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Class Actions: Supreme Court Hears Argument On Whether A Class Action Is Mooted When Named Plaintiff Is Offered Complete Settlement

In mid-October, the United States Supreme Court heard oral arguments in *Campbell-Ewald Co. v. Gomez*, a case posing two important questions for class action defendants: (1) "Whether a case becomes moot, and thus beyond the judicial power of Article III, when the plaintiff receives an offer of complete relief on his claim"; and (2) "Whether the answer to the first question is any different when the plaintiff has asserted a class claim under Federal Rule of Civil Procedure 23, but receives an offer of complete relief before any class is certified."

In *Campbell-Ewald*, a plaintiff (Gomez) filed a class action under the Telephone Consumer Protection Act (TCPA), alleging that he and others had received unsolicited Navy recruiting text messages from a mobile marketing contractor. Before the class was certified, the marketing contractor offered Gomez over US$1500 per violation—three times more than the statutory damages that Gomez would receive if he prevailed—plus costs and a stipulation to an injunction.

From the transcript of oral argument, a number of Justices (Roberts, Scalia) appeared concerned as to whether the required "adversity" still exists between the parties after the plaintiff is offered complete relief. And we know from their dissent in an earlier case, *Genesis HealthCare Corp. v. Symczyk*, that four justices (Kagan, Sotomayor, Ginsberg, and Breyer) believe that an unaccepted settlement offer is not enough to moot a plaintiff's interest in the controversy. The outcome of this case may therefore depend on which way Justice Kennedy comes down. Alternatively, late in the argument, Justice Breyer suggested that if the defendant actually delivered a check to a court for complete payment of the claims, the court would then be free to enter a judgment for the named plaintiff "who has gotten everything that he asked for" and end the class action entirely. It seems at least possible that five justices might be willing to sign on to such an approach.

Class Actions: Southern District of California Denies Nordstrom's Motion To Dismiss Class Action Complaint For Lack Of Standing In False Advertising Case

On October 9, the United States District Court for the Southern District of California denied Nordstrom's motion to dismiss in a class action alleging that price tags at the retailer's Nordstrom Rack locations were misleading in violation of California false advertising laws. The complaint in *Branca v. Nordstrom, Inc.* alleged that price tags on clothing sold at Nordstrom Rack locations contained deceptive "Compare At" prices, which implied that the clothing items were more deeply discounted than they actually were. In its motion to dismiss, Nordstrom argued that the plaintiff lacked standing to represent the class because the class was comprised of people who had bought items of clothing from Nordstrom Rack that the plaintiff had not himself purchased. The district court rejected this argument, reasoning that "the differences across the products are of little import to the alleged misrepresentations," which related primarily to the "consistent format of the tags, i.e., the juxtaposition of two prices, one higher than the other, the term 'Compare At' and a percentage, labeled '% Savings.'" The district court also noted that "all of the products are marketed to the same consumers, Nordstrom Rack

shoppers."

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