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Settlement and Compromise

Does Settlement Offer to Named Plaintiff Moot Class Action?

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On Jan. 20, 2016, the U.S. Supreme Court handed down its decision in *Campbell-Ewald Co. v. Gomez*.[1] The court effectively denied the defendant-petitioner, and other corporations seeking to avoid class action lawsuits, the ability to moot an entire class action case by making a settlement offer that satisfies the named plaintiff's claim.

An opposite result would have significantly affected individuals' ability to gather and form a class action. Such a result would have provided defendants with the ability to approach the named plaintiff with a total settlement—potentially before the named plaintiff may have had the opportunity to move for class certification—and moot the entire action in one fell swoop, even if the plaintiff did not accept the offer. This is striking when the relatively small-scale facts of *Campbell* are considered: in *Campbell*, the court had to consider whether an offer to settle for the maximum statutory amount of $1,500 per unwanted text message (of which there was only one such text message sent to Gomez), plus court costs, meant that no "case" or "controversy" existed to satisfy the jurisdictional requirements of Article III of the Constitution.

However, the result also comes with an unnerving suggestion for defendants that in certain such circumstances, and despite complete offers to settle, litigation may be unavoidable. As stated in the amicus brief from The Chamber of Commerce of the United States of America and Business Roundtable:

> Defendants often make full settlement offers because they believe that fully compensating the plaintiff will resolve the litigation. But if the plaintiff purports to represent a class, and the putative class claims continue to exist despite a full settlement with the putative representative, defendants have little incentive to make such offers, even if they would serve everyone's interest.[2]

Settlement Offer and Decision

The U.S. Navy contracted with an advertising and marketing communications company to send text

messages as part of a recruitment campaign. The concept was that the text message would be sent to individuals who had opted in to receive the messages and who were between the ages of 18 and 24 years old. Over 100,000 cellular numbers received the Navy's message. In part, the text read "Destined for something big? Do it in the Navy."

One of these messages was sent to the named plaintiff in this case, Jose Gomez. Gomez alleged that he had not agreed to receive this message and that he was clearly out of the desired age bracket—Gomez was nearly 40 years old when he received the message. Gomez filed a class action complaint, alleging that the company had violated the Telephone Consumer Protection Act (TCPA), which prohibits such blanket text messages being sent to cellular telephones without the recipient's consent. Gomez sought treble statutory damages (permitted if the defendant willfully or knowingly violated the TCPA), attorney fees, costs and an injunction against the company.

Pursuant to Federal Rule of Civil Procedure 68, the company proposed to settle Gomez's individual claim by filing an offer of judgment in an amount that would have settled Gomez's personal treble-damages claim ($1,503 per message). Gomez chose not to accept the offer and allowed the offer to lapse after the prescribed 14-day period, per the time limit stated in Federal Rule 68. Federal Rule 68(a) states that:

> At least 14 days before the date set for trial, a party defending against a claim may serve on an opposing party an offer to allow judgment on specified terms, with the costs then accrued. If, within 14 days after being served, the opposing party serves written notice accepting the offer, either party may then file the offer and notice of acceptance, plus proof of service. The clerk must then enter judgment.

The company then moved to dismiss the case. It argued, inter alia, that the offer had mooted Gomez's individual claim because it provided him with complete relief. Therefore, no Article III case or controversy remained. The company also argued that because Gomez's individual claim became moot before Gomez had moved for class certification, the putative class claims were mooted as well.

Justice Ruth Bader Ginsburg delivered the opinion of the court, which held that Gomez's claim was not mooted by the settlement offer.[3] Rather, the court held that the unaccepted offer had no force—the company's settlement offer remaining "only a proposal, binding neither Campbell nor Gomez.… In short, with no settlement offer still operative, the parties remained adverse; both retained the same stake in the litigation they had at the outset."[4]

In doing so, the court adopted the analysis within Justice Elena Kagan's dissent in *Genesis Healthcare Corp. v. Symczyk*,[5] (with whom Justice Ginsburg, Justice Stephen Breyer and Justice Sonia Sotomayor joined):

> 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. An unaccepted settlement offer—like any unaccepted contract offer—is a legal nullity, with no operative effect. As every first-year law student learns, the recipient's rejection of an offer "leaves the matter as if no offer had ever been made"….Nothing in Rule 68 alters that basic principle.

The court also observed that Federal Rule 68 itself does not support a finding that an unaccepted settlement offer, that would otherwise have satisfied the named plaintiff's individual claims, should moot the plaintiff's complaint. For instance, the rule provides that offers are "considered withdrawn" if not accepted within 14 days and includes "[t]he sole built-in sanction" that the offeree must pay the costs incurred after the offer was made if the ultimate judgment is not more favorable than the unaccepted offer.[6]

The extent to which the company's settlement offer signaled a potentially significant strategic tool against class actions is demonstrated within Justice Ginsburg's decision. To this end, Ginsburg stated that the company's true aim was "to avoid a potential adverse decision, one that could expose it to damages a thousand-fold larger than the bid Gomez declined to accept."[7]

However, the decision of the court has potentially left the door ajar for future defendants looking to frustrate potential class action claims by proposing to settle the named plaintiff's claim in its entirety. This is because the court did not go as far as to decide the hypothetical of "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."[8] Instead, the court held that this question should be reserved for a case in which that scenario is in issue—and no doubt a class-action defendant will come knocking at this hypothetical's door soon. Indeed, The chief justice's dissent welcomed this caveat, stating that "[t]he good news is that this case is limited to its facts."[9]

The Dissents

Chief Justice John Roberts authored a dissent, with which Justice Antonin Scalia and Justice Samuel Alito joined.

The dissent would have held that no case or controversy existed for the purpose of Article III when a defendant agrees to fully redress the injury that the plaintiff complained of.[10] The dissent argued that a finding that Gomez's claim was not moot would give plaintiffs the power to decide whether federal litigation is necessary—a power that should properly be in the hands of the federal court.[11] The dissent explicitly highlighted that it is "an important constitutional principle" that "[t]he agreement of the plaintiff is not required to moot a case."[12]

To this end, Chief Justice Roberts opined that the focus should not be on the contractual nature of an offer to settle but, instead, the focus should be on the "essential purpose" of Article III, which is to ensure "that the federal courts expound the law only in the last resort, and as a necessity."[13]

Justice Ginsburg addressed this portion of the chief justice's dissent, stating—to the contrary—that to allow the company to avoid a potentially adverse decision by making such an offer would in fact place the defendant, not the plaintiff or the federal court, "in the driver's seat." Justice Ginsburg argued that it was Campbell that was strategically attempting to avoid an adverse decision, and the associated damages, by making a full settlement offer to Gomez for a relatively modest amount.[14]

Justice Alito submitted a separate dissent underlining the risk to plaintiffs of defendants who make

such offers but who fail to follow through—leaving the plaintiff "forever emptyhanded."[15] He also observed that, in such a scenario, placing the burden on the plaintiff to move to reopen the dismissed case was an unattractive remedy. Rather, Alito suggested two potential procedures that would serve to avoid a plaintiff being left high and dry: The defendant could just pay over the money; or, alternatively, the defendant could deposit the money in the district court or with another trusted intermediary to be released when the court dismisses the case as moot. Thus, Justice Alito reiterated that the door for defendants to moot a plaintiff's claim with an offer to settle is open for the simple reason that Justice Ginsburg's decision "does not prevent a defendant who actually pays complete relief—either directly to the plaintiff or to a trusted intermediary—from seeking dismissal on mootness grounds."[16]

This hurdle is not very high, and such a settlement proposition with payment will surely threaten class-action lawsuits in the future.

Endnotes:

1. *Campbell-Ewald Co. v. Gomez*, No. 14-857, 2016 WL 228345, at *2 (U.S. Jan. 20, 2016). The case was a 6-3 decision: Justice Ruth Bader Ginsburg delivered the opinion of the court, in which Justice Anthony Kennedy, Justice Stephen Breyer, Justice Sonia Sotomayor and Justice Elena Kagan joined. Justice Clarence Thomas filed an opinion concurring in the judgment. Chief Justice John Roberts filed a dissenting opinion, in which Justice Antonin Scalia and Justice Samuel Alito joined. Alito filed a dissenting opinion.

2. Brief Of The Chamber Of Commerce Of The United States Of America And Business Roundtable As Amici Curiae In Support Of Petitioner, at pg. 19.

3. Note that the Campbell decision also considered whether Campbell's status as a federal contractor made it entitled to immunity for its violation of the TCPA. That discussion is beyond the scope of this article.

4. *Campbell-Ewald Co.* at *7.

5. *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523, 1533-1534, 185 L. Ed. 2d 636 (2013).

6. *Campbell-Ewald Co*. at *7; Federal Rule 68(a),(b) and (d).

7. Id. at *8.

8. Id. at *8.

9. Id. at 18.

10. Id. at *15.

11. Id. at *16.

12. Id. at *17.

13. Id. at *18; citing to *Allen v. Wright*, 468 U.S. 737, 752, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984)

(internal quotation marks omitted).

14. Id. at *8.

15. Id. at *19.

16. Id. at *20.

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