



JANUARY 2016

UNITED STATES SUPREME COURT RESTRICTS DEFENDANT'S STRATEGICAL USE OF RULE 68 OFFERS OF JUDGMENT

By Glenn S. Grindlinger

On January 20, 2016, in *Campbell-Ewald Co. v. Gomez*, No. 14-857 (January 20, 2016), the United State Supreme Court held that a case is not moot and therefore may continue to be litigated when a defendant makes an offer of judgment to a plaintiff under Federal Rule of Civil Procedure 68, that provides the plaintiff with all relief legally available to him or her, which is then rejected by the plaintiff. *Campbell-Ewald* eviscerates a procedural mechanism that many defendants have used in wage and hour actions to end a putative class or collective action while the actions were in their infancy. In fact, the Court's opinion is likely to embolden the plaintiffs' bar who file class and collective actions because they now know that the named plaintiff cannot be "picked off" at an early stage of the litigation.

Background

Beginning in 2000, the U.S. Navy engaged Campbell-Ewald, a national advertising and marketing agency, to assist it in its recruitment efforts. In 2005 and 2006, Campbell-Ewald proposed a marketing campaign for the Navy in which text messages would be sent to young adults, a target audience for Navy recruitment. The Navy approved the campaign provided that the text messages be sent only to those individuals who "'opted in' to receipt of marketing solicitations on topics that included service in the Navy."

After receiving approval from the Navy to go forward with the campaign, Campbell-Ewald contracted with Mindmatics LLC, which generated a list of recipients of the text message campaign. In May 2006, Minmatics transmitted the text message to over 100,000 recipients including Jose Gomez.

Under the Telephone Consumer Protection Act ("TCPA"), it is unlawful for any person, absent prior consent, to "make any call . . . using any automatic telephone dialing system . . . to any telephone number assigned to a paging service [or] cellular telephone service." This prohibition includes the sending of text messages. If the TCPA is violated an affected individual can file suit in federal court and recover his or her actual damages or \$500 (whichever is greater) for each violation. These damages can be trebled if the defendant willfully or knowingly violated the TCPA.

Gomez claimed that he never consented to receipt of the message nor otherwise opted-into any system or program to receive marketing solicitations on topics that included service in the Navy. He asserted that by receiving the Navy's recruitment message, Campbell-Ewald violated the TCPA and Gomez filed a putative class action in federal court in California.

Before Gomez filed a motion for class certification, Campbell-Ewald filed an offer of judgment pursuant to Rule 68 of the Federal Rules of Civil Procedure. In the

offer of judgment, Campbell-Ewald offered to pay Gomez his costs, excluding attorneys' fees (which are not available under the TCPA), and \$1,503 per message that Gomez received. Gomez did not respond to the offer within the 14 days, and pursuant to Rule 68, the offer lapsed.

Therefore, Campbell-Ewald moved to dismiss the complaint arguing that the case was now moot and the court lacked subject-matter jurisdiction to hear the case. Specifically, Campbell-Ewald claimed that it offered all the individual relief that Gomez could receive under the TCPA and thus there was no longer any "case or controversy" as required under Article III of the Constitution, thereby depriving the court of jurisdiction.

The trial court rejected Campbell-Ewald's argument and allowed the case to proceed to discovery, which was upheld by the Ninth Circuit. The Supreme Court then heard the case.

The Supreme Court's Decision

Writing for a 5-1-3 majority (Justice Thomas concurred in judgment only), Justice Ginsberg rejected Campbell-Ewald's contention that an unaccepted offer of judgment moots a case even if the offer provides for all the relief sought by the plaintiff. Rather, the Court looked to contract law and the tenet that an unacceptable offer is a nullity. That is, in contract law, when an offer is made that is not accepted, the offer becomes a nullity – as if it never existed. The Court reasoned that the same rationale would apply to unaccepted offers of judgment. Because the offer was not accepted, it became a nullity and therefore both parties still had an interest in the case. As such, a case or controversy existed and the case was not moot.

The Court also distinguished *Campbell-Ewald* from *Genesis HealthCare Corp. v. Symczk*, 569 U.S. ___ (2013). In *Genesis HealthCare*, a wage and hour collective action, the defendant made an offer of judgment to the plaintiff, which the plaintiff admitted

mooted his individual claim. Yet the plaintiff wanted to continue to pursue the litigation on behalf of the putative collective. The *Genesis HealthCare* Court held that because the plaintiff admitted that the offer of judgment mooted his claim, a case or controversy no longer existed and thus the court lacked jurisdiction and the case was properly dismissed. The *Campbell-Ewald* Court distinguished *Genesis HealthCare* on the grounds that the plaintiff in *Genesis HealthCare* conceded that his claims were moot after receiving the offer of judgment while Gomez never made any such concession and in fact vigorously argued that his individual claims were not moot. According to the Court, this distinction between the two cases was crucial. Therefore, the Court upheld the decision of the Ninth Circuit.

The Court left open one issue. The Court noted that it was not deciding the "hypothetical" situation where an offer of judgment is made by a defendant and the defendant deposits the money offered in the judgment with the trial court or in an account controlled by the plaintiff. This disclaimer could signal that if the defendant actually pays the plaintiff the money and provides the other relief offered in its offer of judgment, it could moot a case and deprive a court of jurisdiction. However, how the Court would actually rule on such a hypothetical situation remains uncertain.

Practical Implications

Campbell-Ewald removes yet another arrow from the defendant's quiver. Especially in wage and hour cases, one of the early strategies that defendants sometimes employ is at a very early stage of the litigation they will make an offer of judgment to the plaintiff that provides all of the back wages, liquidated damages, and other individual relief sought by the plaintiff. When the plaintiff rejects or ignores that offer, citing *Genesis HealthCare*, the defendant will move to dismiss the complaint. After *Campbell-Ewald*, this is no longer an option for defendants.

In wage and hour cases, it is not uncommon for employers to confront class or collective actions that have been filed by a single disgruntled employee who alleges a technical violation for which the plaintiff's damages are very minor. Prior to *Campbell-Ewald*, the defendant might have been able to quickly resolve the issue through an offer of judgement that provided the plaintiff with complete individual relief and which if not accepted would moot the case. Now, employer-defendants will have to litigate these cases on a class

or collective action basis. This is just another reason why employers must be vigilant in their continued compliance with labor and employment laws.

For more information about this alert, please contact Glenn Grindlinger at ggrindlinger@foxrothschild.com, or another member of the Fox Rothschild LLP's Labor & Employment Department. Visit us on the web at www.foxrothschild.com.



Fox Rothschild LLP
ATTORNEYS AT LAW

Attorney Advertisement

© 2016 Fox Rothschild LLP. All rights reserved. All content of this publication is the property and copyright of Fox Rothschild LLP and may not be reproduced in any format without prior express permission. Contact marketing@foxrothschild.com for more information or to seek permission to reproduce content. This publication is intended for general information purposes only. It does not constitute legal advice. The reader should consult with knowledgeable legal counsel to determine how applicable laws apply to specific facts and situations. This publication is based on the most current information at the time it was written. Since it is possible that the laws or other circumstances may have changed since publication, please call us to discuss any action you may be considering as a result of reading this publication.

www.foxrothschild.com