

CLASS ACTION AND FINANCIAL
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THE SUPREME COURT FORECLOSES SOME, BUT NOT ALL,
STRATEGIES TO MOOT A NAMED PLAINTIFF'S PUTATIVE
CLASS ACTION

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On Wednesday, the U.S. Supreme Court announced that class-action defendants may not moot a named plaintiff's claim simply by extending an offer of judgment that satisfies the putative lead plaintiff's demand for damages. The opinion, [Campbell-Ewald Co. v. Gomez](#), settled a circuit split on the issue of whether a plaintiff's claim is no longer viable once he or she has refused to accept an offer of judgment. The Court's opinion also left several unresolved questions, at least one of which might provide a strategy for defendants wishing to avoid potential class action litigation.

The facts before the Supreme Court were that Jose Gomez received an unwelcome text message in May 2006 that encouraged him to join the U.S. Navy. Gomez was one of over 100,000 recipients of the text message, which the Navy had authorized to be sent only to individuals who had "opted-in" to receive marketing solicitations that included service in the Navy. Gomez had not "opted-in" to receive marketing solicitations that included service in the Navy. Gomez filed suit under the Telephone Consumer Protection Act (TCPA), a statute that requires a recipient's express consent before a text may be sent to his cell phone, seeking to represent a nationwide class of individuals who had also received this text, or others like it, without providing prior express consent. The putative class action complaint

requested treble statutory damages, costs, attorneys' fees, and an injunction against Campbell-Ewald Company (Campbell), the defendant that allegedly had planned and implemented the text blast on behalf of the Navy.

Before Gomez filed his motion for class certification, Campbell served an offer of judgment under Federal Rule of Civil Procedure 68. The offer of judgment, if accepted, would have given Gomez all the relief to which he would have been entitled if he were to litigate and win his individual TCPA claim, including broad injunctive relief and treble damages. However, despite offering complete relief on Gomez's individual claim, the offer of judgment also included Campbell's continued denial that it had done anything wrong and that any relief actually was warranted. Further, the offer of judgment did not include attorneys' fees, which are not available under the TCPA, but might be available in a class action. Gomez refused the offer of judgment, and it lapsed after 14 days, as provided by Rule 68.

Campbell moved to dismiss, arguing that its offer of judgment had provided Gomez complete relief and, thus, mooted his individual claim under Article III since a case or controversy no longer existed. The district court concluded that the case was not moot, but it later granted Campbell

summary judgment based on the theory that the company was shielded by the Navy's sovereign immunity. On appeal, the Ninth Circuit agreed with the district court that the case survived an unaccepted offer of judgment. Since other circuit courts have reached the opposite conclusion, the Supreme Court granted certiorari on the mootness issue.

The Supreme Court held that an unaccepted offer of judgment does not moot a plaintiff's claim because such an offer does not, by itself, make it impossible for a court to grant the plaintiff any effectual relief and, therefore, does not eliminate the Article III controversy. Evaluating the issue under basic contract principles, the Court concluded that an offer of judgment, once rejected, has no continuing efficacy, reasoning that an unaccepted offer leaves the parties in the same position as before the offer. The plaintiff's stake in the litigation continues, as does the adversity of the parties. What remains is a live controversy that provides a basis upon which the district court may grant relief to the plaintiff. The Court found that Rule 68 leads to the same result because the rule states that an unaccepted offer of judgment is considered withdrawn. The Court further reasoned that a would-be class representative with a live claim of his own must be given the opportunity to show that certification is warranted. But the Court expressly declined to decide whether the result would be different if a defendant unilaterally deposited the full amount of the plaintiff's individual claim in an account payable to the plaintiff, and the district court entered judgment for the plaintiff in that amount.

The most immediate impact of the decision is that it will preclude defendants from arguing that an unaccepted offer of judgment, standing alone, deprives a court of Article III jurisdiction by mooting a putative lead plaintiff's claims. The opinion though left open the issue of whether class-action defendants can moot a claim by depositing the full amount of the named class representative's claim in an account payable to the class representative and then having the district court enter judgment for the plaintiff. It is not yet

clear how viable this strategy will be. One may view the Court's caveat reserving judgment on this tactic as a roadmap for how this might be effectively accomplished. The Court's notation that Campbell's proffered injunction did not admit liability suggests that the lower courts will need to determine whether an offer of judgment that does not provide requested injunctive relief or admit liability accords a plaintiff complete relief under the facts of each case.

Justices Roberts, Scalia, and Alito strongly dissented from the Court's opinion. They would have held that Campbell's agreement to fully satisfy Gomez's claims rendered the case moot. Their dissents may be an indication of how they would receive an argument that depositing the full amount of a plaintiff's claim into an account made payable to the plaintiff will moot that claim.

In sum, the Court's decision forecloses defendants from moving to dismiss on the basis of mootness solely because a Rule 68 offer of judgment has expired or been rejected. The Court's reasoning and holding might provide other possible avenues for defendants to moot a putative lead plaintiff's individual claims in certain circumstances. However, for all practical purposes, this decision is likely to chill the ability of a defendant to unilaterally moot a named class representative's claim and terminate a putative class action. ♦

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