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Rule 68 Offers of Judgment in Putative Class Actions: Litigation Strategies After Campbell-Ewald Co. v. Gomez

Evaluating Choice of Jurisdiction, Use of Placeholder Class Certification Motions, and Impact of Pick-Off Strategy

WEDNESDAY, JANUARY 29, 2020

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Rule 68 Offers of Judgment in Putative Class Actions

Presented By Geoffrey M. Wyatt and Jordan M. Schwartz

January 29, 2020

CONTENTS

Skadden

1 WHAT IS AN OFFER OF JUDGMENT?

WHAT IS AN OFFER OF JUDGMENT?

- **Federal Rule of Civil Procedure 68**
  - Allows a party defending against a claim to serve on an opposing party an offer to allow judgment on specified terms. The offer must be served at least 14 days before trial.
  - If, within 14 days after being served, the opposing party serves written notice accepting the offer, either party may then file the offer and notice of acceptance, plus proof of service. The clerk must then enter judgment.
  - An unaccepted offer is considered withdrawn, but it does not preclude a later offer.
  - Rule 68 is a risk-shifting tool designed to encourage settlements.
  - ***If the plaintiff refuses the offer, and then fails to obtain a judgment that is more favorable than the settlement offer, the plaintiff must pay all costs incurred after the offer was made.***

WHAT IS AN OFFER OF JUDGMENT

- **Implications of offers of judgment for class actions**
  - To avoid costly and time-consuming class action litigation, defendants have long tried to moot putative class actions by offering complete relief to the named plaintiff.
  - Courts had split on whether an ***unaccepted*** offer of judgment moots the named plaintiff's claims.
  - The Supreme Court ultimately resolved that split, but left open the potential for mooting a named plaintiff's claims when the defendant actually tenders complete relief.
  - The Supreme Court also left open the subsidiary issue of mootness of ***class*** claims when the ***named*** plaintiff's claims become moot.

2 BACKGROUND: *GENESIS* AND *CAMPBELL-EWALD*

BACKGROUND: GENESIS AND CAMPBELL-EWALD

- *Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 133 S. Ct. 1523, 185 L. Ed. 2d 636 (2013)
  - Plaintiff filed a collective action on behalf of herself and all similarly situated individuals, alleging violation of the Fair Labor Standards Act ("FLSA").
    - Genesis offered to pay all of plaintiff's unpaid wages and attorney's fees.
    - Plaintiff did not respond to the offer.
    - Genesis filed a motion to dismiss for lack of subject matter jurisdiction, claiming that plaintiff no longer had a real interest in the outcome of the action since they offered her full relief.
  - The District Court dismissed the case because defendant made an offer of judgment before the collective action was certified.
  - The Third Circuit reversed and remanded, holding that a full offer of relief does not moot the named plaintiff's claims.
  - The Supreme Court narrowly held that, in cases that lack other claimants, the suit on behalf of other "similarly situated" employees becomes moot when the individual's suit does. Because Symczyk no longer had a personal interest and was not representing the interests of the class, the case was properly dismissed.

BACKGROUND: GENESIS AND CAMPBELL-EWALD

- *Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 133 S. Ct. 1523, 185 L. Ed. 2d 636 (2013)
  - Justice Kagan's dissent: an unaccepted offer did not moot the plaintiff's case because, under the terms of Rule 68, such an offer is considered withdrawn and is therefore a legal nullity.
  - Because Symczyk rejected the settlement offer, she retained her personal interest in the case, and there was no reason to consider her claim moot.
  - In the wake of *Genesis*, a number of circuits followed Justice Kagan's approach, while others did not. This resulted in a split among the circuits.

BACKGROUND: GENESIS AND CAMPBELL-EWALD

- *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 193 L. Ed. 2d 571 (2016), *as revised* (Feb. 9, 2016)
  - Plaintiff alleged that Campbell-Ewald violated the Telephone Consumer Protection Act by instructing or allowing a third-party vendor to send unsolicited text messages on behalf of a client.
  - Before Gomez filed a motion for class certification, the company offered him a settlement, which included offering to pay Gomez's costs excluding attorneys' fees, and $1,503 per text message, thus satisfying his personal treble-damages claim.
  - Campbell-Ewald also offered a stipulated injunction in which it agreed to no longer send text messages in violation of the TCPA. The stipulated injunction denied liability and the allegations of the complaint.
  - Gomez did not accept the offer and allowed it to lapse.
  - Campbell-Ewald thereafter moved to dismiss the case and argued that Gomez's rejection of the settlement offer made the claim moot. The district court denied the motion.

BACKGROUND: GENESIS AND CAMPBELL-EWALD

- *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 193 L. Ed. 2d 571 (2016), *as revised* (Feb. 9, 2016)
  - The Supreme Court **held that an unaccepted offer of judgment does not moot a plaintiff's case.**
    - A case becomes moot "only when it is impossible for a court to grant any effectual relief what[so]ever to the prevailing party," and, "as long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot." 136 S. Ct. at 669.
    - Notwithstanding a defendant's individual settlement offer, "a would-be class representative with a live claim of her own must be accorded a fair opportunity to show that certification is warranted."
  - The Court applied basic principles of contract law, holding that an unaccepted settlement offer has no force and creates no obligation if it is not accepted. As long as the parties continue to have a concrete interest in the outcome of the litigation at hand, the case is not moot.
  - The Court explicitly reserved judgment, however, on "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." *Id*. at 672

BACKGROUND: GENESIS AND CAMPBELL-EWALD

- The Question Left Open in *Campbell-Ewald*
  - *Campbell-Ewald* dealt with a discrete issue – i.e., whether an unaccepted *offer* of judgment moots the *named plaintiff*'s case; it did *not* address the mootness of *class* claims, *accepted* offers of judgment, or the effect of actual payment.
  - In fact, ***the Court specifically left open the possibility of mootness*** if a defendant actually tenders the full amount of the plaintiff's individual claim, and the court then enters judgment for the plaintiff in that amount.

3 AFTERMATH OF *CAMPBELL-EWALD* AND LINGERING ISSUES

- After *Campbell-Ewald*, are Rule 68 offers of judgment ever viable means of mooting a lawsuit?
  - Some courts have held that tendering complete relief never moots the named plaintiff's individual claims.
    - What about Rule 67 settlement offers? Are they any different from Rule 68 offers of judgment?
  - Other courts have held that tender of payment works under certain circumstances
    - Mode of payment (escrow deposits are not effective, but certified checks and deposits into court are)
    - Amount of plaintiff's damages is sufficiently definite
    - But what about attorney's fees?
  - If tendering payment moots the named plaintiff's claims, does that moot the ***entire class action***? Courts are split on this.
  - Other issues relevant to class certification (e.g., adequacy/typicality)

AFTERMATH OF CAMPBELL-EWALD AND LINGERING ISSUES

- In the aftermath of *Campbell-Ewald*, courts have taken divergent approaches in addressing the unresolved question of whether actual payment of full relief moots a named plaintiff's claim.
- **Some circuit courts have held that the tender of the full amount does *not* moot the named plaintiff's individual claim.**
  - *See Chen v. Allstate Ins*., 819 F.3d 1136, 1138-39 (9th Cir. 2016)
  - *Mey v. N. Am. Bancard, LLC*, 655 F. App'x 332, 334 (6th Cir. 2016)
  - *Fulton Dental, LLC v. Bisco, Inc*., 860 F.3d 541, 547 (7th Cir. 2017)
- The thrust of these decisions is that rejecting a *tender* of payment is no different than rejecting an *offer* of payment, because in both cases the plaintiff ends up in the same place as before his or her rejection.

AFTERMATH OF CAMPBELL-EWALD AND LINGERING ISSUES

- **Tender of complete relief does not moot individual claims unless the plaintiff actually receives the money.**
- *Chen v. Allstate Insurance Co.*, 819 F.3d 1136 (9th Cir. 2016)
  - Plaintiffs alleged that Allstate violated the TCPA by making unsolicited automated calls. Defendant served the plaintiffs with a Rule 68 offer, which the plaintiffs did not accept. Defendant offered to pay all of plaintiffs' alleged individual damages, as well as satisfy their non-monetary injunctive requests.
  - The defendant moved to dismiss the lawsuit for lack of a case or controversy. The district court denied the motion to dismiss, but certified the ruling for interlocutory appeal. On appeal, the Supreme Court decided *Campbell-Ewald*, prompting Allstate to **deposit** $20,000 in full settlement of the plaintiff's claims in an escrow account.
  - The Ninth Circuit affirmed, holding that the mere **deposit** of the funds into an escrow account did not suffice to moot the individual claims because the plaintiff did not "*actually receive[]*" the money. *Id.* at 1145.
  - Although the Ninth Circuit theoretically leaves open the possibility that depositing money in the court and unequivocally relinquishing any interest in the money might moot claims in a hypothetical case, the case is a prime example of a circuit court pouring cold water on a mootness-by-tender theory.

AFTERMATH OF CAMPBELL-EWALD AND LINGERING ISSUES

- **Similarly, some courts in this camp have held that a settlement offer made by depositing funds to the court under Rule 67 is no different than a Rule 68 offer of judgment**.
  - Defendants have tried to use Rule 67 to moot plaintiffs' claims.
  - Under Rule 67, a party may deposit with the court all or part of the money judgment. Fed. R. Civ. P. 67(a).
  - "Rule 67 is a 'procedural mechanism'" that is not meant for "depositing funds for the purpose of mooting a plaintiff's claim". Katrina Christakis et. al., "*So You're Telling Me There's A Chance!": The Post-Campbell-Ewald Possibility of Mooting A Class Action by "Tender" of Complete Relief*, 71 Consumer Fin. L.Q. Rep. 237, 241–42 (2017).
  - Courts rejecting Rule 67 deposits as a basis for mooting claims have reasoned that a deposit is no different from an unaccepted offer of settlement under Rule 68.
    - *Fulton Dental, LLC v. Bisco, Inc*., 860 F.3d 541, 544-47 (7th Cir. 2017)

AFTERMATH OF CAMPBELL-EWALD AND LINGERING ISSUES

- **On the other hand, some circuit courts have held that the tender of the full amount ***does*** moot the named plaintiff's individual claim.**
- For example, the Second Circuit has come to this opposite conclusion – that tender of the full amount *does* moot the named plaintiff's claims.
  - *Leyse v. Lifetime Entm't Servs., LLC*, 679 F. App'x 44, 46 (2d Cir. 2017), *cert. denied,* 138 S. Ct. 637, 199 L. Ed. 2d 526 (2018).
- A number of district courts in other circuits have taken a similar approach.
  - *See S. Orange Chiropractic Ctr., LLC v. Cayan LLC*, No. CV 15-13069-PBS, 2016 WL 1441791 (D. Mass. Apr. 12, 2016); *Price v. Berman's Auto., Inc.*, No. 14-763-JMC, 2016 WL 1089417 (D. Md. Mar. 21, 2016); *Rueling v. MOBIT LLC*, No. CV-18-00568-PHX-BSB, 2018 WL 3159726 (D. Ariz. June 28, 2018); *Kuntze v. Josh Enters., Inc.*, 365 F. Supp. 3d 630, 640-41 (E.D. Va. 2019); *LaSpina v. SEIU Pennsylvania State Council*, No. CV 3:18-2018, 2019 WL 4750423 (M.D. Pa. Sept. 30, 2019); *McClain v. Hanna*, No. 2:19-CV-10700, 2019 WL 2325678 (E.D. Mich. May 31, 2019).

AFTERMATH OF CAMPBELL-EWALD AND LINGERING ISSUES

- These cases reason that as soon as a full tender is made, there is no longer a live case or controversy, and the mere rejection of complete relief does not keep the case alive.
- These courts also view tender of the full amount as the precise scenario contemplated in *Campbell-Ewald* that would be sufficient to moot individual claims.
- Courts in this camp have employed different approaches depending on the type of payment method:
  - escrow deposits probably never sufficient, certified checks, and Rule 67 deposits into court might qualify

- **Tendering Full Amount of Plaintiff's Claim – Escrow Deposits and Certified Checks/Deposits Into Court**
- *(1) Escrow Deposits Do Not Moot Claim*
  - *Chen v. Allstate Insurance Co.*, 819 F.3d 1136 (9th Cir. 2016), noted above, seems to reject the mootness-by-tender approach in the Ninth Circuit. To the extent that question is not fully resolved in the Ninth Circuit, it is clear that escrow deposits **do not** moot a plaintiff's claims. The Ninth Circuit went out of its way to distinguish a mere escrow deposit from a situation in which a defendant "unconditionally relinquishe[s] its entire interest in the deposited funds." *Id.* at 1146.
  - *See also Kirkland v. Speedway LLC*, 2017 WL 2198963, at *4 (N.D.N.Y. 2017) (no mootness even though defendant placed full amount of the offer in an escrow/trust account payable to plaintiff).
  - *Abante Rooter & Plumbing, Inc. v. Oh Ins. Agency*, No. 15-CV-9025, 2018 WL 993883 (N.D. Ill. Feb. 20, 2018) (offer of judgment and deposit of funds into an escrow account did not moot claims).
  - **There do not appear to be any cases holding that escrow deposits ever moot an individual plaintiff's claims.**

- **Tendering Full Amount of Plaintiff's Claim – Escrow Deposits and Certified Checks/Deposits Into Court**
- *(2) Certified Checks/Deposits Into Court*
  - **Finding Sufficient to Moot Claim** – Some post-*Campbell-Ewald* district court decisions have concluded that sending a certified check representing complete relief to a plaintiff or his attorney, or depositing that amount into court, is sufficient to moot the plaintiff's individual claims, even if the plaintiff rejects the check or deposit.
    - *Demmler v. ACH Food Cos.*, No. 15-13556-LTS, 2016 WL 4703875, slip op. at *2, *4-6 (D. Mass. June 9, 2016) (finding plaintiff's refusal to accept an unconditional cashier's check sent by a defendant is "immaterial" because the "question under Article III is whether a live case or controversy exists, and the mere fact that [plaintiff] did not accept unconditionally-provided remediation does not extend the life of the dispute") (citing *Campbell-Ewald*, 136 S. Ct. at 671).
    - *S. Orange Chiropractic Ctr., LLC v. Cayan LLC*, No. 15-13069-PBS, 2016 WL 1441791, at *4 (D. Mass. Apr. 12, 2016) (finding plaintiff's individual claims were moot where defendant "tendered" a "bank check" over the statutory maximum that plaintiff could recover, offered to deposit the check with the court, and stipulated to injunctive relief that plaintiff requested).
    - *Leyse v. Lifetime Entertainment Services, LLC*, 171 F. Supp. 3d 153, 156 (S.D.N.Y. 2016) (holding that "a defendant's deposit of a full settlement with the court, and consent to entry of judgment against it, will eliminate the live controversy before a court" and granting motion to enter judgment for plaintiff over plaintiff's objection following denial of motion for class certification).

- **Tendering Full Amount of Plaintiff's Claim – Escrow Deposits and Certified Checks/Deposits Into Court**
- *(2) Certified Checks/Deposits Into Court*
  - **Finding Sufficient to Moot Claim** – *S. Orange Chiropractic Ctr., LLC v. Cayan LLC* (D. Mass. Apr. 12, 2016)
    - In TCPA case, defendant tendered a bank check to plaintiff in the amount of $7,500, which covered treble damages and costs, and stipulated to the injunctive relief that plaintiff requested. Defendant also agreed to a protective order that directed the agent that sent the fax to preserve all information concerning the fax advertisements in question. Finally, defendant "back[ed] up" the offer by offering to deposit a $7,500 check with the court and have judgment entered against it. *S. Orange Chiropractic Ctr*, No. 15-13069-PBS at 4.
    - The court held that the "named plaintiff no longer has the requisite 'live claim'" because defendant provided plaintiff "with the full amount of statutory damages and the full scope of equitable relief" by offering "to deposit a check with the court, to satisfy all of Plaintiff's individual claims (and more), and to have the district court enter judgment in Plaintiff's favor." *Id*. at 5.
    - However, the Court held that even though the individual plaintiff's claims were moot, the class action may still proceed.

- **Tendering Full Amount of Plaintiff's Claim – Escrow Deposits and Certified Checks/Deposits Into Court**
- *(2) Certified Checks/Deposits Into Court*
  - **Finding Sufficient to Moot Claim -** *Leyse v. Lifetime Entertainment Services* (S.D.N.Y. 2016), *aff'd*, 679 F. App'x 44 (2d Cir. 2017)
    - » In TCPA case, plaintiff moved for class certification, which was denied. The defendant subsequently made a Rule 68 offer of judgment to the plaintiff and deposited the full amount of damages and costs recoverable under the TCPA, even though the plaintiff had not accepted the offer of judgment. Despite the plaintiff's rejection of the offer, the district court granted the defendant's motion to enter judgment on behalf of plaintiff. The plaintiff appealed.
    - » The Second Circuit affirmed, reasoning that the case presented the "precise scenario" discussed in *Campbell-Ewald*, and thus fell outside of its holding because "the Court expressly stated that its holding did not extend to cases in which 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.'" *Leyse,* 679 F. App'x at 48.

- **Tendering Full Amount of Plaintiff's Claim – Escrow Deposits and Certified Checks/Deposits Into Court**
- *(2) Certified Checks/Deposits Into Court*
  - **Finding Insufficient to Moot Claim**
    - *Ung v. Universal Acceptance Corp.*, 190 F. Supp. 3d 855, 856 (D. Minn. 2016) (finding that certified check for maximum amount of plaintiff's statutory damages does not moot claim, and noting that "there is no principled difference between a plaintiff rejecting a *tender* of payment and an *offer* of payment.").
    - *Conrad v. Boiron, Inc*., 869 F.3d 536, 541 (7th Cir. 2017) (Rejecting argument that defendant's tendering payment under Rule 67 of amount sought by plaintiff into the court's registry rendered case moot, stating that defendant "would like us to hold that at some point, a plaintiff's stubborn refusal to accept a generous settlement offer should be taken as the legal equivalent of acceptance. But we are aware of no such doctrine, and we are loathe to adopt such an ill-defined rule.").
    - *Fulton Dental, LLC v. Bisco, Inc.*, 860 F.3d 541 (7th Cir. 2017) ("an unaccepted offer to settle a case, accompanied by a payment intended to provide full compensation into the registry of the court under Rule 67, is no different in principle from an offer of settlement made under Rule 68").

- **Tendering Full Amount of Plaintiff's Claim – Escrow Deposits and Certified Checks/Deposits Into Court**
- *(2) Certified Checks/Deposits Into Court*
  - **Finding Insufficient to Moot Claim -** *Ung v. Universal Acceptance Corp.*, 190 F. Supp. 3d 855 (D. Minn. 2016)
    - Consumer brought putative class action against credit financing company, alleging that company violated the TCPA. Defendant sent plaintiff's counsel a certified check for the maximum amount of the plaintiff's statutory damages, but the plaintiff rejected the offer and returned the check.
    - The court held that a rejected tender "works in exactly the same way as a rejected offer under Rule 68" and does not moot a plaintiff's case. *Id.* at 861.
    - Seemingly flying in the face of the distinction between these two concepts recognized in *Campbell-Ewald*, the court found that plaintiff's individual claims were not moot because "there is no principled difference between a plaintiff rejecting a tender of payment and an offer of payment." *Id.* at 860.

- **Tendering Full Amount of Plaintiff's Claim – Escrow Deposits and Certified Checks/Deposits Into Court**
- *(2) Certified Checks/Deposits Into Court*
  - **Finding Insufficient to Moot Claim -** *Fulton Dental, LLC v. Bisco, Inc.*, 860 F.3d 541 (7th Cir. 2017)
    - Defendant in a TCPA class action case deposited the maximum amount of statutory damages in the court's registry under Rule 67. The defendant contended that this tendered offer rendered moot both the plaintiff's individual and class-wide claims.
    - The court held that "an unaccepted offer to settle a case, accompanied by a payment intended to provide full compensation into the registry of the court under Rule 67, is no different in principle from an offer of settlement made under Rule 68." *Fulton*, 860 F.3d at 547.
    - The court reasoned that even funds deposited with the court do not provide the full relief sought because a class action "is about more than statutory damages ... it is also about the additional reward that [a named plaintiff] hopes to earn by serving as the lead plaintiff for a class action." *Id*. at 545. The court concluded that "we cannot say as a matter of law that the unaccepted offer was sufficient to compensate plaintiff Fulton for its loss of the opportunity to represent the putative class." *Id.* at 547.
    - As in *Chen*, the *Fulton* court found that the underlying principle of *Campbell-Ewald* would be violated by a determination that a defendant could escape exposure to class liability by tendering a check to a third-party account and requesting judgment before the plaintiff had the opportunity to pursue class certification.

- *Tender of Payment and "Complete Relief"*
  - **Tender Of Payment Effective Only If Amount Of Plaintiff's Damages Is Definite**
    - In many of the cases post-*Campbell-Ewald*, a defendant's ability to tender "complete relief" is typically limited to those situations where either there is no dispute as to the amount of money the plaintiff is seeking, or damages can be mechanically calculated under the statute at issue.
      - Katrina Christakis et. al., "*So You're Telling Me There's A Chance!": The Post-Campbell-Ewald Possibility of Mooting A Class Action by "Tender" of Complete Relief*, 71 Consumer Fin. L.Q. Rep. 237, 241-42 (2017).
      - *See also Bais Yaakov of Spring Valley v. ACT, Inc.*, 186 F. Supp. 3d 70, 76-77 (D. Mass. 2016) (finding a defendant's tender did not moot plaintiff's TCPA claim where the parties disputed whether plaintiff was entitled to damages per fax or for multiple TCPA violations on each fax).

- *Tender of Payment and "Complete Relief"*
  - **Tender Of Payment Effective Only If Amount Of Plaintiff's Damages Is Definite – Observations And Principles**
    - Statutory causes of action are more amenable to knowing what damages are going to be, especially where there is a definite cap on liability. *See Leyse v. Lifetime Entm't Servs., LLC*, 171 F. Supp. 3d 153, 154 (S.D.N.Y. 2016) (holding plaintiff's individual claim mooted where he was only entitled to "a maximum award of $1500" under the TCPA, and the defendant "offered to pay the plaintiff $1,503.00 plus costs").
    - However, statutory causes of action are not as amenable when there is a dispute as to the method of calculation of damages (e.g., whether damages can be recovered on a per violation or per action basis). *See Bais Yaakov*, 186 F. Supp. 3d at 76-77 (finding a defendant's tender did not moot plaintiff's TCPA claim where the parties disputed whether plaintiff was entitled to damages per fax or for multiple TCPA violations on each fax).
    - Courts usually reject attempts to moot claims where a plaintiff is seeking damages for emotional distress or punitive damages. *See Smith v. Prof'l Debt Mediation, Inc.,* No. 2:16-cv-00258-RDP, 2017 WL 1247507, slip op. at *7 (N.D. Ala. Apr. 5, 2017).
    - What about attorneys' fees?

- **Whether a Claim for Attorney's Fees is Sufficient to Sustain an Otherwise Moot Case**
  - **Finding Claim for Attorney's Fees Does Not Sustain Otherwise Moot Case**
    - *Family Med. Pharm. v. Perfumania Holdings, Inc.*, No. 15-0563-WS-C (S.D. Ala. July 5, 2016) (slip op.) (finding that the tender of a check for maximum damages constituted "full relief" despite the plaintiff's demand for attorney's fees).
    - *Price v. Berman's Auto., Inc.*, No. 14-763-JMC, 2016 WL 1089417, at *3 (D. Md. Mar. 21, 2016) (acknowledging attorney's fees were available under TILA but indicating that "a potential claim for attorney's fees is insufficient to sustain an otherwise moot case.").
  - **Finding Claim for Attorney's Fees Sufficient to Sustain Otherwise Moot Case**
    - *Perez-White v. Advanced Dermatology,* No. 15 Civ. 4858 (PGG), 2016 WL 4681221, slip op. at *7 (S.D.N.Y. Sept. 7, 2016) (finding defendants did not offer "full relief" where a letter sent to plaintiff did "not state that Defendants consent[ed] to having judgment entered against them ... nor [did] it acknowledge Plaintiffs' claim for attorneys' fees and costs").

- **Whether a Claim for Attorney's Fees is Sufficient to Sustain an Otherwise Moot Case**
  - **Finding Claim for Attorney's Fees Does Not Sustain Otherwise Moot Case -** *Price v. Berman's Auto., Inc.* (D. Md. Mar. 21, 2016)
    - Defendants sent plaintiffs a cashier's check representing complete relief, and plaintiffs declined to accept the payment and returned the check. Defendant claimed that its attempted payment mooted plaintiffs' TILA claim. Plaintiffs argued that their claim was not moot because in addition to actual damages, TILA mandates that the Court award costs and a reasonable attorney fee to a claimant who brings a successful action to enforce liability against a defendant.
    - The court held that "a potential claim for attorney's fees is insufficient to sustain an otherwise moot case." *Price,* No. 14-763-JMC at 3.
    - The court also noted that "the dismissal of Plaintiffs' TILA claim as moot would not preclude Plaintiffs from seeking or recovering attorney's fees. For example, other courts have found that the question of attorney's fees is ancillary to the underlying action and survives independently under the court's equitable jurisdiction." *Id.*
    - In other words, the plaintiffs could try to recover attorneys' fees, but that would not sustain the substantive TILA claim in the case.

- **Whether a Claim for Attorney's Fees is Sufficient to Sustain an Otherwise Moot Case**
  - **Finding Claim for Attorney's Fees Sufficient to Sustain Otherwise Moot Case -** *Perez-White v. Advanced Dermatology* (S.D.N.Y. Sept. 7, 2016)
    - In putative collective and class action, defendants served an offer of judgment on plaintiffs' counsel, which plaintiffs rejected, claiming that it did not offer full monetary relief. Defendants served a second letter offering increased amounts, but the "letter d[id] not state that Defendants consent to having judgment entered against them, nor d[id] it acknowledge Plaintiffs' claim for attorneys' fees and costs." *Perez-White*, No. 15 CIV. 4858 (PGG) at 7.
    - The court found that because defendants, in their second letter, offered plaintiffs amounts larger than those set forth in their initial offer of judgment, "the [initial] offer of judgment did not offer Plaintiffs full relief." *Id*. Moreover, the court held that defendants' second letter "cannot be regarded as an offer of judgment that provides Plaintiffs with full relief" because the letter did not state defendants' consent to having judgment entered against them, nor did it address plaintiffs' claim for attorneys' fees.

- ***Genesis/Campbell-Ewald's* Implications for Class Actions**
  - *Campbell-Ewald* did not address the implications of Rule 68 offers of judgment for class actions, as **the Court did not address the mootness of *class claims*, ruling only on the *individual claims* of the named plaintiff**
  - Courts have also viewed *Genesis* as inapplicable to class actions, as it involved a collective action.
  - Given the paucity of Supreme Court guidance on this question, the determination of whether a class claim is moot when a plaintiff's individual claim becomes moot varies by jurisdiction. Federal courts have generally taken three approaches:
    - **(1) class claims are moot;**
    - **(2) class claims are not moot provided that the named plaintiff has filed a motion for class certification; or**
    - **(3) class claims are not moot regardless of whether a motion for class certification has been filed.**

- **Whether a Class Claim is Moot When Named Plaintiff's Individual Claim Becomes Moot**
  - So far, the circuit courts that have addressed this issue have adopted three different approaches:
    - **The Third and Ninth Circuits have held that if a plaintiff's individual claim becomes moot on tender of complete relief, this does *not* moot class claims even if no motion for certification has been filed.**
      - *Richardson v. Bledsoe*, 829 F.3d 273, 276-91 (3d Cir. 2016); *Chen v. Allstate Ins. Co*., 819 F.3d 1136, 1139, 1143-44 (9th Cir. 2016).
    - **The Seventh Circuit has suggested that a plaintiff's class claims will survive if a motion for class certification was filed before the plaintiff's individual claims became moot.**
      - *Fulton Dental, LLC v. Bisco, Inc.,* 860 F.3d 541, 544-47 (7th Cir. 2017) ("[T]he safest way to preserve the option of serving as a class representative is to file a prophylactic motion for class certification at the time the lawsuit is filed.").
    - **The Second Circuit has held that when a plaintiff files a putative class action and his individual claims become moot "prior to certification," then "the entire action becomes moot.**"
      - *Bank v. All. Health Networks, LLC*, 669 F. App'x 584, 585-86 (2d Cir. 2016); *cf. Fulton Dental*, 860 F.3d at 546 ("[A]s long as the proposed class representative has not lost on the merits before a class certification motion is filed, it is not barred from seeking class treatment.").

- **Whether a Class Claim is Moot When Named Plaintiff's Individual Claim Becomes Moot – The Third and Ninth Circuit's Approach**
  - **If a plaintiff's individual claim becomes moot on tender of complete relief, this does *not* moot class claims even if no motion for certification has been filed.**
  - In *Richardson v. Bledsoe*, 829 F.3d 273, 276-91 (3d Cir. 2016), plaintiff brought individual and class action claims against prison officials. However, plaintiff's individual claim was deemed moot because he transferred prisons, causing his "personal stake in the claims" to be "extinguished." *Id.* at 282-83.
  - **Although the case itself does not involve an offer of judgment, the court applied Rule 68 jurisprudence and relied on *Campbell-Ewald*, and district courts have applied this decision to rule on Rule 68 offers of judgment.**
  - The issue the court examined was "whether Richardson may continue to represent the class of inmates still being held in the SMU Program at USP Lewisburg despite the mootness of his individual claim." *Id*.
  - The court held that the mooting of plaintiff's claims did not prevent him from continuing to seek class certification or from serving as class representative. The court also noted that plaintiff "did not have a 'fair opportunity' to seek class certification before his individual claim became moot." *Id.* at 289.

- **Whether a Class Claim is Moot When Named Plaintiff's Individual Claim Becomes Moot – The Third and Ninth Circuit's Approach**
  - In *Chen v. Allstate Insurance Co*., 819 F.3d 1136, 1139, 1143-44 (9th Cir. 2016), the Ninth Circuit rejected a defendant's effort to moot a class action by depositing a check for complete relief in an escrow account for the plaintiff, requesting an order directing the escrow agent to pay the tendered funds to the plaintiff, and entering final judgment for the plaintiff.
  - The court reasoned that because a named plaintiff's claim is "inherently transitory" and "evades review" when a defendant engages in the tactic of "picking off" the lead plaintiff to avoid a class action, an exception to the mootness rule is appropriate if the plaintiff can still file a timely motion for class certification. *Chen*, 819 F.3d at 1142-43.
  - The court also emphasized *Campbell-Ewald*'s oft-cited dicta that "a would-be class representative with a live claim of her own must be accorded a fair opportunity to show that certification is warranted." *Id.* (citing *Campbell-Ewald*, 136 S. Ct. at 672).
- Other courts with similar holdings:
  - *See Abante Rooter & Plumbing, Inc. v. Oh Ins. Agency*, No. 15-CV-9025, 2018 WL 993883 (N.D. Ill. Feb. 20, 2018); *Susinno v. Work Out World, Inc.*, No. 15-CV-5881 (PGS), 2017 WL 5798643 (D.N.J. Nov. 28, 2017); *Boger v. Trinity Heating & Air, Inc.*, No. CV TDC-17-7729, 2018 WL 6050886 (D. Md. Nov. 16, 2018); *Brady v. Basic Research, L.L.C.*, 312 F.R.D. 304, 306 (E.D.N.Y. 2016).

- **Whether a Class Claim is Moot When Named Plaintiff's Individual Claim Becomes Moot – The Second Circuit's Approach**
  - **The Second Circuit has held that when a plaintiff files a putative class action and his individual claims become moot "prior to certification," then "the entire action becomes moot."**
  - In *Bank v. All. Health Networks, LLC*, 669 F. App'x 584, 585-86 (2d Cir. 2016), plaintiff brought claims under the TCPA individually and on behalf of a putative class. In the district court, plaintiff accepted defendants' Rule 68 offer of judgment, and the court entered judgment in his favor, thus rendering his individual claims moot. On appeal, plaintiff argued that "the satisfaction of the judgment on his individual claims did not deprive the court of subject matter jurisdiction over his class action claims." *Id.* at 584.
  - The Second Circuit held that the district court properly dismissed plaintiff's claims as moot and that plaintiff lacked standing to pursue the class claims.
  - The court reasoned that "where judgment has been entered and where the plaintiff's claims have been satisfied, as they were here when Bank negotiated the check, any individual claims are rendered moot." *Id.* As such, "Bank lacks any connection to a live claim of his own…or any cognizable interest in pursuing the class claims." *Id.* (citations omitted).
  - The court further noted that "where the individual claims of the putative class representative are rendered moot prior to certification, in general 'the entire action becomes moot.'" *Id.* (citing *Comer v. Cisneros*, 37 F.3d 775, 798 (2d Cir. 1994)). Therefore, "[s]ince Bank was the sole individual representative for the putative class, once his claim was no longer live, no plaintiff remained in a position to pursue the class claims." *Id.*

- **Necessity of Placeholder Class Cert Motions**
  - **A placeholder class certification motion is usually filed at the same time as the lawsuit, in order to preserve the option of serving as a class representative. Often, the placeholder motions note that a supporting memorandum will follow after obtaining the discovery necessary to satisfy the class cert requirements.**
  - **Allowing Placeholder Motions**
    - *Fulton Dental v. Bisco, Inc.*, 860 F.3d 541 (7th Cir. 2017) (noting that the "safest way to preserve the option of serving as a class representative is to file a prophylactic motion for class certification at the time the lawsuit is filed").
  - **Finding Placeholder Motions Unnecessary**
    - *Career Counseling, Inc. v. Amsterdam Printing & Litho, Inc.*, No. 3:15-CV-05061-JMC, 2016 WL 3679345, at *4 (D.S.C. July 12, 2016) (a class action plaintiff need not file a "placeholder" motion to certify to avoid a defendant's attempt to "pick-off" the plaintiff and moot the class with a Rule 68 Offer of Judgment).
  - **Disallowing Placeholder Motions**
    - *McClain v. Hanna*, No. 2:19-CV-10700, 2019 WL 2325678, at *1 (E.D. Mich. May 31, 2019) ("the Sixth Circuit's jurisprudence in this area does not permit a plaintiff who plainly plans to accept an offer of judgment as to his individual claims to preserve potential class claims merely by filing a bare-bones motion for class certification").

- **Necessity of Placeholder Class Cert Motions**
  - **Disallowing Placeholder Motions -** *McClain v. Hanna*, No. 2:19-CV-10700, 2019 WL 2325678 (E.D. Mich. May 31, 2019)
    - In a case under the Fair Debt Collection Practices Act, defendants sent plaintiff a Rule 68 offer of judgment before a placeholder class certification motion was filed. Four days later, plaintiff filed a class certification motion, describing it as "simply a placeholder motion, a belt and suspenders motion, in light of Defendants' Rule 68 Offer of Judgment, which will subsequently be accepted by Plaintiff." *Id.* at *2.
    - The court held that "a plaintiff cannot preserve class claims simply by filing a placeholder motion for class certification, unsupported by evidence or substantive legal arguments, where the representative plaintiff has fully accepted a settlement." *Id.* at *7.
    - The court's reasoning relied heavily on *Mey v. North American Bancard, LLC*, 655 F. App'x 332 (6th Cir. 2016), which stated in dicta that "for the 'picking off' exception to apply, a motion for class certification must be not only pending but 'perhaps also fully briefed at the time that the lead plaintiff's individual claims became moot' because of her acceptance of an offer of judgment…Only then will the putative class action survive." *Id*. at *6. As such, the court held that "the mootness doctrine requires dismissal of Plaintiff's putative class claims." *Id*. at *1.

- **Offer of Judgment and Adequacy/Typicality**
  - While a defendant's unaccepted Rule 68 offer of judgment will not moot a named plaintiff's claims, it may make the plaintiff atypical and inadequate and thus ineligible to represent the putative class.
  - In *Franco v. Allied Interstate*, 2018 WL 3410009 (S.D.N.Y. July 13, 2018), the Southern District of New York denied class certification in a Fair Debt Collection Practices Act case, holding that plaintiff was an inadequate class representative based on his decision to reject defendant's Rule 68 offer to provide full satisfaction of plaintiff's individual claims.
  - In deciding plaintiff's motion for class certification, the court found that plaintiff's rejection of the Rule 68 offer did not affect a typicality analysis, because "an unaccepted Rule 68 offer is a legal nullity" and therefore cannot "alter the *nature* of plaintiff's claims and/or injury". *Id.* at *4.
  - On the other hand, the court found that "although plaintiff may have 'typical' claims, he appears likely to litigate those claims in a decidedly atypical way," thus affecting his adequacy to represent the class. *Id.*

- **Offer of Judgment and Adequacy/Typicality**
  - A number of courts have found a named plaintiff's refusal to accept an offer of judgment that did not provide for class relief **actually *demonstrated* adequacy.**
    - *Macy v. GC Servs. Ltd. P'ship,* 318 F.R.D. 335, 340 (W.D. Ky. 2017), *aff'd,* 897 F.3d 747 (6th Cir. 2018) (finding the named plaintiffs' act of rejecting offers of judgment that included no class relief "protected class members' interests").
    - *Wicke v. L&C Insulation, Inc.,* 2014 WL 2957434, at *2 (W.D. Wis. July 1, 2014) (noting that if the named plaintiff had accepted an offer of settlement, his adequacy would be called into question).
    - *Liles v. Am. Corrective Counseling Servs., Inc.,* 231 F.R.D. 565, 574 (S.D. Iowa 2005) (plaintiff's implicit rejection of defendants' offer of judgment demonstrated her "commitment to the litigation").

- **Offer of Judgment and Adequacy/Typicality**
  - **Refusal to accept an offer of judgment demonstrates adequacy** - *Wicke v. L&C Insulation, Inc.*, 2014 WL 2957434 (W.D. Wis. July 1, 2014)
  - In *Wicke*, defendant moved to dismiss plaintiff's FLSA claims as mooted by an offer of judgment. Plaintiff argued that at the time defendant made the offer, "plaintiffs' motion for class certification was pending and, therefore, the offer did not provide full relief because it did not consider the interests of the unnamed class members." *Id.* at *1.
  - The court agreed with the plaintiff and found his FLSA claim was not moot, reasoning that "at the time Wicke rejected defendant's offer, the class claims were still pending. If he had accepted the offer of settlement, Wicke's adequacy as a class representative certainly would have been called into question." *Id.* at *2.

- **A Final Option for Avoiding Class Action Litigation Costs: Making Rule 68 Offer To Both Named Plaintiff And The Putative Class**
  - In *Kaymark v. Udren Law Offices, P.C.*, No. CV 13-419, 2017 WL 1080083 (W.D. Pa. Mar. 22, 2017), the defendant sought to avoid costly class action litigation by extending a Rule 68 offer of judgment to both the named plaintiff and the class. Plaintiff argued that the Rule 68 offer of judgment made before class certification was premature, citing "several district court cases in which courts have stricken Rule 68 offers of judgment prior to class certification." *Id*. at *1.
  - The court distinguished the cases cited by plaintiff, which "involved situations in which the defendant was trying to 'pick-off' the named plaintiff prior to class certification with 'the purpose to dampen the efforts of the putative representative in pursuing the class action, if not to cause her to withdraw,' and 'an attempt to inject a conflict of interest between her and those she seeks to represent.'" *Id.* (citing *Zeigenfuse v. Apex Asset Mgmt., LLC*, 239 F.R.D. 400, 403 (E.D. Pa. 2006)).
  - In this case, however, no "pick-off" issue existed because the Rule 68 offer was made to the named plaintiff and the putative class, and plaintiff "cite[d] no cases in which a court struck a Rule 68 offer of judgment in this situation." *Id.*
  - "Defendant understandably does not want to continue incurring defense costs or be liable for a 'runaway train' of the other side's attorney's fees in a case that it believes should be settled without any further litigation for an amount that it believes is the maximum potential recovery." *Id.* at *2.
  - Any accepted classwide settlement would be "provisional" and subject to the strict approval requirements of Rule 23.

4 STRATEGIES

- **Strategies for Plaintiffs**
  - Use placeholder class certification motions in circuits that allow this tactic.
    - » Preemptively file a motion for class certification at the time the lawsuit is filed, in order to preserve the option of serving as a class representative
    - » Circuits that allow this tactic: Third Circuit, Seventh Circuit, Ninth Circuit
  - If possible, include damages allegations that can be characterized as insufficiently definite.
    - » *See Bais Yaakov of Spring Valley v. ACT, Inc.*, 186 F. Supp. 3d 70, 76-77 (D. Mass. 2016) (finding a defendant's tender did not moot plaintiff's TCPA claim where the parties disputed whether plaintiff was entitled to damages per fax or for multiple TCPA violations on each fax).
  - When rejecting offer, state that the offer has not provided full relief – illustrated by *Perez-White v. Advanced Dermatology of New York P.C.*, No. 15 CIV. 4858 (PGG), 2016 WL 4681221 (S.D.N.Y. Sept. 7, 2016), discussed previously.
    - » In *Perez*, upon rejecting the Rule 68 offer, "Plaintiffs' counsel stated that the offer of judgment had not provided full relief" and "The Court directed the parties to attempt to reach agreement as to what amount would constitute full relief on these claims." *Id.* at *3. Afterwards, plaintiff and defense counsel "reached agreement as to what sums would constitute full relief," but plaintiffs nonetheless refused to accept. *Id.* Defendants then served a second offer of an increased amount, and the court found that because defendants, in their second letter, offered plaintiffs amounts larger than those set forth in their initial offer of judgment, "the [initial] offer of judgment did not offer Plaintiffs full relief." *Id.*

- **Strategies for Defendants**
  - Be aggressive and comprehensive with Rule 68 offers
    - Account for attorneys' fees where applicable
    - Choose most widely accepted method of tender of payment (escrow deposits, certified checks or Rule 67 deposits into court) in your jurisdiction.
      - Overall, certified checks are the most widely accepted across circuits.
      - Escrow deposits are the least widely accepted.
      - Some defendants have tried multiple methods out of an abundance of caution. *See S. Orange Chiropractic Ctr., LLC v. Cayan LLC* (D. Mass. Apr. 12, 2016) (defendant first tendered bank check to plaintiff, and then "backed up" the offer by offering to deposit into court)
    - Consider whether your jurisdiction has a "pick-off" rule; if it does, you may need to make the Rule 68 offer to the named plaintiff and the putative class for the approach to be viable.
    - Use a named plaintiff's rejection of an offer of judgment as evidence that he or she is atypical or an inadequate class representative.

THANK YOU

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