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SECOND CIRCUIT REVIEW

Expert Analysis

# Unaccepted Pre-Class Certification Settlement Offers

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Faced with a putative class action, a defendant in certain circumstances may seek to settle the named plaintiffs' individual claims—in an attempt to moot them—rather than risk class certification and face even greater exposure. But the Second Circuit's recent decision in *Radha Geismann, M.D., P.C. v. ZocDoc*, No. 17-2692, 2018 WL 6175291 (2d Cir. Nov. 27, 2018) clarifies and limits the extent to which unaccepted settlement offers might moot named plaintiffs' claims, and makes it considerably more difficult for class action defendants to successfully deploy this strategy.

## 'Genesis Healthcare'

In *Genesis Healthcare v. Symczyk*, 569 U.S. 66 (2013), the defendant sought to prevent certification of a collective action under the Fair Labor Standards Act by making a settlement offer to the named plaintiff. After the offer lapsed, the defendant moved to dismiss, arguing that because it had offered complete relief for the plaintiff's individual claim, the plaintiff—despite rejecting the offer—no longer had a personal stake in the lawsuit and so the entire action was moot.

The Supreme Court determined that the unaccepted offer mooted the plaintiff's individual claim and that the collective action was itself moot. Writing for the four dissenters, Justice Elena Kagan observed that an unaccepted offer cannot moot a case: "[w]hen a plaintiff rejects such an offer … her interest in the lawsuit remains just what it was before. And so too does the court's ability to grant her relief. An unaccepted settlement offer—like any unaccepted contract offer—is a legal nullity, with no operative effect." Id. at 81. Justice Kagan further explained that a court may not enter judgment for the plaintiff when the surrender "in fact fails to give the plaintiff all the law authorizes and she has sought." Id. at 85.

## The 'Campbell-Ewald' Hypothetical

Three years later, the Supreme Court squarely addressed the issue *Genesis Healthcare* did not reach: whether an unaccepted offer to satisfy a named plaintiff's individual claims moots the action. In *Campbell-Ewald v. Gomez*, 136 S. Ct. 663 (2016), the plaintiff brought a putative class action against a marketing firm for sending him unsolicited texts in violation of the Telephone Consumer Protection Act (the TCPA). Before the deadline to file for class certification, the defendant filed an offer of judgment under Federal Rule of Civil Procedure 68 to fully cover the plaintiff's TCPA-prescribed statutory damages, which the plaintiff rejected. A plaintiff who rejects

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a Rule 68 settlement offer and ultimately fails to obtain a more favorable judgment must pay the costs incurred after the offer was made. The defendant moved to dismiss, arguing that there was no longer a case or controversy because its offer mooted the plaintiff's action.

The court adopted Justice Kagan's dissent in *Genesis Healthcare*, holding that an unaccepted settlement offer or offer of judgment does not moot a plaintiff's case. Once rejected, the settlement offer "had no continuing efficacy." Id. at 670. And with "no settlement offer still operative, the parties remained adverse; both retained the same stake in the litigation they had at the outset." Id. at 670-71.

As Chief Justice John Roberts (with whom Justices Antonin Scalia and Samuel Alito joined) explained in dissent, "[t]he majority holds that an *offer* of complete relief is insufficient to moot a case," but "does not say that *payment* of complete relief leads to the same result," and so the "analysis may have come out differently if [the defendant] had deposited the offered funds with the District Court." Id. at 683 (Roberts, C.J., dissenting). He stressed that "[t]he agreement of the plaintiff is not required to moot a case." Id. at 681.

The Supreme Court thus created a potential exception to its holding: where a defendant provides actual payment in satisfaction of a plaintiff's claims. And thus began class-action defendants' attempts to fit within the exception and the lower courts' inconsistent application of the rulings.

### The 'Geismann' Opinion

Last month, the Second Circuit was presented with the opportunity to interpret *Campbell-Ewald*. In *Geismann,* the plaintiff filed a class action lawsuit against ZocDoc alleging that ZocDoc had sent him unsolicited faxes in violation of the TCPA. After failing to moot the action through a settlement offer under Rule 68—due to the Supreme Court's intervening opinion in *Campbell-Ewald*—ZocDoc then attempted to moot the lawsuit through Rule 67, which allows a party to deposit money in the court registry as "a place of safekeeping for disputed funds pending the resolution of a legal dispute." Id. at *5. ZocDoc offered $14,000 more than the plaintiff's individual claims were worth, deposited the funds under Rule 67, and moved for summary judgment, "seek[ing] to perfect the *Campbell-Ewald* hypothetical." The district court granted summary judgment (over the plaintiff's opposition) and directed the clerk to mail a check to the plaintiff (who returned it) in the amount due. The court then dismissed the plaintiff's action—and pending motion for class certification—as moot.

'Geismann' clarifies and limits the extent to which unaccepted settlement offers might moot named plaintiffs' claims.

The Second Circuit reversed on two grounds. First, the court found that depositing money under Rule 67 did not actually fall within the *Campbell-Ewald* hypothetical. Agreeing with the Seventh Circuit's opinion in *Fulton Dental v. Bisco*, 860 F.3d 541, 544 (7th Cir. 2017), the Second Circuit found no "material difference between a plaintiff rejecting a *tender* of payment (pursuant to Rule 67) and an *offer* of payment (pursuant to Rule 68)." Id. at *4. All that exists at either time is an unaccepted contract offer. Id. And because a party's deposit under Rule 67 does not entitle another party to collect those funds, the Rule 67 procedure "is nothing like a bank account in the plaintiff's name—that is, an account in which the plaintiff has a right at any time to withdraw funds." Id. at *5.

Second, the court held that, even in the *Campbell-Ewald* hypothetical, a putative class plaintiff's claims would not be moot—at least until class certification was denied. The court acknowledged prior Circuit case law holding that if a defendant "surrenders to 'complete relief,'" the district court may enter judgment against the defendant "even without the plaintiff's agreement," rendering the plaintiff's individual claims moot. Id. at *6 (quoting *Tanasi* v. *New Alliance Bank*, 786 F.3d 195, 200 (2d Cir. 2015)).

But in the class-action context, a judgment satisfying a named plaintiff's individual claims—even if there is actual payment—is not "*complete* relief" because such a

judgment "does not give a plaintiff … exercising [its] right to sue on behalf of others … 'all that [it] has … requested in the complaint (i.e., relief for the class).'" Id. (quoting *Genesis Healthcare*, 569 U.S. at 85 (Kagan, J., dissenting)). In other words, "[b]y rejecting the settlement offer and returning the clerk's check, [the plaintiff] effectively stated that its suit 'is about more than the statutory damages to which it believes it is entitled; it is also about the additional reward that it hopes to earn by serving as the lead plaintiff for a class action.'" Id. (quoting *Fulton Dental*, 860 F.3d at 545).

The court therefore concluded that before "entering judgment and declaring an action moot based solely on the relief provided to a plaintiff on an individual basis," the district court must *first* resolve any motion for class certification. Id. at *6. This holding is consistent with prior Second Circuit precedent. For example, in *Leyse v. Lifetime Entm't Servs.*, 679 F. App'x 44, 48 (2d Cir. 2017), the court upheld entry of judgment in favor (and over the objection) of the putative class action plaintiff because the defendant had deposited the full amount of the requested damages with the clerk of the court, and therefore fit within the *Campbell-Ewald* hypothetical. The court noted, however, that the "class-certification motion was litigated and resolved *before* [the plaintiff's] [Rule] 68 offer." Id. at 48 n.2 (emphasis added).

## Implications

*Giesmann* reflects the Second Circuit's policy choice to protect class action lawsuits from procedural gamesmanship. Had ZocDoc prevailed, subsequent defendants could limit class-action exposure by unilaterally settling with putative lead plaintiffs before class certification could be decided, thereby frustrating the primary goals of class actions. As the court acknowledged, allowing entry of judgment before determining class certification would "effectively allow[] the use of tactical procedural maneuvers to thwart class litigation at will." Id. at *6. After *Giesmann*—at least within the Second Circuit—class action defendants will be effectively foreclosed from preemptively settling named plaintiffs' individual claims.

It remains to be seen how courts will balance the competing goals of class actions, a plaintiff's powers and autonomy, and Article III separation-of-powers.

By rejecting the notion that full, guaranteed payment of a named plaintiff's individual claims was "complete relief," the Second Circuit brings *Genesis Healthcare* full circle, adopting the essence of Justice Kagan's dissent. In so ruling, it applies a particularly strict definition of "complete relief" and appears to imply a plaintiff's independent interest in obtaining class relief. This raises new questions as to what other claims of relief might defeat a mootness argument or create an Article III case or controversy, and seems to be in tension with prior Supreme Court precedent on standing. See, e.g., *Campbell-Ewald*, 136 S. Ct. at 679 n.1 (Roberts, C.J., dissenting) ("[U]nder this Court's precedents [the plaintiff] does not have standing to seek relief based solely on the alleged injuries of others, and [the plaintiff's] interest … in obtaining a class incentive award does not create Article III standing." (citing cases)).

At the end of the day, class action defendants may still try to settle with named plaintiffs to avoid class certification. It remains to be seen how courts will balance the competing goals of class actions, a plaintiff's powers and autonomy, and Article III separation-of-powers.