

MORE ON **CLASS ACTION** **DECISIONS & SETTLEMENTS**

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Mid-year review and key takeaways: Strategic defense of TCPA class actions

This article summarizes 3 of the Supreme Court's decisions: *Campbell Ewald v. Gomez*, *Tyson v. Bouaphakeo* and *Spokeo v. Robins*, and discusses some of the practical implications for defense counsel and businesses.

DURING THE FIRST HALF of 2016, the Supreme Court has rendered several opinions that impact TCPA class actions. Here, we summarize three of those decisions: *Campbell Ewald v. Gomez*, *Tyson v. Bouaphakeo* and *Spokeo v. Robins*. We will also discuss some of the practical implications for defense counsel and businesses.



The U.S. Supreme Court Decisions

Campbell Ewald v. Gomez:

In this case, the Supreme Court held that an unaccepted Rule 68 offer is not enough to moot a plaintiff's claim. However, the Court left open whether a class representative loses standing to represent the class if the

defendants actually pay (as opposed to simply offering to pay) the money a plaintiff seeks.

Notably, the dissent, led by Chief Justice John Roberts, indicated that they would find that a full payment to the plaintiff would moot a class action. Ultimately, the Supreme Court remanded to the case to the

Ninth Circuit to consider what type of allegations meet the "concreteness" requirement.

Tyson v. Bouaphakeo:

Here, the Supreme Court declined to decide the issue of whether class certification is proper if it contains class members who haven't been injured

and do not have standing under Article III.

Notably, however, at least three justices suggested that it would violate Article III to award relief by lump sum absent assurance that no uninjured class members would receive damages. Chief Justice John Roberts wrote a separate opinion to express his concern that it would likely be impossible to remove uninjured class members from the class and that “a lump-sum jury award cannot overcome the limitations placed on the federal courts by the Constitution.”

Spokeo v. Robins:

In this one, the Supreme Court found that merely alleging a statutory violation is not sufficient to confer standing on a plaintiff. The Court emphasized that Article III standing requires a concrete and particularized injury “even in the context of a statutory violation.”

The court noted that when an alleged injury is nothing more than “a bare procedural violation,” there may be no cognizable harm to the plaintiff and thus no concreteness. The court also explained that the particularization requirement necessitates that a plaintiff has been affected “in a personal and

individual way” by the injurious conduct.

Practical implications:

While it remains to be seen just how these decisions will impact TCPA class actions, the following practice pointers are worth considering:

Tender Payment in full?

Defendants seeking to moot consumer lawsuits should consider tendering payment of the full amount of the plaintiff’s claim when making the Rule 68 offer. Notably, defendants must do more than deposit the funds into an escrow account payable to the plaintiff.

In *Chen v. Allstate Insurance Co.*, the first federal appellate decision addressing Rule 68 offers of judgment for TCPA claims since *Campbell-Ewald*, the court held that a plaintiff’s individual claims are not moot until the plaintiff *actually receives* relief, and merely depositing the offered funds into an escrow account for the plaintiff will not satisfy this standard.

The Ninth Circuit found that to satisfy the “actually receive” standard, a deposit of funds into an account could be an unconditional payment so that the plaintiff actually receives the funds if the “defendant unconditionally

relinquish[es] its entire interest in the deposited funds.”

Motion to dismiss for failure to allege “concrete” harm?

Defendants may also consider filing a motion to dismiss where plaintiff has not adequately pled a concrete and particularized injury. For example, in a case in which Plaintiff alleges that he consented to the receipt of two text messages per month regarding promotional offers, but claims that Defendant violated the TCPA by sending an additional text message for a total of three in a given thirty day period, in a month, where is the concrete harm?

He consented to the receipt of the text messages and is merely alleging a “bare procedural” violation of the TCPA.

Motion for summary judgment where evidence establishes no harm?

Defendants may also consider filing a motion for summary judgment when evidence establishes Plaintiff has suffered no harm. In *Stoops v. Wells Fargo Bank, N.A.*, a recent example, the district court granted a motion for summary judgment on the grounds that plaintiff lacked constitutional standing where the plaintiff admitted purchasing and

monitoring over 35 cell phones for the sole purpose of receiving calls from unwitting creditors and suing under the TCPA.

Citing *Spokeo*, Judge Gibson held the plaintiff lacked constitutional standing to assert a claim under the TCPA. The Court also found her economic interests were not violated because the “only purpose in purchasing her phones and minutes [was] to receive more calls, thus enabling her to file TCPA lawsuits...”

Oppose class certification due to lack of standing of some members of the proposed class?

The practical lesson from the *Tyson* and *Spokeo* opinions for defendants in TCPA class actions is that defendants should challenge class certification by arguing that it would violate Article III to award lump sum relief to a class that includes members who have not been injured. That is, for example, some class members may have cell phone plans that charge them for each text message, whereas other class members may have cell phone plans that have unlimited

calls/texting, and therefore do not incur an additional charge per text message or call.

Tyson and *Spokeo* strongly reinforce the core principle of *Wal-Mart Stores Inc. v. Dukes*, that the rules of proof for a class action are exactly the same as for an individual case. If a class representative cannot establish that all members of a proposed

class suffered such injury, that class may not be certified.

Final takeaway:

While it may take some time to see the full impact of these decisions, what is clear is that Defendants who face “no-injury” TCPA class actions have a new set of arguments to attack plaintiffs who rely on intangible injury.

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ESTEBAN MORALES is an experienced litigator at Mintz Levin’s Los Angeles office, whose practice is principally focused on class action defense and financial services litigation. Esteban has successfully defended both small and large corporate clients targeted in class action suits alleging violations of the Telephone Consumer Protection Act, California’s Unfair Competition Law, and California’s Invasion of Privacy Act. Before joining Mintz Levin, Esteban served as in-house Counsel and managed litigation for a national broker-dealer.

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