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## U.S. Supreme Court Rules Pick-Off “Offer” to Class Representative Does Not Moot Claim, But Pick-Off “Payment” Might Succeed

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### Professionals

James F. Bogan III; C. Allen Garrett Jr.; Cindy D. Hanson

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“Picking-off” a named class representative is a class action defendant’s dream. Faced with a class action in which the named plaintiff seeks a small recovery on an individual basis but an enormous recovery on a class basis, the class action defendant usually would relish the opportunity to offer full relief to the individual plaintiff, if such an offer otherwise would moot and thereby terminate the entire class action.

The pick-off move had been endorsed in three federal circuits and rejected in six others. *See Campbell-Ewald Co. v. Gomez*, 577 U.S. \_\_\_, \_\_\_ (2016) (slip op., at 5-6). In 2015, the Supreme Court granted certiorari to resolve this issue. In a much-anticipated decision, the Supreme Court held today in *Campbell-Ewald* that an unaccepted settlement offer does *not* moot a case. But in so ruling, the Supreme Court left open the possibility that a defendant still could moot a class action through a unilateral *payment* to a plaintiff of the full amount of damages sought – as opposed to a mere *offer of payment* of that amount.

Plaintiff Jose Gomez filed *Campbell-Ewald* in California federal district court in 2010, alleging that Campbell-Ewald violated the Telephone Consumer Protection Act (“TCPA”) by sending an unsolicited text message to his cell phone. *Id.* at 3. On behalf of himself and a nationwide class of individuals who had received but not consented to the text message, Mr. Gomez sought statutory treble damages, costs, and attorney’s fees, as well as an injunction against Campbell-Ewald’s sending of unsolicited text messages in the future. *Id.*

Before the deadline for Gomez to move for class certification, Campbell-Ewald proposed to settle Gomez’s individual claim and also served an offer of judgment under Federal Rule of Civil Procedure 68. *Id.*

Campbell-Ewald offered to pay Gomez his costs, excluding attorney’s fees (because attorney’s fees are not authorized under the TCPA), and \$1,503 per text message received by Gomez (Gomez only received one text message). *Id.* at 3-4. Campbell-Ewald further consented to the entry of injunctive relief barring it from sending future text messages to Gomez in violation of the TCPA. *Id.* at 4. In other words, Campbell-Ewald offered to provide Gomez with all of the relief he was seeking on an individual basis.

Gomez did not accept the settlement offer and allowed the Rule 68 offer of judgment to lapse, after which Campbell-Ewald moved to dismiss the case as moot. *Id.* The district court denied the motion but later entered summary judgment in Campbell-Ewald’s favor on the ground of derivative sovereign immunity. *Id.* at 4-5.

On appeal, the Ninth Circuit affirmed the district court’s order denying Campbell-Ewald’s motion to dismiss on mootness grounds but reversed the district court’s grant of summary judgment on the basis of derivative sovereign immunity. *Id.* at 5. It was in this posture that the Supreme Court granted certiorari to resolve the

circuit split on the issue of whether an unaccepted offer of judgment mooted a class representative's claim. *Id.*

Ruling in favor of the plaintiff, the majority in *Campbell-Ewald* held "that an unaccepted settlement offer has no force," further ruling that "Gomez's complaint was not effaced by Campbell's unaccepted offer to satisfy his individual claim." *Id.* at 1, 8. The majority's decision, which was grounded in "basic principles of contract law," applied both to Campbell-Ewing's Rule 68 offer of judgment as well as to its separate offer to settle the case. Relying on the provision of Federal Rule 68 specifying that "[a]n unaccepted offer is considered withdrawn" (Fed. R. Civ. P. 68(b)), the court observed that an unaccepted offer, combined with a defendant's continuing denial of liability, could not operate to moot a case: "In short, with no settlement offer still operative, the parties remained adverse; both retained the same stake in the litigation they had before. ... [A]n unaccepted settlement offer or offer of judgment does not moot a plaintiff's case." *Id.* at 9, 11. Accordingly, the district court retained jurisdiction to adjudicate Gomez's class action complaint. *Id.* at 11.

But the Supreme Court did *not* resolve whether the case would have been mooted where a defendant actually paid the amount sought by the plaintiff, as opposed to a mere offer to pay. The court stated:

We 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.

*Id.* at 12. The majority's explicit limitation of the *Campbell-Ewald* mootness ruling to the facts of that case potentially preserves the ability of class action defendants unilaterally to terminate a putative class action lawsuit.

As stated in the dissenting opinion of Chief Justice Roberts (joined by Justices Scalia and Alito):

The good news is that this 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.

*Id.* (Roberts, C.J., dissenting) (slip op., at 10) (emphasis in original). Justice Alito, who wrote his own dissenting opinion (in addition to joining Chief Justice Roberts's dissenting opinion), similarly observed:

... 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. Today's decision thus does not prevent a defendant who actually pays complete relief—either directly to the plaintiff or to a trusted intermediary—from seeking dismissal on mootness grounds.

*Id.* (Alito, J., dissenting) (slip op., at 4) (emphasis in original; citations omitted).

Given the majority's explicit limitation of *Campbell-Ewald's* holding to its specific facts, and in accordance with the dissenting opinions, many class action defendants should evaluate carefully whether to "pick off" named class representatives through the payment of complete relief. Rather than utilizing a Rule 68 offer of judgment, class action defendants desiring to moot a class action simply should effectuate full payment to plaintiff, such as by depositing the full relief demanded into the registry of the federal district court. This strategy may moot the class action representative's individual claim for compensatory relief. In the event a named plaintiff also seeks injunctive relief, the class action defendant also would have to stipulate to the grant of injunctive relief, as *Campbell-Ewald* did in its settlement offer to Gomez.

For more information about these issues, please contact the author(s) of this Legal Alert or your existing firm contact.

<b>Name</b>	<b>Telephone</b>	<b>Email</b>
James F. Bogan III	+1 404 815 6467	<a href="mailto:JBogan@kilpatricktownsend.com">JBogan@kilpatricktownsend.com</a>
C. Allen Garrett Jr.	+1 404 815 6141	<a href="mailto:AGarrett@kilpatricktownsend.com">AGarrett@kilpatricktownsend.com</a>
Cindy D. Hanson	+1 404 815 6470	<a href="mailto:CHanson@kilpatricktownsend.com">CHanson@kilpatricktownsend.com</a>

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