Class Actions 101: Mooting a Putative Class Action after *Campbell-Ewald Co. v. Gomez*

Katherine S. Kayatta – October 24, 2016

In the past few years, defense counsel have attempted with increasing frequency to moot putative class actions in federal court by making a Rule 68 offer of judgment for complete relief on the plaintiff's individual claims. Under the prevailing theory, such an offer would moot the plaintiff's individual claim and thus force dismissal of the case as lacking an actual case or controversy under Article III of the U.S. Constitution. The plaintiffs' bar developed strategies in response (generally filing a placeholder class certification motion with the complaint), and the issue eventually made its way to the U.S. Supreme Court in *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663 (2016). The Court decided that an unaccepted offer did not, in fact, moot an individual plaintiff's claim, but the Court left many questions unanswered. Courts across the country are now grappling with those questions, and defendants have begun tendering settlement payments to named plaintiffs or depositing such amounts with the court, as opposed to merely offering full settlement. For the most part, courts have rejected these tactics. While courts are split on whether a defendant can moot a named plaintiff's individual claims, they have nearly all held that class claims cannot be mooted in this manner. However, at least one district court judge held that the defendant's actions mooted *both* the plaintiff's individual claims *and* the plaintiff's class claims. This article discusses several recent decisions on this topic in both the trial and appellate courts.

First Circuit

In *South Orange Chiropractic Center, LLC v. Cayan LLC*, No. 15-13069, 2016 WL 1441791 (D. Mass. Apr. 12, 2016), the defendant sought to deposit $7,500 with the court, providing the named plaintiff in a putative Telephone Consumer Protection Act (TCPA) class action with full relief. In addition, the defendant agreed to

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have judgment entered against it for allegedly sending the plaintiff an unsolicited fax in violation of the TCPA, to pay for costs, to be enjoined from future conduct as to the plaintiff or others, and to preserve evidence, and presented the plaintiff with a stand-alone settlement agreement, all of which the plaintiff rejected. The defendant then moved to dismiss the plaintiff's individual claims and to strike the class allegations, arguing that the plaintiff's individual claims were now moot and the plaintiff could no longer serve as class representative.

Noting that the facts in this case raised "cutting edge" questions concerning a defendant's ability to pick off class representatives through Rule 68 offers of judgment, Chief Judge Saris addressed the specific questions left unanswered by the U.S. Supreme Court in *Campbell-Ewald*. First, if a defendant deposits the full amount of the plaintiff's individual claim in an account payable to the plaintiff (or, in this case, with the court), are the plaintiff's individual claims mooted? Second, if the plaintiff's individual claims are mooted, does the class action remain justiciable?

Noting the few decisions issued since *Campbell-Ewald* on this question, Chief Judge Saris explained how the district courts are split, and he ultimately concluded that the plaintiff no longer had a live claim because the defendant had offered to deposit a check with the court, fully satisfying all of the plaintiff's individual claims.

Addressing the "harder issue" of whether the "class action outlives the mooted individual claims," the court relied on guidance from the First Circuit's "inherently transitory" exception outlined in *Cruz v. Farquharson*, 252 F.3d 530 (1st Cir. 2001), and held that the exception applied because class issues would likely evade review, essentially eviscerating consumer class actions where there exists a "widespread whac-a-mole practice aimed at picking off a named plaintiff before class certification."

In *Demmler v. ACH Food Companies, Inc.*, No. 15-13556-LTS (D. Mass. June 9, 2016), Judge Sorokin followed *South Orange* and reached a different conclusion. Finding that key factual differences in the nature of the claims asserted compelled a different result, the court dismissed both the named plaintiff's individual claims and the class claims. The plaintiffs claimed the defendant's use of the phrase "all natural" on the labels of its barbeque sauces was unfair and deceptive, and they brought claims against the defendant under the Massachusetts consumer protection law and under a theory of unjust enrichment.

Judge Sorokin explained that *South Orange* relied on "a flock of TCPA cases" demonstrating a practice aimed at picking off a named plaintiff before class certification, causing class issues to evade review and making *Cruz*'s inherently transitory exception appropriate. He explained: "While Chief Judge Saris found a pattern of putative TCPA class action defendants tendering full relief to the named plaintiffs before certification, no such record

exists" for claims under the Massachusetts consumer protection law. This "key factual distinction" rendered the inherently transitory exception inapplicable.

Second Circuit

In *Brady v. Basic Research, L.L.C.*, 312 F.R.D. 304 (E.D.N.Y. 2016), the defendants sought to deposit funds with the court in satisfaction of the plaintiff's claims. The court held that the defendants' motion to deposit funds was an improper attempt to moot the case. Further, given the U.S. Supreme Court's directive that "a would-be class representative with a live claim of her own *must be accorded a fair opportunity* to show that certification is warranted," permitting the deposit would be improper.

Fourth Circuit

In *Grice v. Colvin*, No. GJH-14-1082, 2016 WL 1065806 (D. Md. Mar. 14, 2016), the plaintiffs brought suit against the Social Security Administration for alleged violations consisting of improperly withdrawing funds from individuals' income tax refunds for benefits that were overpaid in the prior decade.

After the plaintiffs sued, the Social Security Administration returned the money that was withdrawn but sent a letter informing the plaintiffs that they still owed that amount to the Social Security Administration. The Social Security Administration argued that the case was moot in light of the refunded money and subsequently forgave the debt. The court cited *Campbell-Ewald* in determining that actual payment of the funds and forgiveness of debt mooted the claim before a class was certified. The plaintiffs sought to amend their complaint to add additional named plaintiffs to pursue the class claims before the court, but the court dismissed the action because Maryland was not the proper venue for these potential newly named plaintiffs.

Sixth Circuit

In *Mey v. North American Bancard, LLC*, No. 14-2574, 2016 WL 3613395 (6th Cir. July 6, 2016), a plaintiff filed suit for alleged TCPA violations and simultaneously moved for class certification. The court denied the motion for class certification as premature, at which point the defendant immediately sent a cashier's check for the amount of probable damages to the plaintiff. To the court, the defendant's tender did not moot the plaintiff's individual claim because (1) it was unclear whether the amount tendered actually satisfied the plaintiff's demand and (2) the tender did not address the plaintiff's demand for injunctive relief.

In *Bridging Communities, Inc. v. Top Flite Financial, Inc.*, No. 09 –14971, 2016 WL 1388730 (E.D. Mich., Apr. 6, 2016), the plaintiffs also alleged TCPA violations. A year prior to the Supreme Court's opinion in *Campbell-Ewald*, the district court in *Bridging Communities* had denied the plaintiffs' motion for class certification and granted judgment in favor of the defendant subsequent to its Rule 68 offer of judgment. The plaintiffs appealed both orders to

the Sixth Circuit. While those appeals were pending, the defendant moved to deposit the judgment amount with the district court, pursuant to Rule 67, and to have the clerk note with respect to each plaintiff that the judgment had been satisfied. The district court denied the defendant's Rule 67 motion, observing that that rule should not be used to effect a legal transfer of property between parties and should be used only for safekeeping. Holding otherwise, the court asserted, would thwart the general proposition from *Campbell-Ewald* that plaintiffs should be given a fair opportunity to certify a class before any attempt is made to end their case through individual relief.

Seventh Circuit

In *Fauley v. Royal Canin U.S.A., Inc.*, 143 F. Supp. 3d 763 (N.D. Ill. 2016), another TCPA case, which the court had stayed pending the U.S. Supreme Court's decision in *Campbell-Ewald*, the defendants professed an intent to "exercise the option left open by the Supreme Court and pay Plaintiff the entire amount of individual relief he seeks in the Complaint" immediately after *Campbell-Ewald* was decided. Relying on Chen v. Allstate Insurance Co., 819 F.3d 1136 (9th Cir. 2016), the court rejected the defendant's attempt to moot the case by making unconditional payments to the plaintiff and expressed a desire not to place defendants "in the driver's seat" of litigation and thereby avoid larger exposure. The court noted that other courts had held otherwise, citing Chief Judge Saris's decision in *South Orange*.

Ninth Circuit

In *Chen v. Allstate Insurance Co.*, 819 F.3d 1136 (9th Cir. 2016), the plaintiff filed a class action alleging Allstate violated the TCPA. Allstate deposited the full amount of the plaintiff's individual monetary claims in an escrow account and moved to dismiss. The district court denied the motion and the court of appeals affirmed. The court found that Allstate's offer would have constituted complete relief. However, the court held that (1) even if the individual plaintiff's claims were mooted by Allstate's action, he would still be able to seek class certification; and (2) the plaintiff's claims did not become moot based on the offer, because a claim becomes moot only when a plaintiff actually receives complete relief, not when the relief is offered or tendered.

Eleventh Circuit

In *Family Medicine Pharmacy, LLC v. Perfumania Holdings, Inc.*, No. 15-0563-WS-C, 2016 WL 3676601 (S.D. Ala. July 5, 2016), another TCPA case, the defendants sent a cashier's check directly to the named plaintiff for the complete amount of monetary relief along with a Rule 68 offer of judgment. Adopting the reasoning from *Ung v. Universal Acceptance Corp.*, No. 15-127 (RHK/FLN), 2016 WL 3136858 (D. Minn. June 3, 2016), the court held that there is no principled difference between an unaccepted offer and an unaccepted tender of payment, and the court asserted that a plaintiff "must be accorded a fair opportunity to show that

certification is warranted." The court denied the defendant's motion to dismiss.

Conclusion

While defendants initially were hopeful in the wake of *Campbell-Ewald* that certain pick-off attempts might still succeed in mooting class claims in narrow circumstances, perhaps by tendering a check to the named plaintiff, courts have limited, or altogether foreclosed, this possibility. As of August 2016, *Demmler* appears to be the only instance where a defendant has successfully mooted class claims. *Grice* effectively dismissed the class claims by refusing to permit the plaintiffs to amend their complaint, but its holding is not as reasoned. *Demmler*'s holding is juxtaposed with various TCPA cases in which defendants have failed to achieve mootness of class claims. This division could suggest that while defendants may not be able to moot class TCPA claims, they might succeed in mooting more general consumer protection claims, and potentially others. A body of case law on this issue continues to develop rapidly, and it will be interesting to see what inconsistencies arise as the courts of appeals rule on these cases.

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Katherine S. Kayatta is an associate at Pierce Atwood LLP in Portland, Maine. Katherine would like to thank Joel Antwi (JD candidate, 2017) and Matthew Altieri (JD candidate, 2017) for their assistance in conducting research for this article.