

## It Is Not All Bad News from the Supreme Court in *Campbell-Ewald v. Gomez*



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In a recent clash between contract principles and the mootness doctrine, contract principles won. Relying on traditional contract principles, the U.S. Supreme Court issued a 6–3 decision on January 20, holding that an unaccepted offer to provide complete relief to a named plaintiff in a class action was not sufficient to moot the individual’s personal and class claims. The Court’s opinion throws ice on a strategy commonly used by defendants to force a settlement of class action lawsuits by offering full relief to the named plaintiffs.

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The Court's opinion, however, ultimately offers something to both the plaintiff and defense bars because the majority's reliance on contract principles left an important question open: Do an individual's personal and class claims become moot if the defendant actually tenders money to the plaintiff, as opposed to making an offer of payment that the plaintiff rejects?

## **Background**

In *Campbell-Ewald Co. v. Gomez* (available at [http://www.supremecourt.gov/opinions/15pdf/14-857\\_8njq.pdf](http://www.supremecourt.gov/opinions/15pdf/14-857_8njq.pdf)), No. 14-857 (U.S. Jan. 20, 2016), the plaintiff filed a class action complaint in a federal district court alleging that the defendant had violated the Telephone Consumer Protection Act by sending marketing text messages to individuals without their consent. *Id.*, slip op. at 5–7. The plaintiff sought statutory damages, costs, and attorney's fees, as well as an injunction against the defendant's participation in unsolicited messaging. *Id.* at 3. Before the plaintiff filed a motion for class certification, the defendant proposed to settle the plaintiff's individual claim and filed an offer of judgment under Federal Rule of Civil Procedure 68, which enables a defendant to make an offer to allow judgment on specified terms. *Id.* Here, the defendant offered to pay the plaintiff's costs (excluding attorney's fees) and the statutory maximum amount for each text message that the plaintiff received. *Id.* at 3–4. The defendant also agreed to an injunction barring it from sending text messages that violate the statute. *Id.* at 4.

The plaintiff rejected the offer and immediately faced a motion to dismiss from the defendant on the grounds that its Rule 68 offer deprived the court of subject matter jurisdiction. *Id.* Article III of the Constitution limits federal court jurisdiction to actual controversies, which must exist through all stages of a case. *Id.* at 6. If an intervening circumstance deprives a plaintiff of a personal stake in the outcome of the lawsuit, the case is rendered moot and cannot proceed. *Id.* Here, the defendant argued that there was no case or controversy for the court to resolve because the defendant had offered to provide the plaintiff with complete relief. *Id.* at 4. Both the district court and the U.S. Court of Appeals for the Ninth Circuit rejected the defendant's argument and, relying on settled Ninth Circuit precedent, found that the plaintiff's claim remained live. *Id.* at 4–5. The Supreme Court granted certiorari given the disagreement among courts of appeals over the effect of an unaccepted offer of judgment. *Id.* at 5–6.

The Supreme Court dodged nearly the same question presented by *Campbell-Ewald* less than three years ago. In *Genesis HealthCare Corp. v. Symczyk*, 133 S. Ct. 1523 (2013), a plaintiff who brought a collective action (rather than class action) rejected the defendant's offer to provide complete relief. The plaintiff in *Genesis*, however, did not dispute that the settlement offer rendered her claim moot. See *Campbell-Ewald*, slip op. at 7 (discussing *Genesis*). For this reason, the Court simply assumed, without deciding, that an offer of complete relief under Rule 68 would render a plaintiff's claim moot and held that, absent a plaintiff with a live individual case, the collective action suit could not continue. *Id.* Four Justices dissented from the *Genesis* majority, stating that they would have reached the threshold question and would have held that "an unaccepted offer of judgment cannot moot a case." *Id.* The question left unanswered in *Genesis* came before the Court in *Campbell-Ewald*.

## **Decision**

In holding that an unaccepted offer of judgment cannot render a case moot, the majority relied on basic contract principles. Quoting Justice Kagan's dissent in *Genesis*, the Court concluded that "[a]n unaccepted settlement offer — like any unaccepted contract offer — is a legal nullity, with no operative effect. As every first-year law student learns, the recipient's rejection of an offer 'leaves the matter as if no offer had ever been made.'" *Id.* at 7–8. Because an unaccepted offer has no impact on the parties' interests in the lawsuit, the federal court retains jurisdiction to grant relief. *Id.* Justice Thomas concurred in the result on the grounds that the defendant did not actually tender payment to the plaintiff. *Id.*, slip concurrence at 5.

The dissent, authored by Chief Justice Roberts and joined by Justices Scalia and Alito, rejected the majority's reliance on contract principles and argued that the "agreement of the plaintiff is not required to moot a case." *Id.*, slip dissent at 8. Here, there was no dispute that the defendant's offer would have fully satisfied the individual claims. *Id.* at 4. According to the dissent, "[w]hen a plaintiff files suit seeking redress for an alleged injury, and the defendant *agrees* to fully redress that injury, there is no longer a case or controversy for purposes of Article III." *Id.*

## **Open Question and Related Litigation Strategies**

Although *Campbell-Ewald* clearly holds that an *offer* of judgment does not moot an individual's claim, the decision leaves open the possibility that actual *payment* may strip a federal court of jurisdiction. The Court explicitly reserved the issue of "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.” *Id.*, slip op. at 11.

The fact that the Court’s opinion included such a reservation suggests that at least one Justice required its addition to join the majority. In light of their dissenting and concurring opinions, Chief Justice John Roberts, along with Justices Scalia, Alito and Thomas, would most probably conclude that a defendant could moot a plaintiff’s claim by depositing the full amount a plaintiff seeks into an account payable to the plaintiff. If, in fact, one Justice in the *Campbell-Ewald* majority holds the same view, the Court would likely reach a different result than it did in *Campbell-Ewald* if faced with a case in which a defendant provided, rather than just offered, the relevant funds to the plaintiff.

In the months and years to come, we will undoubtedly see defendants across the country employing litigation strategies consistent with this assumption. *Campbell-Ewald* itself may deposit the funds it offered into an account payable to Mr. Gomez when the case returns to the district court. The Supreme Court thus may be presented with the question left open by the majority in relatively short order. In the meantime, counsel on both sides of the “v.” will likely adjust their litigation strategies, betting on a particular result when the Court is presented with facts that require resolution of this open issue.

At first glance, *Campbell-Ewald* looks like a win for the plaintiffs’ bar. A deeper analysis of the Court’s opinion, however, provides a possible roadmap for avoiding *Campbell-Ewald*’s fate. Even with that roadmap, however, defense counsel should consider the risks of adopting a litigation strategy that includes depositing the full amount the plaintiff seeks with the court. Whether the strategy is, in fact, risky will likely be resolved by the Supreme Court in the next few years.