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U.S. Supreme Court: companies cannot moot class action litigation through generous settlement offers to individual plaintiffs

The Supreme Court struck a blow to companies attempting to avoid costly class action lawsuits in a recent decision holding that a defendant cannot necessarily avoid a class action by offering full relief to the putative class

representative. *Campbell-Ewald Co. v. Gomez*, No. 14-857 concerned a defendant company attempting to use Rule 68 of the Federal Rules of Civil Procedure to preemptively moot a class action. The Court held that making a generous offer under Rule 68 will not moot a class action lawsuit if the plaintiff does not accept the offer.

Generally, Rule 68 provides a powerful settlement tool for defendants. Rule 68 permits parties to present "offers of judgment" under specified terms, which if accepted by the plaintiff will act as a final disposition of the suit. If the plaintiff rejects an offer of judgment, or allows it to lapse, and then recovers less than the defendant offered, the court will award costs to the defendant from the time the offer was made. In the class action context, some companies have used Rule 68 offers to "pick off" class representatives by offering them a full amount of individual recovery to settle their claims before class certification to potentially moot the class action.

The federal courts of appeals split over whether these settlement offers would moot a plaintiff's proposed class action when the offer met or exceeded the individual plaintiff's possible recovery. Notably, the 6th Circuit in the 2009 case *O'Brien v. Ed Donnelly Enters.*, 575 F.3d 567 held that an offer of judgment that satisfied the entire plaintiff's demand *would* moot the plaintiff's cause of action. These courts reasoned that a full settlement offer provided the individual plaintiff with everything that he could possibly legally request, arguably extinguishing the controversy between the parties that is constitutionally required for standing. In the recent six-to-three ruling, the Supreme Court overturned the 6th Circuit

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The facts

The *Campbell-Ewald* case concerned a marketing plan initiated by the U.S. Navy to boost recruitment. Under the marketing strategy, automated text messages would be sent to a targeted audience of 18-to-24 year olds who had consented to receive solicitations from the Navy. The Navy contracted with Campbell-Ewald, a national marketing company, to send these recruitment notices to approximately 100,000 individuals.

Plaintiff Jose Gomez alleged that the Navy's marketers at Campbell-Ewald violated the Telephone Consumer Protection Act (TCPA) when he received a recruiting message; even though the Navy itself possesses sovereign immunity from suit. Gomez claimed he had never consented to receive the message and was nearly 40 years old at the time, which put him squarely outside of the message's targeted audience. Gomez filed a class action complaint in the Northern District of California on behalf of individuals who had received, but not consented to, the Navy's text messages.

Campbell-Ewald, in an effort to settle Gomez's individual claim and stave off the possible class action, presented an offer of judgment to Gomez under Rule 68 before the class was certified. Campbell-Ewald offered to pay Gomez his costs, the maximum statutory penalty for each violation of the TCPA, and enter into a stipulated injunction to bar itself from sending future messages violating the TCPA. This offer of judgment provided Gomez with the maximum personal recovery that he could have received by individually litigating his claim. Nevertheless, Gomez failed to respond to the offer of judgment, allowing it to automatically lapse after 14 days.

Following the offer's lapse, Campbell-Ewald moved to dismiss Gomez's claim. Campbell-Ewald contended that its offer of judgment and settlement agreement, which provided Gomez with complete relief, nullified any controversy between the parties. Also, because Campbell-Ewald made the offer of judgment before class certification, the putative class claims also became moot. Following a ruling by the Ninth Circuit, the question of whether Campbell-Ewald's offer of judgment mooted Gomez's claim and putative class action reached the Supreme Court, which held that Gomez's claims were not moot because an unaccepted settlement offer has no effect on the position of the parties.

The Court's analysis

The Supreme Court applied traditional contract law to rule in Gomez's favor. In an opinion authored by Justice Ginsberg, the Court adopted the reasoning that "under the basic principles of contract law, Campbell's settlement bid and Rule 68 offer of judgment, once rejected, had no continuing efficacy." The Court supported its holding with both the text of Rule 68, which treats unaccepted offers of judgment as "withdrawn," and the basic principle in contract theory that valid contracts require both an offer *and an acceptance*. Gomez voided any potential acceptance by allowing the offer to lapse and left the parties in the same position as if the offer had never been made.

Campbell-Ewald argued that historical railroad cases substantiated its position that a settlement offer which fully satisfied all of the plaintiff's claims mooted the case or controversy. The Court rejected this argument and noted that in each of the cases cited, the opposing party had actually paid the plaintiff, not just made an offer of payment. The Court succinctly stated "[i]n contrast to these cases Campbell highlights, when the

settlement offer Campbell extended to Gomez expired, Gomez remained empty-handed."

The Court made it clear that its reasoning would apply regardless of the generosity of the settlement offer. The Court adopted the analysis of Justice Kagan from her dissent in *Genesis HealthCare Corp. v. Symczyk*, 133 S. Ct. 1523 to hold that "when a plaintiff rejects a settlement offer – however good the terms – her interest in the lawsuit remains just what it was before." Therefore, a plaintiff may reject any offer for any reason without running afoul of the Court's holding. However, the Court refused to rule on whether the plaintiff's claim would have been moot if the settlement monies were placed in a deposit account payable to the plaintiff – arguably making the plaintiff whole and affording him complete relief, leaving that for a case where the question was "not hypothetical."

Conclusions

Based on the *Campbell-Ewald* case, a Rule 68 offer may not be as powerful a tool as thought by some hoping to avoid class discovery and potentially certification. Although the Supreme Court appears to have eliminated one potential avenue for early resolution of putative class actions, we offer the following observations for the defense:

- Rule 68 offers remain a settlement tool that may help curb costs in a class action, but a rejected or lapsed offer will not moot a putative class action
- The possibility remains that paying the full amount of relief to the plaintiff, rather than simply offering it, might moot the class action
- Even if individual plaintiffs capitulate, beware of efforts by the plaintiffs' bar to fight the pick-off strategy by requesting notice to all putative class members under Rule 23 and finding substitute class representatives

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