Ninth Circuit Rejects Mootness Where Defendant Escrows Offered Funds, Broadening *Campbell-Ewald*

By: P. Russell Perdew and Aaron J. Hersh

The Ninth Circuit has answered questions left open by the U.S. Supreme Court's recent *Campbell-Ewald v. Gomez* decision by finding a putative class action was not moot even where the defendant deposited the offered funds into an escrow account for plaintiff's benefit. *Chen, et al. v. Allstate Ins. Co.*, No. 13-16816, 2016 WL 1425869 (9th Cir. Apr. 12, 2016). The Ninth Circuit also addressed an issue not directly addressed in *Campbell-Ewald* by holding that even if plaintiff's individual claim was mooted, a class action cannot be dismissed until the plaintiff is given an opportunity to obtain class certification. The court's rationale in *Chen* would seem to prevent a defendant in the Ninth Circuit from mooting an individual plaintiff's claim before class certification. But the Supreme Court's upcoming decision in *Spokeo, Inc. v. Robins* could undermine the rationale for *Chen*. So the issue of whether a defendant can end a class action by providing complete relief to an individual plaintiff is not yet fully resolved.

Campbell-Ewald left several questions unanswered.

In January 2016, the U.S. Supreme Court in *Campbell-Ewald* rejected a defendant's attempt to end a class action arising under the Telephone Consumer Protection Act by offering the plaintiff (via a Rule 68 offer of judgment) the full amount the plaintiff could receive on his individual claim. 136 S.Ct. 663, 667–668 (2016). The Court found that where a plaintiff refused to accept the offer, the unaccepted offer "had no continuing efficacy." *Id.* at 670.

But the Court also left several questions unanswered. First, the Court's holding was based on the fact that the offer of judgment expired after 14 days. *Id.* at 671. But what if the defendant left the offer open indefinitely, such that the plaintiff retained an ongoing power of acceptance? Second, the Court explicitly did not address whether the plaintiff's claim would be moot if the defendant went beyond ***offering*** complete relief and actually paid relief by depositing the funds into an account for plaintiff's benefit, after which a Court entered judgment for plaintiff. *Id.* at 672. Finally, the Court held that class certification was not mooted so long as plaintiff retained a "live claim of her own", but did not address whether a plaintiff whose individual claim was considered moot could continue to maintain a class action on behalf of the putative class. *Id.*

Chen answers Campbell-Ewald's questions for the Ninth Circuit.

Plaintiff in *Chen* also brought a TCPA class action, and the defendant attempted to moot his claim with the techniques left unaddressed by *Campbell-Ewald*. First, the defendant informed plaintiff that the offer would remain open until accepted or until withdrawn in writing. *Chen*, 2016 WL 1425869, *3. So there was no issue of the offer expiring and becoming void. The defendant also deposited the offered funds into an escrow account that would be paid upon entry of judgment in plaintiff's favor (*Id.*), which was the hypothetical left open by *Campbell-Ewald.*

Although the Ninth Circuit agreed that defendant had offered to provide all the relief plaintiff sought (including injunctive relief), the court found this did not moot plaintiff's claim for two reasons. First, the court held defendant did not moot plaintiff's individual claim because even though the money had been deposited into an account that was available for plaintiff to take, plaintiff had not yet ***actually received*** the money. *Id.* at *7. The court said that plaintiff could not receive the money unless defendant had "unconditionally relinquished" all claim to the money,

rather than retaining the ability to reclaim the money from escrow if no judgment was entered (*Id.* at *8), though the court did not say that even such unconditional relinquishment of funds would thereby require a judgment over plaintiff's objection. *Id.* at *9. Further, the court held that even if defendant could moot plaintiff's individual claim, the case would survive until plaintiff "had a fair opportunity to show that certification is warranted." *Id.* The court held that even a plaintiff whose individual claim has been satisfied maintains a "personal stake in obtaining class certification." *Id.*

Thus, there currently seems to be no way in the Ninth Circuit for a defendant to have a putative class action dismissed by mooting the plaintiff's individual claim, at least not until a class-certification motion has been denied.

Spokeo may undermine the holding in Chen.

The U.S. Supreme Court is expected to issue a decision in *Spokeo* later this term, and that decision could undermine the holding in *Chen* that even a plaintiff with no live individual claim has a personal stake (sufficient to satisfy Article III) in certifying a class. One issue in *Spokeo* is whether the bare violation of a statutory right is sufficient to give an individual plaintiff standing without some resulting concrete injury (e.g., monetary harm). If the Court holds that such a statutory violation is insufficient to create standing, then defendants would gain a strong argument that a plaintiff's statutory right to seek class certification is insufficient to give the plaintiff standing to maintain a class action once the plaintiff's individual claim is satisfied.

Thus, it remains worth watching how other circuits apply *Campbell-Ewald*, and how the U.S. Supreme Court decides *Spokeo*, to determine whether there will be any way for defendants to end class actions with full offers of relief to individual plaintiffs.

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