

Pick-Offs After Campbell-Ewald: Some Predictions

Law360, New York (January 21, 2016, 1:25 PM ET) --



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On Wednesday, the U.S. Supreme Court rightly rejected Campbell-Ewald Co.'s attempt to settle out plaintiff Jose Gomez's individual claim to, in Justice Ruth Bader Ginsburg's words, "avoid a potential adverse decision, one that would expose it to damages a thousand-fold larger than the bid Gomez declined to accept."^[1] The underlying litigation involved claims that Campbell-Ewald violated the Telephone Consumer Protection Act, 47 U.S.C. § 227, when it developed and executed a marketing campaign for the United States Navy that resulted in unsolicited text messages being sent to Gomez and 100,000 other recipients.^[2] Campbell-Ewald sent Gomez an offer of judgment under Federal Rule of Civil Procedure 68 and a written settlement offer of \$1,503, plus costs. When Gomez didn't immediately accept, Campbell-Ewald moved to dismiss, claiming their settlement offer mooted Gomez and the class's claims. Both the district court and the Ninth Circuit rejected that argument.

We believe the court's 6-3 decision effectively puts to rest this all-too-common tactic of the defense bar: Make a Rule 68 offer of judgment or other purported offer of complete relief to the named plaintiff in a class or collective action, wait for those offers to inevitably be rejected, then move to dismiss the entire case for lack of Article III standing as moot.

In adopting Justice Elena Kagan's dissenting opinion in *Genesis HealthCare Corp. v. Symczyk*, which answered a question left open by the majority in that case, the court forcefully held that whether the offer comes in the form of a Rule 68 offer of judgment or contractual settlement offer, its nonacceptance "has no force," "creates no lasting right or obligation" and otherwise does not moot the individual's or the class's case.^[3] In this the court was clear: "A case becomes moot ... only when it is impossible for a court to grant any effectual relief whatever to the prevailing party."^[4] This decision puts a definitive end to the practice of mooting cases by merely offering to "pick off" a named plaintiff.

That's not to say that litigation on the legitimacy of pick-offs is entirely over. Consistent with questioning posed at oral argument by Justice Stephen Breyer (referencing the AFL-CIO's amicus brief supporting Gomez), the

majority did not offer an opinion on what result would follow if “a defendant 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.”[5] Indeed, dissenting opinions from both the chief justice and Justice Samuel Alito invite defendants to do exactly that.[6] Not wanting to give up an occasionally successful tactic to avoid class action litigation, we fully expect that certain defense counsel will shortly be delivering to the district courts or plaintiffs counsel envelopes of cash. We believe that not only are these strategies likely foreclosed by the majority’s opinion, they will inevitably backfire on defense counsel.

First, Justice Ginsburg notes no fewer than four times that Campbell-Ewald “did not admit liability,” strongly suggesting that entry of a judgment admitting liability is a component to “effectual relief” a plaintiff is allowed to seek and that will keep his case alive.[7] In a thoughtful concurrence, Justice Clarence Thomas reminds the court that at common law, a defendant could only end a plaintiff’s case by tendering full monetary relief and admitting liability.[8] And even then, the plaintiff was still entitled to “deny that the tender was sufficient to satisfy his demand and accordingly go on to trial.”[9] That six out of nine justices focused on admission of liability strongly suggests that the defense bar will have a difficult time convincing lower courts that it is possible to moot a class action without such an admission. We suspect that while most defendants were willing to offer a few thousand dollars along with a denial of liability to shortcut a class action (which is generally permitted in Rule 68 offers), they will think hard about admitting liability in a judgment on the merits.

Second, those who have been closely watching the district court dockets where involuntary settlement offers have been made have seen (as in Wojcik v. Crown Castle USA Inc., 15-cv-02612 (N.D. Ill.)) that defendants have paid hundreds of thousands of dollars to pick off plaintiffs only to face arguments that notice should be sent to the putative class pursuant to Rule 23(d)(1) informing them of their right to continue the litigation. Then, of course, a new plaintiff inevitably comes forward in a new case putting the defendants back to square one, albeit with significantly less money in their defense budgets.[10]

Finally, for now, the majority opinion likely also puts an end to the practice of filing skeleton or “place-holder” class certification motions for the purpose of keeping the named plaintiff’s claims alive in the face of an involuntary settlement attempt. The court stated that because the unaccepted settlement offer did not moot Gomez’s claim, “that claim would retain vitality during the time involved in determining whether the case could proceed on behalf of a class ... [such 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.”[11]

So, what are we predicting will be the real-world consequences of the Supreme Court’s decision?

1. Defendants will abandon offers of judgment as a strategy to moot claims;
2. Certain defense counsel will advise their clients to come as close to providing full, unconditional relief to the named plaintiff as the next iteration of the defense bar’s pick-off strategy;
3. Defendants will likely be unwilling to go far enough to satisfy the court, placing conditions on their “surrender” and, critically, refusing to admit liability for fear that the next suit will then be impossible to defend;
4. Plaintiffs counsel will pay more attention to the claims they bring and the remedies they seek, including looking to include statutory claims (even if weak) that include fee-shifting provisions and declaratory judgment causes of action that make it more difficult for a defendant to capitulate;
5. When defendants do employ the “surrender” strategy, they are likely to lose their money without succeeding to actually moot the case;

6. Even if certain defendants find a way to win at the district court level, they will face arguments that Rule 23 allows the court discretion to direct class notice so that a replacement class representative can be found.

The real impact of the Gomez decision may, however, go far beyond the implications for pick-off strategies. Our hope is that it serves as a reminder to the defense bar that there are no magic bullets to get rid of class actions on procedural grounds. Rather, wronged individuals will have an opportunity to have their claims adjudicated on the merits. For those who have faith in the civil justice system, this is a welcome message to receive.

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DISCLOSURE: Edelson PC represented Jose Gomez in the district court.

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[1] Campbell-Ewald v. Gomez, No. 14-857, slip op. at 11.

[2] Id. at 2-3. The Court's decision also addressed whether Campbell-Ewald's status as a federal contractor afforded it immunity from suit. The Court concluded that Campbell-Ewald could be vicariously liable and was unable to claim immunity because the evidence showed it violated federal law and the Navy's explicit instructions for the marketing campaign. Id. at 1.

[3] Id. at 1.

[4] Id. at 6.

[5] Transcript of Oral Argument at 48, Campbell-Ewald v. Gomez.

[6] See Gomez, slip op. at 10 (Roberts, C.J., dissenting); Id., slip op. at 4 (Alito, J., dissenting).

[7] Id., slip op. at 8 (majority opinion). See also id., at 1, 4, 9.

[8] Id., slip op. at 2-3 (Thomas, J., concurring in judgment).

[9] Id. at 3.

[10] Our firm represented the plaintiff in Wojcik, as well as the plaintiff in Suzara v. Crown Castle USA, Inc., No. 1:16-cv-00551 (N.D. Ill.), a similar case against the same defendant.

[11] Id., slip op. at 11 (majority opinion).
