

14-3708

Geismann v. ZocDoc, Inc.

1 UNITED STATES COURT OF APPEALS  
2 FOR THE SECOND CIRCUIT

3 August Term, 2014

4 (Argued: June 5, 2015 Final Submission: February 1, 2016

5 Decided: March 9, 2017)

6 Docket No. 14-3708

7  
8 Radha Geismann, M.D., P.C., individually and on behalf of all others similarly  
9 situated,  
10 Plaintiff-Appellant,

11 v.

12 ZocDoc, Incorporated,  
13 Defendant-Appellee,

14  
15 John Does 1-10,  
16 Defendants.\*

17  
18 Before: SACK, HALL, and CARNEY, *Circuit Judges*.

19 Radha Geismann, M.D., P.C., appeals from a judgment of the United States  
20 District Court for the Southern District of New York (Louis L. Stanton, *Judge*)  
21 dismissing its putative class action suit against ZocDoc, Inc., alleging violations  
22 of the Telephone Consumer Protection Act. The district court concluded that a  
23 settlement offer, made by ZocDoc but rejected by Geismann, would have

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\* The Clerk of Court is respectfully directed to amend the official caption to conform to the caption as it appears above.

1 afforded Geismann complete relief, notwithstanding a pending class-certification  
2 motion. The court entered judgment in Geismann's favor in the amount and  
3 under the terms of the unaccepted offer and dismissed the action for lack of  
4 subject matter jurisdiction on the ground that it had become moot. We conclude  
5 that the settlement offer did not render the action moot and that judgment  
6 should not have been entered nor the action dismissed on that basis. The  
7 judgment of the district court is therefore:

8 VACATED and REMANDED.

9 GLENN L. HARA (David M. Oppenheim,  
10 *on the brief*), Anderson + Wanca, Rolling  
11 Meadows, Illinois, *for Plaintiff-Appellant*.

12 BLAINE C. KIMREY (Charles J. Nerko,  
13 Vedder Price P.C., New York, New York,  
14 Bryan K. Clark, *on the brief*), Vedder Price  
15 P.C., Chicago, Illinois, *for Defendant-*  
16 *Appellee*.

17 SACK, *Circuit Judge*:

18 Plaintiff-appellant Radha Geismann, M.D., P.C. ("Geismann"), appeals  
19 from the district court's dismissal of its putative class action against the  
20 defendant-appellee ZocDoc, Inc. ("ZocDoc"), alleging violations of the Telephone  
21 Consumer Protection Act ("TCPA"), 47 U.S.C. § 227. Geismann's suit stems from  
22 two unsolicited telecopies (colloquially and hereinafter "faxes") it allegedly

1 received from ZocDoc. After Geismann filed a complaint and motion for class  
2 certification, ZocDoc made a settlement offer to Geismann as to its individual  
3 claims pursuant to Federal Rule of Civil Procedure 68. Geismann rejected the  
4 offer. ZocDoc then moved to dismiss the action for lack of subject matter  
5 jurisdiction on the ground that its offer afforded Geismann complete relief,  
6 thereby mooting the action. The United States District Court for the Southern  
7 District of New York (Louis L. Stanton, *Judge*) granted the motion, agreeing with  
8 ZocDoc that the rejected offer, which the court concluded would have afforded  
9 Geismann complete relief on its individual claims, rendered the entire action  
10 moot, notwithstanding the pending class-certification motion. The court entered  
11 judgment in Geismann's favor under the terms offered by ZocDoc and dismissed  
12 the action. While this appeal was pending, the district court granted ZocDoc  
13 leave to deposit a check in the amount of \$6,100.00 with the Clerk of the United  
14 States District Court for the Southern District of New York in satisfaction of  
15 judgment.

16 We conclude that the action was not and is not "moot." An unaccepted  
17 Rule 68 offer of judgment is, regardless of its terms, a legal nullity.

## BACKGROUND

1  
2 Geismann, a Missouri corporation, alleges that it received from ZocDoc, a  
3 Delaware corporation, two unsolicited faxes advertising a "patient matching  
4 service" for doctors. Joint Appendix ("J.A."<sup>1</sup>) 43, 57-58. Both faxes stated that if  
5 the recipient wished to "stop receiving faxes," he or she could call a domestic  
6 telephone number provided in the fax. J.A. 57, 58.

7 In 2014, Geismann filed a complaint in Missouri state court<sup>2</sup> alleging that  
8 these faxes violated the TCPA,<sup>3</sup> which prohibits, *inter alia*, the use of "any  
9 telephone facsimile machine, computer, or other device to send, to a telephone  
10 facsimile machine, an unsolicited advertisement, unless" the sender and recipient  
11 have an "established business relationship," the recipient volunteered its fax

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<sup>1</sup> "J.A." hereinafter refers to the parties' joint appendix filed in this Court on November 6, 2014.

<sup>2</sup> The TCPA provides that "[a] person or entity may, if otherwise permitted by the laws or rules of court of a State, bring [an action] in an appropriate court of that State." 47 U.S.C. § 227(b)(3).

<sup>3</sup> The original complaint also included a claim under the Missouri Consumer Fraud and Deceptive Business Practices Act and a claim for conversion. The former was voluntarily dismissed prior to the filing of the Corrected First Amended Complaint. The district court did not directly address the latter, which was included in the Corrected First Amended Complaint. Geismann stated in its opposition to the motion to dismiss that it planned to dismiss voluntarily the conversion claim and therefore did not oppose its dismissal. The district court's dismissal for lack of subject matter jurisdiction following the entry of judgment applies to the entire action, including the conversion claim, making it a "final decision[]" over which we have jurisdiction. 28 U.S.C. § 1291.

1 number directly to the sender or through voluntary participation in a directory  
2 or other public source, or the fax meets certain specified notice requirements. 47  
3 U.S.C. § 227(b)(1)(C); *see also id.* § 227(a)(5) ("The term 'unsolicited advertisement'  
4 means any material advertising the commercial availability or quality of any  
5 property, goods, or services which is transmitted to any person without that  
6 person's prior express invitation or permission, in writing or otherwise.").

7 The complaint requested between \$500.00 and \$1,500.00 in damages for  
8 each TCPA violation, an injunction prohibiting ZocDoc from sending similar  
9 faxes in the future, and costs. *See id.* § 227(b)(3) (providing a private right of  
10 action for injunctive relief and damages in the amount of "actual monetary loss"  
11 or "\$500 . . . for each [] violation, whichever is greater," to be tripled at the court's  
12 discretion if the defendant "willfully or knowingly violated [the statute]").

13 The complaint also requested that the case be treated as a class action.  
14 Geismann filed a separate motion for class certification pursuant to Missouri law  
15 the same day that it filed the complaint. The certification motion contained a  
16 footnote explaining that Geismann filed the motion at the same time as the  
17 complaint because the "[d]efendants in class litigation have resorted to making  
18 individual settlement offers to named plaintiffs before a class action is certified in

1 an attempt to 'pick-off' the putative class representative and thereby derail the  
2 class action litigation." Pl.'s State Ct. Mot. for Class Certification at 1 n.1 (J.A. 19).

3 On March 13, 2014, ZocDoc removed the action to the United States  
4 District Court for the Eastern District of Missouri, invoking federal question  
5 jurisdiction. *See* 28 U.S.C. §§ 1331, 1367. Two weeks later, ZocDoc made an offer  
6 of judgment to Geismann pursuant to Federal Rule of Civil Procedure 68 for (1)  
7 \$6,000, plus reasonable attorney's fees,<sup>4</sup> in satisfaction of Geismann's individual  
8 claims, and (2) an injunction prohibiting ZocDoc from engaging in the alleged  
9 statutory violations in the future. On April 8, 2014, Geismann rejected the offer  
10 but indicated that it would be willing to accept if ZocDoc would extend the same  
11 offer to all members of the putative class action. ZocDoc declined.

12 In August 2014, the district court granted ZocDoc's motion to transfer the  
13 action to the Southern District of New York. *See* 28 U.S.C. § 1404(a). ZocDoc  
14 then moved to dismiss the complaint, primarily on the ground that its offer of  
15 judgment mooted the action. Geismann disputed, *inter alia*, whether the  
16 unaccepted offer "provided full satisfaction of [its] claim," arguing that the TCPA

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<sup>4</sup> Geismann's initial complaint requested attorney's fees for its state law claims, not for its claim under the TCPA, a statute that the parties agree does not provide expressly for the award of attorney's fees or costs. Attorney's fees are not at issue in this appeal, and we do not take a position regarding the statutory availability of any such fees.

1 provides for monetary damages per "violation," not per fax, entitling it to  
2 "recover for each of the multiple violations in each fax." Pl.'s Opp'n to Def.'s Mot.  
3 to Dismiss at 14 n.4, *Geismann v. ZocDoc, Inc.*, No. 14-cv-7009 (S.D.N.Y. Sept. 25,  
4 2014), ECF No. 53.

5 The district court disagreed, reasoning:

6 The monetary damages Geismann can recover individually under  
7 the TCPA for two unsolicited faxes [it] received . . . are limited to  
8 \$1,000, which could be trebled to not more than \$3,000 if the Court  
9 finds that it was a willful and knowing violation. ZocDoc's offer of  
10 judgment not only adds Geismann's attorneys' fees, but is twice the  
11 trebled amount, and thus more than satisfies any recovery  
12 Geismann could make under the applicable statute.

13 *Geismann v. ZocDoc, Inc.*, 60 F. Supp. 3d 404, 405-06 (S.D.N.Y. 2014). The court  
14 entered judgment in the amount and under the terms of the rejected settlement  
15 offer and dismissed the action as moot because, following the settlement offer  
16 and entry of judgment, "there remain[ed] no case or controversy." *Id.* at 407.

17 Geismann then brought this appeal. While the appeal was pending,  
18 ZocDoc requested leave to deposit a check in the amount of \$6,100.00 payable to  
19 the clerk of the district court in satisfaction of judgment. Pl.'s Ltr. Mot. at 2-3,  
20 *Geismann v. ZocDoc, Inc.*, No. 14-cv-7009 (S.D.N.Y. Feb. 1, 2016), ECF No. 60. The  
21 court granted the request, reasoning that the Supreme Court's then-recent  
22 decision in *Campbell-Ewald Co. v. Gomez*, --- U.S. ----, 136 S. Ct. 663 (2016),

1 "favor[s] deposit of judgments with the Court" in these circumstances. Order for  
2 Deposit in Interest Bearing Account at 2, *Geismann v. ZocDoc, Inc.*, No. 14-cv-7009  
3 (S.D.N.Y. Feb. 3, 2016), ECF No. 63.<sup>5</sup>

4 We ordered the parties to submit supplemental briefing addressing the  
5 effect of *Campbell-Ewald* on the issues presented in this appeal, and, on February  
6 1, 2016, both parties made a responsive submission. ZocDoc argued that  
7 following the entry of judgment and deposit of funds with the clerk of the court,  
8 the plaintiff in this case, unlike the plaintiff in *Campbell-Ewald*, was not left  
9 "emptyhanded." Def.'s Supp. Br. at 2, 4. Geismann argued, *inter alia*, that  
10 *Campbell-Ewald* foreclosed the district court's disposition of this case because "an  
11 unaccepted settlement offer or offer of judgment does not moot a plaintiff's case  
12 no matter how good the terms." Pl.'s Supp. Br. at 1 (internal quotation marks  
13 omitted).

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<sup>5</sup> Geismann challenges this deposit order in a related appeal. See *Geismann v. ZocDoc, Inc.*, No. 16-663 ("*Geismann II*"). Because the disposition of the present appeal renders moot the issues there raised, we have concurrently issued an order granting ZocDoc's motion to dismiss *Geismann II* as duplicative.

## DISCUSSION

### A. Standard of Review

"In considering a dismissal for lack of jurisdiction, we review the district court's factual findings for clear error and its legal conclusions *de novo*." *APWU v. Potter*, 343 F.3d 619, 623-24 (2d Cir. 2003).

### B. Jurisdiction

Our jurisdiction is limited by Article III, section 2, of the United States Constitution to "cases" and "controversies." *Spencer v. Kemna*, 523 U.S. 1, 7 (1998). Where there is no unresolved case or controversy, "mootness occurs" and "the court—whether trial, appellate, or Supreme—loses jurisdiction over the suit, which therefore must be dismissed." *Russman v. Bd. of Educ. of Enlarged City Sch. Dist. of City of Watervliet*, 260 F.3d 114, 118-19 (2d Cir. 2001).

### C. *Campbell-Ewald*

Geismann argues that the district court erred in dismissing its complaint for lack of subject matter jurisdiction because ZocDoc's proffered monetary damages did not provide complete relief as to Geismann's individual claims; the individual and putative class claims were therefore not moot. Alternatively, Geismann asks us to conclude, as a matter of first impression in this Circuit, that

1 even if the offer was complete as to its individual claims, an individual judgment  
2 does not render moot a putative class claim, at least when a class-certification  
3 motion is pending. *Cf. Tanasi v. New Alliance Bank*, 786 F.3d 195, 198 (2d Cir.  
4 2015), *as amended* (May 21, 2015), *cert. denied*, 136 S. Ct. 979 (2016) (declining to  
5 address this question). While this appeal was pending before us, the Supreme  
6 Court decided *Campbell-Ewald*. Its decision made clear that an unaccepted Rule  
7 68 offer of judgment does not render an action moot. *Campbell-Ewald*, 136 S. Ct.  
8 at 670-71. Because that decision controls our review and is dispositive of the case  
9 at bar, we need not, and decline to, reach the issues raised by Geismann in its  
10 pre-*Campbell-Ewald* submissions.

11 In *Campbell-Ewald*, the plaintiff sought individual and class-wide relief  
12 under the TCPA, alleging that he and members of the putative class received  
13 unsolicited text messages sent by the defendant in violation of the statute. *Id.* at  
14 667. The defendant, like ZocDoc, "proposed to settle [the plaintiff's] individual  
15 claim and filed an offer of judgment pursuant to Federal Rule of Civil Procedure  
16 68," including an offer to pay "costs, excluding attorney's fees, and \$1,503 per  
17 message," as well as "a stipulated injunction in which [the defendant] agreed to  
18 be barred from sending text messages in violation of the TCPA." *Id.* at 667-68.

1 The plaintiff, like Geismann, declined the offer. *Id.* at 668. The Supreme Court  
2 concluded that an Article III "case" or "controversy" remained, Rule 68 offer  
3 notwithstanding,<sup>6</sup> because "[a]n unaccepted settlement offer—like any  
4 unaccepted contract offer—is a legal nullity, with no operative effect." *Id.* at 670  
5 (quoting *Genesis Healthcare Corp. v. Symczyk*, --- U.S. ----, 133 S. Ct. 1523, 1533  
6 (2013) (Kagan, J., dissenting)). "[W]ith no settlement offer still operative, the  
7 parties remained adverse; both retained the same stake in the litigation they had  
8 at the outset." *Id.* at 670-71.

9 In light of *Campbell-Ewald*, the district court's conclusion in this case that  
10 Geismann's claim was "mooted by the amount and content of the Rule 68 offer  
11 made by ZocDoc," *Geismann*, 60 F. Supp. 3d at 407, is incorrect. Rule 68 provides  
12 that, "[a]t least 14 days before the date set for trial, a party defending against a  
13 claim may serve on an opposing party an offer to allow judgment on specified  
14 terms, with the costs then accrued." Fed. R. Civ. P. 68(a). "The plain purpose of

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<sup>6</sup> The Supreme Court declined to consider "whether the result would be different if a defendant deposits the full amount of the plaintiff's individual claim in an account payable to the plaintiff, and the court then enters judgment for the plaintiff in that amount." *Campbell-Ewald*, 136 S. Ct. at 672. That "hypothetical" did not present itself in *Campbell-Ewald* in part because the district court declined to dismiss the plaintiff's claim on the ground that it was rendered moot by the unaccepted Rule 68 offer, *Gomez v. Campbell-Ewald Co.*, 805 F. Supp. 2d 923, 928-30 (C.D. Cal. 2011), and the United States Court of Appeals for the Ninth Circuit affirmed, *Gomez v. Campbell-Ewald Co.*, 768 F.3d 871, 875 (9th Cir. 2014).

1 Rule 68 is to encourage settlement and avoid litigation." *Marek v. Chesny*, 473  
2 U.S. 1, 5 (1985). Should the offeree decline the offer, however, it "is considered  
3 withdrawn." Fed. R. Civ. P. 68(b). *Campbell-Ewald* makes clear that such a  
4 "withdrawn" offer "ha[s] no continuing efficacy." 136 S. Ct. at 670. The district  
5 court's entry of judgment, therefore, imbued ZocDoc's offer with a power it did  
6 not possess.

7 The district court's conclusion in the case now before us is, of course,  
8 understandable, it having been reached before *Campbell-Ewald* was decided.  
9 And, as we have noted, "our prior case law has not always been entirely clear on  
10 this subject." *Tanasi*, 786 F.3d at 199. The district court also followed the  
11 "typically proper" procedure by "enter[ing] judgment against the defendant for  
12 the proffered amount and [] direct[ing] payment to the plaintiff consistent with  
13 the offer." *Cabala v. Crowley*, 736 F.3d 226, 228 (2d Cir. 2013) (per curiam). But the  
14 basis upon which the district court entered judgment did not exist: An  
15 unaccepted Rule 68 offer of judgment does not render an action moot.

16 ZocDoc attempts to distinguish *Campbell-Ewald* on two grounds. First,  
17 unlike *Campbell-Ewald*, the district court entered judgment in this case, giving  
18 effect to the unaccepted offer. We do not find this distinction meaningful

1 because the judgment should not have been entered in the first place. *See*  
2 *Campbell-Ewald*, 136 S. Ct. at 672 ("[A]n unaccepted settlement offer or offer of  
3 judgment does not moot a plaintiff's case, so the District Court retained  
4 jurisdiction to adjudicate [the plaintiff's] complaint."). "Under basic principles of  
5 contract law," *id.* at 670, "the recipient's rejection of an offer leaves the matter as if  
6 no offer had ever been made. . . . So assuming the case was live before—because  
7 the plaintiff had a stake and the court could grant relief—the litigation carries on,  
8 unmooted," *id.* (quoting *Genesis Healthcare*, 133 S. Ct. at 1533 (Kagan, J.,  
9 dissenting) (internal quotation marks omitted)). The result in *Campbell-Ewald*  
10 cannot be avoided simply by entering a judgment effectuating an otherwise  
11 precluded dismissal.

12 ZocDoc notes that the district court did not act reflexively, having carefully  
13 considered the content of the rejected offer. Be that as it may, the offer that the  
14 district court carefully reviewed was null and void at the time. It is of no  
15 moment whether the offer "more than satisfie[d] any recovery Geismann could  
16 make under the applicable statute." *Geismann*, 60 F. Supp. 3d at 406. "When a  
17 plaintiff rejects [a Rule 68] offer—however good the terms—her interest in the  
18 lawsuit remains just what it was before. And so too does the court's ability to

1 grant her relief." *Campbell-Ewald*, 136 S. Ct. at 670 (quoting *Genesis Healthcare*, 133  
2 S. Ct. at 1533 (Kagan, J., dissenting)).

3 Geismann also contests whether the offer in fact "more than satisfie[d] any  
4 recovery [it] could make under the applicable statute." *Geismann*, 60 F. Supp. 3d  
5 at 406. Indeed, Geismann insisted in its opposition to the motion to dismiss that  
6 the amount proffered by ZocDoc did not "provide[] full satisfaction of  
7 [Geismann's] claim," in part because the parties had divergent legal theories  
8 regarding the amount of damages available under the TCPA.<sup>7</sup> Pl.'s Opp'n to  
9 Def.'s Mot. to Dismiss at 14 n.4, *Geismann v. ZocDoc, Inc.*, No. 14-cv-7009  
10 (S.D.N.Y. Sept. 25, 2014), ECF No. 53. That constitutes a live controversy  
11 precluding dismissal on the basis of mootness. "A case becomes moot only when  
12 it is impossible for a court to grant any effectual relief whatever to the prevailing  
13 party." *Knox v. Serv. Emps. Int'l Union, Local 1000*, --- U.S. ----, 132 S. Ct. 2277,  
14 2287 (2012) (internal quotation marks omitted). While we recognized prior to  
15 *Campbell-Ewald* that a judgment entered pursuant to an offer can render an action

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<sup>7</sup> While we decline to resolve this dispute, we note that Geismann's position is not frivolous. To wit: the Eleventh Circuit recently sided in favor of Geismann's per-violation interpretation of the TCPA. *Lary v. Trinity Physician Fin. & Ins. Servs.*, 780 F.3d 1101, 1106 (11th Cir. 2015) ("In plain terms, the statute allows a person to recover '\$500 in damages for each' 'violation of this subsection.' Section 227(b)(1) has no language limiting the recovery to \$500 per 'call' or 'fax.'" (citation omitted)).

1 moot where "the parties *agree* that a judgment should be entered against the  
2 defendant," *Tanasi*, 786 F.3d at 200 (emphasis added), the offer of judgment alone  
3 does not have the same or a similar effect, *see, e.g., Hepler v. Abercrombie & Fitch*  
4 *Co.*, 607 F. App'x 91, 92-93 (2d Cir. 2015) (summary order); *Franco v. Allied*  
5 *Interstate LLC*, 602 F. App'x 40, 41 (2d Cir. 2015) (summary order). This was  
6 neither a case in which the parties agreed to the entry of a particular judgment,  
7 *see Tanasi*, 786 F.3d at 200, nor one in which an *accepted* offer rendered the  
8 plaintiff's claim moot, *see Bank v. Alliance Health Networks, LLC*, --- F. App'x ----,  
9 2016 WL 6128043, at \*1, 2016 U.S. App. LEXIS 18849, at \*2 (2d Cir. 2016)  
10 (summary order) (stating that although the "Supreme Court has held that an  
11 unaccepted Rule 68 offer of judgment, on its own, will not moot a plaintiff's  
12 claims," that rule does not control where, unlike here, the plaintiff "negotiated the  
13 check" proffered by the defendants).

14 ZocDoc also argues that *Campbell-Ewald* is distinguishable because  
15 Geismann was not left "emptyhanded." 136 S. Ct. at 672. We disagree. ZocDoc's  
16 unsuccessful attempt to tender judgment notwithstanding, Geismann has not  
17 been compensated in satisfaction of its claim, which would require, at a  
18 minimum, its acceptance of a valid offer. *See id.* ("[W]hen the settlement offer . . .

1 expired, [the plaintiff] remained emptyhanded; [the plaintiff's] TCPA complaint,  
2 which [the defendant] opposed on the merits, stood wholly unsatisfied." ).  
3 Geismann thus remains emptyhanded, distinguishing this case from the trio of  
4 19th-century tax cases that ZocDoc cites for the proposition that Geismann's  
5 claim is "extinguished"; in each of those cases, the claimant accepted tender. *See*  
6 *California v. San Pablo & Tulare R.R. Co.*, 149 U.S. 308, 314 (1893) (finding that the  
7 dispute was resolved by "the offer to pay all [] sums, and the deposit of money in  
8 a bank, which *by a statute* of the state have the same effect as actual payment and  
9 *receipt* of the money" (emphases added)); *Little v. Bowers*, 134 U.S. 547, 552 (1890)  
10 (observing that there was "no denial of the fact that the taxes in dispute ha[d]  
11 been paid" and therefore, implicitly, accepted); *San Mateo Cnty. v. S. Pac. R.R. Co.*,  
12 116 U.S. 138, 141 (1885) (noting that there was no dispute that the "debt for which  
13 the suit was brought ha[d] been unconditionally paid and satisfied").

14 ZocDoc's post-judgment actions move it no closer to its goal. The order  
15 granting leave to deposit a check in the amount of \$6,100.00 with the clerk of the  
16 district court in satisfaction of judgment was made pursuant to and in  
17 furtherance of a judgment that should not have been entered in the first place.  
18 And even if that deposit had satisfied Geismann's demand for monetary relief, it

1 alone does nothing to satisfy the demand for injunctive relief. *Cf. Mey v. N. Am.*  
2 *Bancard, LLC*, 655 F. App'x 332, 336 (6th Cir. 2016) (summary order) (observing  
3 that "a tender" of monetary damages alone "does nothing to satisfy [the  
4 plaintiff's] request for injunctive relief").

5 This is also not a case that matches the hypothetical posed by *Campbell-*  
6 *Ewald*, where the Supreme Court declined to consider whether the outcome  
7 would be different had the "defendant deposit[ed] the full amount of the  
8 plaintiff's individual claim in an account payable to the plaintiff, and the court  
9 then enter[ed] judgment for the plaintiff in that amount." 136 S. Ct. at 672  
10 (emphasis added). Here the district court entered a judgment that should not  
11 have been entered in the first place, and ZocDoc then more than one year later  
12 deposited an amount in satisfaction of that errant judgment in an account  
13 payable to Geismann. Accordingly, we need not, and do not, decide whether a  
14 different outcome would result if the facts here matched the *Campbell-Ewald*  
15 hypothetical.<sup>8</sup>

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<sup>8</sup> We note, without deciding because the situation is not before us, that an attempt by the defendant to use the tactic described in the *Campbell-Ewald* hypothetical to "place [it] in the driver's seat," 136 S. Ct. at 672, might not work. The Supreme Court's criticism of similar tactics suggests that Rule 68 should be harmonized with Rule 23. *See id.* (describing a "kindred strategy" intended to "avoid a potential adverse decision" as a

