YOUR MONEY IS NO GOOD HERE: U.S. SUPREME COURT HOLDS THAT AN UNACCEPTED RULE 68 OFFER OF COMPLETE RELIEF DOES NOT MOOT AN INDIVIDUAL'S CLAIMS, BUT QUESTIONS REMAIN

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Consumer Financial Services Alert

INTRODUCTION

On January 20, 2016, the United States Supreme Court issued its decision in *Campbell-Ewald Co. v. Gomez* regarding Rule 68 offers of judgment.[1] The Court held that a defendant cannot moot a case by merely *offering* complete relief to a plaintiff but left unanswered whether a defendant may do so by actually *providing* complete relief. Nor did the Court reach the question of whether a plaintiff can continue to seek to represent a putative class when his or her individual claims are mooted before a class is certified.

BACKGROUND

In *Campbell-Ewald*, the plaintiff purportedly received a recruiting text message sent on behalf of a branch of the United States military by the defendant, a federal contractor.[2] Claiming that he had not consented to receive such a message, the plaintiff filed suit on behalf of himself and a putative class, alleging a violation of the Telephone Consumer Protection Act ("TCPA").[3] Before the plaintiff moved for class certification, the defendant made a Rule 68 offer of judgment, offering to provide the plaintiff with complete monetary and injunctive relief but denying liability.[4] When the plaintiff took no action in response to the offer of judgment, it lapsed by its terms after 14 days.[5] The defendant moved to dismiss on the basis that its offer of complete relief mooted the plaintiff's individual and class claims and thus deprived the district court of Article III jurisdiction, which motion the district court denied.[6] Ultimately, the district court granted summary judgment for the defendant on the basis that it enjoyed derivative sovereign immunity as a federal contractor acting on behalf of the military.[7] On appeal, the Ninth Circuit reversed.[8] The Supreme Court granted certiorari to address the impact of an unaccepted Rule 68 offer on a federal court's jurisdiction over a matter.

THE DECISION

Writing for the majority, Justice Ginsburg relied upon "basic principles of contract law" to conclude that "an unaccepted settlement offer or offer of judgment does not moot a plaintiff's case."[9] The Court specifically

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adopted Justice Kagan's dissent in *Genesis Healthcare v. Symczyk*,[10] which reasoned that "[a]n unaccepted settlement offer—like any unaccepted contract offer—is a legal nullity, … [and n]othing in Rule 68 alters that basic principle; to the contrary, that rule specifies that '[a]n unaccepted offer is considered withdrawn.'"[11] Applying this analysis to the underlying facts, *Campbell-Ewald* held that the defendant's tender was only an offer and absent acceptance, did not bind either the plaintiff or the defendant.[12] Because no settlement occurred, the parties remained adverse, the district court could still provide relief to the plaintiff, and thus, the case was not moot.[13]

In reaching its decision, the Court distinguished the cases cited by the defendant and the Chief Justice's dissent on the grounds that the defendants in those cases had made an "actual payment" of full relief, rather than making a mere "offer" of relief.[14] In other words, while an *offer* of full relief does not moot a claim, *providing* full relief—consistent with the cases cited by Campbell-Ewald and the dissenters—was a distinction with a difference.[15] In the end, the Court declined to reach the issue 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."[16]

Justice Thomas concurred in the judgment but would have relied on "the common-law history of tenders" instead of contract law in reaching judgment. In summarizing that history, Justice Thomas stated that it "demonstrates that a mere offer of the sum owed is insufficient to eliminate a court's jurisdiction to decide the case to which the offer related."[17]

The Chief Justice, joined by Justices Scalia and Alito, dissented, arguing that the plaintiff's claims were moot because the defendant "had agreed to fully satisfy Gomez's claims."[18] The dissent criticized the majority's reliance on contract principles in deciding the standing issue. According to the Chief Justice, under the Court's prior standing decisions, "[t]he question … is not whether there is a contract; it is whether there is a case or controversy under Article III. If the defendant is willing to give the plaintiff everything he asks for, there is no case or controversy to adjudicate, and the lawsuit is moot."[19] The dissent further noted that "[t]he majority does not say that *payment* of complete relief" cannot moot a case, and rejected the majority's distinction between an offer and the actual provision of relief.[20] "[I]t would be mere pettifoggery," the Chief Justice stated, "to argue that Campbell-Ewald might not make good on" its promise to pay its offer of settlement.[21] Any concerns in this regard, noted the dissent, would be easily addressed by "hav[ing] the firm deposit a certified check with the trial court."[22] On this point, inasmuch as it may align with the majority's implicit acknowledgment that an actual payment may suffice to moot a claim, the Court may have room to reach consensus in a future case.

In deciding that an unaccepted Rule 68 offer cannot moot an individual plaintiff's claims, the Supreme Court did not answer the second part of the mootness inquiry presented in this case, namely, whether a plaintiff can continue to seek to represent a putative class when his or her individual claims are mooted before a class is certified.[23] Nevertheless, aspects of the majority opinion and dissenting opinions reflect divisions between the members of the Court. While the majority notes that "a would-be class representative with a live claim of her own must be accorded a fair opportunity to show that certification is warranted,"[24] the Chief Justice's dissent notes that "under this Court's precedents Gomez does not have standing to seek relief based solely on the alleged injuries of others, and Gomez's interest in sharing attorney's fees among class members or in obtaining a class incentive award does not create Article III standing."[25]

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CONCLUSION

Although *Campbell-Ewald* resolves the question of whether a defendant may moot a plaintiff's claim by virtue of an offer of complete relief in the negative, both the majority and the dissent leave open the possibility that other avenues of *providing* complete relief may yield that result. Whether intended or not, the Supreme Court's decision presents new questions regarding whether a defendant may bypass a plaintiff altogether and moot his or her claims by simply sending a certified check or depositing funds in a bank account in the plaintiff's name.[26] Those questions, as well as the debate regarding standing in class action litigation, are left for future resolution.

NOTES:

[1] --- S. Ct. ---, No. 14-857 (slip op.) ("Campbell-Ewald") at 11.

[2] *Campbell-Ewald* at 3.

[3] 47 U.S.C. § 227 *et seq.*

[4] *Id.* at 3-4 (noting that "[p]rior to the agreed-upon deadline for Gomez to file a motion for class certification … Campbell-Ewald offered to pay Gomez his costs, excluding attorneys' fees, and $1,503 per message…").

[5] *Id.* at 4.

[6] *Id.* (citing *Gomez v. Campbell-Ewald Co.*, 805 F. Supp. 2d 923, 930-31 (C.D. Cal. 2011))

[7] *Campbell-Ewald* at 4-5. This alert focuses on the Supreme Court's decision regarding the impact of unaccepted Rule 68 offers of judgment, but the Court also addressed the doctrine of "derivative sovereign immunity," holding that such immunity does not extend to a "contractor [that] violates both federal law and the Government's explicit instructions." *Campbell-Ewald* at 12-14. Of note for entities defending TCPA claims, the Court's decision appears to defer to a Federal Communications Commission ruling that "under federal common-law principles of agency, there is vicarious liability for TCPA violations." *Id.* at 14 (citing *In re Joint Petition Filed by Dish Network, LLC*, 28 FCC Rcd. 6574 (2013)).

[8] *Id.* at 4-5.

[9] *Campbell-Ewald* at 8, 11.

[10] 133 S. Ct. 1523 (2013); *see also Campbell-Ewald* at 8 n.4 (listing Circuit Court cases reaching that same conclusion that the Supreme Court implicitly affirms).

[11] *Genesis Healthcare* at 1533-34 (Kagan, J., dissenting) (citing Fed. R. Civ. P. 68(b)).

[12] *Campbell-Ewald* at 8-9.

[13] *Id.* at 9.

[14] *Id.* at 9-11, n.5.

[15] *Id.* at 11.

[16] *Id.*

[17] *Campbell-Ewald* (Thomas, J., concurring) at 1, 5.

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[18] *Campbell-Ewald* (Roberts, C.J., dissenting) at 1-2. Justice Alito also filed a separate dissent, noting that a "plaintiff cannot thwart mootness by refusing complete relief presented on a silver platter," and arguing that a full *offer* of judgment is sufficient to moot a case if either (1) there is "no real dispute" that the defendant would "make good on its promise to pay," or (2) the defendant has actually paid the money to the plaintiff. *Campbell-Ewald* (Alito, J., dissenting) at 1-3, and n.1. The latter point highlights further the uncertainties left by the majority's decision, namely, whether a defendant may, for example, send a check to a plaintiff and, by doing so, effectively moot his or her claims.

[19] *Id.* at 9.

[20] *Id*. at 10.

[21] *Id*. at 5

[22] *Id*.

[23] *Campbell-Ewald* at 1 (the opening paragraph of the Court's decision notes that the question before the Court was whether "an unaccepted offer to satisfy the named plaintiff's individual claim [is] sufficient to render a case moot when the complaint seeks relief on behalf of the plaintiff *and a class of persons similarly situated*?" (emphasis added)).

[24] *Id.* at 11.

[25] *Campbell-Ewald* (Roberts, C.J., dissenting) at 5, n.1 (citing *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 480 (1990) (An "interest in attorney's fees is, of course, insufficient to create an Article III case or controversy where none exists on the merits of the underlying claim."); *Steel Co. v. Citizens for Better Environment*, 523 U.S. 83, 107 (1998) ("Obviously, however, a plaintiff cannot achieve standing to litigate a substantive issue by bringing suit for the cost of bringing suit. The litigation must give the plaintiff some other benefit besides reimbursement of costs that are a byproduct of the litigation itself.").

[26] *Campbell-Ewald* at 11; *Campbell-Ewald* (Roberts, C.J., dissenting) at 10; *Campbell-Ewald* (Alito, J., dissenting) at 3.

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