

Holster That Offer: Supreme Court Denies Company's Attempt to Pick-off Lead Plaintiff in a Class Action

Amundsen Davis Class Action Alert
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The Supreme Court recently held that a defendant in a class action does not “moot” a plaintiff’s claim simply by making an offer — which is not accepted — of everything the individual plaintiff requests in a case. The strategy, used to “pick off” a class representative’s claim, the Court found, does not end the case for either the individual or the class action.

In *Campbell-Ewald Co. v. Gomez*, 577 U.S., 136 S. Ct. 663, 669 (2016), an advertising agency, on behalf of the U.S. Navy, sent an unsolicited text message to Jose Gomez. Gomez, in turn, filed a Telephone Consumer Protection Act (TCPA) class action lawsuit, which sought the statutorily-allowed, \$500 to \$1,500 per unsolicited text message. In an attempt to circumvent not only Gomez’s case but the opportunity of the case moving forward as a class action, Campbell-Ewald offered the full monetary amount sought, together with broad injunctive relief. Gomez did not respond and the offer lapsed. Thereafter, Campbell-Ewald moved to dismiss, arguing Gomez’s individual claim was moot by the offer of complete relief. It argued that any certification of a class similarly failed for lack of a class representative, i.e., Gomez, with a case or controversy. The district court denied the defendant’s relief, and on appeal, the Ninth Circuit affirmed.

The Supreme Court agreed. It explained: “when the settlement offer by Campbell-Ewald to Gomez expired, Gomez remained empty-handed” and “his TCPA complaint, which Campbell-Ewald opposed on the merits,” i.e., it had not admitted liability, “stood wholly unsatisfied.”

However, at the end of the majority opinion, the Court supplied a cliffhanger for the careful reader, explaining a different factual scenario that could occasion a different outcome. Justice Ginsburg said: “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.” Indeed, Justice Ginsburg practically invited defendants to come forth with creative alternatives in light of the ruling.

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Left unresolved: what is the “right” way to pick-off a named plaintiff’s claim in a class action matter; or, better yet, *is* there a way to moot an individual plaintiff’s claim? Certain of the Justices, during the course of oral argument, explained that it cannot be the case that a defendant is *never* able to moot an individual plaintiff’s claim so as to avoid lengthy and expensive class certification litigation. Yet, the logistics of how this may be accomplished should be carefully discussed with your defense counsel.

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