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Justices Give Class Actions A Tenuous 'Pick-Off' Defense

*By **Allison Grande***

Law360, New York (January 20, 2016, 10:52 PM ET) -- The U.S. Supreme Court on Wednesday gave a boost to consumer class actions by ruling that companies can't pick off costly class claims by offering full relief to individual plaintiffs, but the justices' refusal to rule on what happens when a company actually pays the settlement hands the defense bar an alternative weapon to cut down these claims.

Attorneys on both sides of the bar generally viewed the Supreme Court's Wednesday decision as a ringing endorsement for class action litigation. (Credit: Law360)

In **a 6-3 ruling** authored by Justice Ruth Bader Ginsburg, the justices rejected longtime U.S. Navy advertising partner Campbell-Ewald Co.'s contention that plaintiff Jose Gomez's case alleging violations of the Telephone Consumer Protection Act was mooted since it offered him $1,503 for each unsolicited text message, plus costs, which represents the maximum recovery available under the statute.

"Without being able to moot a plaintiff's claims through a Rule 68 offer of judgment, defendants will likely be forced to litigate cases further even though they might have preferred to settle based on expensive and rising litigation costs," said David Yohai, co-head of the complex commercial litigation practice at Weil Gotshal & Manges LLP.

But while defendants lost one tool in their arsenal, the majority decision left the door open for the defense bar to counter the loss with a strategy based on the lingering question, which was punted by the justices, of whether actually paying a settlement rather than merely making an offer could be viewed as sufficient to shut down a case.

"The court certainly left the defense bar significant strategy to chew on going forward," Sheppard Mullin Richter & Hampton LLP partner David Almeida said.

In the majority opinion, Justice Ginsburg characterized the question of whether defendants can cut down putative class actions by paying out the full amount of an individual plaintiff's claim as a "hypothetical" that the justices "need not, and do not, now decide." The conclusion leaves wide open the possibility that the issue will soon be in front of the justices again — and that the defense bar will pursue the strategy to dodge potentially massive claims in the meantime, according to attorneys.

"While this decision may, on its face, appear to be a win for this particular plaintiff, one cannot help but be left with the distinct impression that the Supreme Court's opinion is the prologue to a story that remains to be written — and that may well end up having a very different ending," said Martin Jaszczuk, Locke Lord LLP's TCPA class action litigation section head.

The proposition that the alternative strategy will find backing if and when it is taken up by the justices was

supported by Chief Justice John Roberts' dissenting opinion.

Saying that the "good news" from the majority's opinion is that it was limited to the specific facts of the case and only applied to offers and not the payment of complete relief, the chief justice wrote that the fact that Campbell-Ewald has "not yet paid up" did not affect his conclusion that such a settlement offer effectively shuts down the case.

"The situation where a defendant deposits the full amount of relief in an account — or as the dissent suggests, with the court — is very similar to the so-called railroad tax cases and the recent Nike case, where the defendant was able to unilaterally force full relief into the hands of the plaintiff," Almeida said. "The dissent makes abundantly clear that such a scenario is very much available to defendants going forward … [and] provides the defense bar a strategic road map going forward."

But while defendants are likely to gravitate toward the strategy of paying out settlement offers, attorneys on both sides of the bar warn that the tactic is not without its pitfalls.

In praising the Supreme Court for ending the "gamesmanship" of using offers of judgments to pick off class representatives, plaintiffs attorney Jay Edelson, the founding partner of Edelson PC, noted that he fully expects that defense counsel will attempt to "parse the Gomez decision" and try related strategies in hopes of mooting an action.

"People who have been closely watching the district court dockets have seen that defendants have paid hundreds of thousands of dollars to pick off plaintiffs only to face arguments that notice be sent to the putative class informing them of their right to continue the litigation and then, not surprisingly, new filings putting the defendants back to square one, albeit with significantly less money in their defense budgets," Edelson said.

Levine Kellogg Lehman Schneider & Grossman LLP founding partner Larry Kellogg, who has represented both plaintiffs and defendants in complex consumer class actions, also said adopting the strategy of depositing the full amount of the plaintiff's individual claim in an account payable to the plaintiff and then allowing the court to enter judgment for the plaintiff could be damaging to companies in the long term.

"If judgment is entered in a class action case in favor of a plaintiff, that would create a collateral estoppel effect, meaning that the next plaintiff that comes in doesn't have to prove the case anymore, they can just say they have this admission of wrongdoing from the defendant from the previous case," Kellogg said.

Besides failing to address how paying out a settlement would affect the posture of class action litigation, the justices also passed up the chance to address issues such as whether the plaintiff should bear the costs if they ultimately receive less through litigation than they were offered by the defendants and whether a potential incentive award that a plaintiff could receive from being a class representative can factor into consideration of settlement offers, attorneys noted.

"The situation in which a plaintiff is paid the $15 he is asking for but argues that he might be able to get more as a class representative is an interesting one and poses the more significant question of to what extent plaintiffs are entitled to utilize the class action device to right a wrong that's broader than their own injustice," Podhurst Orseck PA partner Stephen Rosenthal said.

But while the justices essentially dodged broader class action issues that fell outside the narrow scope of the facts of the dispute before them, attorneys on both sides of the bar generally viewed the decision as a ringing

endorsement for class action litigation and, as the dissent bitterly notes, for putting plaintiffs in charge of their own destiny.

“The fact that the opinion came out 6-3 is a useful piece of information in looking at how the court views the validity, strength and importance of class actions,” Wolf Haldenstein Adler Freeman & Herz LLP partner Fred Isquith said. “A hostile court could have easily gone the other way and left class actions in a more difficult position as it has with its arbitration decisions.”

The ruling was largely propelled by the liberal justices, who were on the wrong end of the **high court’s 2013 ruling** that a nurse could not continue with her collective action under the Fair Labor Standards Act against Genesis Healthcare Corp. because she had not disputed that the settlement offer mooted her individual claims.

While the case against Campbell-Ewald presented a slightly different factual pattern — namely, that Gomez did challenge his offer from the Navy contractor as insufficient — the majority’s conclusion was significant in that it explicitly endorsed Justice Elena Kagan’s scathing dissent in the Genesis case urging the resurrection of the litigation and earned the support of Justice Anthony Kennedy, who voted with the majority in the 5-4 Genesis ruling. Justice Clarence Thomas, who wrote for the majority in Genesis, sided with Justice Kennedy in the result on Wednesday but issued a concurring opinion.

“While the procedural posture was different in the Genesis case, the decision in Campbell-Ewald was still a victory for Justice Kagan and a vindication of her power on the court because if her dissent in Genesis wasn’t persuasive, Justice Kennedy wouldn’t have come over,” Rosenthal said.

Brian Wanca of plaintiffs firm Anderson & Wanca echoed the praise for the majority, applauding the justices for rejecting the class action “pick-off” tactic that so many defendants have increasingly been using in recent years to avoid costly classwide exposure.

“Now that the Supreme Court has recognized an ordinary consumer trying to vindicate his or her rights in a class action ‘must be accorded a fair opportunity’ to obtain class certification, we hope to see more cases resolved on the merits, rather than tied up in needless gamesmanship,” Wanca said.

The holding is particularly important in the consumer class action context, where the specter of uncapped aggregate damages available to plaintiffs under statutes such as the TCPA has made settling early an appealing proposition for defendants.

“The TCPA is really tailor-made for offers of complete relief,” said Drinker Biddle & Reath LLP partner Michael Daly. “Because the TCPA provides for statutory damages and does not provide for attorneys’ fees, defendants can confidently calculate ‘complete relief’ so as long as they know the number of calls, texts, or faxes at issue. That’s why the strategy has been used so often in TCPA cases, and why defendants are likely to react to this decision by looking for another way to use it.”

But while the justices’ proclamation on the settlement offer issue is likely to affect only the posture of litigation and the quantity of it, the majority's other holding in the case — namely, that Campbell-Ewald's status as a government contractor did not entitle it to immunity from claims brought under the TCPA — could operate to further swell an already bulging TCPA class action docket, attorneys noted.

“There’s a whole cottage industry that has popped up around TCPA cases, and because what plaintiffs have to prove to bring a suit under the statute is so minimal, the fact that sovereign immunity doesn’t work just expands

the pool of potential defendants for lawyers who do nothing but these cases," Kellogg said. "It's another defense to those actions for defendants that has fallen apart."

Campbell-Ewald is represented by Laura A. Wytsma and Meredith J. Siller of Loeb & Loeb LLP and Gregory G. Garre and Nicole Ries Fox of Latham & Watkins LLP.

The plaintiff-appellees are represented by Suzanne L. Havens Beckman and David C. Parisi of Parisi & Havens LLP, Michael J. McMorrow of McMorrow Law PC, Myles McGuire, Evan M. Meyers of McGuire Law PC and Scott L. Nelson, Allison M Zieve and Adina H. Rosenbaum of Public Citizen's Litigation Group and Jonathan F. Mitchell of Stanford University Law School.

The case is Campbell-Ewald Co. v. Gomez, case number 14-857, in the Supreme Court of the United States.

--Editing by Jeremy Barker and Christine Chun