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Lawyers Weigh In On High Court's Class Action Ruling

Law360, New York (January 20, 2016, 9:55 PM ET) -- The Supreme Court ruled Wednesday that defendants facing a Telephone Consumer Protection Act suit couldn't escape a class action by making a settlement offer to individual plaintiffs, a decision that has wide ramifications for all class actions. Here, attorneys tell Law360 why the decision is momentous.

Peder Batalden, Horvitz & Levy LLP

“For defendants, the practical lesson of Campbell-Ewald is straightforward. Continue making Rule 68 offers of judgment, but deposit the offered funds with the court when making the offer. If plaintiff rejects the offer, defendant should move for entry of judgment and should afford the court two options. First, the court may enter judgment for plaintiff under Rule 58(d) as a means of effectuating plaintiff’s full satisfaction through defendant’s deposited payment. Second, the court may enter a judgment of dismissal for defendant because the case is moot. The Campbell-Ewald majority opinion leaves open both options.”

Douglas Bohn, Cullen and Dykman LLP

"The decision stands as a victory for class action plaintiffs and limits strategically how target defendants may initially respond. It also raises institutional and constitutional issues as to the power of the court or the parties to determine finality of a case. One of the most significant aspects of the decision, though, is what it does not say. The majority expressly notes that it is not deciding the outcome had the defendant actually deposited the full amount of relief sought with the court. While perhaps subject to future litigation, this remains a significant potential strategy for defendants to invoke."

Richard Bridgford, Bridgford Gleason & Artinian

“This represents a huge victory for consumers and advocates of equal access to the courts and justice. Large corporations and their counsel's attempts to pick off class representatives as a means of terminating the claims of thousands of other class members was a deplorable practice that threatened to result in a gross miscarriage of justice. In many instances for the cost of what amounts to a couple hours of an expensive corporate defense attorney's billable time, corporations could eliminate millions of dollars in valid claims, leaving a whole class of consumers without a remedy. This victory is especially meaningful in light of recent U.S. Supreme Court cases that cut the other way by upholding class action waivers in arbitration clauses."

Amy Brown, Squire Patton Boggs LLP

"The decision on the narrow facts of the case is not surprising. But the court left open the more interesting question of whether a defendant who tenders a payment of full relief to a plaintiff moots the plaintiff's claim. We will have to see if defendants try to now seize on this open question and how courts react to the mootness issue when a defendant has provided full payment to the plaintiff."

Warren T. Burns, Burns Charest

"Today, six Supreme Court justices did the right thing, preserving class actions for at least another battle on another day. The majority held that a defendant cannot wipe the slate clean by buying off an individual class representative, offering a pittance to settle an individual claim and extinguish uncertified class claims. The dissent resonates with Mephistophelian common sense, dumbfounded by how federal courts could exercise jurisdiction when a defendant had offered to pay in full. But we know the stakes, and it is doubtful that the wing of the court committed to gutting Rule 23 has had its final say."

Jonathan K. Cooperman, Kelley Drye & Warren LLP

"In Campbell-Ewald Company v. Jose Gomez, the Supreme Court resolved a circuit split and held that an unaccepted offer of judgment pursuant to FRCP 68 does not moot the individual or class claims of a putative class action plaintiff when the offer is made prior to class certification. While a defendant can no longer moot a putative class action simply by offering complete relief to the named plaintiff, the court left open the possibility that actual payment — as opposed to a mere offer of payment — with corresponding entry of judgment may result in dismissal on mootness grounds."

Ted Craig, GrayRobinson PA

"The Supreme Court's ruling today was narrow in scope and intended to be so. The court simply held that Rule 68 — by its express language — has no impact on a class representative's standing if a defendant's Rule 68 settlement offer is not accepted. This ruling should not be read to have broader implications. For example, it should not be construed as insulating a class representative plaintiff from a standing challenge where the defendant has actually tendered to the representative plaintiff the total amount claimed, as opposed to making an offer to pay the total amount claimed via Rule 68."

John Donovan, Ropes & Gray LLP

"The Supreme Court's decision today forecloses defendants from stopping class actions against them by 'picking off' the claim of the named plaintiff by offering him complete relief. So long as the plaintiff rejects the offer, he can continue to represent a nationwide class. The result means that the plaintiffs' bar remains firmly in control of class actions. They can continue to press class claims — and receive windfall attorneys' fees — even though the ostensible 'representative' of the class has been offered complete relief and has no claim of his own. But a headless class is no class at all."

Jonathan M. Freiman, Wiggin and Dana LLP

“The court ruled very narrowly that a class action isn’t mooted when a defendant offers the full amount of a class representative’s claims — but the representative declines the offer. The real question is whether a defendant can moot the case by paying the class representative, instead of just offering to pay. The court left that question open, but the other opinions make clear that at least four justices would find that full payment moots a class action. Look for a case raising the big issue to bubble up in about two years.”

Lori Armstrong Halber, Fisher & Phillips LLP

"Thanks to the Supreme Court in Gomez v. Campbell-Ewald Co., employers have lost a small amount of procedural freedom to try to 'pick off' individual plaintiffs attempting to bring class actions before they get too costly. Businesses faced with such a potential class lawsuit should consider taking advantage of this strategy early on in the litigation, but understand it will only work as a complete bar in very limited circumstances. Nevertheless, an offer of judgement still may have value insofar as it can limit a plaintiff’s ability to recover his or her attorneys’ fees and costs, depending on which statute is being litigated, thereby creating a disincentive for his or her attorneys to proceed."

Mona Hanna, Michelman & Robinson LLP

"The Supreme Court’s decision in Campbell-Ewald v. Gomez highlights that a defendant cannot preclude the class representative from proceeding in an action by making a settlement offer to the named plaintiff. The significance of this decision is that individual settlement offers will not be a prohibition against moving forward with the class action. Notably, however, the court stated it was not deciding whether a case would be resolved if the settlement funds had been transferred to the plaintiff, as opposed to merely being offered. This opinion expressly left open the question of whether a class representative loses standing to represent the class if the defendants actually pay the money plaintiff seeks. So, we can expect further lawsuits designed to address this remaining issue.”

Robert S. Kitchenoff, Weinstein Kitchenoff & Asher LLC

"The Supreme Court’s decision preserves what lawyers who practice in the class action field have always believed to be the law; namely, that a defendant cannot pick off class representatives merely by making an individual settlement offer providing 'complete relief.' A settlement offer, like any other contract, must be accepted. Conversely, had the Supreme Court accepted Campbell-Ewald’s position, the class action vehicle would have been essentially extinguished or, at a minimum, there would have been created a whole genre of wasteful ancillary litigation regarding what constitutes complete relief for the plaintiff’s claim, adding substantial delay and uncertainty to the process."

Gerald L. Maatman, Seyfarth Shaw LLP

"Employers facing class actions lost a key tool today with the Supreme Court’s 6-3 decision. Nonetheless, defendants still may use Rule 68 to attempt to create settlement leverage, and may even be able to reinvent the Rule 68 procedure to try to moot plaintiffs' claims. Importantly, the majority limited the holding to situations where there is merely an 'offer' to settle the claims, and expressly reserved and did not decide the question of whether the outcome would be different if a defendant

invokes Rule 68 and '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.' So in the end, it is likely that parties defending against class actions will continue to use Rule 68, and will do so in these two specific ways that ironically were explicitly suggested by the majority opinion. As a result, is likely that litigation over Rule 68 will turn on disputes over whether creating an 'account payable' to a plaintiff satisfies the rule's requirement that an 'offer' be made to the plaintiff."

Seth Miles, Buckner & Miles

"Campbell-Ewald is significant for two reasons. First, it ends some corporate defendants' practice of 'picking off' class representatives by misusing Rule 68 to 'offer' a class representative her individual damages in an attempt to circumvent the class action mechanism. Second, and more importantly, it presents a more balanced view of class actions. The court here held that 'a would-be class representative with a live claim of her own must be afforded a fair opportunity to show that certification is warranted.' When afforded that 'fair opportunity,' class actions can serve an important deterrence function in our society, preventing some corporations from profiting by wrongfully taking a little money each from a lot of people."

Joel Neckers, Wheeler Trigg O'Donnell LLP

"The court's ruling is an unfortunate result for class action defendants who are interested in resolving a dispute by satisfying the entirety of the plaintiff's claim rather than engaging in costly and time-consuming litigation. Critically, however, the court left for another day the question 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,' thereby leaving defendants with this potential avenue to resolve a dispute short of protracted litigation."

Scott O'Connell, Nixon Peabody LLP

"Class actions continue to be costly matters with significant reputational and financial risk. Limiting this exposure is mission critical. Using Rule 68 offers of judgment was an effective tool to make the lead plaintiff financially whole while also preventing the mooted action from being certified. While this is not a surprising decision, it is disappointing that the rule which was designed to focus parties on settlement rather than protracted litigation is no longer available in the class context."

Michael R. Pennington, Bradley Arant Boult Cummings LLP

"The result in Campbell-Ewald is in some respects not altogether surprising given the actual language of Rule 68, which states that an unaccepted offer of judgment is withdrawn, and evidence of it is not admissible except in a proceeding to determine the award of costs. But as Justice Roberts notes in dissent, that is a separate issue from whether a claim should be deemed moot. By allowing a plaintiff and his lawyer to continue a class action even when the plaintiff has been offered a full individual recovery, today's ruling inevitably fuels the growth of lawyer-driven class actions. At the same time, it takes away what could have been a useful weapon to avoid the blackmail effect of class action strike suits, particularly those under statutes like the TCPA, which bring the threat of draconian statutory

penalties and put many defendants to the Hobson's choice of risking potential destruction or paying a ransom in settlement."

Kim Rinehart, Wiggin and Dana LLP

"The court's decision today holds that a defendant cannot dispose of a class action by making an offer of judgment to the named plaintiff for the full value of his or her claim, where that offer is not accepted by the plaintiff. As a practical matter, because the majority of class action cases aggregate relatively small monetary claims, if an unaccepted offer of judgment to the named plaintiff could moot the case, defendants would have the incentive to make such offers — even where they disputed the merits of the case — because it would be a small price to pay to eliminate the risk associated with a large class case. If this position had been accepted, it may well have spelled the end for most class action practice."

Joshua D. Rogaczewski, McDermott Will & Emery LLP

"The four liberal-to-moderate justices, Justice Kennedy and Justice Thomas formed a 6–3 ruling that defendants cannot moot a plaintiff's case by merely offering complete relief. Nevertheless, the strategy followed by Campbell-Ewald in this case may not be foreclosed completely. The court's opinion left for another day whether the tender of complete relief to the plaintiff would moot her case, and Justice Thomas based his opinion concurring in the judgment on the distinction between a mere offer of relief and a tender of relief. Expect defendants to adjust course and tender what amounts to complete relief into courts' registries in an attempt to achieve the result sought by Campbell-Ewald in this case."

David Schenberg, Ogletree Deakins Nash Smoak & Stewart PC

"By misstating the issue as if it is one of contract, the majority opinion obfuscates the crucial fact that the defendant's offer left nothing for the plaintiff to litigate and no need for litigation. The decision epitomizes an unfortunate willingness of some courts to allow themselves to be used for the seeming purpose of forcing defendants to settle on a classwide basis. We often see class actions certified on the flimsiest of grounds, leaving defendants no economically viable option but to settle. Here, the court's decision allows a putative class action to proceed, despite the fact that the defendant already offered the only existing plaintiff everything he could recover in the litigation."

Ira Schochet, Labaton Sucharow LLP

"A contrary finding by the court would have allowed corporations that violate consumer protection statutes such as the one at issue in the case, often resulting in damages that are too small to litigate on an individual basis, an opportunity to escape accountability for virtually all of its wrongdoing, and more, to continue to violate the statute. They would do so by picking off at a nominal cost consumers who seek classwide relief, by offering to pay their statutory damages, and not their legal fees. In this way, they would end the lawsuit without ever having to address the damages caused to the class of consumers, and the statute protecting those consumers would become a nullity."

Robert M. "Bobby" Schwartz, Irell & Manella LLP

“The court ducked the class issues and decided only whether an offer of judgment extinguishes a case. The justices silently deferred on whether a case is extinguished (presumably also for class purposes) if the defendant tenders payment. Fortunately for the defense bar, nothing in the majority opinion expresses interest in preserving class claims where the defendant has made the plaintiff whole. Justice Kennedy probably would not have signed on to the majority were that going to be its holding. For Justice Thomas, payment is dispositive. Thus, five justices likely would hold that a case ends if the defendant tenders enough to make the plaintiff whole.”

Victor Schwartz, Shook Hardy & Bacon LLP

"The significance of this decision is that it postpones for a later day the key question of whether a defendant's complete offer and payment to a plaintiff can moot a case so that it is no longer a 'case' or 'controversy' under Article III of the U.S. Constitution. Neither the majority nor dissent directly addresses the issue of whether a full offer and tender to a lead plaintiff can moot a class action. The majority holds that in this specific case the offer to settle did not render the case moot because it was unaccepted. The majority uses contract law as its guideline. Chief Justice Roberts’ dissent is convincing when it observes the majority's holding will allow future plaintiffs to have a day in court when there is no reason to do so. But the real meaning of the case is that the issue of mootness, offer and refusal to accept has been postponed for a later day. The majority opinion reserves for the future the question of whether a defendant's full offer moots the class action if money is deposited into an account payable to the plaintiff. Chief Justice Roberts says where a defendant is highly solvent and the amount in controversy is $1,500, it amounts to 'pettifoggery' to require such a deposit. But the counseling message of this case to defendants is to make such a deposit and preserve the big issue as to whether such an offer and tender eliminates a named plaintiff from a class action."

Stacey Slaughter, Robins Kaplan LLP

“A number of cases in recent years have made it more difficult for class action plaintiffs, but the Supreme Court’s ruling today in Gomez places some limits on this trend. The practical impact of the court’s ruling means that companies won’t be able to moot a class action case simply by offering to settle with the named class representative, even if the court has not yet certified the class. The plaintiff may still reject the settlement offer, and so a 'case or controversy' still exists for the court to decide.”

M.C. Sungaila, Haynes and Boone LLP

"Campbell-Ewald may have taken an arrow out of the quiver for class action defendants, but it has not thoroughly disarmed them. As Chief Justice Roberts notes in his dissent: 'The good news is that this case is limited to its facts. The majority holds that an offer of complete relief is insufficient to moot a case. The majority does not say that payment of complete relief leads to the same result.' In other words, echoing a point Justice Breyer focused on at oral argument, the case might have come out differently if the defendant had deposited the offered amount with the district court in a dedicated account. A defendant who does that may well end up presenting that next incremental issue in this area to the Supreme Court."

Andrew Unthank, Wheeler Trigg O’Donnell LLP

"Today's ruling runs afoul of Rule 1's most basic directive that the rules 'should be construed and administered to secure the just, speedy and inexpensive determination of every action and proceeding.' Litigants faced with the prospect of costly discovery over a dispute that can be so easily resolved no longer have a just, speedy and inexpensive option at their disposal."

Aaron S. Weiss, Carlton Fields

"The lasting significance of today's decision in Campbell-Ewald Co. v. Gomez may be somewhat diminished by the majority opinion's specific decision to decline 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. That question is appropriately reserved for a case in which it is not hypothetical.'"

Lewis S. Wiener, Sutherland Asbill & Brennan LLP

"Campbell-Ewald leaves open the question whether actually paying (by depositing in the court registry or otherwise) a settlement or Rule 68 offer of judgment, rather than offering to pay, moots an individual and possibly class claims. The question looms large in the TCPA area and potentially impacts all class actions. I suspect we'll see a lot of $1,501 certified checks being sent to TPCA plaintiffs' counsel."

Robert L. Wise, Bowman and Brooke LLP

"Chief Justice Roberts is right in his dissent — courts exists to resolve real disputes. When a defendant has offered the plaintiff everything to which he or she is legitimately entitled, there is no longer any real dispute, and the case should be over. Unfortunately, today's decision is a step in the wrong direction — away from allowing litigation to be brought to a prompt and efficient resolution, and toward continuing to clog court dockets with class actions that oftentimes only benefit the lawyers."

R. Alan York, Godwin PC

"The majority in Campbell-Ewald Co. v. Gomez applies basic contract principles in holding that an unaccepted offer of settlement does not create an enforceable agreement that would justify dismissal of a claim. What makes this case interesting is the fact that the question arises in the class action context, as well as the dissent's analysis of the case or controversy requirement under Article III. The majority finds that the defendant did not admit liability and that there remained open the question of a requested injunction against the complained of activity. The dissent relies upon precedent that an offer to fully compensate a plaintiff deprives the court of authority to hear the case because of the absence of a case or controversy. In the end, the majority's opinion will deprive class action defendants of a potential method of cutting short or complicating the class action process by offering to settle with the named/lead plaintiff(s)."

--Editing by Mark Lebetkin.