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Class Action Mootness

When one plaintiff receiving one facsimile can bring claims about millions of faxes sent to others, raising the possibility of billions of dollars in statutory damages, it will make quite an impact on TCPA litigation if the U.S. Supreme Court agrees in its *Campbell-Ewald* review that an offer to provide a plaintiff of the full statutory damages and injunctive relief available to that individual will not only moot the plaintiff's individual claim, but also eliminate her standing to assert class-wide claims, the author writes.

TCPA Litigants Wait Impatiently for the *Campbell-Ewald* Decision: Can an Offer of Maximum Individual Statutory Damages Impact Putative Class-Wide Claims?

BY BECCA WAHLQUIST

In the *Campbell-Ewald* matter, the U.S. Supreme Court is considering the question of whether a plaintiff retains a sufficient personal stake in a case to keep her litigation alive, when everything that plaintiff could have achieved through the litigation has already been offered but was not accepted by her. *Campbell-Ewald Co. v. Jose Gomez*, 135 S. Ct. 2311 (2015). As discussed below, the statute underlying the parties' dispute in *Campbell-Ewald* highlights the importance of the Court's ultimate determination: the Telephone Consumer Protection Act (TCPA), 47 U.S.C. § 227 provides significant statutory damages without any requirement for actual damage, and has no cap on the statutory damages that can be sought. When one plaintiff receiving one facsimile can bring claims about millions of faxes sent to others, raising the possibility of billions of dollars in statutory damages, it will make quite an impact on TCPA litigation if the Supreme Court agrees that an offer to provide a plaintiff of the full statutory damages and injunctive relief available to that individual will not only moot the plaintiff's individual claim, but also eliminate her standing to assert class-wide claims.

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The *Campbell-Ewald* decision will thus have a tremendous impact on the defense of TCPA claims pursued both individually and in a class-wide forum, as further explained below.

Background: The Dramatic Increase in TCPA Litigation

The TCPA, which was enacted in 1991, was designed primarily to (1) stop marketing calls placed with certain technologies then in use, and (2) empower the FCC to create a national Do Not Call list that would allow residential telephone subscribers to opt out of cold-call marketing campaigns. For certain violations involving

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certain autodialed/prerecorded calls and faxes, or calls to then-rare cellular telephones, the TCPA provided statutory damages of $500 per violation ($1,500 if willful). Various individuals and law firms have now built practices around this antiquated statute—a statute that has found new life with new technologies, the explosion of cellular telephone use, and the expansion of the statute by the FCC into non-telemarketing calls and text messages.

It is clear why litigation brought under the TCPA has been skyrocketing in the past few years: statutory damages are uncapped, and modern technologies can contact hundreds of thousands of numbers in a matter of minutes. All it takes to bring a class action seeking $500 or $1,500 per call, text, or facsimile for every transmission made by a defendant is **one** anchor plaintiff who received **one** communication. For example, one text message sent to 75,000 numbers can lead to class-wide claims of $37.5 million in statutory damages, or $112 million if trebled for willfulness. To repeat: a single recipient of a text sent to 75,000 numbers is all that a TCPA plaintiffs' lawyer need find in order to make allegations that the company has somehow violated the TCPA and is liable for over $100 million in statutory damages.

The stakes are high whenever a TCPA litigation is brought, even when the defendant believes it did not violate the TCPA, because enormous volumes of information and discovery can be involved in the defense.

Moreover, caselaw over time has held the TCPA has defaulted to a four-year statute of limitations (as it has no statute of limitations within it). Putative class plaintiff receiving one text message in one campaign generally seek in discovery all information and records pertaining to all calls/texts/faxes sent by a company in the previous four years. Thus, the stakes are high whenever a TCPA litigation is brought, even when the defendant believes it did not violate the TCPA, because enormous volumes of information and discovery can be involved in the defense. Given that TCPA has become a battering ram pounding away at American companies across industries, it is not surprising that the mootness question now being considered by the Supreme Court in the *Campbell-Ewald* matter emerged out of TCPA litigation.

The Mootness Question Before the Supreme Court

The *Campbell-Ewald* case, in which oral argument took place on October 14, 2015, puts two questions of mootness before the Court: (1) whether a case becomes moot, and thus beyond the judicial power of Article III, when the plaintiff receives an offer of complete relief on his claim; and (2) whether the answer to the first question is any different when the plaintiff has asserted a class claim under Federal Rule of Civil Procedure 23, but receives an offer of complete relief before any class is certified. In sum, the issue is whether a Rule 68 offer of $1,501 per alleged violation of the TCPA (plus an agreed injunction against calling plaintiff again) makes the plaintiff whole and prevents not just the continuation of an individual lawsuit brought under the TCPA, but also precludes that plaintiff from proceeding with putative class-wide claims because that plaintiff lacks standing to do so.

The background of *Campbell-Ewald* case is similar to that of many current TCPA class actions filed throughout the country (several of which actions are stayed pending the Supreme Court's ruling in *Campell-Ewald*). In May 2006, Gomez received a single text message arranged by marketing firm Campbell-Ewald in order to promote its client, the U.S. Navy. Just squeaking under the four-year statute of limitations to bring suit for this text message, Gomez filed a TCPA class action lawsuit against Campbell-Ewald in 2010. In response, and after failing to succeed on its original responsive pleading, Campbell-Ewald offered Gomez $1,503 per violation, plus reasonable costs, to end the litigation.

However, Gomez rejected the offer so that he could proceed with his class action claims. Campbell-Ewald argued that his claims (both as an individual and as a putative class representative) had been mooted by the offer of judgment, but the Ninth Circuit disagreed. Before the Supreme Court, Campbell-Ewald asserts that Plaintiff should not be able to proceed on his own or anyone else's behalf with claims regarding that single text message for which he was offered more than he could recover under the TCPA. In turn, the Plaintiff argues that he cannot be ''bought off'' and is instead entitled to move forward on class-wide claims spanning four years of communications placed by the company.

Of course, the whole picture is not clear without considering one more facet of TCPA litigation: it is generally Plaintiff's counsel who are most concerned that the case proceed, helmed by their chosen Plaintiff. The reason for this is that the TCPA does not provide for recovery of attorneys' fees, and so Plaintiff's counsel (who foot the bill for TCPA actions) have little interest in individual settlements and instead plan to petition the trial for a substantial portion of the class fund as a fees payment (often seeking up to one-third of the settlement fund). What could be taken away by the Supreme Court here, then, would not just be Gomez's ability to proceed as a named plaintiff once his own claims are mooted, but the ability of his lawyers to drive litigation designed to end in a class settlement from which they can seek fees.

The Dilemma Faced by TCPA Defendants

The realities of the expense involved in defending a putative class action case make one thing clear: better to offer $1,501 to a TCPA plaintiff alleging a single violation of that statute than to take on the tremendous expense of defending a putative class action lawsuit, when the expense of class-wide discovery and the millions or billions of dollars of statutory damages alleged on behalf of a class can turn any TCPA allegation into bet-the-company litigation. Say, for example, that a putative class plaintiff received 15 pre-recorded, collections-related calls intended for the actual debtor, who had provided the plaintiff's number to a company as her own. A settlement offer of $22,501 (exceeding the best-

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available $1,500 per call damages) may be something a defendant decides is worthwhile to offer when considering the expenses involved in defending itself in class-wide litigation brought by a non-debtor who received the calls intended for someone else. Moreover, such a complete offer of judgment may be considered to be a windfall for a plaintiff who need not (and almost never does) allege any actual injury.

When class-wide claims have been asserted, the option of providing complete relief under the statute gives defendants a way to avoid the staggering costs of litigation that can accrue even when there is a strong defense and likelihood of eventual success on the merits or in the certification stage. Thus, for example, a retailer with an opt-in text message program for persons who want to receive weekly coupons via text may scoff when receiving a putative class action complaint from someone who signed up through a double-opt-in process to receive the texts. The retailer knows that after the plaintiff opted in twice to receive messages, every text message sent included (after the coupon information) the instruction to reply ''STOP'' at any time. The plaintiff never replied ''STOP'' but instead sat back and let messages accumulate for 20 weeks. This plaintiff then sues not just for the 20 messages she received, claiming that she did not consent to receive autodialed text messages, but on behalf of all 240,000 other persons who had opted to become members of the text program.

In our example, the retailer intends to defend diligently, as it believes that its double-opt-in process sufficiently gathered the requisite consents, and so does not initially make a Rule 68 offer. However, after a hesitant judge does not rule favorably on the dispositive motion, and instead allows the case to proceed into class-wide discovery, the retailer then faces reality: it can continue to defend through expensive class-wide discovery into four years' worth of the text program's communications to hundreds of thousands of persons, facing perhaps a 5 percent chance of losing when statutory damages could be in the billions, or it can decide to offer $30,001 and an injunction to the plaintiff (unless, of course, she elects to re-enroll to get those coupons). The retailer then needs to decide which approach makes the most sense—but if it decides to lay down arms and completely surrender to the plaintiff by making a Rule 68 offer of $30,001 and an injunction, can it be said that the plaintiff suffers for this complete recovery for the 20 text messages she claims violated the TCPA?

If the retailer in our example does not have the option of mooting the claim through a complete offer of judgment, as the *Campbell-Ewald* plaintiff argues should be the case, then instead it faces claims brought under a statute with uncapped statutory damages, where even the smallest risk of loss in litigation (and there is always a risk of loss in any litigation) leads to untenable results. For example, a 5% chance of loss when 5 million text messages are claimed to have been sent without consent leads to a .05 risk of a $7.5 billion dollar verdict, or **$375 million** in perceived risk. This explains, then, why so many defendants have been settling TCPA litigations for tens of millions of dollars at the early stages: they have decided to ''buy peace'' from TCPA claims because the costs of defense and even the smallest risk of losing on the merits add up to exceed even very large settlement sums.

Defendants facing claims want the option of offering the full statutory damages available to a plaintiff at the outset of a case. And once such an offer has been made, who wouldn't agree that a person who has been offered everything he or she could receive through a lawsuit lacks standing to proceed with his or her claims? Well, the Ninth Circuit, for one, disagreed in its *Campbell-Ewald* decision taken up to the Supreme Court. Further, as became apparent in the oral argument before the Supreme Court a few weeks ago, the Justices are divided on this question of mootness/standing.

Takeaways from the *Campell-Ewald* Oral Argument

The *Campell-Ewald* case follows an earlier decision from the Supreme Court, in *Genesis HealthCare Corp. v. Symczyk*, 133 S. Ct. 1523, 2013 BL 100947 (U.S. 2013) , in which a divided five-to-four court held that mooting the individual interest of a named plaintiff in a collective action moots the entire case because a plaintiff's interest in pursuing collective action is not sufficient to provide Article III standing.(14 PVLR 1881, 10/19/15) But in *Genesis*, the plaintiff had conceded that an offer of complete relief mooted the named plaintiff's own controversy; the four dissenters (Kagan, Ginsburg, Breyer, and Sotomayer) argued in dissent that an unaccepted settlement offer is ***not*** enough to moot a plaintiff's claim. Those watching the October 14, 2015 oral argument were focused on whether these four dissenters—who appear poised to stand with Gomez in their analysis—would attract a fifth vote in order to rule against Campbell-Ewald's arguments that its $1,501 offer for the single text message the Plaintiff had received did indeed moot his claim and eliminate his Article III standing to proceed.

During oral argument, the justices who had dissented in *Genesis* made it clear that they have serious concerns about allowing a Rule 68 offer to moot either individual or class-wide claims, if a plaintiff wants to proceed. The justices were concerned that categorizing class actions as simply a procedural mechanism, with Justice Ginsburg asking about the rights of a plaintiff who wanted to be a class representative, and who could have a ''personal stake'' in ''getting a bonus'' as a named plaintiff out of the class fund.

In contrast, Chief Justice Roberts was concerned that a trial court should be required to devote its time to providing a legal ruling even when there is nothing more a plaintiff can get through that ruling than has been offered: ''You won't—you won't take 'yes' for an answer,'' is how he phrased the dilemma. There were also concerns raised about how the trial courts should deal with such arguments that an unaccepted Rule 68 offer has mooted a case: should the case be dismissed as moot, or should the trial court enter judgment for plaintiff based on the terms of the offer (but without adjudicating on the merits).

Chief Justice Roberts also nailed the true center of the dispute: when Gomez's counsel was asked ''would it be over'' if the plaintiff was offered everything he sought under the TCPA, he answered that the reply would be ''yes'' if he wants to accept ''everything that we've asked for'' including ''class certification and class relief.'' Roberts responded, ''Oh, well, that's the whole thing; right? . . . This is all about class certification.'' Gomez's counsel argued that his client would still have an interest in pursuing the claims of others, and in get-

ting an incentive fee, and a Rule 68 offer covering his individual claims would not satisfy these desires. But it was clear that Supreme Court recognized who had the most interest in the litigation proceeding on a class-wide basis—Gomez's counsel.

The Court was very active during the oral argument, and attorneys on both sides of the TCPA debate are waiting anxiously to see how the Court rules.

What the *Campbell-Ewald* Decision Could Mean For TCPA Defendants

Missing for the most part in the recent oral argument was any discussion about the TCPA's unique uncapped statutory damages and the *in terrorem* damages amount that can be put in play through class-wide allegations. But it is this element of TCPA litigation—the uncapped statutory damages available in class litigation—that has led the *Campbell-Ewald* decision to be one of the most anticipated decisions of this term. A company alleged to have sent 30,000 pre-recorded messages in violation of the statute to 30,000 of its customers (and that may well have strong defenses on the merits) is anxious to know whether it has the option of offering a complaining customer $1,501 in lieu of fighting a litigation that could be expensive to defend and, moreover, seeks $45 million in trebled damages on behalf of the putative class.

Should the Supreme Court hold that an offer of full relief under the statute cannot moot an individual's TCPA claim, or that Gomez can still act as the named representative of a putative class even if his individual claim is mooted, then the onslaught of TCPA litigation will continue unabated. It will continue to be the case that one person receiving a single call as long as four years ago could force a defendant into class-wide discovery and other extreme litigation costs rather than accept $1,501 for the single call he received. Defendants would continue to be pushed into multi-million dollar settlements to avoid such expenses and the risk (even small) of statutory damages in the billions.

However, the Supreme Court could hold that a plaintiff such as Gomez lacks standing to proceed further on either an individual or class-wide basis, because he cannot reject an offer that would have provided him with everything available under the TCPA and instead plow forward with claims under that statute. If the Supreme Court does take this position, we can expect that many defendants in TCPA litigations will opt to make Rule 68 offers when facing TCPA litigation.

To assuage the fears that such a rule would allow TCPA-bad-actors to move forward with impunity in violating the statute with no risk of significant damages, I note that a strategy of offering Rule 68 offers for $1,501 per violation in no way immunizes a defendant from TCPA lawsuits. If a company is making multiple calls to thousands of numbers, it is not likely a viable litigation strategy to continue to offer $1,501 per call to every person who files a complaint—not when 30 calls would require a $45,001 offer to take advantage of any possible Campbell-Ewald rule. It will not take allegations of many violations before a defendant may feel financially justified in expending the legal expenses required to defend on the merits. Indeed, if a company sees a steady stream of TCPA class action complaints coming through, even with only one alleged violation per complaint providing a $1,501 settlement option, there could soon come a point at which the defendant decides not to offer those Rule 68 damages and to instead fight on the merits to create precedent for future litigations.

But for cases such as *Campbell-Ewald*—where there is only one person complaining about one text sent so long ago—the Supreme Court's ruling could offer defendants a quick and simple way to save the parties and the courts significant time and expense: offering the plaintiff everything under the TCPA that he or she individually could receive, mooting that plaintiff's individual claims and depriving the plaintiff of standing to proceed on behalf of a class. It is this possibility that has left so many attorneys on both sides of TCPA litigation eagerly awaiting the Supreme Court's ruling on this jurisdictional issue.

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