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Supreme Court Short-Circuits Defense Strategy to Pick Off Class Rep

On January 20, the U.S. Supreme Court held in *Campbell-Ewald Co. v. Gomez* that an unaccepted Rule 68 offer of judgment does not render a plaintiff's action moot, no matter how good the terms of the offer. As a result, the defendant's strategy to defeat a class action by satisfying the individual claims of the putative class representative was rejected. The case plugs a hole left open by the Court's decision in *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523 (2013), in which a collective action under the Fair Labor Standards Act (FLSA) was declared moot after the lead plaintiff conceded in the district court that her individual claim had been mooted by an unaccepted offer of judgment.

Class action litigation allows an individual plaintiff to seek redress on behalf of itself as well as a group of similarly situated parties. However, until a motion to certify the class is filed pursuant to the procedure and standards laid out in Rule 23 of the Federal Rules of Civil Procedure, a federal court's jurisdiction over the matter under Article III of the Constitution depends on the existence of an actual controversy involving the named plaintiff. Rule 68 of the Federal Rules of Civil Procedure provides a mechanism by which a defendant may offer a judgment that grants some or all of the plaintiff's requested relief. In *Campbell-Ewald*, the Court addressed the issue of whether such an offer that would provide complete relief to the named plaintiff before class certification proceedings were instituted rendered his claim moot, thereby eliminating the necessary "case or controversy" required for the case to continue. Prior to *Campbell-Ewald*, the Circuit Courts of Appeals were split on this issue.

In *Campbell-Ewald*, Jose Gomez filed a nationwide class action alleging that Campbell, a marketing company hired by the Navy to conduct a recruiting campaign, violated the Telephone Consumer Protection Act (TCPA) by sending unsolicited text messages. Before Gomez moved for class certification, Campbell offered Gomez $1,503 for each unsolicited text message he received, representing the maximum statutory damages he could recover under the TCPA. Campbell also agreed to pay Gomez's litigation costs (but not attorney fees) and to stipulate to an injunction preventing Campbell from sending further text messages in violation of the TCPA. Gomez allowed the offer of judgment to lapse without accepting it.

The five justices[1] comprising the *Campbell-Ewald* majority held that an unaccepted offer of judgment has no legal effect and therefore does not render an action moot under Article III. In so holding, the Court relied on "basic principles of contract law." The Court reasoned that because the pending offer was not binding on either Campbell or Gomez, the parties remained adverse and a live case or controversy persisted. As the Court noted in a footnote, "Campbell's revocable offer, far from providing Gomez the relief sought in his complaint, gave him nary a penny." The Court distinguished its holding from a trio of 19th-century railroad tax cases in which the government's claims for unpaid taxes were deemed moot upon the railroads' *actual payment* of the disputed amount. The Court emphasized that in the railroad cases, the asserted tax claims had been fully satisfied, whereas Gomez remained "empty-handed."

The Court's decision was heavily influenced by the dissent in *Genesis Healthcare*. That case involved an issue similar to the one in *Campbell-Ewald*: whether an unaccepted offer of judgment made to the lead plaintiff in an FLSA collective action rendered the action moot. Critically, the plaintiff in *Genesis Healthcare* conceded that her individual action was rendered moot by the defendant's offer of judgment. As this issue had been conceded, the majority declined to address it. Unlike the majority, the four dissenting justices in *Genesis Healthcare* – led by Justice Kagan – addressed the issue of whether the unaccepted offer of judgment actually mooted the plaintiff's individual claims. The dissent took the view that the plaintiff's individual claims were not rendered moot because "[a]n unaccepted settlement offer – like any unaccepted contract offer – is

a legal nullity, with no operative effect." The Court in *Campbell-Ewald* expressly indicated that it was adopting Justice Kagan's reasoning in *Genesis Healthcare*.

The dissent in *Campbell-Ewald*, led by Chief Justice Roberts, opined that Campbell's offer of judgment fully satisfied Gomez's claims, thus extinguishing any case or controversy and rendering the case moot. The dissent emphasized that "the federal courts exist to resolve real disputes, not to rule on a plaintiff's entitlement to relief already there for the taking." The chief justice cautioned that a federal court that rules on the merits of a case once the plaintiff no longer has a stake in the litigation "runs afoul of the prohibition on advisory opinions."

Campbell-Ewald largely removes a potential defense tactic aimed at defeating class actions by offering complete relief to the class representative at the beginning of a case. Prior to *Campbell-Ewald*, at least four circuits left open the possibility that an offer of judgment satisfying all the claims of the lead plaintiff in a putative class action would render the class action moot, even if the offer were never accepted.[2] And until 2015, the Seventh Circuit expressly held that a complete offer of judgment to the lead plaintiff made prior to the filing of a motion for class certification would render a putative class action moot.[3]

Campbell-Ewald makes clear that an unaccepted offer of judgment does not render an individual or class action moot. However, as the majority expressly noted, the opinion does not address whether its holding would differ in a situation where the defendant not only makes an offer of judgment but also deposits the full amount of the plaintiff's individual claim in an account payable to the plaintiff and the court enters judgment for the plaintiff in that amount.

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[1] Justice Thomas filed a separate concurrence that reached the same result but was premised on the common law history of tenders and its embodiment in modern Rule 68.

[2] *See, e.g., Hrivnak v. NCO Portfolio Mgmt., Inc.*, 719 F.3d 564, 567 (6th Cir. 2013).

[3] *Damasco v. Clearwire Corp.*, 662 F.3d 891, 893 (7th Cir. 2011), overruled by *Chapman v. First Index, Inc.*, 796 F.3d 783, 787 (7th Cir. 2015).

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