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Client Alert

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Supreme Court Holds Unaccepted Offer of Judgment Does Not Moot Claims, But Leaves Key Issue Unresolved

On January 20, 2016, the United States Supreme Court issued its ruling in *Campbell-Ewald v. Gomez*, No. 14-857 (U.S.), in which a 6-3 majority held that "an unaccepted settlement offer or offer of judgment does not moot a plaintiff's case," thus resolving an ongoing split among the Circuits on this issue.[1] While this is seemingly a positive development for the plaintiffs' bar, the Court expressly left open one critical question that is almost sure to be revisited: whether a defendant can moot a case by tendering—as opposed to simply offering—complete relief to the plaintiff.

As background, the plaintiff in *Campbell-Ewald* brought a class action lawsuit against the defendant, alleging violations of the Telephone Consumer Protection Act ("TCPA"). With statutory damages of $500 per violation, trebled where willful, a defendant's potential exposure in TCPA cases that are certified for class action treatment can be very large. Seeking to dispose of the lawsuit, the defendant in *Campbell-Ewald* offered the named plaintiff full relief on his individual claims; *i.e.*, $1503 per message. The plaintiff did not accept that offer. The issue before the Supreme Court in *Campbell-Ewald* was whether the defendant's unaccepted offer of judgment mooted the plaintiff's claims, thus depriving the district court of jurisdiction to entertain the lawsuit (including the uncertified class claims). The majority held it did not.

The Supreme Court dealt with a similar issue in *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523 (2013), a wage-and-hour collective action brought under the Fair Labor Standards Act. In *Genesis Healthcare*, the Court considered whether a plaintiff could continue to prosecute the claims of the collective class after her own claims had been mooted. Notably, the plaintiff conceded the defendant's offer of judgment mooted her own claims. So the only question was whether the plaintiff could thereafter continue to prosecute the collective claims. The Supreme Court said no. According to the majority in *Campbell-Ewald*, the *Genesis Healthcare* plaintiff's concession regarding the mootness of her own claims left open the threshold question of whether an unaccepted offer of judgment could moot a plaintiff's claims in the first instance.

In *Campbell-Ewald*, the majority—Justices Ginsburg, Kennedy, Breyer, Sotomayor and Kagan[2]—adopted Justice Kagan's reasoning from her dissent in *Genesis Healthcare*. In reaching its decision, the majority relied on "basic principles of contract law" to support its conclusion. Like an unenforceable contract, the majority reasoned, an unaccepted offer of judgment does not bind the plaintiff or the defendant. As a

[1] *See*, *e.g.*, *Hooks v. Landmark Indus., Inc.*, 797 F.3d 309, 314 (5th Cir. 2015) (noting that the "Third, Fourth, Sixth, Seventh, Tenth, and Federal Circuits have all held that a complete Rule 68 offer moots an individual's claim," whereas the "Second, Ninth, and Eleventh Circuits have held that an unaccepted Rule 68 offer cannot moot an individual's claim.").

[2] Justice Thomas wrote a separate concurring opinion. Justice Thomas agreed with the majority's conclusion, but for different reasons. Rather than relying on "basic principles of contract law" like the majority, Justice Thomas looked to the "common-law history of tenders," which he believed "demonstrate[d] that a mere offer of the sum owed is insufficient to eliminate a court's jurisdiction to decide the case to which the offer related." According to Justice Thomas, common law required a "tender"—*i.e.*, actual production in an unconditional manner of the sum in dispute at the time of the tender.

result, the plaintiff "gain[s] no entitlement to the relief [the defendant] previously offered," leaving the parties with the same stake in the litigation they had at the outset. Notably, however, the majority expressly left open one critical question: "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." While the defendant in *Campbell-Ewald* offered the plaintiff full relief, it never tendered payment of that amount.

Chief Justice Roberts authored the dissenting opinion, in which Justices Scalia and Alito joined. According to the dissent, the plaintiff's acceptance of the offer was unnecessary to moot the case, as the question "is not whether there is a contract; it is whether there is a case or controversy under Article III." And the dissent answered that question in the negative: "[W]hen a plaintiff files suit seeking redress for an alleged injury, and the defendant agrees to fully redress that injury, there is no longer a case or controversy for purposes of Article III." The majority's approach, Justice Roberts wrote, takes away a federal court's "important responsibility" "to decide whether each party continues to have the requisite personal stake in the lawsuit" and "hands it to the plaintiff."

Chief Justice Roberts did note some "good news" for future defendants—namely, that the case "is limited to its facts":

> The majority holds that an *offer* of complete relief is insufficient to moot a case. **The majority does not say that *payment* of complete relief leads to the same result.** For aught that appears, the majority's analysis may have come out differently if Campbell had deposited the offered funds with the District Court. [Citation.] This Court leaves that question for another day—assuming there are other plaintiffs out there who, like Gomez, won't take "yes" for an answer.

Indeed, Justice Alito's separate dissent predicts uniformity among the Justices on this issue: "I am heartened that the Court appears to endorse the proposition that a plaintiff's claim *is* moot once he has 'received full redress' from the defendant for the injuries he has asserted."

If (or more likely when) the issue is revisited by the Supreme Court, the defendant, of course, will need to appeal to more than simply the dissenters. Justice Thomas could possibly be swayed if actual payment is made to the plaintiff. In his concurring opinion, Justice Thomas, who relied on the common law history of tenders to reach his decision, noted that a proper tender required, at a minimum, the unconditional payment of funds. Justice Breyer is another possibility. During oral argument, Justice Breyer expressed doubt as to whether a case could continue after actual payment is made (in particular, a tender to the plaintiff followed by a deposit of funds with the court). Justice Kennedy also made comments during oral argument that suggest he might be swayed if actual payment is made ("But there has to be adversity, as the Chief Justice mentioned in the first question. And if $10,000 is in the bank and he's been injured in the sum of $10,000, there's no adversity."). Given that each of those Justices seemingly placed significance on the fact of payment, it may have been necessary for the majority to leave open the question of whether actual payment will suffice in order to keep their votes.

Implications for Companies Going Forward

Until this issue is clarified by the courts, companies seeking to eliminate potentially costly lawsuits through early tenders have much to consider:

- At the very least, defendants seeking to moot a plaintiff's claims early on should tender full relief, as opposed to merely offering it. But the question is, how and to whom? The logistics remain another open question. For example, could a defendant simply send the plaintiff a check? Must the defendant deliver the check to the district court? Another third party? While the Supreme Court did not expressly answer those questions, the decision itself, as well as comments during

oral argument, suggests a defendant should tender funds to the plaintiff, and if rejected, deposit those funds with the court.

- Defendants will need to consider any possible adverse consequences of pursuing this strategy. For example, the preclusive effect of any tender remains unclear. In his concurring opinion, Justice Thomas suggested that a proper tender would have been deemed an admission of liability under common law. As a result, Justice Thomas might not find mootness unless a defendant makes payment *and* admits liability.

- Defendants should consider the implications of any prayers for injunctive or equitable relief in the complaint. The majority in *Campbell-Ewald* reiterated its 2009 holding in *Alvarez v. Smith*, 558 U.S. 87, that a complaint seeking only declaratory and injunctive relief, not damages, would be moot if the defendant had already returned the plaintiff's property or the plaintiff had forfeited a claim to the property. But other circumstances may affect the analysis.

Hunton & Williams LLP's litigation team has extensive experience defending class action lawsuits, and it will continue to monitor these issues. If you need legal assistance in these areas, please contact us.

Contacts

Neil K. Gilman
ngilman@hunton.com

Jamie Zysk Isani
jisani@hunton.com

Laurie Uustal Mathews
lmathews@hunton.com

Michael J. Mueller
mmueller@hunton.com

Jason J. Kim
kimj@hunton.com