Legal Backgrounder

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After *Campbell-Ewald v. Gomez*, Can a Complete Settlement Offer Moot a Potential Class Action?

by Christopher Roach

Claims under the federal Telephone Consumer Protection Act (TCPA) have become a powerful tool by self-described consumer rights lawyers seeking to target "robocalls" made for marketing and collection purposes. When coupled with the Rule 23 class-action procedure, the $500-$1,500 relief available per offending call or text message under the TCPA can reach astronomical levels. While originally conceived as a way of targeting "junk" faxes and similar unsolicited calls, the plaintiffs' bar has focused more and more on solvent defendants with large numbers of consumers, who receive unwanted calls due to reassigned telephone numbers, for collection purposes, or otherwise. In response, defendants have pursued early settlement as a way to rein in this out-of-control litigation.

A Mere Offer of Settlement Will Not Suffice to Moot a Case

In the recent decision of *Campbell-Ewald Co. v. Gomez*,[1] the U.S. Supreme Court addressed a TCPA claim against a contractor for the U.S. Navy that sent recruiting text messages to individuals who allegedly had not "opted in" to receive such calls. The lead plaintiff was a 40-year-old man who claimed that he had not agreed to be called and was out of the target range for the marketing campaign. The Court rejected the argument that the defendant's mere offer to settle the matter in full with the named plaintiff prior to his moving for class certification rendered the case moot.

As a general matter, the Constitution requires plaintiffs to have a stake in an active "case or controversy," a concept known as standing. Thus, when a case between the parties is resolved, the litigation must come to an end. Additional requirements control who may serve as the "representative" plaintiff in a class action. Federal Rule of Civil Procedure 23 requires that "the claims or defenses of the representative parties are typical of the claims or defenses of the class ... [and that] the representative parties will fairly and adequately protect the interests of the class."

The Campbell-Ewald Company, with the hope of preventing the potential class representative's standing, offered José Gomez the maximum available amount under the TCPA—$1,500 per text, plus costs. However, the plaintiff did not accept the offer, even though the statute did not entitle him to obtain additional relief.

In finding the plaintiffs had standing, the majority opinion referenced the familiar contract law principle that an offer that is not accepted is deemed rejected and no contract is ever formed. "We hold

[1] *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663 (2016).

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today, in accord with Rule 68 of the Federal Rules of Civil Procedure, that an unaccepted settlement offer has no force. Like other unaccepted contract offers, it creates no lasting right or obligation. With the offer off the table, and the defendant's continuing denial of liability, adversity between the parties persists."[2]

The Supreme Court had previously addressed this issue in 2013 in the context of a Fair Labor Standards Act "collective action" in which the lead plaintiff had accepted a settlement offer. There the Court held that when "an intervening circumstance deprives the plaintiff of a 'personal stake in the outcome of the lawsuit,' at any point during litigation, the action can no longer proceed and must be dismissed as moot."[3]

Some Viable Alternative Paths to Mootness?

The Court suggested in *Campbell-Ewald* that an alternate scenario—where the actual funds were tendered to the putative class representative in the form of a cashier's check or placed in the depository of the court—may defeat standing. The majority stated specifically that "[w]e need not, and do not, now decide whether the result would be different if 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. That question is appropriately reserved for a case in which it is not hypothetical."[4] This passage suggests a way out for defendants seeking to avoid class certification.

However, this language in the opinion may provide false hope to defendants seeking to moot a class action by settling with the lead plaintiff *after* class certification. Earlier Supreme Court decisions in *Sosna v. Iowa*[5] and *U.S. Parole Commission v. Geraghty*,[6] held that a class action is not rendered moot when the named plaintiff's individual claim becomes moot *after* the class has been duly certified or where class certification was denied erroneously. A class, in contrast to a "collective action," retains independent standing once it is certified, even if the lead plaintiff's claims are resolved prior to the final resolution of the case.

Defendants seeking to avoid a class action—whether in defense of TCPA claims or otherwise—would be well advised to do the following:

1. Make a maximum offer of judgment to the lead plaintiff before the plaintiff files a motion for class certification;
2. Seek court permission to deposit the proffered funds in the court registry, as allowed by Rule 67 of the Federal Rules of Civil Procedure, or, alternately, include a cashier's check for the full amount of the proposed settlement with the offer;
3. Move to dismiss the case on the ground of mootness or lack of standing in advance of class certification based on the combination of the offer, coupled with the demonstrated provision of settlement funds.

Each of these recommendations flows from language in the majority opinion, the "tender" discussion in the concurrence of Justice Thomas, and the dissenting opinions of Chief Justice Roberts and Justice Alito, as well as the large body of existing class-certification case law.

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[2] *Id*. at 666. The opinion also included a discussion of a claim of derivative sovereign immunity by the defendant, which did not depart from well-established case law.
[3] *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523, 1528 (2013).
[4] *Campbell-Ewald*, 136 S. Ct. at 672.
[5] 419 U.S. 393 (1975).
[6] 445 U.S. 388 (1980).

While not every case will have a theoretical statutory maximum, TCPA has a unique formula-based system of damages. Another attempt at settling with a lead plaintiff is likely in this context. In addition, even in cases involving uncertain damages, the maximum amount of damages could theoretically be discovered through interrogatories prior to certification.

The proffer of actual funds should be mindful of the requirements of the law of tender. As the Court stated, "an unaccepted settlement offer has no force." Rather, like any rejected offer, it fails to create a contract. But the common law takes a different view of a proper tender, which, even if rejected, satisfies the tendering party's duties of performance under the contract.

In the case of a tender of good funds, a deposit in an escrow account, or deposit with the court (after obtaining court permission), the rejecting plaintiff cannot easily claim, as in *Campbell-Ewald*, that the offer of relief was incomplete, revocable, or otherwise merely theoretical in nature. Rather, as stated by Justice Thomas's concurrence, the law of settlement itself derives from the law of tender. Under that well-developed law, a formal "offer to pay the entire claim before a suit was filed, accompanied by 'actually produc[ing]' the sum 'at the time of tender' in an 'unconditional' manner" sufficed.[7] Refusing like the majority to address a hypothetical, Justice Thomas offered that the Court "need not decide today whether compliance with every common-law formality [such as admission of liability] would be necessary to end a case."[8]

In addition, as a variation of traditional tender, Justice Alito's dissent recommended the deposit with the court under Rule 67. This rule provides that if

> any part of the relief sought is a money judgment or the disposition of a sum of money or some other deliverable thing, a party—on notice to every other party and by leave of court—may deposit with the court all or part of the money or thing, whether or not that party claims any of it. The depositing party must deliver to the clerk a copy of the order permitting deposit.[9]

Justice Alito noted that "[a] plaintiff cannot thwart mootness by refusing complete relief presented on a silver platter."[10] Although he mentioned that a defendant could hand over cash, a certified check, or deposit funds in a bank account in the plaintiff's name, Justice Alito recommends the Rule 67 procedure because it would enable the defendant to reclaim the money if a court should refuse to dismiss the case or determine that the offer is not for full relief.

So at least two mechanisms—an offer of funds or a deposit of funds under Rule 67—should suffice to show that the offer was not revocable or theoretical. Admittedly, in the words of Chief Justice Roberts's dissent, these requirements are all formalistic to the point of being "mere pettifoggery."[11]

While the courts may find some other basis to reject this approach,[12] the concurring opinion by Justice Thomas, which focused on the law of tender, as well the dissenting opinions of The Chief Justice and Justice Alito, have provided a *de facto* road map for appellate courts to distinguish such a situation from the facts of *Campbell-Ewald*.

[7] *Campbell-Ewald*, 136 S. Ct. at 675 (Thomas, J., concurring in the judgment) (citation omitted).
[8] *Id*. at 677.
[9] Fed. R. Civ. P. 67(a).
[10] *Campbell-Ewald*, 136 S. Ct. at 683, n.1.
[11] *Id*. at 680 (Roberts, C.J., dissenting, joined by Scalia and Alito, JJ.).
[12] *See, e.g.*, *Chen v. Allstate Insurance Co.*, No. 13-16816 (9th Cir. Apr. 12, 2016), available at http://cdn.ca9.uscourts.gov/datastore/opinions/2016/04/12/13-16816.pdf (Defendant's depositing full settlement amount in escrow account to be released upon "entry of a final District Court order or judgment directing the escrow agent to pay the tendered funds to [plaintiff] Pacleb" did not moot the entire action because the plaintiff had not yet actually received relief).

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Whether there are five future votes on the Court for this alternate path is unclear. Although Justice Breyer did not write separately, he mentioned the AFL-CIO *amicus* brief filed in support of Gomez at oral argument. That brief suggested that actually tendering money in an irrevocable way would have sufficed to moot the case. Justice Breyer indicated at argument that he was trying to be practical, and he seemed to be looking for a way to allow defendants to end cases even without the plaintiffs' consent.[13] He might be a fifth vote in a future case where actual payment occurs.

Beware the Risk of a Substituted Plaintiff

Defense counsel should remain aware of an even bigger obstacle to this proposed alternate procedure: namely, that plaintiff's counsel could simply line up another lead plaintiff. Substitution of the lead plaintiff in class-action litigation is done routinely for reasons that do not involve the defendant's "picking off" the class representative(s) with a settlement.[14] For reasons of judicial economy, courts have generally allowed the substitution of class representatives after class certification on the theory that the class has an independent existence and an independent standing following class certification.

The solution may be one of perfect timing. Case law is more mixed on attempted substitution of the lead plaintiff prior to class certification, particularly when it can be shown that the putative lead lacks standing at some point prior to class certification. *Barnes v. First American Title Insurance Co.*, held, for example, that "substitution is improper when the original named plaintiff lacks standing to assert claims."[15]

Conclusion

While *Campbell-Ewald* is disappointing in its rigid formalism, that same formalism provides guidance for defendants aiming to employ the unsuccessful settlement strategy rejected in that case. Namely, by actually tendering funds directly to the lead plaintiff or depositing them into the court registry, the unique circumstances in *Campbell-Ewald* can be readily distinguished, and a ruling of dismissal would find ample support. In short, the key to settling a case before it can turn into a class action is to move quickly and to have money in hand.

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[13] Transcript of Oral Argument at 48, *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663 (2016).

[14] *See, e.g., Ford v. U.S. Steel Corp.*, 638 F.2d 753 (5th Cir. 1981); *In re Currency Conversion Fee Antitrust Litigation*, 2005 WL 3304605 (S.D.N.Y., Dec. 7, 2005); *see also In re Stone Energy Corp. Sec. Litig.*, Fed. Sec. L. Rep. P 95364 (W.D. La. 2009) (allowing substitution of lead plaintiff prior to class certification). Courts have a "continuing duty to monitor whether lead plaintiffs are capable of adequately protecting the interests of the class members." *In re NYSE Specialists Sec. Litig.*, 240 F.R.D. 128, 133 (S.D.N.Y. 2007). Accordingly, despite the absence of explicit authorization in Rule 23 of the Federal Rules of Civil Procedure, courts have the "ability to consider motions to disqualify, remove, withdraw, substitute, and add lead plaintiffs throughout the litigation of a securities class action." *Id.* at 132–33 (collecting cases).

[15] 473 F. Supp. 2d 798, 800 (N.D. Ohio 2007). "[T]he reason substitution is appropriate *after* class certification is that 'once certified, a class acquires a legal status separate from that of the named plaintiffs,'" such that the named plaintiff's loss of standing does 'not necessarily call for the simultaneous dismissal of the class action, if members of that class might still have live claims.' ... This line of reasoning is inapposite here, where no class has yet been certified." *Velazquez v. GMAC Mortg. Corp.*, 2009 WL 2959838, at *3 (C.D. Cal. 2009) (emphasis in original); *see also Ramirez v. STi Prepaid LLC*, 644 F. Supp. 2d 496, 504 (D.N.J. 2009) ("If the named plaintiffs bringing a[sic] class action claims do not individually have standing to bring those claims, the case should be dismissed prior to the class certification process.").

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