

## KD Alert: Supreme Court Ends Tactic of “Picking Off” Class Representatives

By Bradley Levison

Consumer class actions have long been the bane of corporate defendants and a boon for the plaintiffs’ bar. Because settlements of consumer class actions can run well into the millions of dollars, defendants will often seek early resolution directly with the named plaintiff prior to class certification, and often through use of an “Offer of Judgment” pursuant to Federal Rule of Civil Procedure 68 (“Rule 68”). After a recent decision by the Supreme Court of the United States (the “Supreme Court”), defendants have lost an important tool for defeating putative class actions.

On January 20, 2016, the Supreme Court decided the case of *Campbell-Ewald Co. v. Gomez* in favor of Gomez, a consumer, and effectively put an end to the tactic of “picking off” the class representative as a strategy to defeat a class action. *Campbell-Ewald* involved a putative class action for alleged violations of the Telephone Consumer Protection Act (“TCPA” or the “Act”). The TCPA is a federal consumer protection statute that prohibits any person, absent prior consent, from making a call using an automatic dialing system. The TCPA provides that a successful plaintiff may recover her actual monetary loss or \$500 for each violation, whichever is greater. The TCPA also provides for treble damages if the defendant willfully or knowingly violated the Act.

Petitioner *Campbell-Ewald Company* (“*Campbell-Ewald*” or “*Campbell*”) is a nationwide advertising and marketing communications agency that was retained by the US Navy to develop and execute a multimedia recruiting campaign. *Campbell-Ewald* proposed a campaign to send text messages to young adults and the Navy approved it, conditioned on sending messages only to individuals that had “opted in” to receive marketing solicitations from the Navy. Respondent Jose Gomez (“*Gomez*”) received the Navy’s recruiting text message but alleges that he never consented to receiving such messages. Gomez filed a class action complaint in the District Court for the Central District of California. Gomez sought treble damages, statutory damages, costs and attorney fees as well as injunction against *Campbell-Ewald* on behalf of a nationwide class of individuals that received the Navy text message, but did not consent to receipt of that message. Neither *Campbell-Ewald* nor Gomez disputed that a text message qualifies as a “call” within the compass of the TCPA.

Prior to Plaintiff moving to certify the class, *Campbell-Ewald* made a settlement proposal to Gomez and filed an offer of judgment pursuant to Rule 68, essentially a way to resolve the case for a sum certain and allowing a judgment in favor of plaintiff to be entered. *Campbell-Ewald*’s offer, if accepted, would have given Gomez complete relief, but would have eliminated any recovery for the putative class of similarly situated individuals. However, Gomez did not accept the offer of judgment and instead allowed it to expire.

*Campbell-Ewald* then moved to dismiss Gomez’s complaint for lack of subject-matter jurisdiction arguing that the offer to provide complete relief to Gomez mooted his claim. *Campbell-Ewald* further argued that the putative class claims should be dismissed as moot because Gomez failed to move for class certification before his claim became moot.

The district court denied the motion to dismiss, but later granted a motion for summary judgment in favor of *Campbell-Ewald* on a separate issue. On appeal, the Ninth Circuit held that both Gomez’s claim and the putative class claims remained viable while vacating the entry of summary judgment.

In the majority opinion, authored by Justice Ginsburg and joined by Justices Kennedy, Breyer, Sotomayor and Kagan, the Supreme Court affirmed the Ninth Circuit. Addressing mootness first, the Supreme Court adopted Justice Kagan’s analysis of Rule 68 from the dissent in *Genesis HealthCare Corp. v. Symczk*. There, Justice Kagan reasoned that “an unaccepted settlement offer – like any unaccepted contract offer – is a legal nullity, with no operative effect.” Echoing that analysis, the majority in *Gomez* declared that “under basic principles of contract law, *Campbell*’s settlement bid and Rule 68 offer of judgment, once rejected, had no continuing efficacy. Absent Gomez’s acceptance, *Campbell*’s settlement offer remained only a proposal, binding neither *Campbell* nor Gomez.”

In arguing that an offer of judgment can render a controversy moot, *Campbell-Ewald* relied on three 19<sup>th</sup>-century railroad tax cases. In all three railroad tax cases, the railroad made full payment satisfying the asserted tax claims and so extinguished them. The Supreme Court distinguished all three railroad tax cases because “none of those decisions suggests that an unaccepted settlement offer can put a plaintiff out of court.” The Supreme Court explained further that “when the settlement offer *Campbell* extended to Gomez expired, Gomez remained emptyhanded; his TCPA complaint, which *Campbell* opposed on the merits, stood wholly unsatisfied.” This fact — that

the settlement offer was unaccepted — was determinative in the majority's view.

Although the majority left no doubt that an unaccepted settlement offer or offer of judgment does not moot a plaintiff's case, the Supreme Court left unanswered the question about whether the result would have been different if a defendant deposits the full amount of plaintiff's individual claim in an account payable to the plaintiff, and the court enters judgment in favor of plaintiff in that amount.

*Campbell-Ewald ends the debate about whether a defendant, by making an offer of judgment, may "pick off" a class representative and render moot the putative class claims. Rule 68 no longer provides defendants and their counsel a means to curtail putative class actions. While this decision affects all class actions, its greatest impact will be in the realm of consumer protection class actions involving laws such as the Fair Debt Collection Practices Act, Fair Credit Reporting Act, and Truth in Lending Act.*

*Following Campbell-Ewald, the only option available to defendants to potentially moot the action before the class is certified is to consider making actual payment for the full amount of the class representative's individual claim and having judgment entered in favor of the class representative in that amount. That option, however, is not guaranteed to succeed and is fraught with perils, especially regarding the procedure and consequences of unilaterally having judgment entered against the defendant. The more prudent course is to properly and completely assess liability and damages in the early stages of litigation and to negotiate an early class resolution on terms acceptable to the defendant rather than engage in protracted, and ultimately unsuccessful, litigation when the defendant lacks any strong or compelling defense on the merit.*

*KD's business litigation attorneys can assist companies in assessing and defending consumer class actions, to avoid and minimize the costs associated with such lawsuits. If you have any questions, please contact a member of our commercial litigation team:*

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