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U.S. Supreme Court Holds that Unaccepted Offer to Settle Per Rule 68 Does Not Moot a Case

In a 6-3 opinion, the United States Supreme Court held yesterday that a defendant's unaccepted Rule 68 offer of judgment for complete relief does not moot a case. *See Campbell-Ewald Co. v. Gomez*, 577 U.S. ___ (2016). Justice Bader Ginsburg, writing for the 6-3 majority, explained that "[u]nder basic principles of contract law," an offer without acceptance is a legal nullity. Therefore, the Court reasoned, if a plaintiff does not accept a defendant's mid-case settlement offer, the plaintiff gains no entitlement to relief, and "the parties remain[] adverse; both retain[] the same stake in the litigation they had at the outset."

In so ruling, the Court addressed a question left open by its 2013 decision in *Genesis HealthCare Corp. v. Symczyk*, 569 U.S. ___; 133 S. Ct. 1523 (2013). In *Genesis HealthCare*, the majority declined to decide whether an unaccepted offer of complete relief mooted an individual's claim because the plaintiff failed to preserve that argument. Even though defendant's Rule 68 offer in *Genesis HealthCare* (whose lead counsel was Greenberg Traurig) was not accepted, Plaintiff did not argue that her failure to accept the Rule 68 offer prevented dismissal of her individual claim. Rather, she conceded that the offer mooted her individual claim and instead insisted that her case was not subject to dismissal because she brought her claim as a collective action on behalf of a group, and the Company's offer of judgment provided no relief for that group. Unlike Mr. Gomez, therefore, the plaintiff in *Genesis Healthcare* never denied that the offer of judgment mooted ***her individual claim***, and thus the majority did not reach the question. Justice Kagan wrote a critical dissent in *Genesis HealthCare*, explaining that she would have reached the mootness question, and stating that "an unaccepted offer of judgment cannot moot a case."

The *Campbell-Ewald* majority, now joined by Justice Kennedy, explicitly adopted Justice Kagan's dissent from *Genesis HealthCare*. Although Plaintiff Gomez did not dispute that the Rule 68 offer would fully satisfy and moot his claims, the Supreme Court nevertheless held that the Defendant's offer did not moot his case because the Plaintiff had not accepted the offer. The majority emphasized that, never actually having received the relief offered, the Plaintiff's complaint "stood wholly unsatisfied." The Court also decided the second issue presented in the case, holding that federal contractors do not

share the Government's unqualified immunity from liability and litigation.

Chief Justice Roberts, joined by Justices Scalia and Alito in his dissent, disagreed with the majority's mootness ruling. Justice Roberts wrote that "[t]he agreement of the plaintiff is not required to moot a case." Rather, according to Justice Roberts, "When a plaintiff files suit seeking redress for an alleged injury, and the defendant *agrees* to fully redress that injury, there is no longer a case or controversy for purposes of Article III" (emphasis in original).

The tipping point in the *Campbell-Ewald* case came from Justice Thomas (who ironically authored the *Genesis HealthCare* decision). Justice Thomas concurred in the result only based on his stated view that the Plaintiff's case was not moot "on the common-law history of tenders." According to Justice Thomas, the fact that the Defendant had "only declared its intent to pay" Plaintiff's damages and had taken "no further steps" to satisfy those damages supported the finding that Plaintiff's case had not been mooted simply by the unaccepted offer.

Justice Alito, dissenting, characterized the majority's holding as limited. He wrote, "The good news is that this case is limited to its facts. The majority holds that an *offer* of complete relief is insufficient to moot a case. The majority does not say that *payment* of complete relief leads to the same result" (emphasis in original). Indeed, the majority noted that it would leave for another day the answer to the hypothetical question of what result would follow "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." Justice Alito suggested that defendants wishing to moot a case after *Campbell-Ewald* "might hand the plaintiff a certified check or deposit the requisite funds in a bank account in the plaintiff's name."

Campbell-Ewald has far-reaching implications for class and collective actions. Under *Genesis HealthCare*, plaintiffs were precluded from arguing that the group nature of certain suits exempted them from Article III's standing requirements. This left room for defendants to try to settle quickly with named plaintiffs through Rule 68 offers of judgment. *Campbell-Ewald* changes the landscape by clarifying that an unaccepted Rule 68 offer will not end class litigation. It remains to be seen whether defendants actually willing to tender the amount of the offer can obtain a different result, particularly in putative class litigation.

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