

The Case Goes On, For Now: Seventh Circuit Holds Rule 67 Cannot Moot TCPA Class Action

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In January 2016, the Supreme Court issued its *Campbell-Ewald v. Gomez* decision and definitely ruled that Federal Rule of Civil Procedure 68 **could not** be used to moot the claims of a named plaintiff. Prior to that ruling, courts across the country were split as to whether a defendant could make a complete offer of judgment pursuant to Rule 68—offering to pay all, and sometimes more than, the relief a plaintiff would be entitled to if they won at trial—and thus deprive the plaintiff of standing to continue litigating the case. In other words, courts were split as to whether a plaintiff could keep litigating after they had already won (following an “unconditional surrender” by the defendant).

The Supreme Court, however, left open the issue of whether a plaintiff’s claim could be effectively mooted by depositing the full amount of the claim in an account payable to the plaintiff. Specifically, the Court held:

In sum, an unaccepted settlement offer or offer of judgment does not moot a plaintiff’s case, so the District Court retained jurisdiction to adjudicate Gomez’s complaint. That ruling suffices to decide this case. ***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.*** That question is appropriately reserved for a case in which it is not hypothetical.

Campbell-Ewald Co. v. Gomez, 136 S. Ct. 663, 672 (2016).

Since the *Campbell-Ewald* decision, numerous defendants have sought to test this unresolved issue by depositing the full amount of a claim with the Court through Rule 67. Such a circumstance arose in *Fulton Dental, LLC v. Bisco, Inc.*, a TCPA class action pending in the United States District Court for the Northern District of Illinois. Bisco, following an unsuccessful offer of judgment, filed a motion to deposit \$3,600 with the court pursuant to Rule 67, intending to cover both the plaintiff’s maximum relief as well as any incurred costs. The District Court subsequently granted the motion, holding that “Fulton Dental will have no remaining personal stake in the litigation after receiving maximum statutory damages, injunctive relief, costs, and judgment in its favor.” See 2017 WL 4593825, at *10 (N.D. Ill. Sept. 2, 2016).

Fulton Dental, having just had its putative class action swept from under its feet, appealed to the Seventh Circuit. On June 20, 2017, the Seventh Circuit reversed. In a short opinion, the Court held that, though the Supreme Court left the issue unresolved, there was “no principled distinction between attempting to force a settlement on an unwilling party through Rule 68, as in *Campbell-Ewald*, and attempting to force a settlement on an unwilling party through Rule 67.”

Fulton Dental, LLC v. Bisco, Inc., -- F.3d --, 2017 WL 2641124, at *3 (7th Cir. June 20, 2017).

Though brief, the Seventh Circuit's decision includes two key-if not contradictory-pieces of dicta, in addition to its holding. In the first, the Court strongly implies that a named plaintiff turning down a complete offer of judgment (or refusing to accept a deposit under Rule 67) may have no personal stake in the litigation, and thus "the district judge might well question whether it is the appropriate champion for the class." *Id.* at *4. While a named plaintiff may evade mootness, it may eventually thus lose class certification as an inadequate class representative. This line will no doubt serve as a useful argument in opposing class certification in the Seventh Circuit.

Second, and contradictorily, the Seventh Circuit indicated that named plaintiffs may have a monetary interest in the opportunity to act as class representative. Specifically, the Court stated that "we cannot say as a matter of law that the unaccepted offer was sufficient to compensate plaintiff Fulton for its loss of the opportunity to represent the putative class." *Id.* at *5. If taken at face value, this quote suggests that the opportunity to serve as named plaintiff is independently compensable, separate and apart from the underlying claim. Such a theory, if true, would run directly contrary to longstanding law that "the right of a litigant to employ Rule 23 is a procedural right only, ancillary to the litigation of substantive claims." *Deposit Guar. Nat. Bank, Jackson, Miss. v. Roper*, 445 U.S. 326, 332 (1980).

The key takeaway of *Fulton Dental* is that Rule 67, as a tool for mootting class action cases, is a nonstarter in the Seventh Circuit. Secondly, however, the extent to which Rule 67 can be used to undercut the adequacy of a named plaintiff is very much an open question, and may prove a useful tool moving forward.

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