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'Gambits' or Just Good Lawyering? Class Action Cases in Supreme Court

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In recent years, the Roberts Court has raised the thresholds for class action plaintiffs and other plaintiffs to bring and sustain their claims. In *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 562 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009), the court announced heightened Rule 8 pleading standards, requiring plaintiffs' claims to rise to a more stringent level of plausibility. In *Wal-Mart v. Dukes*, 131 S. Ct. 2541, 2551 (2011), the court announced more rigorous standards that made it tougher for plaintiffs to establish commonality and predominance under Rule 23 class certification analysis. And in several recent arbitration cases, the court has sided with defendants and required class action plaintiffs to arbitrate their claims out of court.[1] In *AT&T Mobility v. Concepcion*, the court articulated a concern that underlies many of these decisions—that "[f]aced with even a small chance of a devastating loss" as a result of these high-impact claims, "defendants will be pressured into settling questionable claims." *Concepcion*, 563 U.S. at 350.

At the start of this Supreme Court term, the court appeared poised to continue this threshold-raising trend, granting defendants' petitions for certiorari in three class action cases: *Campbell-Ewald Co. v. Gomez,* No. 14-857 (whether an unaccepted settlement offer of relief moots the class action); *Spokeo, Inc. v. Robins*, No. 13-1339 (whether a named plaintiff has Article III standing based only on the violation of a statutorily created right); and *Tyson Foods v. Bouaphakeo*, No. 14-1146 (whether a class may be maintained where there are uninjured members).

> Taken together, 'Campbell-Ewald' and earlier decisions manifest a consistent goal of maintaining the class action device free from manipulation of the process by either side.

During oral argument in all three cases, a majority of the court appeared to lean toward a restrictive approach to class actions, and many commentators expected decisions favoring the defendants in all three. Later during the term, the court granted the defendant's petition for certiorari in *Microsoft Corp. v. Baker*, No. 15-457, another class action case, but the court recently postponed argument in that case until the court's next term, when the court's balance may be substantially different than it was when certiorari was granted.

On Jan. 20, 2016, the court issued its first decision in any of these cases. Surprising many court watchers, the court affirmed the U.S. Court of Appeals for the Ninth Circuit's decision in *Campbell-Ewald* and held that an unaccepted settlement offer of full relief does not moot the action. *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 666 (2016). Its holding prevents defendants from unilaterally ending the class action through an unaccepted Rule 68 offer of judgment, which the court referred to as a "gambit" in order to avoid class liability.

Despite the pro-plaintiff result in *Campbell-Ewald*, there is an underlying logic to the decision that can be squared with the court's recent class-action opinions raising the threshold requirements faced by plaintiffs. By heightening Rule 23 requirements and limiting which types of claims and class members may be in the class, the court limits plaintiffs' ability to use the "gambit" of unsupported or insufficient allegations to coerce settlements from defendants before such "questionable claims" are truly tested in court. See *Concepcion*, 563 U.S. at 350. Taken together, *Campbell-Ewald* and these earlier decisions manifest a consistent goal of maintaining the class action device free from manipulation of the process by either side. Of course, the question remains as to which practices the court views as impermissible procedural "gambits."

Whenever it is decided, *Microsoft v. Baker,* in which the defendant argues that the plaintiffs are engaging in the former type of practice, should shed further light on the court's jurisprudence in this area.

'Campbell-Ewald'

In March 2010, Jose Gomez sued Campbell-Ewald Company (Campbell), alleging a violation of the Telephone Consumer Protection

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Act (TCPA) on behalf of a nationwide class based on unsolicited text messages he received and which had been authorized by Campbell. Campbell eventually offered the plaintiff $1,503 per unsolicited text message and injunctive relief—together representing the full individual relief available to a plaintiff under the TCPA. Campbell simultaneously filed an offer of judgment with the district court pursuant to Federal Rule of Civil Procedure 68, which establishes the procedure for the entry of judgment if an opposing party accepts judgment within 14 days of the offer being made.

When Gomez did not accept the offer, Campbell moved to dismiss the case for lack of subject matter jurisdiction, arguing that the offer of complete relief had mooted Gomez's claim and eliminated the case or controversy under Article III. The district court denied the motion to dismiss and the Ninth Circuit affirmed that holding. See *Gomez v. Campbell-Ewald*, 805 F.Supp.2d 923, 931 (C.D. Cal. 2011); *Gomez v. Campbell-Ewald*, 768 F.3d 871, 874-75 (9th Cir. 2014).

On Jan. 20, 2016, the Supreme Court affirmed the Ninth Circuit's decision in a five-member opinion authored by Justice Ruth Bader Ginsburg, with Justice Clarence Thomas concurring in the judgment, and a three-member dissent authored by Chief Justice John Roberts. Relying on basic principles of contract law, the court held that Campbell's unaccepted Rule 68 offer did not moot the case. *Campbell-Ewald*, 136 S. Ct. at 670. Having declined the defendant's offer, Gomez "remained empty handed," with his complaint "wholly unsatisfied." Id. at 672.

Significantly, the court cited to an earlier case in which it had rejected a similar "gambit" by a defendant, noting that in this case Campbell "sought to avoid a potential adverse decision, one that could expose it to damages a thousand-fold larger than the bid Gomez declined to accept." Id. In support of its holding, the court noted several appellate court decisions, including last year's U.S. Court of Appeals for the Second Circuit decision in *Tanasi v. New Alliance Bank*, 786 F.3d 195, 199–200 (2d Cir. 2015) (holding that an unaccepted Rule 68 offer did not moot plaintiff's case and a district court "should not enter judgment against the defendant if it does not provide complete relief").

The protection *Campbell-Ewald* offers class action plaintiffs may be largely illusory. Notwithstanding its holding on mootness, the court noted that it was not deciding "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," reserving that question "for a case in which it is not hypothetical." *Campbell-Ewald*, 136 S. Ct. at 672.

Two recent district court decisions within the Second Circuit have addressed that scenario or a similar one, reaching contrary results.[2] Future case law on this likely recurring scenario will define the practical impact of *Campbell-Ewald.*

'Microsoft v. Baker'

On Jan. 15, 2016, the court agreed to review *Microsoft v. Baker*, a Ninth Circuit decision concerning the ability of plaintiffs to dismiss with prejudice a putative class action complaint voluntarily in order to create a "final judgment" on class certification that is ripe for appellate review. If it is decided in accordance with *Campbell-Ewald,* how the court resolves *Microsoft* will hinge on whether a majority of the court's members views the plaintiffs' practice as an impermissible "gambit" or as an acceptable way to obtain timely judicial review of a substantive district court ruling.

In late 2005, Microsoft began selling the Xbox 360 video game console. In 2007, a putative class of Xbox owners sued Microsoft, alleging that a design defect in the Xbox scratched their game discs and rendered them permanently unusable. The district court denied class certification, finding that individual issues would predominate under Rule 23(b), in part because only 0.4 percent of Xbox owners reported having experienced the disc-scratching problem, and thus any defect did not uniformly manifest itself in the Xbox. *In re Microsoft Xbox 360 Scratched Disc Litig.*, No. C07-1121-JCC, 2009 WL 10219350, at *7 (W.D. Wash. Oct. 5, 2009). The plaintiffs did not appeal.

In 2011, a putative class of plaintiffs filed a new action against Microsoft asserting the same claims at issue in the 2005 case but claiming that an intervening Ninth Circuit decision had changed the law. Defendants moved to strike the complaint's class action allegations. Granting defendants' motion, the court adopted a rule from a treatise published by the American Law Institute, which provides that a prior denial of class certification on the same subject matter should be afforded a rebuttable presumption of correctness.

The court held that the presumption had not been rebutted, and it struck plaintiffs' class action allegations. *Baker v. Microsoft*, 851 F.Supp.2d 1274, 1280 (W.D. Wash. 2012). After the Ninth Circuit denied plaintiffs' interlocutory appeal petition, the parties stipulated to dismiss the case voluntarily with prejudice without any type of settlement. With a final judgment in hand, the plaintiffs appealed as of right to the Ninth Circuit.

The Ninth Circuit rejected Microsoft's argument that the circuit court did not have appellate jurisdiction to consider the case under 28 U.S.C. §1291. The court held that because the parties' stipulated dismissal of the action did not include any type of settlement, the parties "retain[ed] sufficient adversity to sustain an appeal." *Baker v. Microsoft*, 797 F.3d 607, 612 (9th Cir. 2015). The court then reversed the district court's decision to strike the class allegations, holding that the lower court had misinterpreted the intervening Ninth Circuit opinion regarding class certification. Id. at 615.

Petitioning to the Supreme Court, Microsoft appealed only the jurisdictional holding, presenting a single question for review: "Whether a federal court of appeals has jurisdiction to review an order denying class certification after the named plaintiffs voluntarily dismiss their claims with prejudice." Microsoft relied upon *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978), in which the Supreme Court held that interlocutory review of the denial of class certification is discretionary. In that case, the court rejected the "death knell" doctrine, in which several circuits had held that interlocutory review of class certification denial was mandatory if

such a denial was tantamount to the "death knell" of plaintiffs' case.

In its petition, Microsoft argued that the plaintiffs' "voluntary dismissal tactic" was an end run around Coopers & Lybrand, and that there was neither jurisdiction nor a case or controversy sufficient to support appellate review. Microsoft suggested that the court should review the case in part because there was a 5-2 circuit split against this tactic. It noted that the Second Circuit was in the minority of courts allowing the tactic, citing *Gary Plastic Packaging v. Merrill Lynch, Pierce, Fenner & Smith*, 903 F.2d 176 (2d Cir. 1990). In their opposition brief, the plaintiffs argued that there had been no denial of class certification; rather, the district court had struck the class allegations from the complaint. The plaintiffs also deemed the circuit split "illusory."

On Jan. 15, 2016, the Supreme Court granted Microsoft's petition for certiorari. The court stated it would consider: "Whether a federal court of appeals has jurisdiction under both Article III and 28 U.S.C. §1291 to review an order denying class certification after the named plaintiffs voluntarily dismiss their individual claims with prejudice." Although the court initially agreed to hear the case in its current term, it recently announced that argument would be postponed until the following term. The nomination and confirmation of a justice to replace Justice Antonin Scalia, who has consistently voted for the interests of class-action defendants, could have a substantial effect on the outcome of *Microsoft v. Baker*.

Acceptable Gambit?

Microsoft's petition repeatedly refers to the plaintiffs' voluntary dismissal and appeal as a "tactic," evoking the type of gaming of the system the court has recently rejected. Citing to the court's concern with defendants being pressured into settlements articulated in *Concepcion*, Microsoft referred to the plaintiffs' conduct as a "one-way ratchet [that] distorts litigation and settlement incentives."

One amicus brief laid out the perceived manipulation in even clearer terms, calling it a "one-way street for opportunistic plaintiffs looking to force defendants into high-dollar settlement through multiple appeals despite the existence of a meritorious defense." The U.S. Court of Appeals for the Third Circuit, addressing the practice in the Fair Labor Standards Act collective action context, deemed it a "procedural sleight-of-hand to bring about finality" and dismissed the appeal for lack of jurisdiction. *Camesi v. Univ. of Pittsburgh Med. Ctr.*, 729 F.3d 239, 245-46 (3d Cir. 2013).

As the parties' briefs note, the Second Circuit in *Gary Plastic* allowed appellate review of a class certification denial after the named plaintiffs' claims were dismissed for failure to prosecute—a holding that would support the plaintiffs' position in *Microsoft v. Baker*. In fact, there appear to be several recent instances in which plaintiffs within the Second Circuit appealed class certification denials following voluntary dismissal of their claims.[3]

> How the court resolves 'Microsoft v. Baker' will hinge on whether a majority of the court's members views the plaintiffs' practice as an impermissible "gambit" or as an acceptable way to obtain timely judicial review of a substantive district court ruling.

The plaintiffs in *Microsoft v. Baker* may look to *Gary Plastic* for ways to frame their approach as a valid use of class action procedure to obtain a review of a substantive decision by the district court on their claims. In *Gary Plastic*, the Second Circuit held that the concerns the Supreme Court had with the "death knell" doctrine—such as the discretionary nature of courts "formulating an appealability rule" and the "waste of judicial resources" in determining when the denial of class certification was the "death knell" of the plaintiffs' action, among others—were not present where the named plaintiffs' claims were dismissed with prejudice.

Under this view, the plaintiffs' dismissal of their individual claims with prejudice and subsequent appeal is a straightforward review of a final order. Even if a "gambit," it is only available to named plaintiffs "who risk forfeiting their potentially meritorious individual claims," *Gary Plastic*, 903 F.2d at 179. Moreover, given the impracticality of taking individual plaintiffs' claims, which may be for very small amounts of money, all the way to summary judgment or trial, the Supreme Court may find it an acceptable gambit.

Conclusion

However *Microsoft v. Baker* is resolved, the court's decision will speak to whether the underlying logic to this body of law will continue with a focus on preventing parties from short-circuiting the consideration of sound class action claims or sustaining weak claims beyond the case's earliest stages. And whoever the new justice appointed to the court may be, and whenever that appointment may come to pass, that justice may have a heavy influence on the underlying balance between these two objectives. By the end of the court's next term, we will have a clearer picture of which practices are improper gambits and which are valid efforts to sustain a party's "day in court."

1. *DirectTV, Inc. v. Imburgia*, 136 S. Ct. 463, 467 (2015); *Am. Exp. Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2312 (2013); *AT&T Mobility v. Concepcion*, 563 U.S. 333, 344 (2011).

2. Compare *Franco v. Allied Interstate*, No. 13-CV-4053, 2015 WL 7758534, at *3 (S.D.N.Y. Nov. 30, 2015) (entering judgment for plaintiff following defendant's offer of "complete relief" and finding case moot) with *Brady v. Basic Research*, No. 13-CV-7169, 2016 WL 462916, at *2 (E.D.N.Y. Feb. 3, 2016) (denying defendants leave to deposit full amount of plaintiffs' claim in account because Campbell-Ewald required a "fair opportunity to show that certification is warranted").

3. See, e.g., See, e.g., *Steginsky v. Xcelera*, No. 12-cv-188 (D. Conn. 2015); *Vincent v. Money Store*, No. 11-cv-7685 (S.D.N.Y. 2015).