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TCPA Row Gives Justices Chance To Pare Class Actions

By **Allison Grande**

Law360, New York (May 18, 2015, 9:35 PM ET) -- The U.S. Supreme Court on Monday agreed to weigh in on whether businesses that are sued under the Telephone Consumer Protection Act can head off costly litigation by making a settlement offer to individual plaintiffs, a decision that could help reduce swelling class action dockets.

The Supreme Court's decision in this TCPA case could help trim burgeoning class action dockets. (Credit: Getty)

The issue taken up by the justices was raised by longtime U.S. Navy advertising partner Campbell-Ewald Co., which brought the dispute to the high court after the Ninth Circuit ruled in September that the company could be held liable for naval recruitment messages it sent to about 100,000 people in 2006 through subcontractor MindMatic LLC, which isn't named in the suit.

The company had argued that plaintiff Jose Gomez's case was mooted since it offered him $1,503 for each unsolicited text message — more than three times the statutory amount of $500 per violation — but the Ninth Circuit in remanding the case joined the Eleventh Circuit in rejected the contention and instead revived the suit on the grounds that derivative sovereign immunity did not shield the contractor from federal tort liability.

"The Supreme Court's decision to review this issue could be a game changer," said Lauri Mazzuchetti,

the co-chair of Kelley Drye & Warren LLP's TCPA practice. "A favorable decision would go a long way to curbing the abusive lawsuits that have plagued this area of the law."

Spurred by unclear statutory language and uncapped damages of $500 to $1,500 per violation, the plaintiffs class action bar has significantly stepped up its filing of TCPA litigation in recent years.

The result has been companies ranging from Twitter Inc. to Capital One Financial Corp. being hit with putative class actions alleging the dissemination of hundreds or even millions of unsolicited calls, faxes or texts in violation of the statute.

Because of the potential for eye-popping statutory payouts, many companies choose to go the settlement route instead of contesting thorny issues such as what constitutes an autodialer or third-party liability, topics that companies to no avail have urged the Federal Communications Commission to resolve.

The petition now before the high court tackles the question of whether defendants can strategically offer individual plaintiffs the relief necessary to make them whole at the outset of the litigation in order to avoid a long court battle or a potential multimillion-dollar class action settlement down the line.

"The question comes up frequently in the context of TCPA class actions because TCPA cases often involve requests for staggering amounts of statutory damages and businesses are therefore understandably eager to find ways to address the concerns of a named plaintiff without the added burden of the massive transaction costs of a class action," Mayer Brown LLP litigation partner Archis Parasharami said.

While the practice is common in TCPA cases, attorneys were quick to point out that the justices' decision is likely to have a much wider impact on defendants' ability to offer settlements to moot consumer class action claims, especially in case that involve a statute such as the TCPA under which damages can be easily calculated.

"The most welcome aspect of this is that the Supreme Court has the chance to add clarity not just in the TCPA area but other types of potential class actions by saying at what point is it possible to settle with the main plaintiff and negate class action claims," Sutherland Asbill & Brennan LLP partner Lewis Wiener said.

In the instant matter, Campbell-Ewald contends it offered the plaintiff the statutory maximum of treble damages per violation under the TCPA. If the high court departs from the Ninth Circuit and finds that offers of complete relief under Rule 68 moot class action claims, defendants would be free to head off class claims in cases where an earlier settlement would likely be more cost-effective than continuing to litigate, attorneys say.

"There are many ways by which the court could level the playing field, including by addressing Rule 68 offers of judgment in the present Campbell-Ewald appeal and holding that an offer of full relief to the lead plaintiff — whether accepted, rejected or ignored — moots the plaintiff's claim," said Martin Jaszczuk, Locke Lord LLP's TCPA class action litigation section head. "Either way, this case presents the high court with an excellent opportunity to put an end to opportunistic class actions that provide little meaningful benefits but hurt well-meaning American businesses."

The ruling would be especially significant for TCPA litigation, given that the statute has largely been

perceived as a vehicle for the plaintiffs bar to rack up lofty rewards as well as attorneys' fees that are not provided for by the statute, attorneys noted.

"The main hope is that the Supreme Court will be able to insert some rationality into TCPA litigation, which has been becoming more and more absurd as time passes and class action attorneys are aggressively latching onto the TCPA and its uncapped statutory damages," Snell & Wilmer LLP partner Becca Wahlquist said.

On the other hand, the high court could instead decide to side with the plaintiff's argument that allowing defendants to make individual plaintiffs whole would unfairly pick off class actions, especially in cases where not many consumers have come forward to complain.

"What we're likely to see more of if the Supreme Court sides with the Ninth Circuit is more of placeholder litigation where the plaintiffs file a placeholder motion for class certification even though all of the elements may not be known yet," Wiener said.

Sheppard Mullin Richter & Hampton LLP partner David Almeida pointed out that even a narrowly crafted ruling in favor of offering these types of settlements could leave the door open for plaintiffs to continue to push their cases, noting that even in the Seventh Circuit where mooting is permissible, nearly every plaintiffs lawyer files a boilerplate motion for class certification along with their complaint.

"The only way I would foresee Gomez being impactful would be if the Supreme Court reversed and did not endorse the [Seventh Circuit] rule either; meaning if the Supreme Court said, 'A defendant can moot the claims of the class representative by tendering a Rule 68 offer and the mere filing of a boilerplate motion for class certification does not do anything to preserve those claims,'" he said. "In that instance, district courts would be faced with determining whether plaintiffs moved for class certification as early as practicable as is the standard under Rule 23."

While it's impossible to predict which way the Supreme Court will rule, attorneys did note that some clues may be found in the high court's 2013 decision Genesis HealthCare v. Symczyk, in which the justices gave employers a green light to use the pickoff settlement strategy in collective actions under the Fair Labor Standards Act.

"The reasoning and analysis in Genesis HealthCare could be an indicator that the Supreme Court is receptive to the argument being presented by the cert petition," said Kristy McAlister Brown, the chair of Alston & Bird LLP's telecommunications and technology and privacy litigation practice teams.

However, Brown pointed out that the Genesis decision came with a scathing dissent by Justice Elena Kagan, which the plaintiff in the Campbell-Ewald case has pointed to in briefs as evidence that such settlements are not permissible.

"In the two years since Genesis HealthCare was decided, there has been a great deal of litigation — and disagreement — over whether an offer of judgment that would give full individual relief to the named plaintiff moots the plaintiff's claim and accordingly precludes him or her from proceeding with a class action," Parasharami said. "The grant of review in Campbell-Ewald is welcome news because the court's decision in the case will provide lower courts and class action practitioners with much-needed guidance on the issue."

The plaintiffs are represented by Suzanne L. Havens Beckman and David C. Parisi of Parisi & Havens LLP,

Michael J. McMorrow of McMorrow Law PC, Myles McGuire and Evan M. Meyers of McGuire Law PC and Scott L. Nelson, Allison M. Zieve and Adina H. Rosenbaum of the Public Citizen Litigation Group.

Campbell-Ewald Co. is represented by Laura A. Wytsma and Meredith J. Siller of Loeb & Loeb LLP and Gregory G. Garre and Nicole Ries Fox of Latham & Watkins LLP.

The case is Campbell-Ewald Co. v. Gomez, case number 14-857, in the U.S. Supreme Court.

--Editing by Katherine Rautenberg and Brian Baresch.
