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Supreme Court to again consider whether "picking off" class representatives through a Rule 68 offer of judgment moots class action claims

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The Supreme Court on Monday, May 18, 2015, granted certiorari review in *Campbell-Ewald Co. v. Gomez* (No. 14-857), a class action alleging violations of the Telephone Consumer Protection Act, 47 U.S.C. § 227 ("TCPA"). The case will address two related questions that are the source of frequent litigation and circuit conflict in class actions generally: whether a Federal Rule of Civil Procedure 68 offer of complete relief to a plaintiff moots the plaintiff's claim; and whether that same offer of complete relief before class certification moots a named plaintiff's class claim under Federal Rule of Civil Procedure 23. (In addition, the Court has been asked to decide whether the doctrine of derivative sovereign immunity applies to claims for violation of the TCPA).

The underlying case involves an unsolicited text message. The plaintiff Gomez received a single, unsolicited recruitment text from defendant Campbell-Ewald Company, a marketing consultant for the United States Navy. Gomez responded with a putative class action against Campbell-Ewald in the United States District Court for the Central District of California, alleging a single violation of the TCPA. TCPA's statutory damages often lead to the use of an offer of judgment under Federal Rule of Civil Procedure 68.[1] Here, Campbell-Ewald made an offer of judgment to Gomez prior to class certification for just over $1,500 (the maximum amount of statutory damages Gomez could recover for a single violation of the TCPA), plus reasonable costs. Gomez declined the offer by failing to accept it within the time provided. Campbell-Ewald then moved to dismiss Gomez's claim, arguing that it was moot because Campbell-Ewald had already offered Gomez the full amount he could possibly recover. After the district court denied that motion, *see Gomez v. Campbell-Ewald Co.*, 805 F. Supp. 2d 923 (C.D. Cal. 2011), Campbell-Ewald moved for summary judgment, invoking derivative sovereign immunity under *Yearsley v. W. A. Ross Construction Co.*, 309 U.S. 18 (1940). The district court granted Campbell-Ewald's motion for summary judgment.

[1] Rule 68 of the Federal Rules of Civil Procedure allows a defendant to offer a judgment to the plaintiff on whatever terms the defendant deems appropriate. If the plaintiff accepts the offer, judgment is entered in accordance with the offered terms. If the plaintiff declines and ultimately obtains a judgment less favorable than the offer, the plaintiff must pay the costs incurred by the defendant after the offer.

Gomez v. Campbell-Ewald Co., 2013 U.S. Dist. LEXIS 34346, 2013 WL 655237 (C.D. Cal. Feb. 22, 2013).

Gomez appealed to the Ninth Circuit, which reversed the trial court, finding that derivative sovereign immunity did not extend to claims under the TCPA. *Gomez v. Campbell-Ewald Co.*, 768 F.3d 871 (9th Cir. 2014). More importantly to class action parties and practitioners generally, the Ninth Circuit also held that an unaccepted Rule 68 offer neither moots a plaintiff's individual claims nor moots putative class claims. Although these mootness rulings were consistent with Ninth Circuit precedent, the various federal courts of appeal are not uniform on these questions. Campbell-Ewald therefore sought Supreme Court review.

The Ninth Circuit's ruling conflicts with the majority of other circuits to address the issue. The Third, Fourth, Fifth, Sixth and Seventh Circuits have all held that a Rule 68 offer that fully satisfies a plaintiff's individual claim moots the claim. The Eleventh Circuit, in *Stein v. Buccaneers Limited Partnership*, 772 F.3d 698 (11th Cir. 2014), has sided with the Ninth Circuit in holding that an unaccepted Rule 68 offer of judgment does not moot a plaintiff's individual claim (and by extension, cannot moot a putative class claim based on that plaintiff's claim). The Second Circuit has adopted an intermediate approach, holding that a defendant's offer of judgment does not by itself moot the individual plaintiff's claim, but suggesting that the defendant may seek and obtain a default judgment premised on the offer. *See McCauley v. Trans Union, LLC*, 402 F.3d 340, 342 (2d Cir. 2005). The approach of the circuit courts is even more varied on the class action part of the question. The Third and Seventh Circuits have held, contrary to the Ninth Circuit, that an offer of complete relief to the named plaintiff before the plaintiff moves for class certification generally moots the individual claim and the class action.

The Supreme Court had the opportunity a couple years ago to address whether a Rule 68 offer moots a plaintiff's claim in the context of a collective action under the Fair Labor Standards Act. *See Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523 (2013). A majority of the Court ultimately declined to address the mootness question, however, finding that the issue was not properly before the Court. Writing in dissent, Justice Kagan indicated that she would have held that an unaccepted Rule 68 offer could not moot the plaintiff's claim. By granting certiorari in *Campbell-Ewald*, the Supreme Court can revisit this question and its applicability in the class action context and resolve the circuit confusion.

This case promises to have significant ramifications far beyond merely TCPA class actions. Rule 68 offers of judgment have evolved into a common class action defense tool to "pick off' class action plaintiffs in a variety of contexts. The *Campbell-Ewald* decision might expand that tool to all jurisdictions or it might eliminate it completely.

The Supreme Court's decision to grant certiorari in this case also points to a larger trend—a continuing interest to define the parameters of class actions. In just the past three months, the Supreme Court has granted certiorari in three cases presenting significant class action questions. In March 2015, the Court granted certiorari in *DirecTV, Inc. v. Imburgia,* No. 14-462, *cert. granted*, 2015 WL 1280237 (S. Ct. Mar. 23, 2015), which will consider another in a long-line of California-based challenges to class-waiver provisions in arbitration agreements. (*See* our prior alert on *DirecTV* here). And in April 2015, it agreed to review *Spokeo, Inc. v. Robins*, No. 13-1339, cert. granted, 2015 WL 1879778 (S. Ct. Apr. 27, 2015), a case that asks whether Congress can confer Article III standing onto plaintiffs who suffer no actual damages by providing for statutory damages instead. (*See* our prior alert on *Spokeo* here). The Supreme Court's rulings in this trio of cases (which will likely issue next term) could dramatically alter the landscape of class action practice in America.

The Supreme Court has not yet issued a scheduling order in *Campbell-Ewald*. It is likely that briefing will occur over the summer and oral argument may be heard as early as fall 2015 with a decision issuing sometime in spring 2016. We will be closely monitoring this case, and the other class action cases before the Supreme Court, and will provide updates when appropriate.

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