

Client Alert

National Class Action Practice Group

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Is there a silver lining for defendants in the recent class action decision by the Supreme Court?

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On January 20, 2016, the U.S. Supreme Court issued an opinion in *Campbell-Ewald Co. v. Gomez*, 577 U.S. __ (2016), holding that an unaccepted offer of judgment made by a defendant pursuant to Rule 68 of the Federal Rules of Civil Procedure does not moot a plaintiff's individual claim.¹

Prior to the Court's decision in *Gomez*, there was a split of authority among federal courts, with some holding that a defendant could eliminate a class action by making an offer of judgment for complete relief to the individual named plaintiff *before* the case was certified as a class action. Those courts reasoned that the offer eliminated the case's "controversy," which is a required element for a plaintiff to have standing to bring a claim in federal court under Article III of the U.S. Constitution. Under this reasoning, once the named plaintiff no longer had an individual claim, he could not represent a putative class to bring a class action, so the case (and threat of a possible class action) would be dismissed. This offer of judgment approach had become an effective strategy for many faced with defending a potentially costly class action with low damage claims per individual class member. Widely reported, *Gomez* now settles this question and removes an arrow from the quiver of class action defense strategies.

The Court's Decision

In *Gomez*, the plaintiff filed a lawsuit against an advertising and marketing communications agency for a text message that he received in alleged violation of the Telephone Consumer Protection Act (TCPA). After receiving the text message, the plaintiff filed a nationwide class action lawsuit claiming that the text messages were sent by an automatic telephone dialing system in violation of section 227(b)(1)(A)(iii) of the TCPA.

After the plaintiff filed the lawsuit, but before the case had been certified as a class action, the defendant made an offer of judgment under Rule 68. Defendant offered the named plaintiff complete statutory relief, which totaled \$1,503 for the one offending text message (the maximum penalty available under the TCPA), plus his costs (not including attorneys' fees, which are not an available remedy under the TCPA). The plaintiff did not accept the offer and it expired per the Federal Rules of Civil Procedure. The

defendant then filed a motion to dismiss the case arguing that it was moot because the plaintiff no longer had standing to pursue his own claim and a class action claim in federal court. The district court rejected these arguments and so did the U.S. Court of Appeals for the Ninth Circuit.

The Supreme Court, in a 6-3 decision written by Justice Ginsburg, agreed and held that the expiration of an offer of judgment made under Rule 68 did not moot the plaintiff's claim. In so holding, the majority distinguished previous cases where the Court held that a plaintiff's claim was moot when a defendant provided complete relief. Of particular importance to the Court was the text of Rule 68 itself. Justice Ginsburg noted that an offer of judgment, under Rule 68 "is considered withdrawn" if not accepted "within 14 days of its service" and that the sole built-in sanction is that "[i]f the [ultimate] judgment . . . is not more favorable than the unaccepted offer, the offeree must pay the costs incurred after the offer was made." Consequently, the *Gomez* majority pointed out that an offer of judgment did not actually provide the plaintiff with the relief. As a result, the offer was like a contract, wherein under contract law, an unaccepted offer has no lasting legal effect after it expires. The majority concluded that "with no settlement offer still operative, the parties remained adverse; both retained the same stake in the litigation they had at the outset." Ultimately, the Court held that an unaccepted offer of judgment did not moot a lawsuit.

In reaching this conclusion, the majority rejected the reasoning of Chief Justice Roberts' dissent that the majority's opinion transferred authority from the federal courts and "hands it to the plaintiff," pointing out that an alternate rule "would place the defendant in the driver's seat" and essentially permit defendants to control whether there was a case or controversy.

What Now?

Looking ahead, the Court's decision likely will embolden plaintiffs and their attorneys to pursue class actions under the TCPA and similar statutes. Indeed, coupled with the FCC's recent declaratory order regarding the TCPA in July 2015, companies that conduct text messaging marketing or other outbound dialing campaigns should be particularly cautious. Without the potential threat of knocking out the individual plaintiff's claim with an offer of judgment, potential defendants should begin to plan for an increase in class actions and should consult with outside counsel before launching any text-message based marketing campaign or other automated dialing program to reduce potential exposure to future liability.

Nevertheless, there may still be a similar defense tactic available even after the *Gomez* decision for quickly resolving class actions before they are certified. In the *Gomez* opinion, the Court expressly stated that it was not addressing the hypothetical situation where a defendant deposits the full amount of the plaintiff's individual claim in an account payable to the plaintiff or with the court.

While it may appear insignificant, this slight differentiation of the facts may prove dispositive in some cases. In making this distinction, the Court addressed the limited issue of an offer of judgment, but left open the possibility that a payment of complete relief may be sufficient to moot an individual plaintiff's claim, thereby extinguishing the threat of a potential class action. The three justices that authored the dissenting opinions, including the Chief Justice Roberts, highlight this nuance, noting that this strategy was not foreclosed by the *Gomez* decision. It remains to be seen whether district courts will accept this argument from class action defendants going forward.

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ⁱ *Gomez* also held that the defendant, a federal contractor for the U.S. Navy, was not entitled to derivative sovereign immunity because it allegedly exceeded its authority. This alert focuses on the class action aspects of the decision only.