

Supreme Court Sustains TCPA Plaintiff's Claim Following an Unaccepted Settlement Offer

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On January 20, 2016, the U.S. Supreme Court handed down its [ruling](#) in *Campbell-Ewald Co. v. Gomez*, where it was considering whether a plaintiff seeking damages under the Telephone Consumer Protection Act ("TCPA") is able to maintain his individual claim and claims on behalf of a putative class once that plaintiff has received an offer from the defendant to settle his individual claim in full. The court – by a 6-3 vote – held that in this case, the defendant's unaccepted settlement offer did not render the plaintiff's claim moot for Article III jurisdiction purposes. It also held that the defendant in this case was not entitled to derivative sovereign immunity from TCPA liability despite being a contractor for the Navy.

Case Background

Defendant Campbell-Ewald Co. provided recruiting assistance services to the U.S. Department of the Navy, and developed a recruiting campaign that involved sending text messages to individuals between the ages of 18-24 encouraging them to learn more about the Navy. The text messages were supposedly sent only to those individuals that had "opted in" to receive marketing solicitations on topics that included Navy service. Through its subcontractor, Campbell-Ewald sent text messages to over 100,000 recipients, including Jose Gomez, the plaintiff. Gomez sued, claiming that he never consented to receive such text messages.

Prior to class certification, Campbell-Ewald filed a Rule 68 Offer of Judgment to settle Gomez's individual claim for (i) trebled damages for each text message that Gomez received in violation of the TCPA; (ii) his costs in bringing the action; and (iii) a stipulated injunction in which Campbell-Ewald agreed to be barred from sending future text messages in violation of the TCPA. Gomez did not respond within fourteen days as provided for in Rule 68 of the Federal Rules of Civil Procedure and the offer therefore lapsed.

The District Court denied a motion by Campbell-Ewald to dismiss the case on the ground that Gomez's claim became moot after the contractor offered him complete relief for his individual claims. Subsequently, however, the court granted summary judgment to the company on the basis that, as a Navy contractor, it was entitled to derivative sovereign immunity. The Ninth Circuit overturned this ruling, and the Supreme Court granted certiorari to resolve both the mootness issue and the derivative sovereign immunity question.

Effect of an Unaccepted Settlement Offer

The Court first addressed "whether an unaccepted offer can moot a plaintiff's claim, thereby depriving federal courts of Article III jurisdiction." Starting with the notion that Article III jurisdiction requires "an actual controversy," Justice Ginsberg in her opinion concluded that "[u]nder basic principles of contract law, Campbell's settlement bid and Rule 68 offer of judgment, once rejected,

had no continuing efficacy [and] [w]ith no settlement offer operative, the parties remained adverse.” As such, the plaintiff’s claim is not moot and the district court properly retained jurisdiction over the case.

The majority opinion was careful to distinguish this case from previous cases in which the Court found that a plaintiff’s claim was moot because the defendants offered to settle the case and had actually paid the plaintiffs to satisfy claims. Interestingly, the opinion leaves open “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.” In his dissent, Justice Alito states that “[t]oday’s decision thus does not prevent a defendant who actually pays complete relief --- either directly to the plaintiff or to a trusted intermediary – from seeking dismissal on mootness grounds.”

Availability of Derivative Sovereign Immunity

The second issue addressed by the Court was whether Campbell-Ewald, by virtue of its status as a contractor for the Navy, should be immune from TCPA liability under the doctrine of derivative sovereign immunity. The Court first explained that government contractors are generally exempt from liability for their actions performed pursuant to a contract. The Court then clarified, however, that “[w]hen a contractor violates both federal law and the Government’s explicit instructions, as here alleged, no ‘derivative immunity’ shields the contractor from suit by persons adversely affected by the violation.”

In this case, the Court determined that the plaintiff had presented sufficient evidence during the pre-trial stages to show that the Navy authorized Campbell-Ewald to send text messages only to those individuals that had consented to receive them, and that the company supposedly disobeyed these instructions (and violated the TCPA) when it sent text messages to Gomez. Thus, the defendant could not escape potential liability on the ground of derivative sovereign immunity.

Potential Impact of the Decision

The *Campbell-Ewald* decision, while resolving the narrow issue of the effect of an unaccepted Rule 68 offer, also leaves many questions unanswered, particularly with regard to the impact of a defendant’s actual payment to a plaintiff to resolve a dispute. (Kelley Drye’s Litigation group has prepared an [advisory](#) on the decision that discusses these questions in more detail.) Until these issues are resolved, courts are likely to see an increase in Rule 68 offers with corresponding efforts at payment and accompanying motions for judgment from defendants who want to test the boundaries of this potential exception to the Court’s ruling.

In the TCPA context, this decision could end up interplaying with two other high-profile TCPA cases currently pending in federal courts. First, the Supreme Court is expected this term to rule in the case of *Robins v. Spokeo, Inc.*, which will address the issue of whether Congress may confer Article III standing on a plaintiff who suffers no concrete harm by simply authorizing a private right of action based on the violation of a federal statute alone. Second, the U.S. Court of Appeals for the D.C. Circuit is currently considering several challenges to the FCC’s July 2015 Omnibus TCPA Order, and is expected to issue a decision this spring to resolve issues such as the proper definition of an auto-dialer, proper consent, and liability for placing calls to reassigned phone numbers. These cases, taken together, may result in significant changes to the TCPA litigation landscape going forward.