transaction before investing the time needed to initiate it." Slip op. at *5. Both the Supreme Court and this Court have recognized that the failure to receive information required by statute constitutes injury-in-fact under Article III. *See, e.g.*, *FEC v. Akins*, 524 U.S. 11, 21 (1998) ("[A] plaintiff suffers an 'injury in fact' when the plaintiff fails to obtain information which must be publicly disclosed pursuant to a statute."); *Ctr. for Biological Diversity, Inc. v. BP Am. Prod. Co.*, 704 F.3d 413, 430 (5th Cir. 2013) (holding that plaintiffs deprived of a notice required by law had suffered a "concrete informational injury"). And the panel correctly recognized that Ms. Mabary suffered an injury-in-fact when she was deprived of the on-machine, pre-

transaction fee information here.

HTB argues that the deprivation of the on-machine, pre-transaction notice was not an injury because Ms. Mabary eventually received an on-screen notice that a fee would be charged for her transaction. But EFTA required HTB to provide Ms. Mabary with both an on-machine fee notice before beginning the transaction and an on-screen or paper notice afterwards. 15 U.S.C. § 1693b(d)(3)(B) (2010). HTB is thus wrong to contend that "Mabary got all she was entitled to under EFTA." Pet. 6. She did not receive the pre-initiation-of-the transaction, on-machine notice to which she was entitled.

This deprivation was not just one of form. As the opinion explains, receiving information at a different time and place than required affects the utility and meaningfulness of the information. An ATM user who only receives an on-screen fee notice after she has "retrieved her ATM card, entered personal information such as a Personal Identification Number, and initiated a transaction" is "not in the same position to decline an ATM transaction" as she is when she "walks by the ATM and sees the posted notice that Congress required." Slip op. at *4-*5. She has already devoted time to the transaction that may affect the impact of the information on her actions. *Cf. Ctr. for Biological Diversity*, 704 F.3d at 430 (rejecting argument that Article III's requirements were not met because the

information at issue was "already publicly available" in part because that argument ignored the statutory requirement that the information be available "at a designated location").[1]

HTB also argues that any injury Ms. Mabary suffered by not receiving the on-machine notice before initiating her transaction is "speculative or conjectural" because Ms. Mabary did not cite evidence that she would have "made a different decision had she known about the fee before she initiated the transaction." Pet. 8 (quoting slip op. at *13 (Jolly, J., dissenting)). But Ms. Mabary's injury is that she was deprived of the required notice; she does not need to show that her injury affected other decisions. The Supreme Court's decision in *Havens Realty Co. v. Coleman*, 455 U.S. 363 (1982), demonstrates this point. In *Havens*, the Court held that a "tester"—a person who posed as someone interested in renting an apartment for the purpose of collecting evidence that the apartment complex was engaged in

[1]In support of the notion that an informational injury does not exist if the person deprived of the information receives it eventually, the dissent noted that *Center for Biological Diversity* "distinguish[ed] a prior case declining to find informational-injury-based standing"—*Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 109 (1998)—"on the ground that, in [*Center for Biological Diversity*], the defendant 'never claimed that it . . . at any time complied with [the] reporting requirement.'" Slip op. at *14 n.3 (Jolly, J., dissenting) (quoting *Ctr. for Biological Diversity*, 704 F.3d at 430). In that passage, however, *Center for Biological Diversity* was distinguishing *Steel Co.* with respect to redressability, not injury-in-fact. 704 F.3d at 430. That portion of *Center for Biological Diversity* is irrelevant here, where redressability is not in question.

illegal racial steering practices—suffered an injury-in-fact when she was falsely told that no apartments were available in violation of a statute that established a right to truthful housing information. *Id.* at 374. The Court explained that the fact that "the tester may have approached the real estate agent fully expecting that he would receive false information, and without any intention of buying or renting a home, does not negate the simple fact of injury." *Id*. The deprivation of truthful information was a sufficient injury-in-fact without a showing that the false information affected the tester's decisions. Likewise, here, the deprivation of the on-machine, pre-initiation fee notice is itself a sufficient injury-in-fact, and that injury is neither speculative nor conjectural.

The dissent accused the panel majority of finding "standing on the basis of a new theory of law that has not been so much as hinted at" by the plaintiff, slip op. at *12 (Jolly, J., dissenting). However, Ms Mabary argued before the panel that she suffered an informational injury when she was denied the on-machine fee notice, *see, e.g.*, Mabary Reply Br. at 7, and the Court's holding was directly responsive to that argument.

Moreover, although the Court based its holding that Ms. Mabary has standing on the deprivation of the fee information, that deprivation is not the only injury Ms. Mabary suffered. EFTA forbids ATM operators from charging fees

unless they provide the requisite fee notices, 15 U.SC. § 1693b(d)(3)(C)(i), which, at the time of Ms. Mabary's transactions, included the on-machine notice. Although it did not provide her with the on-machine notice, HTB charged her a fee—a fee it was not legally allowed to take from her irrespective of whether she was eventually informed of the fee and elected to proceed with the transaction.

Had the panel held that Ms. Mabary lacked standing, it would have created a circuit split on the question whether a person deprived of the on-machine notice required by EFTA suffered an injury-in-fact. *See Charvat v. Mut. First Fed. Credit Union*, 725 F.3d 819 (8th Cir. 2013). Indeed, every federal court to have considered the issue, with the single exception of a district court decision that the Eighth Circuit reversed, has held that failure to provide the on-machine notice constitutes injury-in-fact. *See id.*; *Alicea v. Citizens Bank of Pa.*, 2013 WL 1891348 (W.D. Pa. May 6, 2013); *Frey v. eGlobal ATM*, 2013 WL 1091237 (N.D. Tex. March 15, 2013); *Frey v. First Nat'l Bank Sw.*, Case No. 11–CV–3093 (N.D. Tex. Feb. 20, 2013) (USCA5 2141); *Bell v. First Bank Richmond*, 2013 WL 123615 (S.D. Ind. Jan. 7, 2013); *Kinder v. United Bancorp Inc.*, 2012 WL 4490874 (E.D. Mich. Sept. 28, 2012); *Zabienski v. ONB Bank & Trust*, 2012 WL 3583020 (N.D. Okla. Aug. 20, 2012); *Campbell v. Hope Cmty. Credit Union*, 2012 WL 423432 (W.D. Tenn. Feb. 8, 2012); *Kinder v. Dearborn Fed. Sav. Bank*, 2011

WL 6371184 (E.D. Mich. Dec. 20, 2011); *In re Regions Bank ATM Fee Notice Litig.*, 2011 WL 4036691 (S.D. Miss. Sept. 12, 2011).

In sum, the questions whether there can be standing without an injury-in-fact and whether a statutory violation alone is sufficient to confer standing are not presented in this case. The Court's holding that Ms. Mabary suffered an injury-in-fact is correct and based on well-established standing principles.

II. The Panel's Holding on Mootness Was Correct, Unexceptional, and Consistent with the Holdings of This Court and Other Federal Courts.

HTB contends that rehearing is also warranted because it made an offer of judgment to Ms. Mabary for $1,000 plus costs and fees to the date of the offer. According to HTB, although Ms. Mabary did not accept the offer, the offer rendered her claim moot and requires dismissal of the entire case for lack of subject matter jurisdiction. As the panel explained, however, "these circumstances fit within the 'relation back' doctrine," which "prevents a defendant from 'picking off' a named plaintiff by mooting her individual claim before the court has an opportunity to rule on the question of class certification." Slip op. at *5-*6. Under the relation-back doctrine, if a named "plaintiff files a timely motion for certification of a [class] action, that motion relates back to the date the plaintiff filed the initial complaint." *Sandoz v. Cingular Wireless LLC*, 553 F.3d 913, 920-

21 (5th Cir. 2008). "If the court ultimately grants the motion to certify, then the Rule 68 offer to the individual plaintiff would not fully satisfy the claims of everyone" in the class action and the case is not moot. *Id*. at 921; *see also Zeidman v. J. Ray McDermott & Co., Inc.*, 651 F.2d 1030, 1051 (5th Cir. 1981) ("[A] suit brought as a class action should not be dismissed for mootness upon tender to the named plaintiffs of their personal claims, at least when, as here, there is pending before the district court a timely filed and diligently pursued motion for class certification."); *Stein v. Buccaneers Ltd. P'ship*, No. 13-15417, slip op. at *18 (11th Cir. Dec. 1, 2014) ("[A] Rule 68 offer of full relief to the named plaintiff does not moot a class action, . . . so long as the named plaintiff has not failed to diligently pursue class certification."); *Pitts v. Terrible Herbst, Inc.*, 653 F.3d 1081, 1091-92 (9th Cir. 2011) ("An unaccepted Rule 68 offer of judgment—for the full amount of the named plaintiff's individual claim and made before the named plaintiff files a motion for class certification—does not moot a class action[.]"); *Lucero v. Bur. of Collection Recovery, Inc.*, 639 F.3d 1239, 1250 (10th Cir. 2011) ("[A] named plaintiff in a proposed class action for monetary relief may proceed to seek timely class certification where an unaccepted offer of judgment is tendered in satisfaction of the plaintiff's individual claim before the court can reasonably be expected to rule on the class certification motion."); *Weiss v. Regal*

Collections, 385 F.3d 337, 348 (3d Cir. 2004) ("[W]here a defendant makes a Rule 68 offer to an individual claim that has the effect of mooting possible class relief asserted in the complaint, the appropriate course is to relate the certification motion back to the filing of the class complaint.").

HTB argues that the relation-back doctrine is not applicable after *Genesis*, 133 S. Ct. 1523, which held that a plaintiff whose individual claim became moot did not have a personal interest in an opt-in collective action under the FLSA, 29 U.S.C. § 216(b). As the panel explained, however, in *Genesis*, the Supreme Court "rejected the plaintiff's reliance on Rule 23 class action cases, explaining that 'Rule 23 actions are fundamentally different from collective actions under the FLSA.'" Slip op. at *7 (quoting *Genesis*, 133 S. Ct. at 1529); *cf. Sandoz*, 553 F.3d at 919 ("[T]here is a difference between when a Rule 23 class action and a FLSA collective action can become moot[.]"). Accordingly, since *Genesis* was decided, numerous courts, including the Sixth, Ninth, and Eleventh Circuits, have found its holding inapplicable to class actions. *See Stein v. Buccaneers Ltd. P'ship*, No. 13-15417, slip op. at *22 (11th Cir. Dec. 1, 2014); *Gomez v. Campbell-Ewald Co.*, 768 F.3d 871, 875-76 (9th Cir. 2014); *Schlaud v. Snyder*, 717 F.3d 451, 456 n.3 (6th Cir. 2013), *vacated and remanded on other grounds*, *Schlaud v. Snyder*, 134 S. Ct. 2899 (2014). No circuit has held otherwise.

Moreover, in *Genesis*, the Supreme Court noted, but did not resolve, "a circuit split on 'whether an unaccepted offer that fully satisfies a plaintiff's claim is sufficient to render the claim moot' when the collective action class has not yet been certified." Slip op. at *6-*7. In dissent, Justice Kagan, joined by Justices Ginsburg, Breyer, and Sotomayor, reached the issue left unresolved by the majority and demonstrated that a Rule 68 offer that would provide complete relief on a named plaintiff's individual claim does not moot the plaintiff's claim. Justice Kagan explained that a "'case becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party,'" 133 S. Ct. at 1533 (Kagan, J. dissenting) (quoting *Chafin v. Chafin*, 133 S. Ct. 1017, 1023 (2012)), and that an unaccepted offer cannot moot a case because it does not deprive the Court of the ability to grant relief. For the reasons explained by Justice Kagan, as well, the Court was correct in holding that this case is not moot.

Finally, the question whether an unaccepted Rule 68 offer on a named plaintiff's individual claims renders a class action moot arises only if the offer, if entered, would provide complete relief on those individual claims. Here, HTB's offer was incomplete in two ways. First, although HTB deprived Ms. Mabary of the on-machine notice on two occasions, the offer was for only $1,000 in damages. This Court has not addressed whether statutory damages under EFTA are awarded

per case or per violation, and that issue is a question for the merits. *See Hrivnak v. NCO Portfolio Mgmt., Inc.*, 719 F.3d 564, 570 (6th Cir. 2013) ("To rule on whether [a plaintiff] is entitled to a particular kind of relief is to decide the merits of the case. Neither Civil Rule 68 nor any other Rule or tradition requires the district court to do that in response to a motion to dismiss for lack of subject matter jurisdiction."). Second, the offer included only attorneys' fees "accrued to the date of this Offer," but stated that the amount accrued would be "determined by the Court," USCA5 205, thereby contemplating future proceedings to determine fees. A party to whom fees are awarded is entitled to fees for time spent "litigating a fee claim." *Cruz v. Huack*, 762 F.2d 1230, 1233 (5th Cir. 1985). "[B]ecause the offer of judgment excluded post-offer attorney's fees that Plaintiff would otherwise be entitled to receive," it "did not offer complete relief to the Plaintiff." *Lobianco v. John F. Hayter, Attorney at Law, P.A.*, 944 F. Supp. 2d 1183, 1187 (N.D. Fla. 2013). That the Rule 68 offer did not offer Ms. Mabary complete relief even on her individual claims provides an additional reason why the panel was correct to hold that her claim is not moot. That conclusion, from which no judge voiced a dissent, does not warrant rehearing en banc.

CONCLUSION

The petition for rehearing en banc should be denied.

Respectfully submitted,

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December 1, 2014

CERTIFICATE OF SERVICE

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