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What Companies Can Expect After Campbell-Ewald

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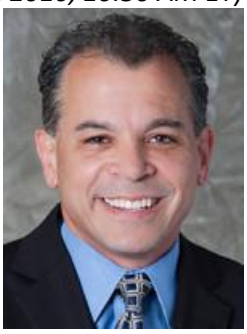

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May defendants moot a putative class action by merely offering complete relief to the putative class representative? The U.S. Supreme Court says no, and the decision may have profound implications on class actions for years to come. Some options may remain, however, if more than a mere offer can be given.

In Campbell-Ewald Co. v. Gomez, No. 14-857 (Jan. 20, 2016), the Supreme Court held that a mere unaccepted offer of judgment does not moot an individual class action. The decision rejects one of many important defenses commonly thought to be available to companies facing potentially massive litigation costs in cases in which theoretical statutory damages are astronomical. Prior to the decision, many courts concluded that by making an offer of judgment for complete relief under Rule 68 of the Federal Rules of Civil Procedure, a defendant mooted a plaintiff's claim even if rejected. After the Supreme Court's 6-3 ruling, that is (mostly) no longer the law in any of our federal courts.

The ruling is a significant one for companies facing consumer protection statutes lacking statutory damages caps, or any other actions where offers of judgment were often made, such as those brought under the Fair Labor Standards Act. Perhaps the best example of the problem is the much-criticized federal Telephone Consumer Protection Act, which was the statute at issue in Campbell-Ewald.

Even though today's consumers are less likely to maintain landlines for their own use, and instead rely solely upon their mobile phones, the TCPA imposes draconian penalties on companies that even inadvertently contact mobile phone users without their prior and express written consent. New and evolving rules and regulations, scrutinizing regulators and aggressive plaintiffs have combined to create a complex web of risks ready to ensnare even the most careful institutions. The TCPA has posed one of the greatest litigation and compliance risks these institutions have faced in recent years. Indeed, companies with valid business reasons for contacting customers have been swept up in the wave of

TCPA class actions, often paying out multimillion-dollar settlements just to resolve claims that often amount to minimal or no actual customer harm.

Post-Campbell-Ewald: Unaccepted Offers Do Not Moot Class Actions

In Campbell-Ewald, the U.S. Navy contracted with Campbell-Ewald Company to conduct a targeted media campaign focused on sending text messages to young adults to encourage them to learn more about the Navy, but only those who had opted in to receiving these types of marketing solicitations. Campbell's contractor compiled a list of cellular phone numbers to contact, and text message solicitations were sent to over 100,000 recipients, including the plaintiff, Jose Gomez. Gomez claimed that he never consented to receive these messages, and brought a federal putative class action, alleging Campbell violated the TCPA. The plaintiff sought treble statutory damages ($1,500 under the statute), costs and an injunction.

Prior to moving for class certification, Campbell offered Gomez the full relief he sought under Rule 68, including (1) his costs and the maximum amount of individual statutory damages; and (2) a stipulated injunction that it would no longer violate the TCPA. The plaintiff did not accept the offer and allowed Campbell's Rule 68 offer to expire after the 14-day deadline specified in the Federal Rules. Campbell then moved to dismiss under Rule 12(b)(1), arguing that (1) its offer mooted the plaintiff's individual claim by providing him complete relief; and (2) because the plaintiff had not moved for class certification prior to his claim becoming moot, the putative class action claims also were moot. The district court denied the motion and the Ninth Circuit affirmed.

Resolving a long-standing circuit split, the Supreme Court affirmed. Justice Ruth Bader Ginsburg, writing for the majority, held that the unaccepted settlement offer did not moot the case. The court, adopting the analysis from Justice Elena Kagan's dissent in Genesis HealthCare Corp. v. Symczyk, 569 U. S. ___, (2013), reasoned that an "unaccepted settlement offer — like any unaccepted contract offer — is a legal nullity, with no operative effect." The court concluded that the rejection could only mean that the settlement offer was no longer operative, and the parties "retained the same stake in the litigation they had at the outset."

Court Leaves Door Open for Defendants to Moot a Claim

Crucially, the court did not reach the question of whether a defendant moots a claim by making an actual payment of full relief. The majority provided some guidance on the mechanics of how such a payment could be made, explaining that a claim might be mooted under Rule 68 when 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."

Chief Justice John Roberts, in dissent, found this possible remaining opening to be the "good news" from the majority's opinion. He provided another potential route for defendants to moot a claim — depositing a certified check with the trial court for the full amount due. Chief Justice Roberts noted that such an act would resolve any question on whether a defendant would make good on a promise to pay on the offer and would moot the claim.

Important Takeaways

After Campbell-Ewald, consumer-facing companies remain well advised to take a closer look at and monitor their compliance processes. For example, before engaging in any telemarketing, companies

should ensure that they have developed robust processes and procedures for TCPA compliance. Indeed, this is particularly important, given the Federal Communications Commission's July 2015 declaratory ruling that, among other things, substantially expanded the definition of an autodialer and made other sweeping revisions that further complicated the numerous TCPA challenges companies face.

Campbell-Ewald will undoubtedly further fuel class action litigation, but defendants are not powerless to extinguish a plaintiff's claims. There are some lingering questions post-Campbell-Ewald, and before tendering complete relief, defendants will have to take into consideration various factors.

As a first step, companies must carefully review their records to assess whether they can provide complete relief. Plaintiffs undoubtedly will raise some challenges to the adequacy of the complete relief payment. For example, the TCPA provides for statutory damages per each call or text, and plaintiffs likely will contest the relief to which they believe they are entitled. Defendants should carefully review and be armed with records that support their payment.

Companies also should evaluate the best means to make the payment to plaintiff. Both the majority and dissent provided suggestions on the options for paying the complete relief required to moot a claim, such as by depositing funds in a bank account in plaintiff's name or depositing funds with the district court on the condition that the money is released to plaintiff upon dismissal.

Rule 68(d)'s cost-shifting provision is still in effect. In light of the decision, plaintiffs may be emboldened to resist early settlement discussions. The court, however, left intact one advantage of offering full relief under Rule 68. As Justice Ginsburg noted, Rule 68(d) has a "built-in sanction": "If the [ultimate] judgment … is not more favorable than the unaccepted offer, the offeree must pay the costs incurred after the offer was made." This cost-shifting provision can provide leverage and facilitate settlement discussions.

A named plaintiff who rejects an offer for full relief may face greater scrutiny on his or her ability to represent the class. For example, in another recent TCPA case, Chapman v. First Index Inc., 796 F.3d 783, 787 (7th Cir. 2015), the Seventh Circuit suggested that "[f]ailure to accept a fully compensatory offer also may suggest that the plaintiff is a bad representative of the class." The court added that such a representative "has nothing to gain (implying poor incentives to monitor counsel) and may have given up something the class values (here, an injunction that would have stopped any further improper faxing)." Id.

A plaintiff's refusal to accept an offer of complete compensation could be deemed an affirmative defense. In Chapman, the court questioned "whether a spurned offer of complete compensation should be deemed an affirmative defense, perhaps in the nature of estoppel or a waiver." Id. Defendants already have started to assert such defenses. E.g., Williams v. Amazon.com Inc., No. 15 C 7256, 2015 WL 8013501, at *1 (N.D. Ill. Dec. 7, 2015) (Fair Credit Reporting Act putative class action; noting denial of defendants' motion for summary judgment brought under Chapman's estoppel/waiver principle on the ground that defendants had not offered plaintiff complete relief).

Resolving the suit with the lead plaintiff in a putative class action may not end the case, or similar litigation. Even if the lead plaintiff is dismissed out of the suit, a new, unnamed plaintiff or putative class representative may be waiting to continue the litigation or to file a new action.

The TCPA as well as other consumer protection statutes have been the source of much litigation over the past several years. The court's decision in Campbell-Ewald does not ease those litigation risks and, in

fact, may only contribute to increased litigation. Nonetheless, as both the majority and dissent recognized, there are still several avenues for attempting to moot consumer lawsuits.

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