Client Update

Supreme Court Rules that Unaccepted Rule 68 Offers of Complete Relief Do Not Moot a Plaintiff's Case – But *Payment* of Full Relief Just May

NEW YORK
David H. Bernstein
dhbernst@debevoise.com

Courtney M. Dankworth
cmdankwo@debevoise.com

Jyotin Hamid
jhamid@debevoise.com

Mary Beth Hogan
mbhogan@debevoise.com

Maura Kathleen Monaghan
mkmonaghan@debevoise.com

Erol Gulay
egulay@debevoise.com

WASHINGTON, D.C.
Jeffrey P. Cunard
jpcunard@debevoise.com

The Supreme Court ruled last week that defendants may not moot class-action lawsuits by offering complete relief to the individual plaintiffs before a class is certified. The Court's decision in *Campbell-Ewald Company v. Gomez* will prevent defendants from relying upon an unaccepted Rule 68 offer to pick off the named plaintiffs and avoid a class action. Most commentators have focused exclusively or principally on this result: the decision was hailed as a victory for the plaintiffs' bar and a blow to business defendants. The case is not quite as clear-cut as that, however—the decision turned on the plaintiff having rejected the company's settlement offer, leaving him "emptyhanded." The Court expressly left open the question of whether a defendant could moot a suit by depositing the full amount of a plaintiff's claim in an account. Such a tactic could be used to achieve the same advantageous result sought by the defendant in *Campbell-Ewald*—preemptively and unilaterally mooting the case before it reaches the class certification phase.

AN OFFER OF FULL RELIEF DOES NOT MOOT A PLAINTIFF'S CASE – EVEN IF THE OFFER IS EVERYTHING THE PLAINTIFF REQUESTED

Plaintiff Jose Gomez originally brought his putative class-action lawsuit against telemarketing firm Campbell-Ewald ("Campbell") in 2010, alleging that Campbell violated the Telephone Consumer Protection Act ("TCPA") by sending him and a nationwide class of about 100,000 people unsolicited recruiting texts on behalf of the U.S. Navy.[1] Before Gomez filed a motion for class certification, Campbell offered Gomez, pursuant to Rule 68 of the Federal Rules of Civil

[1] The TCPA permits plaintiffs to recover the greater of their actual monetary loss or $500 for each unauthorized text. 47 U.S.C. § 227(b)(3). Damages may be trebled if the defendant "willfully or knowingly violated" the TCPA. *Id.*

Procedure,[2] the maximum amount he could recover under the TCPA for his individual claim: $1,503 for each unauthorized text message and the costs of filing suit. Campbell further proposed a stipulated injunction in which it would deny Gomez's allegations but agree not to send unauthorized text messages. Even though Gomez conceded that the company's offer "would have fully satisfied the individual claims asserted" by him,[3] Gomez rejected the settlement offer.

Campbell subsequently moved to dismiss the case for lack of subject-matter jurisdiction, arguing there was no dispute for the court to resolve since Gomez had been offered the maximum he could recover through litigation. Campbell's motion was denied and, on appeal, the Ninth Circuit affirmed, ruling that a rejected Rule 68 offer of judgment does not moot a class action even if the offer is for complete relief.[4]

The Supreme Court granted certiorari to resolve a split in the circuit courts over whether an unaccepted offer of maximum relief can moot a plaintiff's claim.[5] Relying on "basic principles of contract law," Justice Ginsberg, writing for the majority, found that Campbell's settlement bid "once rejected, had no continuing efficacy." "When a plaintiff rejects such an offer—however good the terms—her interest in the lawsuit remains just what it was before. And so too does the court's ability to grant her relief," the Court ruled.

ACTUAL PAYMENT OF COMPLETE RELIEF MAY MOOT A CLASS ACTION CASE

Although a "revocable offer" of relief leaving the plaintiff "emptyhanded" cannot moot a case, Justice Ginsberg expressly reserved the question of whether unilaterally depositing payment of complete relief to the plaintiff could moot a case. "We need not, and do not, now decide whether the result would be different if a defendant deposits the full amount of the plaintiff's individual claim in an account payable to the plaintiff, and the court then enters judgment for the plaintiff in that amount," she wrote.

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2 Rule 68 permits defendants to "serve on an opposing party an offer to allow judgment on specified terms." If the plaintiff does not accept the offer, the "offer is considered withdrawn."

3 805 F. Supp. 2d 923, 927 (C.D. Cal. 2011).

4 805 F. Supp. 2d 923 (C.D. Cal. 2011); 768 F.3d 871 (9th Cir. 2014).

5 The First, Second, Fifth, Seventh, Ninth, and Eleventh circuits have ruled that an unaccepted offer does not render a plaintiff's claim moot; the Third, Fourth, and Sixth circuits have decided that an unaccepted offer can moot a plaintiff's claim.

The dissenting justices were "heartened" that the Court "appears to endorse the proposition that a plaintiff's claim is moot once he has 'received full redress' from the defendant." In his dissent, Justice Alito even proposed a roadmap for class-action defendants who sought to moot a plaintiff's individual claim before the class could be certified, explaining that the defendant could hand the plaintiff a certified check, deposit the requisite funds in a bank account in the plaintiff's name, or deposit the money with the district court. Once paid, Justice Alito wrote, the defendant could then seek to dismiss the case on mootness grounds.

It seems reasonable to expect that, on remand, Campbell will seek to deposit the money previously offered to Gomez with the district court or otherwise effectuate payment, and then move for dismissal. At that point, the district court will have to address the question Justice Ginsberg did not answer.

CONCLUSION

Campbell-Ewald is the latest in a continuing line of cases grappling with a defendant's ability to force a settlement of a class action by offering full relief to the named plaintiffs. In 2013, the Court held in *Genesis HealthCare Corp. v. Symczyk*, 133 S. Ct. 1523, that a defendant can moot a class action if the named plaintiff's claims are mooted before a class is certified. Although *Campbell-Ewald* thwarts one tactic defendants had used to fend off certain class-action lawsuits and may ease a plaintiff's path to class certification, the alternative approach not reached by Justice Ginsberg (and embraced by the dissenting justices) combined with *Symczyk* indicates that current law might not preclude defendants from dismissing a class action by tendering payment of full relief to the named plaintiff.

Depositing full relief with the plaintiff and moving for dismissal may not work for every class action, particularly where the asserted claim for damages is large or difficult to value. The question of whether and how attorney's fees must be tendered also remains open. Nevertheless, finding a way to deposit full relief is a tactic well worth consideration by defendants in consumer and employee class actions involving small statutory damages under statutes like the TCPA and the Fair Labor Standards Act or where damages are otherwise both ascertainable and modest.

Interestingly, despite ruling on a consumer class action, the Court did not dwell on the policy implications of its decision for consumers. Justice Ginsberg did reject the dissent's reasoning—that a unilateral offer, even if rejected, was sufficient—on the ground that such a result "would place defendants in the driver's seat" and permit them to "avoid a potential adverse decision . . . that

could expose it to damages a thousand-fold larger." The Court may be eager to avert an outcome where a deep-pocketed defendant dictates the outcome of a lawsuit by unilaterally writing the plaintiff a check. Yet the opening allowed by the majority—that actual payment or deposit of full relief could head off a lawsuit—suggests that the Court may find such a result acceptable if the plaintiff obtains everything he or she requested.

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Please do not hesitate to contact us with any questions.