Outside Counsel

Rule 68 Offers of Judgment: Supreme Court Invites the Next Case

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The law is replete with its own little ironies, and the U.S. Supreme Court has just delivered one in the form of *Campbell-Ewald Inc. v. Gomez*.[1] There the court ruled that in a class action, where a defendant makes an offer to settle to the named plaintiff and that plaintiff does not accept the offer, that does not moot the case. Federal Rule of Civil Procedure 68, the Offer of Judgment rule, requires more in order to declare a case nonjusticiable. Unless the defendant does something more substantial, the matter remains "live," and the Cases and Controversies Clause of Article III is satisfied.[2]

Rule 68 is quite straightforward. A defending party, at any time more than 14 days before the commencement of trial, may serve the opposition party with an offer permitting the entry of judgment against that defendant. The offer must be made upon specific terms, and allow for the payment of court costs accrued to date.[3] The plaintiff may then accept the proposal within the next 14 days. The clerk *must* then enter judgment.[4] If the offer is unaccepted, then it is deemed withdrawn, but the offer of judgment can be renewed or a new one proffered.[5] Its intended benefit is to permit both sides to a controversy to avoid the risks of trial, yet conclude the litigation on terms acceptable to both.

What matters greatly is that *Campbell's* range is quite narrow, given that its holding is clearly predicated upon strictly delimited, and some would say incomplete, facts. This distinguishing feature is what allows *Campbell* to deliver such high irony to the Rule 68 controversy. We find that elucidated in the voices of no fewer than three justices: Justice Ruth Bader Ginsburg writing for the majority, and as accompanied by two interrelated dissents. Each opinion plainly declares the high court has reserved for another day this question: Can a case, including a class action, be mooted pursuant to Rule 68 when the defendant goes beyond merely offering to settle, but also submits itself to judgment pursuant to Rule 68, and concomitantly proves its sincerity by actually depositing the settlement monies with the district court or some other trustworthy intermediary, so the money is unquestionably there for the taking by the individual plaintiff?

> Can a case, including a class action, be mooted pursuant to Rule 68 when the defendant goes beyond offering to settle, but also submits to judgment pursuant to Rule 68?

That is a much different application of Rule 68, one that might accordingly yield a quite different result. It is remarkable how the totality of *Campbell* boldly invites such changed facts to be replayed before the justices at some future date. In that regard, both the majority and the dissents are undeniably full of promise that a proper application of Rule 68 can indeed moot a case pursuant to Article III, provided that the next defendant is wise is enough to learn from *Campbell's* deficiencies, which the court took pains to highlight. Indeed, how can any sensible litigant ignore the set of instructions the justices provide for avoiding the pitfalls of the case already decided?

Given the great likelihood that a modified approach shall meet with the justices' approval, combined with the court's specific reservation on that much different question, we find that Rule 68 offers of judgment as a means to end litigation remain vital, and therefore a topic quite worthy of discussion.

While the linchpin of our previous discussion[6] was whether an offer of judgment that afforded complete relief to a proposed class representative would render a putative class action nonjusticiable pursuant to Article III, we did set forth the underpinnings of at least parts of the Rule 68 controversy put before the high court in *Campbell*. Key among them was the following postulation: While a mere offer to settle, made to the named plaintiff but never accepted, is insufficient to moot a case, it is quite a different matter indeed where an offer of judgment actually becomes a recorded judgment pursuant to Rule 68.

By bestowing upon the named plaintiff all the relief a court could possibly grant, the case is moot, because the matter fails to comply with Article III's command that there be at all times a "live" case or controversy.[7] It is that not so subtle distinction between mere unaccepted offers to » Page 7

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settle and an offer that can be transformed into a true, binding judgment which has fomented so much controversy, leading to *Campbell* and cases like it finding their way to the Supreme Court.

Campbell Case

All that being prelude to the current day, we can now turn to *Campbell*. The facts are simple enough. Campbell-Ewald Inc., an advertising and marketing communications company, was retained by the U.S. Navy to run a recruitment campaign aimed at young adults who had consented to receiving text messages concerning enlistment. Jose Gomez alleged he had wrongfully received several such texts, in violation of the Telephone Consumer Protection Act (TCPA), the federal law severely restricting the transmission of unsolicited texts, "robocalls," and faxes. Far more important, he wished to represent a class of persons similarly aggrieved.

While the TCPA fixes statutory damages at a rather mild amount per individual, the certification of a class would have raised Campbell's liability to a whole other order of magnitude. That danger prompted the company to offer Gomez a sum of money in excess of the individual statutory damages he might be entitled to. Campbell's strategy was plain: grant this named plaintiff complete relief, and thereby moot his claim and eliminate his ability to represent a class.

In all candor, in deciding *Campbell* the Supreme Court focused upon one, unassailable fact. The defendant had merely tendered a bare offer to the named plaintiff (which apparently expired of its own accord), and then did nothing. Having taken no further steps at all, it went directly to a motion to dismiss Gomez's claims pursuant to Rule 68, asserting that its flimsy unaccepted settlement offer was enough to render the case nonjusticiable pursuant to Article III's mandate for a "live" case or controversy.

Little wonder then that Justice Ginsburg, writing for the majority, was unrelenting in her emphasis of the court's one salient holding: A defendant cannot moot a case with nothing more than an "unaccepted settlement offer." The majority establishes this point from its opening,[8] and then reinforces this as the cornerstone of its decision by exemplifying this flaw in the defendant's tactics, referencing it a half a dozen times in less than four subsequent pages.[9]

To close its reasoning on the Rule 68 question presented in *Campbell*, the majority could not have been plainer with its intentions for the future of offers of judgment and Rule 68. "We need not, and do not, now decide" the outcome when "a defendant deposits the full amount" of all the relief the named plaintiff is entitled to with the court or another suitable intermediary, "and the court then enters judgment for the plaintiff in that amount."[10] Rarely does one find the high court so overt in dispensing advice, while simultaneously issuing an invitation for future litigants to follow its edicts and emplace such a revised scenario before the high bench for a fresh look.

Dissents

Yet the high court does not stop with the unmistakable invitation found in the majority's teachings. Rather, a second invitation, even bolder, can be found in the sharply worded dissent authored by Chief Justice John Roberts (as joined by Justice Samuel Alito and the late Justice Antonin Scalia). As we shall see momentarily, the dissenters do not provide mere suggestions to the next Rule 68 litigant; they provide a blueprint for the correct deployment of Rule 68 as a means to moot a case, on the grounds that it no longer meets the Article III requirement of being a "live" case or controversy.

In his dissent, Roberts is unyielding in his declaration that the Cases and Controversies Clause of Article III demands the federal courts limit themselves to deciding "live" cases only.[11] Per force, any matter rendered noncontroversial cannot be adjudicated, and must therefore be dismissed. Precisely, noted the chief justice, this means that the federal bench cannot continue to adjudicate matters where "a plaintiff's entitlement to relief [is] already there for the taking." That would be an indulgence in rendering advisory opinions, something Article III has been clearly understood not to permit since the first days of the Republic.[12] Moreover, only the federal courts can make a determination of nonjusticiability; that question is never left to the whims of a plaintiff, particularly a recalcitrant one.[13]

Therefore, the dissent opines that a violation of the Cases and Controversies Clause is inevitable if a court continues to entertain a matter where complete relief is actually paid into court, and the named plaintiff can take ownership at any time. To be sure, the availability of that full relief should be objectively unequivocal or nearly so.[14] That was the fatal flaw in *Campbell*, declared the chief justice—the irredeemable defect in that defendant's tactic was that it stopped at making the offer, and never took steps to place settlement funds in the hands of the court or a trustworthy third party before making its plea for Rule 68 relief.[15]

Taking matters a significant step further, Roberts paints a clear picture as how to remedy the egregious shortcoming of *Campbell*. "The majority does not say that *payment* of complete relief leads to the same result."[16] In an open tutorial, the dissent instructs that an offer of judgment becomes indisputable when a defendant "deposit[s] a certified check with the trial court" contemporaneous with its Rule 68 practice. The unquestioned availability of complete relief to the named plaintiff thus ends all controversy, and

moots the case pursuant to Article III.[17] Implicit in the dissent's teaching is this further ramification: Mooting the case as to the named plaintiff denies it the ability to represent a class, since it no longer holds a justiciable interest in the proceeding.

The chief justice closes in robust terms. *Campbell* bears "good news....[T]his case is limited to its facts." And that is why, he posits, the next defendant should not be deterred from Rule 68 practice when a future plaintiff "won't take 'yes' for an answer."[18] What plainer invitation to come before the justices can a litigant ask for?

Additionally, we note the following parenthetical in the dissent, albeit with the caveat that we know better than to place too much stock in footnotes, even those found in a Supreme Court opinion. The chief justice's aside archly points out that the court this day did not at all reach the further question of ending class actions via going beyond a mere offer to settle to the putative class representative, and submitting actual payment to the district court as part of the defendant's Rule 68 offer of judgment.[19] Thus, the dissent appears to expand its open invitation for another go round on Rule 68 to encompass that aspect of the controversy as well (another reason to presume that Rule 68 shall soon be before the justices again).[20]

Lastly, we cannot neglect Justice Alito's separate dissent (in addition to joining the chief justice's counterpoints to the majority's reasoning). This third opining virtually guarantees that there shall be another Rule 68 adjudication, and this one shall feature a defendant "simply pay[ing] over the money" to the account of the named plaintiff before seeking to moot the case via Rule 68.[21]

Looking Ahead

After turning the last page of *Campbell*, one can rely upon not one, not two, but three plainspoken edicts showing the way to remedy the shortcomings of the defendant's tactics therein, by the obvious expedients of depositing settlement monies into the court registry, and then moving pursuant to Rule 68 to turn a mere unaccepted offer into a conclusive decree of judgment. Given such, can there be a scintilla of doubt that a wiser defendant shall soon avoid *Campbell's* errors, and place before the justices a fact pattern in tune with the scenario the court itself was so kind to script out in that constrained holding?

After all, can any defendant seeking to bring an end to litigation deny the irresistible tug of the court's reasoned analysis of how to correctly make an offer of judgment pursuant to Rule 68, and thereby render a controversy nonjusticiable under Article III? We are confident that when *Campbell* redux finds its way to the justices, there shall be a much different outcome, and this time there shall be a ruling that unequivocally proves the efficacy of Rule 68 in ending litigation by the mechanism of the offer and payment of judgment.

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1. 136 S. Ct. 663, 577 U.S. ___ (No. 14-857) (Jan. 20, 2016) (*Campbell*).
2. Art. III, §2, cl.1 (the federal courts may only hear and decide "live" cases or controversies).
3. Fed. R. Civ. P. 68(a).
4. Id. (emphasis supplied).
5. Id. at 68(b).
6. A.M. Sabino and M.A. Sabino, "Applying Rule 68 on Offers of Judgment to Class Actions," 253 New York Law Journal 4 (June 1, 2015) ("Rule 68 I").
7. See Rule 68 I, analyzing, inter alia, *Jones-Bartley v. McCabe, Weisberg & Conway*, 59 F.Supp.3d 617, 631 (S.D.N.Y. 2014) (Rule 68 moots the case when the offer is one for judgment, not merely to settle).
8. *Campbell*, supra, slip op. at 1 (Ginsburg, J.).
9. Id. at 8-11. See also id., slip op. at 1-2 (Thomas, J., concurring in the result) ("A defendant's offer...without more—would not have deprived a court of jurisdiction.").
10. Id. at 10-11.
11. Id., slip op. at 1 (Roberts, C.J., dissenting). See also *Genesis Healthcare Corp. v. Symczyk*, ___ U.S. ___, 133 S. Ct. 1523, 1528 (2013).
12. Id. at 2 (discussing Chief Justice Jay's remonstrations to President Washington that Article III and separation of powers principles forbade the judicial branch from rendering advisory opinions in any form whatsoever).
13. Id.
14. Id. at 2-3 and 10.
15. Id. at 2-3 and 10.
16. Id. at 10 (emphasis in the original).
17. Id. at 5.
18. Id. at 10.
19. Id. at 5 n.1.
20. See Rule 68 I at 8.
21. *Campbell*, supra, slip op. at 3-4, 3 n.2, and 4 n.3 (Alito, J., dissenting).