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CLIENT ALERT

Knocking Out Class Actions After *Campbell-Ewald*: Can Defendants Still Control Their Destiny?

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Prior to the Supreme Court's January 2016 decision in *Campbell-Ewald Co. v. Gomez*, 136 S.Ct. 663 (2016), the Rule 68 offer of judgment was a powerful tool in a defendant's arsenal when facing a consumer class action. By offering judgment in full to the putative class representative, the defendant could effectively render the class action moot in certain jurisdictions. But the Supreme Court rejected this practice in *Campbell-Ewald*, holding that an unaccepted offer of judgment does not moot a class action lawsuit, even if the defendant offers everything the plaintiff seeks to recover.

While *Campbell-Ewald* closed one door to defendants seeking to knock out a class action at the pleading stage, it left open another. The Supreme Court expressly dodged the question of whether an actual payment by the defendant—such as a voluntary payment to the plaintiff or one received by the plaintiff through the defendant's recall or refund program—might still moot the plaintiff's claims: "We need not, and do not, now decide whether the result would be different if a defendant deposits the full amount of the plaintiff's individual claim in an account payable to the plaintiff, and the court then enters judgment for the plaintiff in that amount."

The *Campbell-Ewald* case is now back in federal district court in the Central District of California, where Campbell-Ewald is again seeking to make a payment to the plaintiff, Jose Gomez, that would moot his claim. Relying on the Supreme Court's language, on February 8, 2016, Campbell-Ewald sent a cashier's check to Mr. Gomez for $10,000. Campbell-Ewald declared the payment to be "unconditional and irrevocable" and "made to resolve all individual claims that have been asserted by Mr. Gomez against Campbell-Ewald in the lawsuit." *Gomez v. Campbell-Ewald*, No. 2:10-cv-02007-DMG-CW, Dkt. 250-1 (Mar. 15, 2016). Separately, on March 18, 2016, Campbell-Ewald asked the court to accept a payment in the same amount and moved for leave to deposit $10,000 with the court pursuant to Rule 67.

On March 18, Campbell-Ewald moved to dismiss for lack of jurisdiction or, in the alternative, entry of judgment for the plaintiff. Campbell-Ewald argues that the payment and tender of deposit eliminate any case or controversy as to Gomez's claim and either render his case moot or support entry of judgment in the plaintiff's favor.

The district court must now decide whether an actual payment to the putative class representative, even if unsolicited, renders the plaintiff's claim moot. Depending on the outcome, a voluntary payment may still prove a powerful weapon in protecting against future litigation risk despite the Supreme Court's limitation on Rule 68 offers of judgment.

Yet even if the district court concludes that an unsolicited voluntary payment does not resolve the plaintiff's claim, there are other ways that a voluntary payment or remedy might knock out a class action. For example, in 2012, the Tenth Circuit in *Winzler v. Toyota Motor Sales USA, Inc.*, 681 F.3d 1208 (10th Cir. 2012), dismissed a consumer class action as moot because the lawsuit sought the same relief that the manufacturer was already providing through its voluntary recall program under the supervision of the National Highway Traffic Safety Administration (NHTSA). When a mootness defense is not successful at the pleading stage, a voluntary payment or recall program may still pave the way to defeating class certification.

If the same remedy is available through a recall or refund program, is a class action the superior way to resolve the dispute? And is a class representative seeking to subject the class to protracted litigation adequately protecting the interests of those already entitled to a voluntarily-provided remedy? A number of courts have answered "no."

Courts have refused to certify a class when a refund or recall program is available. For example, the U.S. District Court for the District of Minnesota in *Daigle v. Ford Motor Co.* found that when a recall "provides most of the putative class the relief it seeks . . . a class action does not appear to be a superior method to adjudicate the putative class claims" as required by Rule 23. No. 09-cv-3214, 2012 WL 3113854, *5 (D. Minn. July 31, 2012). Other courts have denied certification on adequacy grounds, reasoning that "[a] representative who proposes that high transaction costs (notice and attorneys' fees) be incurred at the class members' expense to obtain a refund that already is on offer is not adequately protecting the class members' interests." *See In re Aquadots Products Liability Litigation*, 654 F.3d 748, 752 (7th Cir. 2011). Similarly, in *Martin v. Ford Motor Co.*, 292 F.R.D. 252, 282-85 (E.D. Pa. 2013), the Eastern District of Pennsylvania—after rejecting a mootness argument at the pleading stage—declined to certify a damages class under Rule 23(b)(3) because class litigation was not superior to the remedy already being offered, and refused to certify a Rule 23(b)(2) class for injunctive relief because the putative class representative who had refused the recall remedy was not typical or adequate.

While class action defendants were dealt a setback with *Campbell-Ewald*'s rejection of the Rule 68 offer of judgment strategy, defendants facing class actions—especially consumer class actions—should carefully consider whether a voluntary payment, recall, or refund remedy may still play an important role in defeating the litigation.

Other Articles in This Month's Edition:

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

April Nelson Ross
Partner – Washington, D.C.
Phone: +1.202.624.2687
Email: aross@crowell.com

Rebecca Baden Chaney
Partner – Washington, D.C.

Phone: +1.202.624.2772
Email: rchaney@crowell.com