Class Actions in the Balance: U.S. Supreme Court Hears Oral Argument in 'Pick-Off' Case

By Jeffrey W. Brecher

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The U.S. Supreme Court heard oral argument in *Campbell-Ewald Company v. Gomez*, No. 14-857, a case that could significantly affect the viability of class action litigation, particularly wage and hour class actions, though the case pending before the Court arises under the Telephone Consumer Protection Act (TCPA).

The issue before the Court is whether an individual plaintiff who has been offered complete relief on his or her claim (whether by a formal Offer of Judgment under Rule 68 of the Federal Rules of Civil Procedure or by a separate offer), but who rejects the offer, may nonetheless proceed with the case, or whether such offer renders the case "moot." In addition, assuming the unaccepted offer *does* render the individual claim moot, whether the existence of a putative Rule 23 class action changes that result, particularly where the offer is made before the case has been certified.

The issue arises frequently where a class action plaintiff has readily identifiable damages, either because they involve statutory claims with specific damages or the value of the claims can be determined based on a mathematical formula (*e.g.*, a certain number of overtime hours per week). Often, because the claims of the individual plaintiff are small, but the claims of the aggregate class are large, the defendant may seek to terminate the case and the class action by providing the named plaintiff full relief, sometimes referred to "picking-off" the plaintiff.

The Facts

The U.S. Navy hired Campbell-Ewald, a marketing company, to assist the Navy in recruitment. As part of the recruitment campaign, Campbell-Ewald, through a subcontractor, sent a text message to individuals who had been targeted as possible recruits. The text message read: "Destined for something big? Do it in the Navy. Get a career. An education. And a chance to serve a greater cause."

The problem was not the content of the text message, but that under the TCPA, a person is prohibited from sending a text message using an automated dialing system without the individual recipient's consent, and the named plaintiff, Jose Gomez, had not provided his consent.

Instead of deleting the text message and going on his way, the plaintiff filed a class action suit seeking to represent the other individuals who received the same text message without their consent (over 100,000 people were sent the same text message). Because the maximum damages under the TCPA for a violation is $1,500, the one small text message seeking recruits to join the Navy resulted in a class action asking for hundreds of millions of dollars in damages.

Seeking to terminate the case from the start, the defendant served both an official Offer of Judgment under Rule 68 and a separate offer to the plaintiff for $1,501, more than the complete relief to which he would be entitled should he prevail, and then moved to dismiss the case as "moot." The plaintiff responded by moving to strike the Rule 68 offer and moved for class certification.

The district court denied the motion to dismiss, finding the unaccepted offer did not terminate the case, although the court ultimately granted summary judgment to Campbell-Ewald under the doctrine of derivative sovereign immunity (*i.e.*, it was acting on behalf of the U.S. Navy and, therefore, was immune from suit).

The Ninth Circuit affirmed the district court's decision that the unaccepted offer of judgment did not render the case moot, but reversed the district court's decision regarding derivative sovereign immunity, thereby reviving the case.

The Issue

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The U.S. Supreme Court accepted the case, revisiting an issue that it left undecided in its sharply divided, 5-4 decision in *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523 (2013): whether an unaccepted offer of judgment that provides full relief to the named plaintiff divests a court of jurisdiction and renders the case moot.

In *Genesis*, the Supreme Court held the mere fact that the plaintiff, who sought to bring a collective action under the Fair Labor Standards Act, had failed to accept satisfaction in full of her claim did not preclude a case from becoming moot once the individual claim had become moot. However, the Court in *Genesis* had assumed, without deciding, that the individual plaintiff's case had become moot when she did not accept the offer (an issue that was not challenged on appeal and, thus, accepted). In a vigorous dissent, Justice Elena Kagan argued the issue the Court decided was an "imaginary question" because it was premised on a faulty assumption: that an unaccepted offer that provides full relief results in a case becoming moot, an issue the Court had not decided.

Following the *Genesis* decision, several U.S. Circuit Courts of Appeals, including the Ninth Circuit, adopted Justice Kagan's dissent. However, the circuit courts remained split, resulting in the U.S. Supreme Court taking up this case.

Oral Argument

At the October 14 oral argument, the Court once again appeared divided on whether a case should be permitted to proceed when a plaintiff has been afforded full relief.

One issue raised at argument, however, which may avoid a decision on the question, is whether the plaintiff in Campbell-Ewald had in fact been offered "complete relief." The plaintiff argued, for example, the offer did not accord complete relief because it did not provide for attorneys' fees. Justice Kagan seemed to agree, noting that the issue regarding the availability of attorneys' fees still had to be adjudicated.

The defendant argued, however, that because attorneys' fees are not recoverable under the TCPA, the case is moot despite the request for fees, and a plaintiff cannot avoid dismissal simply by seeking relief that is unavailable. Justice Antonin Scalia, echoing this argument, noted that a plaintiff could ask for the "key to Fort Knox" or a "unicorn," clearly suggesting that the mere existence of a request for relief is not sufficient to prevent mootness.

Several Justices appear to believe that while an unaccepted offer alone might not result in rendering a case moot (since that plaintiff might not receive *any* relief), a different result might follow if the Court enters judgment against the defendant for the amount in the offer, a position taken by the Sixth and Second Circuits, and one the Supreme Court may adopt.

The conservative Justices, including Chief Justice John Roberts, were clearly uncomfortable with the proposition that a plaintiff, having been offered full relief, should be permitted to continue simply because the plaintiff, as he stated, "won't take 'yes' for an answer." Even Justice Stephen Breyer seemed frustrated with an obstinate plaintiff who has been given all the relief sought, noting that where the defendant has paid the amount owed, "the judge at that point should say, [the plaintiff] has all he wants. The case is over. Good-bye."

As to whether the existence of a putative class action is enough to prevent a case from becoming moot even if the plaintiff is given complete relief individually, the Justices also appeared split, with the liberal Justices distinguishing *Genesis* because it involved permissive joinder, not class certification under Rule 23. However, the focus of the Justices questions centered on whether the individual claim had become moot, rather than the effect of the existence of a Rule 23 class, though both issues are before the Court.

A decision is expected before the end of June 2016.

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