Supreme Court Rules That Unaccepted Offer of Judgment Does Not Moot Class Action & NLRB Doubles Down on Horton and Expands Its Reach

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Supreme Court Rules That Unaccepted Offer of Judgment Does Not Moot Class Action

An unaccepted settlement offer or offer of judgment does not moot a plaintiff's case, the U.S. Supreme Court ruled this week in *Campbell-Ewald Co. v. Gomez*. In the case, Jose Gomez filed a nationwide class-action on behalf of individuals who had received, but had not consented to receipt of, unsolicited Navy recruiting text messages in violation of the Telephone Consumer Protection Act (TCPA or Act).

Prior to the deadline for filing a motion for class certification, Campbell-Ewald proposed to settle the individual claims and filed an offer of judgment pursuant to Federal Rule of Civil Procedure 68. Campbell-Ewald offered to pay Gomez's costs, excluding attorney's fees, and $1,503 per message that Gomez could show he had received, thereby satisfying his personal treble-damages claim. Campbell-Ewald also proposed a stipulated injunction in which it agreed to be barred from sending text messages in violation of the TCPA. The proposed injunction, however, denied liability and the allegations made in the complaint, and disclaimed the existence of grounds for the imposition of an injunction. The settlement offer did not include attorney fees because the TCPA does not provide for them to be awarded. Gomez did not accept the settlement offer and allowed Campbell-Ewald's Rule 68 submission to lapse. Campbell-Ewald argued that the case should have been dismissed because its offer mooted Gomez's individual claim.

The U.S. Supreme Court ruled that the complaint was not rendered moot by the unaccepted offer to satisfy the individual claim. It held that once Gomez rejected the offer of judgment, it had no continuing effect. Applying principles of contract law, the Court found that absent acceptance, the offer remained only a proposal that was not binding on any party. Thus, there remained a live case or controversy. The Court explained, however, that it was not deciding whether the result would be different if a defendant actually deposits the full amount of the individual claim into an account payable to the plaintiff.

What Does This Case Mean For Employers and Defendants?

Gomez limits the ability of employers and dependents to moot a class action by relying on an unaccepted offer of judgment. However, because the Court did not address the situation when the employer actually delivered the full amount of an individual claim to the plaintiff, this might provide an avenue for attacking putative class action lawsuits. Employers and defendants should consider this and other proactive measures to address class action allegations. For more information, please contact your Miller Canfield attorney or any of the attorneys listed in this alert.

NLRB Doubles Down on Horton and Expands Its Reach

On January 20, 2016, the National Labor Relations Board expanded its rule that waivers of class actions in arbitration provisions are inherently a violation of employees' Section 7 rights under the National Labor Relations Act. In *Century Fast Foods*, a Board majority held that an arbitration provision which did not expressly waive class grievances, but required use of a "confidential binding arbitration … for any claims that arise between me and [the company]," could reasonably be viewed by employees as prohibiting collective arbitration. The Board therefore held that the arbitration

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clause violated Section 8 (a)(1) of the Act as a restraint on protected concerted activity. NLRB Board member Philip Miscimarra provided a strong dissent, noting that the Board's basic rule against class arbitration waivers has been rejected by numerous courts, and suggesting that expansion of the rule was therefore unwarranted. Mr. Miscimarra did however concur that the confidentiality, and other aspects of the provision, could deter employees from filing charges with the Board, and to that extent was unlawful.

Century Fast Foods Inc., the respondent in this case, maintained an arbitration agreement that required employees to use "confidential binding arbitration, instead of going to court, for any claims that arise between me and Taco Bell … ." It further required that in the event of a dispute, prior to initiating arbitration, the employee first "present any such claims in full written detail" to the company; then, "complete any internal [company] review process" and then complete any "external administrative remedy." The charge alleged that the company had violated the Act when it filed a motion to compel arbitration of a class action wage-hour law suit filed under California state law. (The company prevailed on the motion.)

The Board, relying on its decision in *D.B. Horton*, held that maintaining and enforcing the arbitration provision violated Section 8(a)(1) of the Act. Notably the arbitration agreement did not contain any express restriction on class claims, but the Board inferred the restriction from the confidentiality language. Both the majority and the dissent agreed that the confidentiality language independently violated Section 8(a)(1) as it could be read to chill employees' ability to discuss matters of mutual concern. The Board also rejected the company's claim that the arbitration agreement was sufficiently voluntary to be lawful, due to an opt-out provision. The Board rejected the voluntariness argument on the fact, but further held that even if the agreement were "voluntary" it would be unlawful as the confidentiality and other provision amounted to a prospective waiver of the right to engage in protected concerted activity.

What does this mean for employers?

From a practical perspective, employers should review their arbitration agreements for language that could be interpreted as prohibiting employees from discussing matters of mutual concern or placing preconditions on an employee's ability to file a charge, as the panel unanimously agreed these would make the agreement unlawful. Employers who wish to restrict class arbitration expressly can take some comfort from the fact that the lower courts have generally not been receptive to arguments that are based on D.B. Horton when ruling on motions to compel arbitration of individual claims. However, at this point most of the decisions are at the district court level and the matter therefore requires on-going monitoring.

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