

## Client Alert

---

January 22, 2016

# U.S. Supreme Court Closes One Door to Mooting a Plaintiff's Claims, but Potentially Opens Another

By Sylvia Rivera, David Fioccola, Tiffany Cheung, and Grant Schrader

On Wednesday, the United States Supreme Court issued its decision in *Campbell-Ewald Company v. Gomez*, No. 14–857 (Jan. 20, 2016), holding that a defendant cannot moot a plaintiff's claim under Article III of the U.S. Constitution by making a settlement offer that would provide the plaintiff complete relief, which the plaintiff refuses. Although the decision rejects one cost-effective way to resolve a plaintiff's claim without protracted litigation, it explicitly leaves open the possibility that the result would be different for a defendant that actually delivers payment to the plaintiff rather than merely offering to do so. The Court also left open the possibility that such a scenario would moot the plaintiff's ability to bring claims on behalf of a putative class of plaintiffs in addition to the plaintiff's individual claims, thus limiting a defendant's exposure to classwide liability.

### BACKGROUND

In this Telephone Consumer Protection Act ("TCPA") case, the Navy engaged a marketing firm, defendant Campbell-Ewald Company ("Campbell"), to create and implement a multimedia recruiting campaign. The campaign involved the transmission of text messages to over 100,000 young adults who previously had consented to receiving solicitations related to service in the Navy. Plaintiff Jose Gomez received a text message, but claimed that he never "opted in" to receiving such messages. He filed a class action lawsuit for alleged violations of the TCPA, which entitles a plaintiff to statutory damages of \$500 for each unsolicited "call [or text] . . . using any automatic telephone dialing system . . . to any telephone number assigned to a . . . cellular telephone service." 47 U.S.C. § 227(b)(1), (b)(3). Gomez sought treble statutory damages for allegedly willful or knowing violations, 47 U.S.C. § 227(b)(3), costs, and attorney's fees, as well as an injunction against future unsolicited text messaging.

Before Gomez moved for class certification, Campbell made two settlement offers to Gomez—one offer of judgment under Federal Rule of Civil Procedure 68 and one freestanding settlement offer—and each had identical terms. Campbell offered to pay Gomez his costs, excluding attorney's fees, and \$1,503 per text message that he could show he received, along with a stipulated injunction that barred Campbell from sending text messages that violate the TCPA.

When Gomez failed to accept these offers, Campbell moved to dismiss the case for lack of subject-matter jurisdiction, arguing that its offers of complete relief mooted Gomez's individual claim along with the putative class claims. Despite finding that the "parties [did] not dispute" that Campbell's offer would have provided Gomez complete relief for his individual claims if Gomez had accepted the offer, the district court denied Campbell's motion. It later granted summary judgment to Campbell on unrelated grounds. On appeal, the Ninth Circuit

# Client Alert

---

reversed the grant of summary judgment, and affirmed the district court's denial of Campbell's motion to dismiss for lack of subject-matter jurisdiction. 768 F. 3d 871 (9th Cir. 2014). Campbell then sought review by the Supreme Court.

## "BASIC PRINCIPLES OF CONTRACT LAW"

In the 6-3 decision (with Justice Thomas concurring in the judgment only) delivered by Justice Ginsburg, the majority had little trouble concluding that Campbell's unaccepted settlement offers "had no force" and did not moot Gomez's individual TCPA claim. Relying on "basic principles of contract law" and adopting Justice Kagan's dissent in *Genesis HealthCare Corp. v. Symczyk*, 569 U. S. \_\_\_\_ (2013), the majority held that Campbell's offers, like other unaccepted contract offers, had no "continuing efficacy" once they were rejected. Because the offer was not accepted, the parties retained the same stake in the litigation they had at the outset and remained adverse for Article III purposes.

Importantly, because it was only "hypothetical" in this case, the majority expressly declined to 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," instead of the defendant merely offering to do so. The majority also did not address the related issue of whether the claims he asserted on behalf of the putative class would have become moot if his individual claims had become moot (that is, whether an individual with no active claims could purport to represent a class of individuals with non-moot claims).<sup>1</sup>

In his concurrence, Justice Thomas agreed that an unaccepted offer does not moot a plaintiff's claim, but criticized the majority's reliance on contract law. He instead looked to the common law of tenders, which "demonstrates that a mere offer of the sum owed is insufficient to eliminate a court's jurisdiction to decide the case to which the offer related."

## THE CHIEF JUSTICE'S DISSENT

Chief Justice Roberts authored a dissenting opinion, joined by Justices Scalia and Alito. The Chief Justice called the case a "straightforward" application of the Court's Article III jurisprudence, which limits federal courts' authority to actual cases and controversies between parties that, by "necessity," require redress from the courts. Because the district court found that Campbell offered to fully remedy Gomez's injury, Gomez could no longer demonstrate an injury in need of redress by the courts, rendering his claim moot. This was so despite the fact that he rejected Campbell's offers—it is up to the court, not the plaintiff, to decide whether the exercise of the court's authority is "necessary" to resolve an actual case or controversy.

## IMPLICATIONS

While the decision resolved the specific issue being presented, the door remains open to continued litigation on the relationship between claims brought by a named plaintiff and the claims of the class as a whole.

---

<sup>1</sup> The majority also held that Campbell was not entitled to immunity from suit as a federal contractor because there was some evidence (that had to be credited at the summary judgment stage) that it had exceeded the authority given to it by the Navy to send text messages only to consenting recipients.

# Client Alert

---

First and foremost, it sets the stage for a defendant to attempt to moot a plaintiff's claims by not only merely offering the plaintiff complete relief in the form of a settlement, but actually depositing the funds in an account payable to plaintiff or with the court—or perhaps simply by delivering a certified check to the plaintiff. Given Justice Breyer's apparent endorsement of this approach during oral argument, and the seeming agreement among Justice Thomas and the three dissenting justices, it is possible that a majority of the justices would sanction this tactic should it reach the Court.

The decision also leaves unanswered the fundamental question of what constitutes "complete relief" in any given case. For example, in the foregoing scenario, must the defendant also agree to an injunction or admit liability in addition to making the monetary payment? The dissenting justices concluded that an admission of liability is not required, Justice Thomas suggested that it might be required, and the majority opinion did not weigh in. Finally, this decision leaves undisturbed the possibility that a defendant who successfully moots the plaintiff's individual claims simultaneously thwarts that plaintiff's ability to pursue claims on behalf of a putative class, warranting dismissal of the action in its entirety. Given that such a strategy, if successful, would nip a class action in the bud, it remains open to be tested—likely in cases where the named plaintiff's individual injury can be fully redressed for an easily calculable sum, such as cases where only statutory damages are at issue.

## Contact:

**Sylvia Rivera**

(213) 892-5734

[srivera@mofocom](mailto:srivera@mofocom)**David Fioccola**

(212) 336-4069

[dfioccola@mofocom](mailto:dfioccola@mofocom)**Tiffany Cheung**

(415) 268-6848

[tcheung@mofocom](mailto:tcheung@mofocom)**Grant Schrader**

(415) 268-6635

[gschrader@mofocom](mailto:gschrader@mofocom)

## About Morrison & Foerster:

We are Morrison & Foerster—a global firm of exceptional credentials. Our clients include some of the largest financial institutions, investment banks, Fortune 100, technology and life science companies. We've been included on *The American Lawyer's* A-List for 12 straight years, and *Fortune* named us one of the "100 Best Companies to Work For." Our lawyers are committed to achieving innovative and business-minded results for our clients, while preserving the differences that make us stronger. This is MoFo. Visit us at [www.mofocom](http://www.mofocom).

*Because of the generality of this update, the information provided herein may not be applicable in all situations and should not be acted upon without specific legal advice based on particular situations. Prior results do not guarantee a similar outcome.*