Legal Backgrounder

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"Picking Off" Class Representatives Obtains Mixed Results in Lower Courts after *Campbell-Ewald v. Gomez*

by Christopher Roach

Tension persists between the pro-settlement policy of Federal Rule of Civil Procedure 68 and the class-action policy of Rule 23 following the US Supreme Court's 2016 decision in *Campbell-Ewald Co. v. Gomez.*

In *Campbell-Ewald*, the Court refused to find a lack of standing, even after the lead plaintiff in a Telephone Consumer Protection Act (TCPA) action was offered all the relief he could possibly obtain under the statutory-damages formula.[1] Reasoning that an unaccepted offer amounted to a "legal nullity," the Court found that constitutional standing persisted, and that the lead plaintiff could continue to the class-certification stage.

Yet in 2013, the Court had ruled in a Fair Labor Standards Act "collective action" in which the lead plaintiff had accepted a settlement offer, that where "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."[2] An offer of everything the plaintiff could possibly obtain in a class action would appear on the surface to moot the matter with regard to the proposed lead plaintiff, but the Court emphasized the inchoate nature of an unaccepted contractual offer.

The *Campbell-Ewald* majority suggested in dicta that an alternate scenario may defeat standing for would-be class representatives.[3] Justice Thomas, in a concurrence to the judgment, suggested that the law of tender was the proper lens through which to view the matter, but that the offer made under Rule 68 without the associated funds in hand failed to constitute a sufficient tender.
The dissenters—Chief Justice Roberts and Justices Scalia and Alito—criticized the Court's formalism. They suggested the actual tender of funds, whether in the form of a cashier's check or placed in the depository of the court as allowed by Rule 67, would suffice to impose mootness and defeat a lead plaintiff's ability to serve as class representative (and thus potentially defeat class certification altogether) if the case appeared in such a posture before the Court.

Lower courts interpreting *Campbell-Ewald* and the procedure proposed by the dissenters offer a mixed bag.[4]

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[1] *Campbell-Ewald Co. v. Gomez,* 136 S. Ct. 663, 670-71 (2016).
[2] *Genesis Healthcare Corp. v. Symczyk,* 133 S. Ct. 1523, 1528 (2013).
[3] *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. at 672.
[4] *See Getchman v. Pyramid Consulting, Inc.,* No. 4:16-CV-1208-CDP, 2017 U.S. Dist. 25081, at *7-8 (E.D. Mo. Feb. 23, 2017) (collecting cases).

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A decision issued by the US Court of Appeals for the Second Circuit pending at the time of *Campbell-Ewald* and issued shortly after that ruling held that an unaccepted offer of settlement under Rule 68 was a legal nullity that did not defeat the class representative's ability to maintain his claim and pursue class certification. *Geismann v. ZocDoc, Inc.* reversed a district court decision that issued a judgment in favor of the plaintiff following a Rule 68 offer, while allowing the offering defendants to deposit funds in the court depository after the issuance of the judgment for good measure.[5] The court noted that "an unaccepted Rule 68 offer of judgment does not render an action moot. *Campbell-Ewald,* 136 S. Ct. at 670-71. Because that decision controls our review and is dispositive of the case at bar, we need not, and decline to, reach the issues raised by Geismann in its pre-*Campbell-Ewald* submissions."[6]

The Second Circuit found the district court's decision to actually enter judgment to be of no moment: "We do not find this distinction meaningful because the judgment should not have been entered in the first place."[7] In dicta, the court stated that the hoped-for ability to pick off a lead plaintiff prior to certification might not succeed even in the hypotheticals proffered by the dissenters in *Campbell-Ewald*. The court believed that such a rule would fail to harmonize the Rule 68 offer-of-judgment policy favoring settlements with that of Rule 23, which governs and favors class actions under specified circumstances.[8]

The Second Circuit issued *Leyse v. Lifetime Entertainment Services LLC* one year after the *ZocDoc* case.[9] *Lifetime Entertainment* addressed several aspects of the TCPA unrelated to this discussion, but most importantly dismissed the plaintiff's claim after a Rule 68 offer by the defendant coupled with the defendant's deposit of the proffered funds into the court depository. The Second Circuit emphasized the district court's authority over Rule 68 matters: "While an unaccepted Fed. R. Civ. P. 68 offer for complete relief does not *moot* a case—that is, it does not strip the district court of jurisdiction over the case—such an offer, if rejected, may nonetheless permit a court to enter a judgment in plaintiff's favor."[10]

The *Lifetime Entertainment* decision hinged on the combination of a Rule 68 offer and a deposit in the court depository, in what the decision described as the "precise scenario" that the *Campbell-Ewald* decision held open for future consideration.[11] The court did note that this decision occurred after the lower court had already made a ruling rejecting class certification. This aspect unfortunately creates uncertainty for the "pick off" strategy for businesses facing dubious class actions in cases where the plaintiff's damages are certain and known pre-certification.[12]

Three related decisions originating in the Western District of Pennsylvania concluded favorably for the "pick off the lead plaintiff" tactic intimated by *Campbell-Ewald.* In a decision affirmed by the

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[5] 850 F.3d 507 (2d Cir. 2016).
[6] *Id*. at 512.
[7] *Id.* at 513.
[8] *Id.* at 515 n. 8 ("The Supreme Court has also acknowledged that '[r]equiring multiple plaintiffs to bring separate actions, which effectively could be "picked off" by a defendant's tender of judgment before an affirmative ruling on class certification could be obtained obviously would frustrate the objectives of class actions,' and 'would invite waste of judicial resources by stimulating successive suits brought by others claiming aggrievement.' *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 339 (1980). However we need not, and therefore do not, weigh in on whether further maneuvers by the defendant might render a motion to dismiss viable. We do no more than observe the obvious: an attempt to make use of the hypothetical posited in *Campbell-Ewald* is not guaranteed to bear fruit.").
[9] No. 16-1133-CV, 2017 U.S. App. LEXIS 2607 (2d Cir. Feb. 15, 2017).
[10] *Id.* at *7 (emphasis in original).
[11] *Ibid.*
[12] *See also Bank v. Alliance Health Networks, LLC,* 2016 U.S. App. LEXIS 18849, at *13 (2d Cir. 2016) (holding that claim rendered moot where plaintiff "negotiated the check" proffered by the defendants in Rule 68 offer).

district court, a federal magistrate judge in *Kaymark v. Udren Law Offices, P.C.,* declined to strike the defendant's Rule 68 settlement offer.[13] The defendant made a Rule 68 offer of judgment for the entire amount of class-action damages available for the class's Fair Debt Collections Practices Act (FDCPA) claim. While recognizing the tension between Rule 68 and Rule 23, the court expressed sympathy for the defendant's reasonable concern not "to continue incurring defense costs or be liable for a 'runaway train' of the other side's attorneys' fees in a case that it believes should be settled without any further litigation for the amount that it believes is the maximum potential recovery."[14]

While the TCPA is notable for its statutory formula for individual damages—which permits defendants to determine and offer the lead plaintiffs their maximum possible damages—the FDCPA uniquely caps damages for the class at the lesser of either $500,000 or 1% of the defendant's net worth.[15] In affirming the magistrate judge's decision, the district court observed that "an offer of judgment tendered to the entire putative class, and not just to the individual named plaintiff, is enforceable and resolves any apparent conflict between Rule 23 and Rule 68."[16]

This case is, in some respects, the mirror image of *Campbell-Ewald*, as the offer related to settling the case as a whole, leaving the plaintiff (and his lawyers) unlikely to obtain attorneys' fees after the Rule 68 offer, which fully provided for damages available to the class. Notably, the district court also cited pre-*Campbell-Ewald* precedent that such efforts to "pick off" the lead plaintiff may contravene the general class-certification policies embodied in Rule 23.[17]

Finally, the Seventh Circuit rejected the free standing use of a Rule 67 deposit, after the plaintiff in a TCPA class action had earlier rejected a Rule 68 offer in the June 20, 2017, decision of *Fulton Dental, LLC v. Bisco, Inc*.[18] The Seventh Circuit held that Rule 67 does not automatically require payment to the plaintiff and is more often used in interpleader or other contexts, where the matter deposited may remain in dispute.[19] Further, the Seventh Circuit emphasized rather uniquely the potential value of class certification as an incentive for the lead plaintiff to retain standing and reject an offer, even if its own individual damages could be certified by a combined offer under Rules 67 and 68:

> [W]e see no principled distinction between attempting to force a settlement on an unwilling party through Rule 68, as in *Campbell-Ewald*, and attempting to force a settlement on an unwilling party through Rule 67. In either case, all that exists is an unaccepted contract offer, and as the Supreme Court recognized, an unaccepted offer is not binding on the offeree. Justice Thomas's opinion concurring in the judgment in *Campbell-Ewald* does not help Bisco either. He would have relied on the common law of tenders, under which 'a mere offer of the sum owed is insufficient to eliminate a court's jurisdiction to decide the case to which the offer related.' 136 S. Ct. at 674 (Thomas, J., concurring). At common law, he said 'a plaintiff was entitled to deny that the tender was sufficient to satisfy his demand

[13] No. 13-419, 2017 U.S. Dist. LEXIS 34420 (W.D. Pa. Mar. 10, 2017), *reh'g denied*, 2017 U.S. Dist. 41037 (W.D. Pa. Mar. 22, 2017), *aff'd,* 2017 U.S. Dist. LEXIS 440141 (W.D. Pa. Mar. 27, 2017).
[14] *Id.* at *5-6.
[15] 15 U.S.C. § 1692k(a)(2)(B).
[16] 2017 U.S. Dist. LEXIS 44014, at *2.
[17] *Id.* at *3 (citing *Jacobson v. Persolve, LLC*, No. 14-CV-00735-LHK, 2014 U.S. Dist. LEXIS 1150601 (N.D. Cal. Aug. 19, 2014)).
[18] No. 16-3574, 2017 U.S. App. LEXIS 10839, at *1 (7th Cir. June 20, 2017).
[19] *Id.* at *9.

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> and accordingly go on to trial.' *Id*. at 675 (internal quotation marks and brackets omitted). *That is just what Fulton is trying to do: it is saying that its suit is about more than the statutory damages to which it believes it is entitled; it is also about the additional reward that it hopes to earn by serving as the lead plaintiff for a class action. Nothing forces it to accept Bisco's valuation of the latter part of the case.*[20]

While the *Campbell-Ewald* majority focused on the existence of a settlement agreement and the dissenters raised the issues of mootness and constitutional standing, lower courts have largely focused on the disparate policy goals of Rule 68 offers of judgment, which are designed to encourage settlement, and Rule 23, which recognizes the efficiencies of class treatment under specified circumstances. "Picking off" lead plaintiffs—potentially one after another—would arguably undermine those goals, and district courts have expressed ambivalence about doing so, even when all of the particular boxes suggested by the *Campbell-Ewald* majority and dissenting opinions have been checked off. The precedent is mixed, so the attempt to make such offers remains a possible path.

That said, any attempt to obtain dismissal should emphasize the consequent lack of constitutional standing under the circumstances, as well as the manner in which the application of the procedure in a particular case does not do violence to the class-certification policy more generally. Those attempting this procedure should also be mindful of the availability (or not) of incentive awards; while in some cases plaintiffs may have limited and determinate actual damages for themselves, which could be mooted by an offer including tender of their available damages, they arguably can retain standing thereafter, because they might obtain and have an interest in a possible future incentive award.[21] Taking advantage of the hypothetical scenario discussed in *Campbell-Ewald* thus appears to require at a minimum: (1) a Rule 68 offer, (2) a simultaneous tender of the funds, and (3) a showing that no additional damages are available or disputed, whether as a class representative incentive payment or otherwise.

[20] *Id.* at *9-10 (emphasis added).
[21] *See, e.g.,* 15 U.S.C. § 78u-4(a)(4).

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