

# Class Action Monitor

## *Campbell-Ewald* Leaves Open a Path to Try to Moot Individual and Potentially Class Claims

By David Lender, Eric Hochstadt, and Gaspard Curioni

The Supreme Court's long-awaited ruling on the impact of a Rule 68 offer of judgment in a putative class action came down this week in a 6-3 decision in *Campbell-Ewald Co. v. Gomez*.<sup>1</sup> In a majority opinion, the Court held that a defendant's *unaccepted offer* of complete relief does not moot the individual claim of a named plaintiff in a putative class action. But the majority left open for a future case whether *payment* of the full amount of the individual claim to a named plaintiff will moot his claim. The two dissents stated that full payment would moot an individual claim, and they provided a roadmap for defendants to implement that strategy. The impact of mooted out an individual claim on a putative class claim was also left for a future case. *Campbell-Ewald* will thus lead to more litigation in this area as companies continue to explore if full resolution of an individual claim (including payment) can resolve a putative class action in its entirety at the outset of litigation. With the large potential exposure from putative consumer class actions, especially those with minimum statutory damages available to plaintiffs, trying to moot out an individual claim to possibly resolve the entire dispute will remain a potentially powerful defense strategy for companies facing these types of cases.

### **Campbell-Ewald Sought to Resolve Its Potential TCPA Consumer Class Action Exposure**

The dispute arose when the named plaintiff received a text message sent on behalf of Campbell-Ewald,<sup>2</sup> an advertising and marketing agency hired by the Navy as part of a recruitment campaign. The named plaintiff brought a putative class action lawsuit against Campbell-Ewald, alleging that the company had violated the Telephone Consumer Protection Act (TCPA) by sending text messages without receiving his prior written consent. The TCPA provides a private right of action for minimum statutory damages of \$500 for each violation, which may be trebled to \$1,500. Before class certification, Campbell-Ewald offered to settle the plaintiff's individual claim by making a full offer of relief of \$1,503 per message received plus plaintiff's costs and a proposed injunction barring Campbell-Ewald from violating the TCPA.<sup>3</sup> The company then filed a Rule 68 offer with the court. Importantly, the plaintiff did not accept the settlement offer, and the Rule 68 offer lapsed. Campbell-Ewald then moved to dismiss the case for lack of subject-matter jurisdiction on the grounds that the offers mooted the individual claim—and, with it, the putative class claims. The district court denied the motion and the Ninth Circuit affirmed.<sup>4</sup>

## A Very Limited Majority Opinion on an Unaccepted Offer Not Mooting an Individual Claim

In holding that an unaccepted offer of complete relief, without more, does not moot a claim, the Supreme Court adopted the reasoning first advanced by Justice Kagan in her dissent in *Genesis Healthcare Corp. v. Symczyk*,<sup>5</sup> which was subsequently endorsed by several lower courts. In *Genesis*, Justice Kagan explained that “[a]n unaccepted settlement offer—like any unaccepted contract offer—is a legal nullity, with no operative effect.”<sup>6</sup> Relying on “basic principles of contract law,” Justice Ginsburg joined by Justices Kennedy, Breyer, Sotomayor, and Kagan, similarly reasoned that the unaccepted offer, “once rejected, had no continuing efficacy,” and “the parties remained adverse ... [with] the same stake in the litigation they had at the outset.”<sup>7</sup> However, the majority expressly declined to decide if an individual claim would be mooted where “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.”<sup>8</sup> According to the majority, “[t]hat question is appropriately reserved for a case in which it is not hypothetical.”<sup>9</sup>

## The Dissents’ Roadmap for Mootness of an Individual Claim

In dissent, Chief Justice Roberts, joined by Justices Scalia and Alito, criticized the majority for its “pettyfogery” in suggesting that *Campbell-Ewald* “might not make good on its promise” to pay the named plaintiff.<sup>10</sup> As framed by the dissent, the real issue was who, as between the court and the plaintiff, could decide whether a suit survived an offer of full relief. The dissent considered the plaintiff’s acceptance or rejection of the offer to be irrelevant because “[t]he agreement of the plaintiff is not required to moot a case.”<sup>11</sup> All that was needed was for the defendant to be “willing to give the plaintiff everything he asks for.”<sup>12</sup> In any event, the dissent observed that the majority’s

holding was limited to the effect of unaccepted offers of judgment but left open the possibility of mooted claims through “*payment* of complete relief,” possibly through a deposit with the trial court.<sup>13</sup> In a separate dissent, Justice Alito built on that approach and opined that a claim is moot if “it is ‘absolutely clear’ that the plaintiff will be able to receive the offered relief,” for example through a certified check, a bank deposit in the plaintiff’s name, or a tender of the money into court.<sup>14</sup> Justice Alito further suggested that entry of judgment for the plaintiff was not necessary to moot the claim.<sup>15</sup>

We anticipate that courts will soon be asked to decide the issue of whether payment providing full relief moots the plaintiff’s claim and thereby ends purported class actions such as the one at issue in this case.

1. *Campbell-Ewald Co. v. Gomez*, No. 14-857, 2016 WL 228345 (U.S. Jan. 20, 2016).
2. *Id.* at \*3.
3. *Id.* at \*4.
4. The case also involved a sovereign immunity defense that is beyond the scope of this alert.
5. 133 S. Ct. 1523, 1533 (2013) (Kagan, J., dissenting). The Court did not decide whether an unaccepted offer of judgment moots an individual claim in *Genesis* because the plaintiff there had conceded the point. *See Genesis*, 133 S. Ct. at 1529 (majority opinion).
6. *Id.* at 1533 (Kagan, J., dissenting).
7. *Campbell-Ewald*, 2016 WL 228345, at \*7.
8. *Id.*
9. *Id.*
10. *Id.* at \*15 (Roberts, C.J., dissenting).
11. *Id.* at \*17.
12. *Id.* at \*18.
13. *Id.* at \*15, \*18.
14. *Id.* at \*19-20 (Alito, J., dissenting).
15. *Id.* at \*20 n.3.

**Class Action Monitor** is published by the Litigation Department of Weil, Gotshal & Manges LLP, 767 Fifth Avenue, New York, NY 10153, +1 212 310 8000, [www.weil.com](http://www.weil.com).

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