

## Court Holds that Pre-Suit Offer Did Not Moot Claims

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The U.S. District Court for the Southern District of Florida recently held that a defendant's *pre-suit* proffer of a settlement check and a letter promising not to violate the TCPA in the future did not moot the plaintiff's claims because the plaintiff did not accept the offer. [Edelsberg v. Brea Fin. Gp., LLC, No. 18-cv-62119, 2019 WL 1302828 \(S.D. Fla. Eb. 26, 2019\)](#). The case highlights the ongoing litigation regarding Article III standing in the wake of the U.S. Supreme Court's decision in *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663 (2016).

In *Campbell-Ewald Co. v. Gomez*, a narrow majority of the Supreme Court held that an unaccepted offer of judgment pursuant to Federal Rule of Civil Procedure 68 does not render a plaintiff's claim moot. *Id.* at 673. In so holding, the majority was careful to distinguish between merely offering relief (which, the majority held, creates neither an "obligation" to provide nor an "entitlement" to receive relief) and *actually providing* relief that fully redresses the claim (which, one might reasonably presume, should end the case because there is no longer a real dispute for the court to adjudicate).

The *Edelsberg* case involved a slightly different fact pattern because the defendant submitted a check and a letter to the plaintiff before the plaintiff even filed his lawsuit. 2019 WL 1302828 at \*1. Specifically, prior to filing his lawsuit, the plaintiff sent the defendant a pre-litigation demand letter alleging that the defendant violated the TCPA when it sent him a telemarketing text message using an ATDS. *Id.* The defendant responded by sending the plaintiff a cashier's check totaling \$3,000 payable to the plaintiff. *Id.* The defendant also included a letter that denied any TCPA violation and stated that the defendant would not violate the TCPA in the future. *Id.*

The plaintiff rejected the check and the terms of the accompanying letter and subsequently filed a putative class action. *Id.*

The defendant filed a motion to dismiss for lack of subject matter jurisdiction, which argued that its settlement offer mooted the plaintiff's entire action because the offer provided compensation over-and-above the amount available as damages under the TCPA and because the letter pledged not to send future messages in violation of the TCPA. *Id.* The defendant argued that *Campbell-Ewald* was distinguishable because, here, the defendant made its offer *prior* to the date the plaintiff filed his complaint. *Id.* at \*2. Whereas, in *Campbell-Ewald*, the defendant issued its offer *after* the plaintiff filed his complaint. *Id.*

The court applied the Seventh Circuit's decision in *Laurens v. Volvo Cars of North America, LLC*, 868 F.3d 622 (7th Cir. 2017), and rejected the defendant's argument. *Id.* The court reasoned that *Laurens* involved similar facts and the Seventh Circuit rejected a virtually identical argument. *Id.* The court quoted the following language from the *Laurens* decision:

The only salient differences between this case and *Campbell-Ewald* are that [the defendant] made its offer before [the plaintiff] sued, and that it communicated its offer through a generic letter instead of Rule 68's more formal process. Neither distinction matters . . . . *Campbell-Ewald's* core lesson is that unaccepted contract offers are nullities; settlement proposals are contract offers; and therefore unaccepted settlement proposals are nullities. Nothing about that logic turns on whether a suit has been filed.

*Id.* (quoting *Laurens*, 868 F.3d at 627).

The *Edelsberg* decision shows that some courts continue hold that a rejected pre-suit settlement offer may not be sufficient to moot a plaintiff's putative class action complaint. Nonetheless, as we have previously argued, the submission of funds into a court's account pursuant to Rule 67 should moot a plaintiff's claim because Rule 67 does not relate to "offers." Rule 67 creates a mechanism for depositing money into an interest-bearing account, and actually anticipates that a defendant can seek leave to make such a deposit if the defendant no longer "claims any of it" as its own. Depositing funds with the court under Rule 67 and disclaiming any interest in the money is the functional equivalent of depositing the funds directly into the plaintiff's bank account. Several of the *Campbell-Ewald* justices even suggested that the tender of complete relief would be sufficient to render claims moot.

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