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Employment Law

High Court's Class Action Ruling May Affect Wage Claims



By Lisa Nagele-Piazza

Jan. 21 — A U.S. Supreme Court ruling Jan. 20 that an unaccepted offer to settle an individual claim doesn't render a claimant's proposed class action moot may have implications for employment-related actions, particularly wage and hour claims, employment attorneys told Bloomberg BNA (*Campbell-Ewald Co. v. Gomez*, 2016 BL 14352, U.S., No. 14-857, 1/20/16).

In a 6-3 decision affirming a U.S. Court of Appeals for the Ninth Circuit ruling, the high court found that once a settlement offer is rejected, it has no continued efficacy. The decision is in accord with Rule 68 of the Federal Rules of Civil Procedure and basic principles of contract law, Justice Ruth Bader Ginsburg wrote for the majority.

In dissent, Chief Justice John Roberts said marketing firm Campbell-Ewald Co.'s offer to fully satisfy Jose Gomez's claim rendered the case moot and that "Gomez is not entitled to a ruling on the merits of a moot case."

"The importance of the case is not its impact, but the *lack* of devastating impact that it could have had, if the majority had gone Roberts' direction," Bryan Schwartz, an employee-side attorney in Oakland, Calif., told Bloomberg BNA in a Jan. 21 e-mail. "It would have been especially devastating to wage claims, which typically involve very modest recovery for each individual plaintiff and class member."

"This case is another reminder for employers to be mindful of the small things," management attorney Ryan E. Mick told Bloomberg BNA in a Jan. 20 phone interview. As a best practice, employers should audit their wage and hour practices to make sure there aren't any violations that may affect multiple employees, Mick, a partner at Dorsey & Whitney LLP in Minneapolis, said.

Firm Offered Maximum Claimant Could Recover

In his class action complaint, Gomez claimed that Campbell-Ewald sent him unsolicited U.S. Navy recruitment text messages in violation of the Telephone Consumer Protection Act.

Before Gomez moved for class certification, the firm offered him about \$1,500 to settle his individual claim and filed a Rule 68 offer of judgment. The offer represented the maximum Gomez could receive under the TCPA, but he didn't accept the offer.

Campbell-Ewald sought to dismiss the case for lack of subject-matter jurisdiction, arguing that no case or controversy remained, because the offer provided complete relief and thus mooted Gomez's individual claim. The firm also contended that, because Gomez had yet to move for class certification, the proposed class claim was also moot.

But the Supreme Court ultimately held that once an offer of judgment is rejected, it has no continuing force.

Rule 68 provides that an unaccepted offer of judgment is considered withdrawn if it isn't accepted within 14 days of service. Ginsburg said the "sole built-in sanction" under the rule is that, if the final judgment isn't more favorable than the offer, then "the offeree must pay the costs incurred after the offer was made."

"In short, with no settlement offer still operative, the parties remained adverse; both retained the same stake in the litigation they had at the outset," Ginsburg wrote.

The majority also found that a federal contractor isn't entitled to "derivative sovereign immunity" when the contractor exceeds its authority.

Majority Adopts Dissent in Prior FLSA Ruling

The high court faced a similar claim in *Genesis HealthCare Corp. v. Symczyk*, 133 S. Ct. 1523, 20 WH Cases2d 801 (U.S. 2013) (73 DLR AA-1, 4/16/13).

Genesis HealthCare involved a purported collective action in which the named plaintiff sought unpaid wages under the Fair Labor Standards Act. As in the present case, Genesis HealthCare made a Rule 68 offer that would have provided Laura Symczyk with full relief.

But the high court found that Symczyk failed to properly challenge the lower courts' rulings that the offer of full relief resolved her individual claim. Therefore, the court assumed without deciding that an unaccepted settlement offer under Rule 68 will render an employee's individual FLSA claim moot.

In dissent, Justice Elena Kagan said, "An unaccepted settlement offer—like any unaccepted contract offer—is a legal nullity, with no operative effect."

"As every first-year law student learns, the recipient's rejection of an offer 'leaves the matter as if no offer had ever been made,'" Kagan added.

Adopting Kagan's analysis, Ginsburg noted that every federal appeals court that has ruled on the issue since *Genesis HealthCare* has adopted Kagan's reasoning.

BNA Snapshot

Campbell-Ewald Co. v. Gomez, 2016 BL 14352, U.S., No. 14-857, 1/20/16

Holding: Unaccepted Rule 68 offer of judgment and bid to settle individual plaintiff's claim doesn't render proposed class action moot.

Takeaway: Employers can't defeat class action by attempting to "pick off" or "knock out" named plaintiff's individual claim.

Some Attorneys Say Decision Has Little Significance

The *Genesis HealthCare* decision opened this intriguing possibility that the defense could "knock out" a class action by satisfying the individual plaintiff's claim, Mark W. Batten, a partner in the labor & employment law department at Proskauer Rose LLP in Boston, told Bloomberg BNA Jan. 21.

But most courts have been reluctant to go that route, Batten said. The Supreme Court is now saying that caution was justified, he said.

The danger with this case was the potential for defendants to "pick off" a litigant's case and defeat a class action, W. James Young, staff attorney at the National Right to Work Legal Defense Foundation, said. But the Supreme Court respected the role of the class action against mass tortfeasors, he said.

Young said the decision had a very narrow focus and may not have a substantial effect.

Effect of Tendering Full Payment Unclear

The justices left open the question of whether an actual payment rather than a mere offer would result in a different conclusion.

Campbell-Ewald cited what the high court called "a trio of 19th-century railroad tax cases" in support of its argument that an offer of judgment can render a controversy moot. But those cases involved actual payments of the full amount demanded—not just offers, the majority said.

"None of those decisions suggests that an *unaccepted* settlement offer can put a plaintiff out of court," Ginsburg wrote.

The cases Campbell-Ewald cited were based on an unusual California statute involving certain tax obligations, Batten said. While there is some discussion about this being a potential loophole for employers, it may have limited applicability, he said.

The best practice is to never get there in the first place, Mick said. Another good practice is to have employees sign arbitration agreements and class action waivers, which the courts have generally permitted, he said. But Mick cautioned that these agreements aren't appropriate for all situations and have various associated costs.

It is much better to formulate good policies and practices in the first place than to argue the enforceability of these agreements later, Mick said.

Kagan, along with Justices Anthony M. Kennedy, Stephen G. Breyer and Sonia Sotomayor, joined the majority. Justice Clarence Thomas wrote a separate concurring opinion. Justices Antonin Scalia and Samuel A. Alito joined Roberts's dissenting opinion, and Alito also wrote a separate dissenting opinion.

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For More Information

Text of the opinion is available at

http://www.bloomberglaw.com/public/document/CampbellEwald_Co_v_Gomez_No_14857_US_Jan_20_2016_Court_Opinion/1.

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