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The Supreme Court Rules That an Unaccepted Offer of Judgment Cannot Moot a Case, But What About Payment of Complete Relief?

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A divided U.S. Supreme Court recently ruled in *Campbell-Ewald Co. v. Gomez*¹ that an unaccepted settlement offer or offer of judgment is a legal nullity that cannot moot a case. However, the Court left open the possibility that payment of complete relief may suffice.

Factual Background and District Court Proceedings

The U.S. Navy contracted with Campbell to develop a multi-media recruiting campaign that included sending text messages to young adults if they "opted in" to receiving such marketing solicitations. Campbell used a subcontractor to identify cell phone numbers of such individuals. The subcontractor sent a text message to Jose Gomez ("the plaintiff") encouraging him to explore opportunities in the Navy. The plaintiff filed a nationwide class action against Campbell in federal court in Los Angeles claiming that he had not consented to receiving such solicitations and alleging violation of the Telephone Consumer Protection Act ("TCPA").² The plaintiff sought treble damages for a willful and knowing violation, an injunction against Campbell's involvement in unsolicited messaging, and attorneys' fees and costs.

Early in the case Campbell made a settlement offer and a Rule 68 offer of judgment to the plaintiff, both offering \$1,503 per message (three times the maximum statutory damages of \$500) plus costs, and a stipulated injunction. Attorneys' fees were not recoverable by statute. The plaintiff did not accept the settlement offer or the offer of judgment, which automatically lapsed under Rule 68. Campbell then moved to dismiss the case for lack of subject matter jurisdiction, arguing that the unaccepted offers provided the plaintiff with complete relief and there was no longer a "case or controversy." In opposition, the plaintiff argued that the Rule 68 offer was an improper attempt to pick off his claim before he had the opportunity to move for class certification.

¹ 577 U.S. ____ (2016).

² 47 U.S.C. §227(b)(1)(A)(iii).

The district court observed that there was no dispute that the settlement offer and offer of judgment would have fully satisfied the plaintiff's individual claims.³ In the absence of Ninth Circuit authority on point, the district court followed the Third, Fifth and Tenth Circuits and held that the Rule 68 offer could not moot the putative class action prior to class certification, applying the "relation-back doctrine." This doctrine provides that class claims relate back to the date of filing of the complaint for the purposes of a subsequent motion for class certification if the named plaintiff's claims are found to be moot.⁴ The district court reasoned that otherwise the defendant could "make an end-run around a class action simply by virtue of a facile procedural 'gotcha,' i.e., the conveyance of a Rule 68 offer of judgment to 'pick off' the named plaintiff prior to the filing of a class certification motion."⁵ Without further analysis, the district court also held that the unaccepted settlement offer did not moot the plaintiff's claim and denied the motion to dismiss.⁶

Ninth Circuit Decision

The Ninth Circuit affirmed the district court's decision, focusing on the fact that the plaintiff had not accepted the Rule 68 offer or the settlement offer. As a result, the court held that the offers were legal nullities that could not moot the plaintiff's claim.⁷ The Ninth Circuit also ruled that the relation-back doctrine prevented the plaintiff's class claims from being rendered moot. In so ruling, it distinguished the Supreme Court's decision not to apply the relation-back doctrine in *Genesis HealthCare Corp.*,⁸ as that the case involved a FLSA collective action, not a Rule 23 class action. Class certification under Rule 23 creates a class with an independent legal status, and relating class certification back to the date the complaint was filed would save the class claims from being moot. In contrast, in a FLSA collective action, relating conditional certification back to the date the complaint was filed would not save any claims from being moot because conditional certification does not create a class, but only results in the issuance of notice to putative collective action members who may later opt in as plaintiffs.⁹

A Majority of the U.S. Supreme Court Affirmed the Ninth Circuit, Holding That an Unaccepted Settlement Offer or Offer of Judgment Cannot Moot a Case

The United States Supreme Court granted review to address the issue not reached in the Supreme Court's April 2013 decision in *Genesis HealthCare* – whether an unaccepted offer to satisfy the named plaintiff's individual claim is sufficient to render a case moot when the complaint seeks relief on behalf of the plaintiff and a class of similarly situated individuals. Justice Thomas, writing for the majority in *Genesis HealthCare*, declined to reach this issue because the plaintiff in that case failed to preserve it in the lower courts. As a result, the *Genesis HealthCare* majority assumed, without deciding, that an unaccepted offer which provides complete relief moots a plaintiff's claim, and then held that the FLSA collective action was no longer justiciable based on the collective action allegations alone. Justice Kagan dissented in that case (joined by Justices Ginsburg, Breyer and

3 *Gomez v. Campbell-Ewald Co.*, 805 F. Supp.2d 923, 927 (C.D. Cal. 2011).

4 The Court relied on *Weiss v. Regal Collections*, 385 F.3d 337, 347-48 (3d Cir. 2004); *Lucero v. Bureau of Collection Recovery, Inc.*, 639 F.3d 1239 (10th Cir. 2011); *Sandoz v. Cingular Wireless LLC*, 553 F.3d 913, 920 (5th Cir. 2008), and rejected the approach of the Seventh Circuit. *Holstein v. City of Chicago*, 29 F.3d 1145, 1147 (7th Cir. 1994).

5 805 F. Supp.2d at 930.

6 Thereafter, Campbell won dismissal of the case on summary judgment on the ground that as a government contractor, it was immune from liability under the doctrine of derivative sovereign immunity. On appeal, the Ninth Circuit reversed this holding, and the Supreme Court affirmed the reversal, holding because Campbell had not followed the government's instructions and sending the message to the plaintiff violated federal law, Campbell's derivative sovereign immunity defense failed.

7 The Ninth Circuit relied on its then recent decision in *Diaz v. First American Home Buyers Protection Corp.*, 732 F.3d 948, 950 (9th Cir. 2013) (adopting Justice Kagan's dissent in *Genesis HealthCare Corporation v. Symczyk*, 133 S. Ct. 1523, 185 L.Ed. 2d 636; 2013 U.S. LEXIS 3157 (2013)).

8 The Ninth Circuit relied on its decision in *Pitts v. Terrible Herbst, Inc.* 653 F.3d 1081 (9th Cir. 2011), which was issued four months after the district court decision in *Campbell-Ewald*. Pitts applied the relation-back doctrine to preserve jurisdiction over a class claim for damages which, while not inherently transitory in nature, was found to be acutely susceptible to being rendered moot by a Rule 68 offer.

9 68 F.3d at 875-76 (citing *Genesis HealthCare Corp.*, 133 S.Ct. at 1529).

Sotomayor), arguing the Court should have reached and resolved the issue by ruling that an unaccepted offer of judgment is a legal nullity that cannot moot a case.¹⁰

With the question squarely presented in this case, Justice Ginsburg, joined by the *Genesis HealthCare* dissenters and Justice Kennedy, affirmed the Ninth Circuit, holding that an unaccepted offer to satisfy the named plaintiff's individual claims cannot render the individual or class claims moot. The majority reasoned that a case becomes moot only when it is impossible for a court to grant any effectual relief to the prevailing party. When a plaintiff rejects a settlement offer or a Rule 68 offer of judgment, the offer becomes a legal nullity under basic contract law principles and the case proceeds as if it were never made. The majority observed that this was consistent with Rule 68 which expressly provides that a Rule 68 offer is deemed withdrawn if not accepted within 14 days of service, with the only sanction being payment of the offeree's costs if the unaccepted offer is more favorable than the ultimate judgment.

The Court majority distinguished three railroad tax cases relied on by Campbell, noting that they were found moot because the railroads paid the full amount demanded into a bank account in the plaintiffs' names pursuant to a statute that extinguished the tax obligation upon such a payment. The majority also distinguished several declaratory and/or injunctive relief cases held moot after the underlying property was returned, cash forfeited, and trademark infringement dispute resolved by a covenant not to sue by the trademark owner, on the ground that, in contrast, after the offers to the plaintiff to settle his claim for damages for past harm expired in this case, he was left with nothing. The Court declined to decide whether the result would have been different if Campbell deposited the full amount of the plaintiff's individual claim in an account payable to the plaintiff and the court entered judgment in that amount.

Justice Thomas (who authored the majority's ruling in *Genesis HealthCare*) concurred in the judgment, although he disagreed with the reliance on contract law principles. In his view, whether there is a case or controversy derives from the traditional limitations on the power of common law courts. Historically, according to the common law of tenders (the precursor to Rule 68), a mere offer to settle a case would not extinguish it. Rather, a defendant had to offer to pay the entire claim and produce the sum in an unconditional manner. In the state and federal courts, such a tender was considered an admission of liability, so a defendant could not deny liability and effectuate a tender. Here, because Campbell offered to pay the plaintiff's claim but took no further steps to make payment, the unaccepted offer did not extinguish the plaintiff's claim. Justice Thomas declined to speculate whether all of the common law formalities (i.e. an admission of liability) had to be followed to moot a case.

In the View of the Dissenters, Because There Was No Dispute That Campbell Would Pay the Amount Offered, the Case Was Moot

Chief Justice Roberts dissented, joined by Justices Scalia and Alito. Chief Justice Roberts wrote that Campbell offered to pay the plaintiff the maximum amount recoverable, but the plaintiff wanted more – a federal court to say he is right. In Chief Justice Roberts' view, federal courts exist to resolve real disputes – cases or controversies -- not to rule on entitlement to relief that has already been offered. The Chief Justice asserted that the plaintiff must have a personal stake, which is shown by standing to sue -- a personal injury allegedly due to the defendant's unlawful conduct that is likely to be redressed by the requested relief. Here, Campbell agreed to redress the injury fully without forcing the plaintiff to litigate. As a result, the plaintiff could not show an injury in need of redress by the court and there was no need for the court to expound and interpret the law and no case or controversy under Article III. Nor did the plaintiff have standing based on his class action allegations because a plaintiff does not have standing to seek relief based solely on the injuries of others.

¹⁰ By the time of the decision in *Campbell*, the First, Second, Fifth, Seventh, and Eleventh Circuits held that an unaccepted offer cannot moot a plaintiff's claim, with all of the decisions decided after *Genesis HealthCare* adopting the Kagan dissent. *Bais Yaakov v. Act, Inc.*, 798 F.3d 46, 52 (1st Cir. 2015); *Hooks v. Landmark Indus., Inc.*, 797 F.3d 309, 315 (5th Cir. 2015); *Chapman v. First Index, Inc.*, 796 F.3d 783, 787 (7th Cir. 2015); *Tanasi v. New Alliance Bank*, 786 F.3d 195, 200 (2d Cir. 2015); *Stein v. Buccaneers Ltd. Partnership*, 772 F.3d 698, 703 (11th Cir. 2014). The Third, Fourth and Sixth Circuits held that an unaccepted offer can moot a plaintiff's claim. *Warren v. Sessoms & Rogers, P.A.*, 676 F.3d 365, 371 (4th Cir. 2012); *O'Brien v. Ed Donnelly Enterprises, Inc.*, 575 F.3d 567, 574-75 (6th Cir. 2009); *Weiss v. Regal Collections*, 385 F.3d 337, 340 (3d Cir. 2004).

While Chief Justice Roberts conceded that Rule 68 by its terms does not extinguish cases upon a plaintiff's failure to accept an offer of complete relief, he noted that here there was also a settlement offer. In his view, whether the settlement offer was a legal nullity under contract law principles is irrelevant to the "case or controversy" analysis. He explained that the Court's precedents have not required a plaintiff's acceptance or the defendant's admission of liability. Chief Justice Roberts further reasoned that the fact that Campbell had not paid up should not change the analysis. There was no evidence that it could not pay, and had there been any such evidence, the issue could be addressed by Campbell's depositing a certified check with the trial court. Chief Justice Roberts observed that the case was limited to its facts insofar as the majority did not reach the issue of whether payment of complete relief would moot a case.

Justice Alito wrote separately to clarify that he dissented because there was no real dispute that Campbell would pay the plaintiff what was offered. If there had been such a dispute, then the case would not have been moot. Justice Alito noted that a defendant could make clear that it will pay over the money by handing the plaintiff a certified check or depositing the requisite funds in a bank account in the plaintiff's name. The defendant could also deposit the money with a district court or other intermediary on the condition that the payment be released after the court dismisses the case as moot.

Practical Guidance

The majority, concurring and dissenting opinions in *Campbell* suggest that a defendant interested in providing complete relief to extinguish a plaintiff's case in either a single plaintiff or class or collective action should consider the following:

1. Make a settlement offer in addition to a Rule 68 offer. The *Campbell* majority noted that the only penalty for rejecting a Rule 68 offer that provides for complete relief is the possibility of paying the other side's costs if the offer exceeds the ultimate judgment. Chief Justice Roberts conceded this point, but pointed to the fact that a settlement offer had also been made.
2. Make sure that the settlement offer and Rule 68 offer provide complete relief. This is essential to mooting a claim. Thought must be given to how to frame the relief where attorneys' fees are recoverable by statute. In some jurisdictions, such as the District of Maryland, if plaintiffs wish to recover attorneys' fees in the litigation, they are required to provide quarterly statements to defendants listing their fees incurred to date. As a result, since defendants will have precise information from plaintiffs' counsel about their amount of fees, it will be easier for defendants to make a full payment that includes attorneys' fees in those jurisdictions.
3. Pay the relief by certified check payable to the plaintiff and deposit it with the Court or pay it to the plaintiff, or deposit the funds in an account payable to the plaintiff. The majority reasoned that the plaintiff was left with nothing after rejecting the offers, and distinguished the cases cited by the dissent as involving situations in which full relief was in fact provided. The concurring and dissenting opinions noted that the case may have come out differently had Campbell taken further steps to pay the money to the plaintiff.
4. Consider the pros and cons of asking the Court to enter judgment on the amount. The majority noted that it need not decide whether the result would be different had Campbell paid the money into court and the court entered judgment on that amount. Justice Alito's dissent stated that he believes that the Court's prior precedents established that the entry of a judgment is not required under those circumstances.
5. Consider the pros and cons of making an admission of liability. This requires careful analysis, especially where class and collective action claims have been or may be asserted. The majority noted that Campbell continued to deny liability in its stipulated injunction, further underscoring that there remained a case or controversy. Justice Thomas' concurrence declined to reach the issue of whether an admission of liability was necessary to moot a claim. The dissent noted that an admission of liability is unnecessary if the plaintiff is provided with complete relief.

6. If a defendant successfully moots a named plaintiff's individual claim by paying complete relief, what is the result for the alleged class claims? The majority suggested that the relation-back doctrine could be applied to salvage the class claims (*Genesis HealthCare* rejected the application of the relation-back doctrine in collective actions). The dissenters would decline to allow a named plaintiff to have standing based on the injuries of others, to share attorneys' fees among class members or to achieve a class incentive award in addition to damages for the individual claim.