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AN OFFER THEY CAN REFUSE: SCOTUS TAKES SOME POWER AWAY FROM OFFERS FOR COMPLETE RELIEF

Insights
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Today, the Supreme Court limited employers' ability to proactively and inexpensively end class action litigation before it takes off. In a 6 to 3 decision, the Court held that a defendant making a complete offer of relief to a plaintiff does not serve to kill the case, and more importantly, the plaintiff can still move forward with class action litigation. *Gomez v. Campbell-Ewald Co.*

Offers Of Relief: Picking Off Individual Plaintiffs, But What About Class Actions?
The legal system has developed a solution for defendants willing to compensate plaintiffs for the harm they claim to have sustained, making it so that plaintiffs cannot proceed with their lawsuits without facing serious financial consequences. Under Federal Rule of Civil Procedure 68, if a defendant makes a formal offer to settle under the Rule and the plaintiff refuses, the plaintiff could be liable for defendant's costs if they do not later recover at least the amount the defendant originally offered. Another possible consequence is that such plaintiffs might be unable to recover their attorney fees from that point on even if they prevail in the claim, which is a serious disincentive for their attorneys to proceed.

In most contexts, if the plaintiff accepts the offer, the case ends. If the plaintiff refuses the offer, the plaintiff

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runs the risk of paying defendant's costs or the plaintiff's attorney loses out on a large chunk of fees. Thus, these "offers of relief" or "offers of compromise" serve as a cost-shifting benefit to defendants, preventing plaintiffs from maintaining litigation past the point of reason and stopping them from bleeding defendants dry into the unforeseen future.

But what happens when the defendant makes a plaintiff an offer of relief that covers more than the claimed damages, and the plaintiff still refuses? What if the defendant seeks to prevent the case from blossoming into a much-costlier class action lawsuit and tries to buy its way out of the trouble with an early offer of compromise?

The Supreme Court agreed to hear the case of *Gomez* to answer this question. This is not the first time where the Court has addressed some version of this issue. Most recently, in 2013, the Court ruled that wage-and-hour collective actions brought under the Fair Labor Standards Act (FLSA) can be dismissed if an unaccepted offer of full relief mooted the plaintiff's claim. The case of *Genesis Healthcare v. Symczyk* (see Alert here) wasn't necessarily a sweeping victory for businesses, however, because the Court did not specifically address whether offers of relief always mooted a plaintiff's claim, and limited its decision to FLSA actions.

Overview Of *Gomez*: A New Beginning

The current case before the Supreme Court began when Jose Gomez received an unsolicited text message advertising the U.S. Navy. The text message was the result of a partnership between the Navy and its marketing consultant, Campbell-Ewald Company. Gomez brought a class action lawsuit on behalf of all those who received such unsolicited texts arguing that Campbell-Ewald violated the Telephone Consumer Protection Act by sending them.

The company offered Gomez a settlement worth three times more than he could recover under the statute, his costs, and an injunction to stop any future text

messages, but Gomez rejected this offer. Campbell-Ewald then moved to dismiss the case and argued that Gomez's rejection of the settlement offer made the claim moot. The district court denied the motion, and the 9th Circuit Court of Appeals agreed, holding that the unaccepted offer did not moot the named plaintiff's individual claims or his putative class claims.

SCOTUS: It Was An Offer That You Could Refuse
The Supreme Court agreed with the 9th Circuit and found in favor of Gomez. It held that the action of a defendant making a complete offer of relief does not render a plaintiff's claim moot, and that the plaintiff can refuse the offer and still move forward to seek class certification.

Writing for the majority, Justice Ginsburg reasoned that a case can only become moot under the U.S. Constitution when it is impossible for a court to grant any effectual relief whatever to the prevailing party. This does not happen when a plaintiff rejects a settlement offer, the Court explained, because like any offer made to enter into a contract, the offer ceases to exist if it is refused. And, in this case, "with no settlement offer still operative, the parties remained adverse; both retained the same stake in the litigation they had at the outset." The Court noted that after the plaintiff refused the settlement offer, he "remained emptyhanded," and his legal complaint "stood wholly unsatisfied."

The Court also preserved the claims of the entire class, reasoning that because Gomez still had a live claim, he now had the opportunity to show that certification of a class was justified. Notably, the Court declined to answer the hypothetical of whether a plaintiff's claim would become moot if a defendant deposited the entire amount of a plaintiff's claim in an account payable to the plaintiff, saving that question for a future case.

What This Means For Employers
Although this decision did not arise in the labor and employment context, it will have an impact on employment class action litigation. And while it is a loss

for employers, the impact should not be overly dramatic.

As a result of today's setback, employers lose a small amount of procedural freedom to try and pick off individual plaintiffs attempting to bring class actions before they get too costly. However, besides losing this procedural tactic, not much else has changed.

The Court did not overrule the 2013 *Genesis* decision, so it is still possible for employers to offer complete relief in class actions brought under the federal FLSA. However, *Genesis* was decided in the context where the plaintiff did not challenge the argument that her claim was mooted by this maneuver. Businesses faced with such a potential class lawsuit should consider taking advantage of this strategy early on in the litigation, but understand it will only work in very limited circumstances.

More adventurous defendants may want to consider depositing the full amount of the plaintiff's individual claim in an account payable to plaintiff and then seeking judgment as a result. However, this remains a risky maneuver until the Supreme Court answers the question of whether this action would also kill any associated class action litigation.

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