



SUPREME COURT LIMITS DEFENDANTS' USE OF OFFERS OF JUDGMENT TO MOOT CLASS ACTIONS

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In a closely watched case, the U.S. Supreme Court has dealt a significant blow to the ability of class action defendants to “pick off” named plaintiffs by offering them complete relief for their individual claims, thereby mooting the remainder of the class action.

In *Campbell-Ewald v. Gomez*, No. 14-857 (U.S. Jan. 20, 2016), a 6-3 majority of the Supreme Court led by Justice Ginsburg held that an unaccepted offer of judgment made to a named plaintiff pursuant to Federal Rule of Civil Procedure 68, standing alone, does not moot the plaintiff's claim and deprive the trial court of Article III subject-matter jurisdiction. While the court's decision blunts a strategy that has enjoyed increasing popularity with defendants to try to shed themselves of class actions, particularly those involving low-dollar consumer claims, both the majority and dissenting opinions recognize the possibility that Rule 68 offers of judgment can still be employed as an effective part of the defense arsenal.

Rule 68 Offers of Judgment

Rule 68 provides that “at least 14 days before the date set for trial, a party defending against the claim may serve on an opposing party an offer to allow judgment on specified terms, with the costs then accrued.” Under the rule, failure to accept the offer subjects the offeree to liability for all costs incurred after the date of the offer unless the offeree gets a judgment more favorable than the unaccepted offer.

In the context of class action litigation, defendants have used Rule 68 offers of judgment as a tool for picking off representative plaintiffs, mooting the remainder of the case and forcing courts to dismiss for lack of jurisdiction. For instance, in consumer cases arising from the purchase of low-cost goods or under statutes such as the Telephone Consumer Protection Act (TCPA), the damages and other relief sought by an individual plaintiff may be low enough that it makes economic sense for a defendant, prior to class certification, to offer the plaintiff as much if not more than he or she could recover by litigating the case to a successful conclusion.

Once the named plaintiff is picked off, the defendant argues that the remainder of the case is “moot” and must be dismissed for lack of jurisdiction. The use of Rule 68 offers of judgment as a pick-off tactic has split federal courts across the country, with some approving the practice while others condemned it.

The *Campbell-Ewald* Case

The *Campbell-Ewald* case arose as a purported class action for violations of the TCPA. Plaintiff Gomez alleged that he received unwanted text messages on his mobile phone as part of a recruiting campaign for the U.S. Navy and that he had not consented to get the texts. The TCPA generally prohibits using an automated telephone dialing system to make voice calls or send text messages to a cellular telephone without the recipient's prior express consent. A

successful plaintiff under the TCPA can receive injunctive relief and damages ranging from \$500 to \$1,500 per call or text (the TCPA does not provide for recovery of attorney's fees). Gomez sought treble damages and injunctive relief for himself and all other recipients of the unsolicited texts.

Before Gomez could move for class certification, the defendant made a Rule 68 offer of judgment to pay Gomez \$1,503 for each text message he received, together with costs and a stipulated injunction against sending text messages in violation of the TCPA. When Gomez did not accept the offer, the defendant contended that his claim was moot and the case should be dismissed for lack of subject-matter jurisdiction.

The Supreme Court held that the offer of judgment had expired when not accepted after 14 days in accordance with Rule 68 and thus could not affect the continued viability of Gomez's claim. "An unaccepted settlement offer like any unaccepted contract offer is a legal nullity with no operative effect." Accordingly, an unaccepted offer of judgment does not moot a plaintiff's case or affect the ability of a district court to adjudicate it.

The Continued Vitality of Rule 68 Offers

Despite the court's holding in *Campbell-Ewald*, Rule 68 offers still may play a key role in terminating class actions. As the dissenters led by Chief Justice Roberts argued, even if an *offer* of complete relief is not enough to moot a case, actual payment of complete relief pursuant to that offer can moot a case. "The majority holds that an offer of complete relief is insufficient to moot a case. The majority does not say that *payment* of complete relief leads to the same result." Indeed, "the majority's analysis may have come out differently if Campbell had deposited the offered funds with the District Court." Tellingly, the majority did not reject this notion, stating only: "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 in that amount."

The *Campbell-Ewald* decision is not necessarily the death knell for use of Rule 68 offers of judgment to thwart class actions. Instead, a class action defendant looking to cut off potential liability must go beyond simply extending the offer to actually tendering payment into court and allowing the entry of judgment in favor of the individual plaintiff. There is an open issue when litigating claims under statutes such as the Fair Debt Collection Practices Act that provide for shifting attorney's fees. In those instances, the attorney's fees are generally unknown such that a defendant may not be able to tender into court the entire amount due to a plaintiff at the time the offer of judgment is made. Although this remains an open issue, it may be a good practice to make a Rule 68 offer of judgment, pay statutory or calculable damages into court and agree to pay attorney's fees and costs then accrued in an amount to be determined by the court. Once the court makes that determination, the additional amount can be paid into court. The court can then enter judgment in favor of the plaintiff and dismiss any remaining class claims as moot.

While there may be valid legal and business reasons for a defendant not to want an "adverse" judgment entered against it, the prospect of bearing the potentially enormous litigation costs of a class action and the threat of a ruinous judgment make a Rule 68 offer of judgment something that a prudent class action defendant still needs to consider.

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