COHEN MILSTEIN

Supreme Court Asked to Endorse Cynical Defense Tactic that Could Moot Certain Class Actions

When a company is sued, it can usually be expected to reject the lawsuit's demands outright, attempt to get the lawsuit dismissed, and otherwise defend itself with vigor. If all else fails, and if the risk of trial is too great, the company might try to settle. Even then, the company can be expected to negotiate, and to only offer the plaintiff part of what she asks for—after all, settlement implies compromise.

Yet, in class action cases, companies have been known to do something quite strange: instead of fighting tooth and nail, they roll over relatively early on, by offering to settle the case for the full amount requested. Indeed, that is exactly what one company did in a case recently argued in the Supreme Court.[1] To understand why, let's review the facts of the case.

Campbell-Ewald, a telemarketing firm, had sent the plaintiff, Jose Gomez, an unsolicited marketing text message, which Gomez claimed violated the Telephone Consumer Protection Act ("TCPA"). The maximum amount of damages Gomez could recover under the TCPA was $500, which could be tripled under certain circumstances. Given that court fees alone would likely have exceeded this amount, Gomez brought the case as a class action on behalf of people who had received similar unsolicited text messages.

Before the court could certify the case as a class action, however, Campbell-Ewald made an offer. It would pay Gomez $1503—slightly more than what Gomez could have theoretically recovered—plus costs he'd incurred up to that point. Gomez did not accept the offer, and it expired.

What prompted this offer? Did the company just want to make things right? Sadly, the answer is no. The company's true intentions were revealed shortly after the offer expired, when the company asked the court to dismiss the lawsuit. Its argument was that, as a result of its offer, Gomez personally had no real dispute with the company. In legal terms, Gomez and the company lacked "adversity." Under longstanding legal principles, that made Gomez's case "moot," and federal courts do not have Constitutional authority to hear "moot" cases.

[1] *Campbell-Ewald Company v. Gomez*, No. 14-857 (U.S.), certiorari granted May 18, 2015, oral argument held October 14, 2015. The transcript is available here: **http://www.supremecourt.gov/oral_arguments/argument_transcripts/14-857_2d8f.pdf**.

More important than Gomez's individual case, however, was the class action. Because the offer "mooted" Gomez's individual case, the company argued, the class action Gomez hoped to lead had to be dismissed as well. Gomez disagreed, arguing that the unaccepted offer could not end the case.

Who was right? Despite the facts being relatively straightforward, the legal issues are anything but. Indeed, the question has divided the federal courts. The Ninth Circuit, for example, rejected Campbell-Ewald's theory, while other circuits have reached opposite conclusions in similar cases.[2] Suffice it to say, the core issue—what happens to a lawsuit when a defendant makes an offer like Campbell-Ewald's—does not have a definitive legal answer.[3]

This brings us to the Supreme Court case, which will resolve the disagreement among the circuits, and the recent oral arguments. There, the discussion ranged from arcane debates over the nature and scope of a federal court's jurisdiction under Article III of the Constitution, to the different types of legal theories under which a court could dismiss a case, to hypotheticals such as what should happen if Campbell-Ewald's lawyer were to hand Gomez's lawyer a briefcase of cash right then and there. Ultimately, however, the debate seemed to boil down to two areas of practical, and opposing, concerns: (1) why should a plaintiff be allowed to continue a case despite a defendant's offer of complete surrender, versus (2) how can a defendant unilaterally end a case merely by making an offer that was not only unaccepted, but not binding or enforceable?

The Court, and the parties, grappled with these two concerns. Predictably, the more liberal justices generally expressed skepticism over Campbell-Ewald's theory, pointing out that in addition to damages, Gomez had also asked for other relief, such as attorneys' fees, not to mention the right to pursue the case as a class action, none of which had been part of Campbell-Ewald's offer. The more conservative justices, for their part, demanded to know why the plaintiff "wouldn't take 'yes' for an answer," and hinted at their skepticism over class actions and plaintiffs' lawyers generally.[4] If there was a middle

[2] The Third, Fourth, or Sixth Circuits have previously accepted versions of the company's theory, while the First, Fifth, and Seventh Circuits have sided with plaintiffs in similar cases. Indeed, in recent months, the First, Fifth, and Seventh Circuits have issued rulings to explicitly make their position that unaccepted offers do not "moot" cases clear in advance of the Supreme Court decision. *See Chapman v. First Index, Inc.*, No. 14-2775, 2015 WL 4652878 (7th Cir. Ill. Aug. 6, 2015); *Bais Yaakov of Spring Valley v. Act, Inc.*, No. 14-1789, 2015 U.S. App. LEXIS 14718 (1st Cir. Mass. Aug. 21, 2015); *Hooks v. Landmark Indus.*, 2015 U.S. App. LEXIS 14116 (5th Cir. Tex. Aug. 12, 2015).

[3] It is worth pausing to consider why that might be. Given the straightforward facts, one would think there is an accepted way of dealing with offers such as Campbell-Ewald's offer. But of course, rarely do defendants display such generosity in ordinary litigation, which likely explains the lack of precedent. In class actions, however, such settlement offers might result in a defendant losing the battle against the named plaintiff, but winning the far more important war: defeating the class action.

[4] All in all, however, the realpolitik aspect of the case as a battle over class actions did not figure prominently in the justices' questioning. Indeed, in response to Campbell-Ewald's argument that Congress could address via legislation any negative impact

ground, it was reached by Justice Breyer, who expressed support for the view, advanced by the AFL-CIO in an *amicus* brief, that although a defendant should be able to end a case by offering to settle in full, the proper procedure for doing so was for the defendant to actually deposit the money with the court, as opposed to simply making an offer.[5]

How the Court will ultimately rule, however, remains unclear. Certain votes can reasonably be predicted. In a 2013 case involving similar issues, Justice Kagan, joined by Justices Ginsburg, Breyer, and Sotomayor, authored a blistering and widely-cited dissent castigating the notion that an unaccepted offer could "moot" a case.[6] Her reasoning was simple: under Supreme Court precedent, so long as it is possible for a court to award a plaintiff relief—which is the case when a plaintiff doesn't accept a defendant's offer, however generous—a case is not "moot." It seems reasonably safe to predict that those justices, except for perhaps Justice Breyer, will reject Campbell-Ewald's theory completely.

To win, however, Gomez needs five justices on his side, which none of the more conservative justices seemed particularly inclined to join. And yet, it also did not seem like the justices most likely to "cross over," particularly Justice Kennedy, were certain to vote for Campbell-Ewald either. Nevertheless, given the nature of the conservative justices' questioning, and the fact that Justice Breyer—one of the more liberal justices—seemed to embrace a middle-ground approach, it seems more likely than not that Campbell-Ewald will eke out a slight victory.

As for what result investors, consumers, and those concerned with corporate wrongdoing should prefer, the answer is clear: we should be cheering for Gomez.

To see why, consider the impact on the legal landscape if Campbell-Ewald wins. Indeed, consider the impact it would have on litigation arising out of the corporate scandal du jour: Volkswagen's installation of fraudulent emissions control technology on millions of its diesel cars, which were marketed as being more environmentally friendly, but which contained technology designed to cheat on emissions tests.

---

its theory would have on class actions, Justice Kagan explicitly noted that "both sides have these class action policy arguments, but it's important not to let those drive this pretty technical mootness question. So if we could just take the class action arguments out of it." These comments might fairly be interpreted as an attempt to neutralize any attempt to paint her as being motivated by a perceived ideological preference for class actions. Nevertheless, it would be naïve to conclude that the justices' views on class actions aren't relevant.

[5] For a full discussion of the proceedings, see Ronald Mann, *Argument analysis: Justices struggle over procedures for forcing settlement of class actions,* SCOTUSblog, **http://www.scotusblog.com/2015/10/argument-analysis-justices-struggle-over-procedures-for-forcing-settlement-of-class-actions/**.

[6] *Genesis HealthCare Corp. v. Symczyk* , 133 S. Ct. 1523 (2013) (Kagan, J., dissenting). The issue had not been decided by the majority in that case, which assumed the plaintiff's individual case was moot because the plaintiff had not adequately argued otherwise in the lower courts.

In the weeks after the EPA revealed Volkswagen's massive fraud, Volkswagen owners filed a variety of class actions, including consumer cases claiming that the company's deception decreased the value of their cars and securities cases claiming that it caused their investments in Volkswagen to plummet.

Now, imagine the Supreme Court rules for Campbell-Ewald. Under that theory, Volkswagen could end all of these cases by offering to pay the named plaintiffs' claimed damages. Those individuals might be compensated for their injuries, but what of the class of victims they sought to represent? Other Volkswagen owners or investors might hope that additional class actions will be filed, but those would just as easily be snuffed out by an offer from Volkswagen.

The end result is that few, if any, class actions would be filed, meaning that the only way a Volkswagen owner or investor could ensure it was compensated for its losses would be to bring their own lawsuit. But that is a time consuming and expensive process, and many will reasonably conclude it would not be worth it, even they had suffered hundreds or even thousands of dollars in damages. The overall net effect, then, would be that Volkswagen would be let off the hook for tens or even hundreds of millions of dollars in damages.

Needless to say, that would be a fantastic result for the wrongdoers at Volkswagen, and a terrible result for consumers or investors. Here's hoping the Supreme Court won't let that happen.

For more information about this topic, please contact Times Wang (**twang@cohenmilstein.com**), Julie G. Reiser (**jreiser@cohenmilstein.com**), or Michael Eisenkraft (**meisenkraft@cohenmilstein.com**).