The Unaccepted Offer of Judgment: Implications for Statutory Violation Claims

Almost every business that interacts with the general public has potential liability for a myriad of statutory violation claims. For instance, if you sell sandwiches, and refer to them as "Footlong," but they, in fact, are not twelve inches long, you may have opened your business up to liability under the New Jersey Consumer Fraud Act, N.J.S.A. 56:8-1, *et seq*. (the "NFCFA"). If you are responsible for collecting debts and unintentionally contact a represented debtor by mail, you may be liable under the Fair Debt Collections Practices Act ("FDCPA"), 15 U.S.C. § 1601, *et seq*. If you are the "Papa" of pizza frachisors, and advertise your pizza by text message, you may eventually pay $16.5 million to settle a class action brought under the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227, *et seq.* If you own a fitness center and fail to comply with the NJCFA, or any other clearly established legal right, you may be alleged to be responsible under the New Jersey Truth-in-Consumer Contract, Warranty and Notice Act ("TCCWNA"), N.J.S.A. 56:12-14, *et seq*. And so it goes, as claims in New Jersey are rampant under NJCFA, TTCWNA, FDCPA, TCPA, and countless others. Unsurprisingly, a good number of the complaints filed under these statutes are brought on a class-wide basis.

As with many class actions, and statutory claims, one of the motivations to keep the case moving forward is the potential for attorneys' fees, to be paid to plaintiff's counsel, associated with an eventual, post-discovery settlement. To be sure, these statutes generally provide for fee-shifting and the imposition of attorneys' fees, not to mention the defendant's own litigation costs. Although several public-facing, contract-based systems have instituted class action waivers and arbitration clauses in their agreements (see, e.g., AT&T Mobility v. Concepcion, 563 U.S. 333 (2011)), such waivers are much less feasible in conducting day-to-day business with the general public. Thus, costly litigation invariably ensues.

By way of example, and as alluded to above, in the recent "Subway Footlong" Class Action, Doctors Associates, Inc. (i.e. Subway) was sued for allegedly deceptive and unfair advertising, sales and marketing practices regarding the length of "Footlong" subs. In that case, which amicably settled on a class-wide basis, the Plaintiffs received no monetary benefit, other than "practice changes" within the Subway system, whereas the attorneys received approximately $520,000. See In Re: Subway Footlong Sandwich Marketing and Sales Practices Litigation, Civil Action No.: 2:13-md-02439-LA (E.D. Wis. December 31, 2013).

In light of these motivating factors, defendants (particularly, class action defendants) may be tempted to offer a plaintiff the maximum statutory award permissible in hopes of quashing the suit (and attorneys' fees claim) at the earliest possible stage. This seems to be prudent, given the costs associated with litigating class-wide claims. However, in light of a recent decision from the Supreme Court of the United States, defendants may no longer be incentivized to make such an early offer.

On January 20, 2016, Associate Justice Ruth Bader Ginsberg issued a 6-3 decision that may change the landscape of statutory litigation (and negotiation) for a long time to come.

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Specifically, in Campbell-Ewald Co. v. Gomez, No. 14-857, the Supreme Court held that a class action complaint is not effaced by a Defendant's unaccepted offer to satisfy the individual plaintiff's claims in full.

By way of background, Campbell-Ewald Company ("Campbell") is a nationwide advertising and marketing company. Campbell was engaged to execute a multimedia recruiting campaign for the United States Navy and, in 2005 and 2006, Campbell sent messages to individuals, stating:

> Destined for something big? Do it in the Navy. Get a career. An education. And a chance to serve a greater cause. For a FREE Navy video call [phone number].

In total, the Navy's message was transmitted to over 100,000 recipients. A recipient of these text messages, Jose Gomez, filed a class action complaint in the District Court for the Central District of California in 2010. Therein, Gomez alleged that the text messages were unwanted, and that Campbell had violated the TCPA. Gomez sought treble statutory damages, costs, and attorneys' fees, and an injunction against Campbell's involvement in future unsolicited messaging.

Prior to the deadline to file a motion for class certification, Campbell proposed to settle Gomez's individual claims and filed an Offer of Judgment pursuant to Fed. R. Civ. P. 68. At that time, Campbell agreed to pay Gomez (the then-sole class representative) his costs, excluding attorney's fees, and $1,503 per text message for any messages Gomez could show he received, thereby satisfying his personal treble-damages claim. Campbell also agreed to an injunction, but denied liability. Gomez did not accept the settlement offer and allowed the Offer of Judgment to lapse.

Thereafter, Campbell moved to dismiss for lack of subject-matter jurisdiction, alleging that no Article III case or controversy remained because its offer mooted Gomez's individual claims by providing him with "complete relief." While the District Court denied Campbell's motion, the case was eventually elevated to the Court of Appeals for the Ninth Circuit, which held that Gomez's claims were not mooted by Campbell's offer. The Supreme Court then granted *certiorari*, in light of a split in the various Circuit Courts, to determine whether an unaccepted offer can moot a plaintiff's claim, thereby depriving federal courts of Article III jurisdiction. Ultimately, the Supreme Court held that an unaccepted offer cannot moot a plaintiff's claim. The Opinion of the Court stated:

> Under basic principles of contract law, Campbell's settlement bid and Rule 68 offer of judgment, once rejected, had no continuing efficacy. Absent Gomez's acceptance, Campbell's settlement offer remained only a proposal, binding neither Campbell nor Gomez. Having rejected Campbell's settlement bid, and given Campbell's continuing denial of liability, Gomez gained no entitlement to the relief Campbell previously offered. In short, with no settlement offer still operative, the

> parties remained adverse; both retained the same stake in the litigation they had at the outset.

No. 14-857, pp. 8 – 9 (internal citations omitted). Given the Supreme Court's ruling, this decision may have long-term effects on the way businesses approach class action and traditional litigation. Of course, if the dissent had its way, and Gomez's claims were moot, the future of class action litigation would have been non-existent or, undoubtedly, nothing like we know it today.

Notwithstanding this decision, all hope is not lost for businesses in statutory violation litigation. First, a defendant can attempt to make an offer of judgment while admitting liability and offering to pay attorneys' fees, which Campbell refused to do, in hopes of distinguishing their case from the recent decision of the Supreme Court. Alternatively, in a class action, the defendant can seek to strike the class allegations before a responsive pleading is filed. See N.J. Ct. R. 4:32-1, *et seq*.; see also Fed. R. Civ. P. 23. If that does not work, a defendant could admit liability, in a pleading before the Court, and make payment into the Court, in hopes of stopping the continued rise in attorneys' fees. This is akin to a party seeking affirmative summary/dispositive relief against itself. This may be advantageous, as most fee-shifting statutes only permit *reasonable* attorneys' fees. See Rendine v. Pantzer, 141 N.J. 292 (1995); see also Walker v. Giuffre, 209 N.J. 124 (2012). It would flow that, if liability and damages have been admitted by the defendant, any attorneys' fees after that time are *unreasonable*. While the Supreme Court acknowledged this potential approach, where the court could enter judgment for the plaintiff in the deposited amount, the Supreme Court chose not to decide the merits of such a "hypothetical" case.

Ultimately, there are a number of ways business can try and reduce their ultimate financial liability on statutory-based claims; however, everyone will have to wait to see how the Supreme Court rules on the next case that could come down the pike.

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