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Article III of the Constitution limits the jurisdiction of the federal courts to “cases” and “controversies.” The

Supreme Court has held that “an actual controversy ... be extant at all stages of review, not merely at the time the

complaint is filed.” *Arizonans for Official English v. Arizona*, 520 U.S. 43, 67 (1997). Accordingly, “[i]f an

intervening circumstance deprives the plaintiff of a ‘personal stake in the outcome of the lawsuit,’ at any point

during litigation, the action can no longer proceed and must be dismissed as moot.” *Genesis HealthCare Corp. v.*

*Symczyk*, 133 S. Ct. 1523, 1528 (2013). In *Genesis*, the Court recognized that one “intervening circumstance”

may arise under Rule 68 of the Federal Rules of Civil Procedure, which permits a party to offer to allow judgment in

favor of its adversary on specified terms. A party who rejects a Rule 68 offer, but obtains a judgment “not more

favorable than the unaccepted offer,” must pay the costs accrued by the offering party between the offer and

judgment.

Today, the Court granted certiorari in *Campbell-Ewald Company v. Gomez*, No. 14-857, to determine whether a

defendant's unaccepted offer of judgment, made before a class is certified, that would fully satisfy the claim of a

would-be class representative renders the plaintiff's individual and class claims moot. The Court also granted

certiorari to decide whether the derivative sovereign immunity doctrine recognized in *Yearsley v. W.A. Ross*

*Construction Co.*, 309 U.S. 18 (1940), applies only to claims for property damage caused by public works projects.

In this case, respondent Gomez filed a class action alleging that he and other individuals had received unsolicited

text messages recruiting for the U.S. Navy without their consent, in violation of the Telephone Consumer Protection

Act (TCPA). The Navy had hired petitioner Campbell-Ewald Company to develop a mobile marketing campaign to

attract new recruits; the text message Gomez received was part of that campaign. Before a class had been

certified, Campbell-Ewald tendered a Rule 68 offer to Gomez, offering to pay him \$1503 per violation (slightly more

than the full statutory damages available under the TCPA) in addition to certain costs, and to stipulate to an

injunction. When Gomez rejected the offer, Campbell-Ewald moved to dismiss his individual and class claims as

moot. The district court denied the motion, but granted Campbell-Ewald's later motion for summary judgment on

the ground that, as a government contractor, Campbell-Ewald was entitled to derivative sovereign immunity. The

Ninth Circuit reversed, agreeing with the district court that Gomez's claims were not moot but holding that *Yearsley*

applied "only in the context of property damage resulting from public works projects."

The Supreme Court addressed a similar mootness issue in *Genesis*, which concerned whether a defendant's offer



of judgment to the named plaintiff in a collective action under the Fair Labor Standards Act mooted the entire

action. *Id.* at 1532. The Court recognized that the circuits are divided over whether an unaccepted offer that fully

satisfies a plaintiff's claim is sufficient to render the individual claim moot. *Id.* at 1528-29. The Third, Fourth, Fifth,

Sixth, and Seventh Circuits have held that such an offer of judgment moots an individual plaintiff's claims, while

the Second, Ninth and Eleventh Circuits have held to the contrary. But because the plaintiff in *Genesis* had not

contested the mootness of her own claims in the court of appeals, the majority assumed without deciding that an

unaccepted offer that fully satisfies a plaintiff's claim renders the claim moot. *Id.* at 1528-29. The Court explained

that once the offer of judgment had mooted the named plaintiff's individual claims, the entire action "became moot,

because [the plaintiff] lacked any personal stake in representing” other employees. *Id.* at 1529. The Court did not

decide whether the same logic applied in the context of a class action, observing only (in the course of

distinguishing earlier cases) that “[Rule 23](#) actions are fundamentally different from collective actions under the

FLSA.” *Id.*

Justice Kagan's dissent in *Genesis* criticized the majority's assumption that the individual claims were moot,

maintaining that an unaccepted offer of judgment is a "legal nullity" with "no operative effect." *Id.* at 1533 (Kagan,

J., dissenting). Justice Kagan further contended that an offer that addresses only the named plaintiff's individual

claim is insufficient to moot either a FLSA collective action or a class action under Rule 23. *Id.* at 1536.

The lower courts have been divided over the application of *Genesis* in the context of offers of judgments made to

named plaintiffs in putative class actions. Notably, the Ninth Circuit—in a case prior to *Campbell-Ewald*—rested its

reasoning on the dissent in *Genesis*, stating: “We are persuaded that Justice Kagan has articulated the correct

approach.” *Diaz v. First American Home Buyers Protection Corp.*, 732 F.3d 948, 955 (9th Cir. 2013). The Court will

now resolve the questions left open in *Genesis* regarding the effect of an unaccepted Rule 68 offer has any legal

effect on both individual and class claims.

If the Court holds that Gomez's action is not moot, it will decide whether a government contractor may invoke

derivative sovereign immunity outside of the context of damage caused by public works projects. *Yearsley* involved

property damages claimed to result from Mississippi River dikes constructed by a government contractor. The

Court held that the contractor was immune from suit, however, explaining that, “if th[e] authority to carry out the

project was validly conferred, that is, if what was done was within the constitutional power of Congress, there is no

liability on the part of the contractor for executing its will.” 309 U.S.at 20-21. While the Ninth Circuit limited

*Yearsley* to property damage from public works projects, at least four other circuits have applied the derivative



sovereign immunity doctrine outside that context.

This case is of fundamental interest to all businesses. The Court's resolution of the mootness issue is important for

all potential class-action defendants. As the petition indicates, the question has two important components: (1) the

effect under Article III of an unaccepted Rule 68 offer that would fully satisfy the plaintiff's claims, and (2) the

significance for Article III purposes of the individual plaintiff's desire to represent a putative class that has not been

certified. In addition, if the Court were to reach the scope of the derivative sovereign immunity doctrine, its decision

will determine the liability of a wide range of government contractors.

Absent extensions, amicus briefs in support of the petitioner will be due on July 2, 2015, and amicus briefs in

support of the respondent will be due on August 3, 2015. Any questions about this case should be directed to

[Archis A. Parasharami](#) (+1 202-263-3328) in our Washington office or to [Donald M. Falk](#) (+1 650 331 2030) in our

Palo Alto office.