

**ALERTS**

## Commercial Litigation Law Alert - Supreme Court Finds Full Settlement Offer Prior To Certification Does Not Moot Class Representative's Claim

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In a 6-3 decision, the U.S. Supreme Court ruled that an unaccepted settlement offer under Fed. R. Civ. P. 68 does not moot a class representative's claim, even when the offer is made before class certification. *Campbell-Ewald Co. v. Gomez*, 2016 WL 228345, at \* 8 (U.S. Jan. 20, 2016). In doing so, the Court resolved a split among the Courts of Appeals, which had been trending in this [direction](#).

Defendant-Petitioner Campbell-Ewald Company (Campbell) was engaged to develop a nationwide marketing strategy for a government entity to send text messages "only to individuals who had 'opted-in'" to receiving the solicitation. Jose Gomez, the class representative, received a communication from Defendant and claimed he had not consented to receive such messages. Gomez filed a class action law suit alleging that Campbell's text message violated Telephone Consumer Protection Act (TCPA). 47 U.S.C. § 227(b)(1)(A)(iii).

Prior to class certification, Campbell offered to pay Gomez his court costs and \$1,503 per message received under Rule 68, "thereby satisfying his personal treble-damages claim." Gomez did not accept the offer. Campbell, claiming that it had offered Gomez complete relief, moved to dismiss Gomez's and the classes claim for lack of a case or controversy.

The Court (Justice Ginsburg writing for the majority) disagreed with Campbell and adopted Justice Kagan's analysis of the issue in her dissent in *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523 (2013), which was based on "basic principles of contract law." The Court concluded that Rule 68 does not change the basic principle that "every first-year law student learns[:] the recipient's rejection of an offer 'leaves the matter as if no offer had ever been made.'" Rule 68 also contains a "sole built-in sanction: 'If the [ultimate] judgment . . . is not more favorable than the unaccepted offer, the offeree must pay the costs incurred after the offer was made.'" Therefore, without Gomez's acceptance, the Court held Campbell's offer remained a proposal, "binding neither on Campbell nor Gomez."

In his dissent, Chief Justice John Roberts disagreed that contract principals governed; instead, he viewed the question as whether a case or controversy exists. He reasoned that an actual controversy cannot exist where defendant is willing to give the plaintiff everything he asks for.

Justice Ginsburg and Chief Justice Roberts both agreed that the Court's ruling is not intended to decide cases where the defendant actually pays the plaintiff relief or "deposits the full amount of the plaintiff's individual

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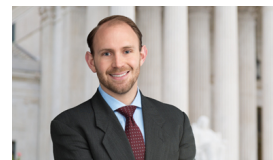
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claim in an account payable, and the court then enters judgement for the plaintiff in that amount,” leaving a defendant with the possibility of ending a class action by actually paying representative plaintiffs or depositing settlement funds with the court.

For more information, contact the Barnes & Thornburg attorney with whom you normally work, or one of the following attorneys: David Frazee at 317-231-7541 or [david.frazee@btlaw.com](mailto:david.frazee@btlaw.com); Christine Skoczylas at 312-214-5613 or [Christine.Skoczylas@btlaw.com](mailto:Christine.Skoczylas@btlaw.com); or Joe Wendt 317-231-7748 or [joseph.wendt@btlaw.com](mailto:joseph.wendt@btlaw.com).

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