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Class Actions

Supreme Court Hands Win to TCPA Plaintiffs, Rejects Defendant 'Pick Off' Strategy

BY ALEXIS KRAMER

Class action claims under the Telephone Consumer Protection Act may be harder to fight in light of a U.S. Supreme Court ruling that puts a stop to a common defense strategy.

In a case over the transmission of unsolicited text messages under the federal law, the Supreme Court Jan. 20 ruled 6-3 that defendants can no longer defeat class action suits by offering to pay off the lead plaintiff (*Campbell-Ewald Co. v. Gomez*, 2016 BL 14352, U.S., No. 14-857, 1/20/16).

The decision changes the dynamic for TCPA lawsuits, which often are brought as class actions against companies for allegedly sending unsolicited text messages to mobile phone users.

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JAY EDELSON, EDELSON PC, CHICAGO

The strategy of picking off the lead plaintiff was favorable for TCPA litigation because companies often send text messages to thousands of people, Scott Shaffer, a partner at Olshan Frome Wolosky LLP in New York told Bloomberg BNA Jan. 25. ''It allowed defendants to end a class action for a fraction of the potential liability by addressing only the claims of one individual.''

Among other things, the TCPA, 47 U.S.C. § 227, prohibits sending unsolicited text messages to mobile devices using an automatic telephone dialing system. Plaintiffs may recover ''actual monetary loss'' or $500 for each violation, and damages may be tripled if the defendant willfully or knowingly violated the statute.

New Strategies, But Harder to Succeed? A higher than normal percentage of TCPA cases are filed as class actions, as compared to other types of litigation, because of the $500 per-text or per-call liability, according to Shaffer.

Defense counsel would say that ''picking off'' lead plaintiffs is a good strategy in TCPA class action suits, Jay Edelson, founder of Edelson PC in Chicago, told Bloomberg BNA Jan. 21. Defendants can offer $1,500 per text message—the most money a person can obtain under the statute. If the lead plaintiff is gone and the other class members don't take the lead, the class action could be over.

''The Supreme Court ruling means that defendants will employ new strategies, especially in the text messaging context, but they will be much harder to succeed on and have a serious risk of backfiring,'' Edelson said.

Unaccepted Offer Has No Force, Court Says. Jose Gomez brought a class complaint against Campbell-Ewald Co., alleging that the marketing company sent him unsolicited U.S. Navy recruitment text messages in violation of the TCPA.

Campbell-Ewald offered Gomez $1,503, the value of his claim under the TCPA. Gomez rejected the offer.

Campbell-Ewald moved to dismiss for lack of jurisdiction, arguing that its offer of complete relief mooted both Gomez's individual and class claims. The district court denied the motion, and the U.S. Court of Appeals for the Ninth Circuit affirmed.

An unaccepted settlement offer has no force, the Supreme Court said. ''With the offer off the table, and the defendant's continuing denial of liability, adversity between the parties persists,'' the justices said.

The majority adopted Justice Elena Kagan's dissent in *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523 (2013), a decision involving a collection action under the Fair Labor Standards Act. The majority in that case said an unaccepted offer that completely satisfied a claim would moot an individual plaintiff's claim.

But Kagan, joined by three justices in dissent, said an unaccepted offer of judgment can't moot a plaintiff's individual claims because that offer is a legal nullity with no operative effect.

Here, the court embraced Kagan's analysis, noting that every court of appeals that has considered the issue since *Genesis Healthcare* has also done so.

Jonathan F. Mitchell argued for Gomez.

Latham & Watkins LLP argued for Campbell-Ewald.

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