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## Post-Judgment Tender Cannot Trigger Unaccepted Rule 68 Offer

Matthew S. Mulqueen – May 19, 2017



An unaccepted [Rule 68](#) offer of judgment is a legal nullity, even if the defendant tenders the full amount of the plaintiff's claim after a judgment, according to a new opinion from the U.S. Court of Appeals for the Second Circuit. The opinion is one of several to interpret the U.S. Supreme Court's decision in *Campbell-Ewald Co. v. Gomez*, which left open the possibility that certain unaccepted Rule 68 offers might effectively stop a putative class action.

### Post-Judgment Tender Results in Dismissal of Case

In *Radha Geismann, M.D., P.C. v. ZocDoc, Inc.*, ZocDoc, a Delaware corporation, allegedly sent two unsolicited faxes to Geismann, a Missouri medical corporation, advertising a "patient matching service" for doctors. Unhappy with the faxes, Geismann filed a class action lawsuit in Missouri state court accusing ZocDoc of violating the [Telephone Consumer Protection Act](#).

Geismann filed a motion for class certification the same day that it filed the complaint. Geismann told the court that the motion was intended to head off any attempts by ZocDoc to "pick off" the sole class representative with an offer to settle the representative's individual claims. After ZocDoc removed the case to the U.S. District Court for the Eastern District of Missouri, Geismann's concern materialized. ZocDoc made an offer of judgment to Geismann pursuant to Federal Rule of Civil Procedure 68 for an amount of money that, in ZocDoc's view, surpassed what Geismann could hope to recover individually at trial. Geismann rejected the offer.

ZocDoc successfully transferred the action to the Southern District of New York and moved to dismiss the action for lack of subject matter jurisdiction. The court granted the motion, holding that the rejected offer would have afforded Geismann complete relief on its individual claims and therefore rendered the entire action moot, notwithstanding the pending class certification motion. The court entered judgment in Geismann's favor and dismissed the action.

### Dismissal Is Reversed on Appeal

Geismann appealed. While the appeal was pending, the U.S. Supreme Court decided *Campbell-Ewald Co. v. Gomez*. In a majority opinion authored by Justice Ruth Bader Ginsburg, the Court held that an unaccepted settlement offer is a legal nullity with no operative effect. The Court specifically declined



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to decide whether the result would be different if a defendant deposited the full amount of the plaintiff's individual claim in an account payable to the plaintiff, and the court then entered judgment for the plaintiff in that amount.

Seizing on this language, ZocDoc requested permission from the district court to deposit a check in the amount of the judgment with the district court clerk. There the money sat until the U.S. Court of Appeals issued an opinion reversing the district court's judgment. The appellate court concluded that *Campbell-Ewald* controlled the outcome and that ZocDoc's unaccepted offer was a legal nullity. ZocDoc's post-judgment deposit with the district court clerk did not change that result, said the appellate court, because the deposit was made after a judgment that should not have been entered in the first place.

### Courts Reach Varying Results Following *Campbell-Ewald*

The appellate court reached the right decision, says [Kathryn Honecker](#), Scottsdale, AZ, cochair of the [ABA Section of Litigation's Consumer Litigation Committee](#). "It would turn the law of contracts on its head if the simple act of making an offer, even though that offer is unaccepted or affirmatively rejected, could unilaterally create a contractual relationship and obligations," adds Honecker. The opposite result would "destroy the class action procedure and the concept of due process for absent class members" by allowing a defendant, for example, "to only make offers under Rule 68 to the named plaintiffs with the best cases, leaving the class either unrepresented or left to be represented by plaintiffs with weaker cases or less competent counsel," explains Honecker.

"Many defendants have tried to mimic the hypothetical from *Campbell-Ewald*," observes Honecker. In response to such attempts by defendants, courts have reached varying conclusions, "many of which are difficult to square," says [Robert J. Herrington](#), Los Angeles, CA, cochair of the Emerging Issues Subcommittee of the Section of Litigation's [Class Actions & Derivative Suits Committee](#). For example, courts in the Eighth Circuit have held that tendering a check for the full amount of a plaintiff's claim does not moot a putative class action where the plaintiff rejects the tender while at least one court in the Fourth Circuit has indicated that an unconditional tender of the full amount of plaintiff's individual claim would moot the case.

Herrington points to another decision from the Second Circuit just a month prior to its decision in *ZocDoc*. In *Leyse v. Lifetime Entm't Servs., LLC*, the Second Circuit affirmed entry of judgment based on an unaccepted Rule 68 offer of judgment where the defendant made an unaccepted offer—and deposited the full amount of damages and costs recoverable in an account payable to the plaintiff—after the denial of class certification and before the district court entered judgment.

Reading *ZocDoc* and *Leyse* together suggests that "(i) an offer of judgment made before class certification is decided may not provide a basis to avoid a decision on the certification issues; (ii) an offer of judgment needs to be for the complete relief requested by plaintiff; and (iii) depositing the full amount of plaintiff's individual claim in an account payable to plaintiff is likely necessary for a district court to be able to enter judgment based on an unaccepted Rule 68 offer," concludes Herrington.

[Matthew S. Mulqueen](#) is an associate editor for *Litigation News*.

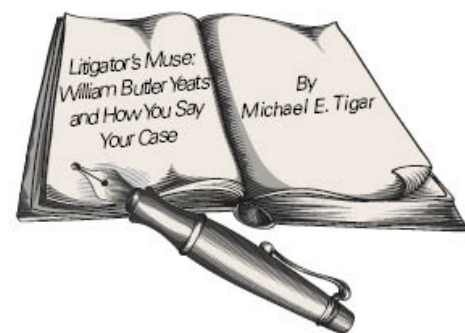
**Keywords:** Rule 68, offer of judgment, TCPA, class actions

### Related Resources

- » [Campbell-Ewald Co. v. Gomez](#), --- U.S. ----, 136 S.Ct. 663, 193 L.Ed.2d 571 (2016).
- » [Leyse v. Lifetime Entm't Servs., LLC](#), --- Fed.Appx. ----, No. 16-1133-CV, 2017 WL 659894, at \*3 (2d Cir. Feb. 15, 2017).
- » [Radha Geismann, M.D., P.C. v. ZocDoc, Inc.](#), --- F.3d ----, No. 14-3708, 2017 WL 929165, at \*6 (2d Cir. Mar. 9, 2017).
- » [Heather McCombs, D.P.M., L.L.C. v. Cayan LLC](#), No. 15 C 10843, 2017 WL 1022013, at \*4 (N.D. Ill. Mar. 16, 2017).
- » [Bell v. Survey Sampling Int'l, LLC](#), No. 3:15-CV-1666 (MPS), 2017 WL 1013294, at \*5 (D. Conn. Mar. 15, 2017).
- » [Getchman v. Pyramid Consulting, Inc.](#), No. 4:16 CV 1208 CDP, 2017 WL 713034, at \*3 (E.D. Mo. Feb. 23, 2017).
- » [Pankowski v. Bluenrgy Grp. Ltd.](#), No. CV H-15-1668, 2016 WL 7179122, at \*3 (S.D. Tex. Dec. 9, 2016).
- » [Price v. Berman's Auto., Inc.](#), No. 14-763-JMC, 2016 WL 1089417, at \*3 (D. Md. Mar. 21, 2016).
- » [South Orange Chiropractic Center, LLC v. Cayan LLC](#), No. 15-13069, 2016 WL 1441791, at \*5 (D. Mass. Apr. 12, 2016)
- » [Federal Rule of Civil Procedure 23](#).
- » [Federal Rule of Civil Procedure 68](#).
- » [Telephone Consumer Protection Act, 47 U.S.C. § 227](#).

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