Outside Counsel

Mooting Class Actions by an Offer of Judgment: Can It Really Be Done?

By: Albert Rizzo, New York Law Journal

August 8, 2016

Is an unaccepted offer to satisfy the named plaintiff's individual claim in a putative class action sufficient to render the class action moot? The U.S. Supreme Court answered the question (sort of) at the beginning of this year.

In *Campbell-Ewald v. Gomez*, 136 S.Ct. 663, 193 L.Ed.2d 571 (2016) the court held that under Federal Rule of Civil Procedure 68, an unaccepted settlement offer has no force, and therefore cannot moot a class action claim. It opined, using basic principles of contract law analysis, that it is like any other contract offer that is not accepted—it creates no lasting right or obligation.

This was the second case the Supreme Court grappled with where at issue was a defendant's ability to force a settlement of a class action by offering full relief to the named plaintiff. The first case was *Genesis Healthcare Corp. v. Symczyk*, 133 S.Ct. 1523, 185 L.Ed.2d 636 (2013). In *Genesis Healthcare*, the Supreme Court held that a defendant can moot a class action if it can moot the claim of the named plaintiff.

However, the question that was left unanswered by the Genesis Healthcare court was: What actions on the part of the defendant will moot the plaintiff's claim? The court in *Campbell-Ewald* attempted to answer by holding that an unaccepted offer is not enough to moot the plaintiff's claim. But what about an accepted offer? Not only was that question left unanswered, but the court's majority opinion actually raised the possibility as a hypothetical. What 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[?]" Since those facts were not present in *Campbell-Ewald*, the court declined to opine.

'Campbell-Ewald'

In *Campbell-Ewald*, plaintiff Jose Gomez received unsolicited text messages from defendant Campbell-Ewald Company on his cell phone. The text messages were the result of a recruitment campaign developed by Campbell-Ewald on behalf of the Department of the Navy. Campbell-Ewald, however, was only supposed to send these text messages to individuals who had opted in to receive solicitations on topics that included Navy service. Plaintiff allegedly never opted-in to receive the text messages, so he filed a class action alleging that Campbell-Ewald violated the Telephone Consumer Protection Act, 47 U.S.C. §227 (TCPA).

After commencement of the action, but before the deadline to file a motion for class certification, Campbell-Ewald made an offer of judgment pursuant to FRCP 68 to settle Gomez's individual claim.

Gomez, however, did not accept the offer and the 14 days permitted to accept the offer under the rule lapsed.

Campbell-Ewald ultimately moved for summary judgment. It argued that the California District Court lacked subject matter jurisdiction because the FRCP 68 offer mooted plaintiff's individual claim, and that since that claim was moot and plaintiff failed to move for class certification before it became moot, the class claims would also become moot. The U.S. Court of Appeals for the Ninth Circuit reversed dismissal of the action, and Campbell-Ewald petitioned the Supreme Court.

FRCP 68

FRCP 68 was intended to encourage settlement of litigation and to provide additional inducement to settle in those cases in which there is a strong probability that plaintiff will obtain judgment, but where the amount of recovery is uncertain .*Delta Air Lines v. August*, 101 S.Ct. 1146, 67 L.Ed.2d 287 (1981). Analyzing the issue raised in *Campbell-Ewald* under FRCP 68, the Supreme Court's majority observed that the rule can hardly support the argument that an unaccepted settlement offer can moot a complaint because the rule provides that an unaccepted offer is considered withdrawn if not accepted within 14 days of service. Accordingly, under basic contract law, an offer that is not accepted cannot take away a right to pursue a claim.

Common Law Tender

In a concurring opinion, Justice Clarence Thomas disagreed with the majority on the basis for the decision, if not the decision itself. Thomas wrote that he would base the decision on the common-law history of tenders instead of contract law. At common law a defendant could prevent a case from proceeding, but the defendant needed to provide substantially more than a bare offer; the defendant needed to provide a "tender," that is, an offer to pay the entire claim before a suit was filed accompanied by "'actually producing' the sum 'at the time of tender' in an 'unconditional manner.'" 136 S.Ct. at 675 (quoting M. Bacon, A New Abridgement of the Law, 314-315,321 (1856).

Even when a potential defendant properly effectuated a tender, the case would not necessarily end because the plaintiff could deny that the tender was sufficient to satisfy the demand, and go to trial. The point is, that at common law courts would not have understood a mere offer to strip the court of jurisdiction to hear the controversy. Accordingly, Justice Thomas concurred in the decision, but reasoned the conclusion under a common-law theory of tender.

Cases and Controversies

The dissent by Chief Justice John Roberts saw the Campbell-Ewald case differently and as very "straightforward." The dissent observed that plaintiff had a maximum amount of damages that he could collect under the TCPA and that amount was offered to him. He rejected it. The dissenters saw the case as plaintiff simply wanting more, wanting to be said to be right.

The problem for the dissent was that federal courts must resolve real disputes, not rule on a party's "entitlement to relief already there for the taking." 136 S.Ct. at 678. In other words, the court's role is limited to actual cases or controversies under Article III of the U.S. Constitution—and plaintiff here would neither have a case nor a controversy once he was offered and would receive everything he was entitled to under the law.

Open Question in New York

So where does this leave us in New York? In an attempt to test the hypothetical posed by the Supreme Court's majority, the defendant in *Brady v. Basic Research*, 2016 WL 1735856 (EDNY, 2016) (slip opinion) asked the Eastern District of New York to certify the question whether a class action defendant in the Second Circuit may moot a putative class action before a plaintiff has had the opportunity to file a class certification motion by placing an amount of money sufficient to cover all of the relief the plaintiff could possibly obtain in a trust account and requesting a district court to enter judgment against the defendants.

Judge Sandra Feuerstein opined in *Brady* that courts in the Second Circuit are in agreement that a defendant is no longer able to moot a putative class action by tendering payment to a named plaintiff and asking the court to enter judgment against it over the plaintiff's objection. The plaintiff, the court said, must be accorded a fair opportunity to show that class certification is warranted because that would be consistent with the reasoning supporting the holding in *Campbell-Ewald* that class action defendants "should not be in the driver's seat." Id. at *1. The court denied the request for an interlocutory appeal because there was no substantial ground for difference of opinion regarding the meaning of *Campbell-Ewald*.

However, the Supreme Court had specifically raised the possibility of a full tender of a judgment against the defendant and declined to offer its opinion on the issue whether such a situation would moot the class action claims—leaving a bit of a hole in the reasoning of the Brady decision.

In *Bais Yaakov of Spring Valley v. Graduation Source*, __ F.Supp.3d __, WL 872914 (SDNY, 2016), the defendants attempted to do the same. They deposited the full amount of statutory damages into the court and assented to the injunctive relief requested by plaintiff, but because the court did not enter judgment in favor of plaintiff and had not released the funds to plaintiff, the plaintiff's claim remained "live."

Judge Nelson Roman opined that "[w]ith a live claim remaining, this court is bound by *Campbell-Ewald* to afford plaintiff a fair opportunity to show that class certification is warranted." Id. at *1. The decision though begs the question: Why did the court not enter judgment and release the funds to the plaintiff? Had it done so, the case would have presented precisely the hypothetical posed by the Supreme Court's majority.

What is interesting about the Campbell-Ewald decision is the use and convergence of basic established principles of law to reach an uncertain outcome. How do the courts reconcile the right of a defendant to foreclose any further damages by tendering to the plaintiff all that it is entitled to under FRCP 68, and the constitutional principle that all decisions by a court must be based upon an actual case or controversy under Article III (which case or controversy would not exist if a defendant concedes defeat and makes an offer of judgment) with the prerogative of the plaintiff to simply say: "No, I do not accept a judgment in my favor, and want to continue my class action suit on behalf of myself and those similarly situated"?

It seems like a third case, a trilogy if you will, is needed to bring the issue again before the Supreme Court.

Albert Rizzo is the principal of the Law Offices of Albert Rizzo, P.C.
