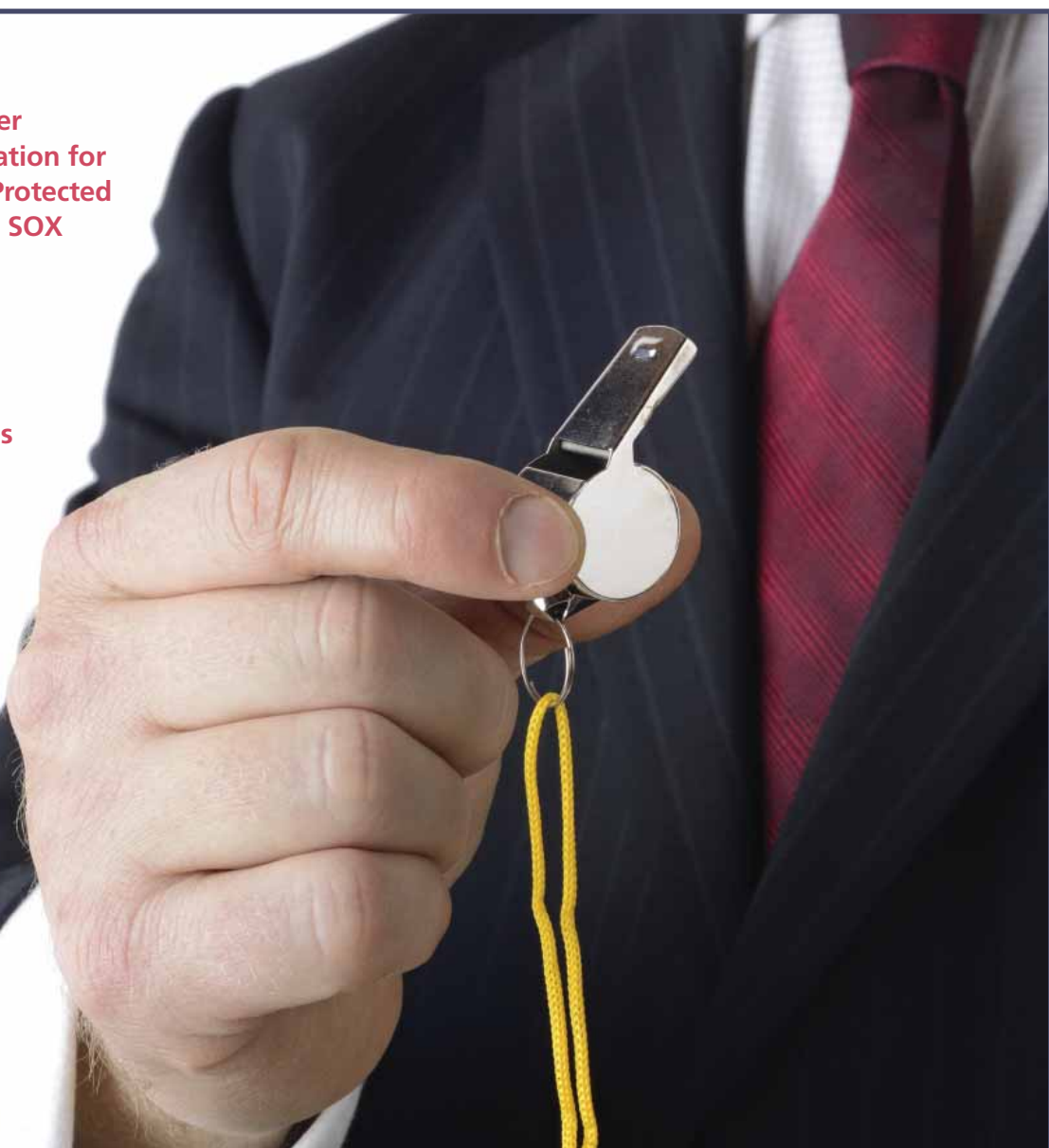


# NYLitigator

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## Inside

- **Blacklisting a Former Employee in Retaliation for Post-Employment Protected Activity Can Create SOX Exposure**
- **Whistleblower Protection and Antitrust**
- **Settlement Releases and Waiving the "Unknown"**
- **Federal Rule of Evidence 502**
- **Rule 68 Offers of Judgment and Mootness**
- **Social Media Ethics Guidelines**



# Rule 68 Offers of Judgment and Mootness, Especially for Collective or Class Actions

This report addresses a split in the federal circuits on the question of whether an unaccepted offer of judgment under Rule 68 of the Federal Rules of Civil Procedure<sup>1</sup> for as much or more than the offeree could legally recover renders the action moot and requires its dismissal. Faced with a plaintiff's rejection of a defendant's offer of complete relief,<sup>2</sup> the Second and Sixth Circuits have nonetheless entered judgment in the plaintiff's favor in the amount of the offer and accordingly dismissed the action as moot.<sup>3</sup> In contrast, the Seventh Circuit has held that a court may dismiss an action without providing an offeree any remedy where the offeree refuses to accept a Rule 68 offer for complete relief.<sup>4</sup> In *dicta*, the Third Circuit has stated its agreement with the Seventh Circuit's approach.<sup>5</sup> The Ninth Circuit, on the other hand, has held that "an unaccepted Rule 68 offer that would have fully satisfied a plaintiff's claim does not render that claim moot."<sup>6</sup> In *Symczyk*, the Supreme Court acknowledged that the circuit courts were split on this issue but declined to resolve the question, finding that the issue was not properly presented for review.<sup>7</sup>

The question of what a district court should do in the face of an unaccepted offer of judgment for complete relief gains particular significance in class actions under Federal Rule of Civil Procedure 23 and collective actions such as those brought under the Fair Labor Standards Act (the "FLSA"). Where an offer under Rule 68 leads to the involuntary dismissal of such claims, a judicial determination of an issue common to potential plaintiffs who would otherwise lack the financial resources to prosecute their claims may be preempted. By "picking off" potential class or collective action representatives one by one, a defendant could potentially preclude judicial review and redress of a widespread injury.

This report first examines the case law on whether a failure to accept a Rule 68 offer affording complete relief moots the case. While the courts are split, and the text of Rule 68 does not specifically provide or even suggest that an unaccepted offer should moot the case, the Section recommends that the Rule be amended to allow the entry of a judgment for the full amount of an offer that provides complete relief but is not accepted.

The report also examines the case law and arguments regarding the tension between a Rule 68 offer of complete relief to an individual representative in a class or collective action and the termination of the action as a result of such an offer. However, no recommendation is made to change or retain current Rule 68 in this area.

## 1. The *Symczyk* Decision

In *Symczyk*, the plaintiff brought a collective action under the FLSA on behalf of herself and others "similarly situated."<sup>8</sup> After she allowed an offer of judgment under Rule 68 to lapse, the district court, finding that no other individuals had joined her suit and that the relief offered by the defendant under Rule 68, if accepted, would have fully satisfied her claim, concluded that the suit was moot and dismissed plaintiff's claim for lack of subject matter jurisdiction.<sup>9</sup>

The Third Circuit reversed, holding that, while the plaintiff's individual claim was moot, allowing defendants before certification to "pick off" named plaintiffs with "Rule 68 offers would frustrate the goals of collective actions."<sup>10</sup> The matter was therefore remanded to the district court for the plaintiff to seek "conditional certification," which, if successful, would relate back to the commencement of the action and permit the case to go forward.<sup>11</sup>

In the Supreme Court, the defendant argued that the Third Circuit's order remanding the case to the district court should be reversed and that, because the plaintiff's claim was moot, the entire action should be dismissed. The plaintiff argued that the district and circuit courts erred when each held the defendant's unaccepted offer of judgment mooted the plaintiff's FLSA claim, because the Rule 68 offer lapsed without an entry of judgment.<sup>12</sup> The United States, as *amicus curiae*, argued in support of the plaintiff's position that the defendant's unaccepted Rule 68 offer did not moot the FLSA claim.<sup>13</sup>

In a 5-4 decision by Justice Thomas (joined by Justices Roberts, Scalia, Kennedy, and Alito), the Supreme Court acknowledged that the Courts of Appeals were split as to whether an unaccepted Rule 68 offer that fully satisfies a plaintiff's claim necessarily renders the claim moot.<sup>14</sup> The Court declined to decide that issue, however, on the ground that the plaintiff failed to raise it in her opposition to the petition for certiorari and had also conceded at the district and circuit court levels that an unaccepted offer for full relief mooted an offeree's claim.<sup>15</sup> The Court therefore assumed, without deciding, that the plaintiff's individual claim was rendered moot by the defendant's Rule 68 offer.<sup>16</sup>

The remainder of the Court's opinion focused on whether the plaintiff's collective-action allegations were sufficient to render the action justiciable notwithstanding the mootness of her individual claim.<sup>17</sup> The Court held that they were not, reasoning that collective actions under the FLSA and analogous statutes are fundamentally dif-

ferent from Rule 23 class actions.<sup>18</sup> The majority's reasoning rejected three arguments by Symczyk.

*First*, the Court rejected Symczyk's argument that she had a sufficient personal stake in the collective action, other than her individual claim, by virtue of her status as a potential representative of other similarly situated employees.<sup>19</sup> According to the Court, at the time her claim became moot, there was no certification decision to which the claim could relate back because Symczyk had not moved for "conditional certification."<sup>20</sup> Even if she had moved for conditional certification, the Court drew a distinction between Rule 23 class actions and "conditional certification" under FLSA.<sup>21</sup> Under Rule 23, a putative class acquires independent legal status upon the district court's grant of class certification.<sup>22</sup> By contrast, under the FLSA, a grant of conditional certification only permits similarly situated employees to opt into the litigation by filing written consent with the court.<sup>23</sup> Thus, the Court held, in FLSA collective action cases, a grant of conditional certification could not render justiciable the named plaintiff's claim if that claim had been rendered moot by an offer for a complete remedy.<sup>24</sup>

*Second*, the Court rejected Symczyk's argument that, even if her claim were moot, the action would survive under a line of authority holding that those class action claims which are "inherently transitory" are not necessarily rendered moot upon the termination of a named plaintiff's claim.<sup>25</sup> The Court explained that the "inherently transitory" analysis was developed to address situations involving a plaintiff's interest in a suit concerning fleeting conduct, where the plaintiff's stake did not last long enough to enable litigation to run its course.<sup>26</sup> In contrast, the Court concluded that using Rule 68 to "pick off" a named plaintiff before the collective action process was complete addressed a defendant's strategy but not the duration of the defendant's conduct.<sup>27</sup> Because nothing prevented similarly situated plaintiffs from continuing their suit, claims subject to Rule 68 offers cannot be described as "inherently transitory."<sup>28</sup>

*Third*, having assumed without deciding that the unaccepted offer mooted the plaintiff's claim, the Court rejected Symczyk's argument that the action should survive because the purposes served by the FLSA's collective-action provisions would be frustrated by a defendant's use of Rule 68 to "pick off" named plaintiffs.<sup>29</sup> In support of her argument, Symczyk relied on *Deposit Guaranty National Bank v. Roper*, where the Court held that named plaintiffs possessed a continuing economic interest in their case following denial of class certification and entry of judgment in their favor due to a Rule 68 offer because a successful appeal would enable the plaintiffs to shift the burden of a portion of their attorney's fees and costs on to successful class litigants.<sup>30</sup> But Symczyk had conceded that the Rule 68 offer afforded her complete relief, and she never asserted that she

possessed a continuing economic interest in the case.<sup>31</sup> Therefore, *Roper* was inapplicable.<sup>32</sup>

## 2. The Symczyk Dissent

Justice Kagan (joined by Justices Ginsburg, Breyer, and Sotomayor) dissented. The dissent focused heavily on principles of equity, fairness, and basic contract law, reasoning that an unaccepted Rule 68 offer operated like any other rejected settlement offer—the plaintiff rejecting a Rule 68 offer retained an interest in the case; an unaccepted offer of judgment could never moot a claim. Justice Kagan made the following points:

"[A]s long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot. [A] case becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party." ...[A]n unaccepted offer of judgment cannot moot a case [because, w]hen a plaintiff rejects such an offer—however good the terms—her interest in the lawsuit remains just what it was before. And so too does the court's ability to grant her relief. An unaccepted settlement offer—like any unaccepted contract offer—is a legal nullity, with no operative effect.... Nothing in Rule 68 alters that basic principle; to the contrary, that rule specifies that "[a]n unaccepted offer is considered withdrawn."<sup>33</sup>

Chastising the majority for avoiding the central issue by finding a waiver, the dissent underscored that the Court's own precedent would allow the issue to be considered even though a cross-petition for review had not been filed.<sup>34</sup> The dissent further explained that the text of Rule 68 contemplates that a court will enter judgment only when a plaintiff *accepts* an offer, and that an unaccepted offer will have no other consequence but to shift costs if the plaintiff ultimately secures a result less favorable than that offered.<sup>35</sup> "The Rule provides no appropriate mechanism for a court to terminate a lawsuit without the plaintiff's consent."<sup>36</sup> Thus, the dissent reasoned, because the plaintiff's rejection of the Rule 68 offer had no legal impact, neither the individual case nor the potential collective action was mooted.<sup>37</sup>

## 3. The Split in the Circuits on Mootness

As noted above, the Courts of Appeal are split on whether a Rule 68 offer for maximum relief to a plaintiff moots the plaintiff's claim and, if so, whether a plaintiff who allows such an offer to lapse should receive judgment anyway, should receive no relief, or should be allowed to continue her suit.

The Second and Sixth Circuits hold that, where a plaintiff allows a Rule 68 offer for maximum relief to

lapse, the district court should enter judgment for the amount offered to the plaintiff (i.e., at least the maximum relief obtainable by the plaintiff) and dismiss the action as moot. In *McCauley v. Trans Union L.L.C.*, the Second Circuit held that the district court erred by dismissing the case, leaving the plaintiff with no recovery, where the plaintiff rejected an offer sufficient to afford him all that he could have obtained in the action, even though the offer did not meet the technical requirements of Rule 68.<sup>38</sup> In reversing the district court, the Second Circuit directed that a default judgment be entered against the defendant for the amount offered.<sup>39</sup> The Court of Appeals noted that the plaintiff's interest in having a day in court was not sufficient to satisfy the case or controversy requirement; neither was the defendant's unwillingness to admit liability,<sup>40</sup> citing the Seventh Circuit's decision in *Chathas v. Local 134 IBEW*.<sup>41</sup> The Second Circuit ruled that a plaintiff could not force a defendant to admit a legal violation since a defendant could always default and avoid a binding admission.<sup>42</sup> The Second Circuit relied on *Chathas* in entering a default judgment against the defendant for the amount of the offer, thus balancing the interests of all parties.<sup>43</sup>

Likewise, in *O'Brien v. Ed Donnelly Enters, Inc.*, the Sixth Circuit held that a Rule 68 offer for maximum relief mooted the plaintiff's claim, but that judgment must be entered in the plaintiff's favor before the action could be dismissed.<sup>44</sup> The Eighth Circuit cited *O'Brien* favorably in *Hartis v. Chi. Title Ins. Co.*<sup>45</sup>

The Seventh Circuit, on the other hand, has held that, where certification of a class action properly was denied, the plaintiff's refusal to accept an offer for more than what could be obtained mooted the case and required dismissal.<sup>46</sup> The plaintiff took nothing.<sup>47</sup> The Third Circuit has stated its agreement with the Seventh Circuit's approach but, to our knowledge, has not had occasion to apply the rule directly.<sup>48</sup>

The Ninth Circuit has rejected both of these approaches. Instead, it has adopted the reasoning expressed by Justice Kagan in her *Symczyk* dissent, holding that "an unaccepted Rule 68 offer that would have fully satisfied a plaintiff's claim does not render that claim moot."<sup>49</sup> The Ninth Circuit also cited *dictum* in *McCauley*, reasoning that the Second Circuit's entry of judgment on the Rule 68 offer necessarily rejected the idea that the claim was moot.<sup>50</sup>

The Eleventh Circuit recently adopted the Ninth Circuit approach in *Stein v. Buccaneers Ltd. P'ship*, when it considered whether an unaccepted Rule 68 offer for maximum relief to the named plaintiffs in a purported class could moot a class action when the offer was made prior to certification.<sup>51</sup> The *Stein* court held that the class claim could *not* be mooted based on alternative holdings.<sup>52</sup> First, adopting the reasoning of Justice Kagan's dissent, the court held that an unaccepted Rule 68 offer cannot render an individual's claim moot.<sup>53</sup> Second, even if the

offer did moot the individual's claim, it would not moot the purported class's claim.<sup>54</sup>

#### 4. Discussion of Mootness

We agree with the dissent of Justices Kagan, Ginsburg, Breyer, and Sotomayor in *Symczyk*, and believe that the approaches adopted by the Seventh, Sixth, and Second Circuits to Rule 68 offers are not supported by the current version of the Rule. In addition, the Seventh Circuit's approach outlined in *Greisz*—under which the claim of an offeree who rejects a settlement offer for maximum relief is dismissed as moot without any relief being granted—is fundamentally unfair.

Under Rule 68(b), an offer made under Rule 68(a) that goes unaccepted by the offeree after 14 days "is considered withdrawn."<sup>55</sup> Rule 68(d) articulates only one consequence of failing to accept a Rule 68(a) offer: "If the judgment that the offeree finally obtains is not more favorable than the unaccepted offer, the offeree must pay the costs incurred after the offer was made."<sup>56</sup> The language of the Rule does not allow for or suggest that a court may dismiss the offeree's claim after an offer goes unaccepted.

Nor is there any support in the mootness doctrine for the Seventh Circuit's approach, under which the action is dismissed—with no relief to the offeree—if a Rule 68 offer of full relief is not accepted. As Justice Kagan noted in her *Symczyk* dissent, the Supreme Court has held that a "case becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party."<sup>57</sup> But when an offeree allows a Rule 68 offer to go unaccepted such that it is automatically withdrawn under Rule 68(b), under the current language of the Rule nothing in the litigation should change; the offeree retains the same stake in the outcome of the case as before the offer was made, and the court may grant the same relief as was always available to the offeree. There is nothing about the current formulation of Rule 68 that should render the controversy moot.

The rule established by the Second and Sixth Circuits is more consistent with traditional mootness principles. In the Second Circuit, if a defendant makes a settlement offer for maximum relief, the "typically proper disposition...is for the district court to enter judgment against the defendant for the proffered amount and to direct payment to the plaintiff consistent with the offer."<sup>58</sup> Once a default judgment is entered and the plaintiff is awarded all relief that could be achieved in the litigation, the case may be dismissed as moot. Thus, the Second Circuit's approach recognizes that the plaintiff must be granted full relief in order to render the dispute moot.

As a practical matter, the Sixth Circuit's approach is consistent with the Second Circuit's. Under the Sixth Circuit's rule, a Rule 68 offer of judgment that satisfies the plaintiff's entire demand moots the case, but where the

offer is not accepted, the court must enter judgment on it anyway for the full amount of the offer and dismiss the case.<sup>59</sup>

The approach of the Second and Sixth Circuits is a pragmatic solution, but it does not find support in the language of Rule 68. As currently drafted, Rule 68 provides no authority for a court to enter judgment against a defendant absent an offer by the defendant to take a default judgment against itself.<sup>60</sup> Also, we know of no basis within a court's inherent authority to enter a default judgment against a defendant based on the *plaintiff's* rejection of a Rule 68 offer.

For these reasons, Rule 68 should be amended to provide a district court with the authority to enter judgment in a plaintiff's favor and dismiss the action where the plaintiff has rejected a Rule 68 offer for all the relief that the plaintiff could legally recover. Specifically, a new subparagraph (e) should be added to Rule 68:

(e) Where, under subparagraph (a) of this Rule, a party makes an offer of judgment that would afford the offeree all relief that the offeree could recover under applicable law (including costs and attorney's fees, if available), and the offeree does not accept such offer, the district court may direct the clerk to enter final judgment in the offeree's favor for the full amount of the offer. In such a case, issues regarding costs and attorney's fees shall be decided in accordance with the procedures set forth in Rule 54.

Until such an amendment is adopted, a defendant seeking a dismissal should consider accompanying its Rule 68 offer of complete relief with an offer to have a default judgment entered against it, which may provide a basis for a court to dismiss an action when complete relief has been rejected.

## 5. Special Issues Arising in Class and Collective Actions

The analysis is somewhat more complicated in the context of class actions. As the Third Circuit in *Weiss v. Regal Collections* noted:

Courts have wrestled with the application of Rule 68 in the class action context, noting Rule 68 offers to individual named plaintiffs undercut close court supervision of class action settlements, create conflicts of interests for named plaintiffs, and encourage premature class certification motions. See *Gibson v. Aman Collection Serv.*, 2001 U.S. Dist. LEXIS 10669, at \*8 (S.D. Ind. July 23, 2001) (recognizing conflict of interest posed by Rule 68 offer to lead plaintiff); *Gay v.*

*Waiters' and Dairy Lunchmen's Union*, 86 F.R.D. 500, 502-03 (N.D. Cal. 1980). Justice Brennan also discussed the conflict of interests facing named representatives presented with a Rule 68 offer in *Marek v. Chesny*, 473 U.S. 1, 35 n.49, 87 L. Ed. 2d 1, 105 S. Ct. 3012 (1985) (Brennan, J., dissenting).

No express statement limits the application of Fed. R. Civ. P. 68 in class actions. Proposed amendments to make Rule 68 inapplicable to class actions were suggested in 1983 and 1984, and they were rejected both times. The proposals read in part: "this rule shall not apply to class or derivative actions under Rules 23, 23.1, and 23.2." See 98 F.R.D. at 363; 102 F.R.D. at 433. In support of the proposals, the Advisory Committee wrote: "An offeree's rejection would burden a named representative-offeree with the risk of exposure to heavy liability [for costs and expenses] that could not be recouped from unnamed class members.... [This] could lead to a conflict of interest between the named representatives and other members of the class." Advisory Committee's Note to Proposed Amendment to Rule 68, 102 F.R.D. at 436. See also Roy D. Simon, Jr., *The Riddle of Rule 68*, 54 Geo. Wash. L. Rev. 1, 52 (1985) (discussing rule changes and rationale for rejecting changes).

The leading treatises recognize the tension between these two procedural rules. See, e.g., 12 Charles Alan Wright & Arthur R. Miller, *Fed. Practice and Procedure* § 3001.1, at 76 (2d ed. 1997) ("There is much force to the contention that, as a matter of policy [Rule 68] should not be employed in class actions."); 13 James William Moore et. al., *Moore's Federal Practice* P 68.03[3], at 68-15 (3d ed. 2004) ("policy and practicality considerations make application of the offer of judgment rule to class and derivative actions questionable."); 5 Newberg on Class Actions § 15.36, at 115 (4th ed.) ("By denying the mandatory imposition of Rule 68 in class actions, class representatives will not be forced to abandon their litigation posture each time they are threatened with the possibility of incurring substantial costs for the sake of absent class members.").<sup>61</sup>

In *Marek v. Chesny*, an individual action, not a class action, the Supreme Court held that the term "costs" in

Rule 68 includes attorney's fees if a suit is brought under a statute that defines "costs" to include attorney's fees.<sup>62</sup> While the central holding of *Marek* did not involve class actions directly, Justice Brennan's dissent noted that the expansion of costs to include attorney's fees might create a conflict for a named class representative who received a Rule 68 offer. The plaintiff's interest in pursuing the class action might be impaired by the fear that, if she rejected the Rule 68 offer, she might have to pay the legal fees the defendant incurred after the offer that could not be recouped from unnamed class members.<sup>63</sup>

The courts have crafted rules in the class action context to prevent the conflicts identified by Justice Brennan in *Marek* when Rule 68 offers are made. For example, defendants cannot prevent an appeal from a denial of class certification by offering relief to a named plaintiff.<sup>64</sup> Otherwise, an action could be delayed indefinitely by buying off each putative class representative in succession.

However, the tension between Rule 68 and the class procedures prescribed under Rule 23 becomes apparent when an offer of judgment occurs before a request for certification is made or resolved. In such a situation, some circuits have held that a plaintiff may move to certify a class, absent undue delay, and avoid mootness, even after being offered complete relief. Circuits in this camp include the Third;<sup>65</sup> the Fifth;<sup>66</sup> the Ninth;<sup>67</sup> and the Tenth.<sup>68</sup>

The Seventh Circuit rejected an invitation to follow this line of cases and to overrule its holding in *Greisz* and related cases. In *Damasco v. Clearwire Corp.*, the Seventh Circuit addressed the policy arguments against mooting an individual claim by use of a Rule 68 offer in the class setting.<sup>69</sup> In adhering to its view that mootness mandated the dismissal of a case when the individual claimant, prior to moving for class certification, received an offer for as much or more than could legally be obtained, the Seventh Circuit first discussed its prior authority.

In *Holstein v. City of Chicago*, the plaintiff had not moved for class certification prior to the expiration of the offer, and the claim was therefore mooted and dismissed under Rule 12(b)(6).<sup>70</sup> In *Greisz*, the Seventh Circuit held the offer to the named plaintiff did not moot a class action unless it came before certification was sought.<sup>71</sup> In *Gates v. City of Chicago*, the Court of Appeals held that a plaintiff could not move for class certification after receiving an offer for complete relief.<sup>72</sup> This decision put the Seventh Circuit squarely at odds with other Circuit Courts permitting a plaintiff a reasonable period of time to move for certification before the claim would be dismissed as moot.

In so doing, the Seventh Circuit considered and rejected the policy considerations advanced for a change in its approach:

We believe that the exception created by [the Third, Fifth, Ninth, and Tenth Cir-

cuits] is unnecessary. To allow a case, not certified as a class action and with no motion for class certification even pending, to continue in federal court when the sole plaintiff no longer maintains a personal stake defies the limits on federal jurisdiction expressed in Article III.

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A simple solution to the buy-off problem that Damasco identifies is available, and it does not require us to forge a new rule that runs afoul of Article III: Class-action plaintiffs can move to certify the class at the same time that they file their complaint. The pendency of that motion protects a putative class from attempts to buy off the named plaintiffs. See *Primax*, 324 F.3d at 546-47. Damasco argues that this solution would provoke plaintiffs to move for certification prematurely, before they have fully developed or discovered the facts necessary to obtain certification. See 5 Moore's Federal Practice § 23.64[1] [b], at 350 (3d ed. 2011). But this objection is unpersuasive. If the parties have yet to fully develop the facts needed for certification, then they can also ask the district court to delay its ruling to provide time for additional discovery or investigation. In a variety of other contexts, we have allowed plaintiffs to request stays after filing suit in order to allow them to complete essential activities. See Fed. R. Civ. P. 56(d) (allowing stays to complete discovery before summary judgment); *Newell v. Hanks*, 283 F.3d 827, 834 (7th Cir. 2002) (allowing stays in habeas petitions to permit exhaustion without risk of time bar); *Johnson v. Rivera*, 272 F.3d 519, 522 (7th Cir. 2001) (allowing stays in prisoner-rights suits to permit exhaustion without risk of statute-of-limitation bar). Moreover, this procedure comports with Federal Rule of Civil Procedure 23(c)(1)(A), which permits district courts to wait until "an early practicable time" before ruling on a motion to certify a class. We remind district courts that they must engage in a "rigorous analysis"—sometimes probing behind the pleadings—before ruling on certification. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551, 180 L. Ed. 2d 374 (2011). Although discovery may in some cases be unnecessary to resolve class issues, see 3 Alba Conte & Herbert B. Newberg, *Newberg on Class Actions* § 7.8, at 25 (4th ed. 2002), in other cases a

court may abuse its discretion by not allowing for appropriate discovery before deciding whether to certify a class, *see Pitts*, 653 F.3d at 1093 n.5; *Mills v. Foremost Ins. Co.*, 511 F.3d 1300, 1311 (11th Cir. 2008); *Duke v. Univ. of Tex. at El Paso*, 729 F.2d 994, 996-97 (5th Cir. 1984).<sup>73</sup>

Collective actions under the FLSA present potentially similar concerns, although jurisprudential distinctions exist between class actions and collective actions that can affect the impact of a Rule 68 offer. Indeed, “Rule 23 actions are fundamentally different from collective actions under the FLSA.”<sup>74</sup> For example:

[A] putative class acquires an independent legal status once it is certified under Rule 23. Under the FLSA, by contrast, “conditional certification” does not produce a class with an independent legal status, or join additional parties to the action. The sole consequence of conditional certification is the sending of court-approved written notice to employees, who in turn become parties to a collective action only by filing written consent with the court.

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Whatever significance “conditional certification” may have in [FLSA] proceedings, it is not tantamount to class certification under Rule 23.<sup>75</sup>

## 6. Two Approaches to the Tension Between Rule 68 and Class or Collective Actions

Arguments can be made that Rule 68 should be amended to account for inequities that may arise in class and collective actions when defendants attempt to moot representative plaintiffs’ claims prior to class or collective action certification. Arguments can also be made that no amendment of Rule 68 is necessary because the early issuance of Rule 68 offers encourages resolution of lawsuits with marginal merit, serves an important pruning function in the federal courts, and properly balances the purposes underlying Rule 68 with those of Rule 23 and the collective action procedure.

### a. Arguments Favoring Amendment of Rule 68

Application of Rule 68 offers to individual representatives prior to certification can lead to unfair and impractical results. The monetary value of each putative class or collective action member’s claim is generally small relative to the monetary value of the claims of the putative class or collective group as a whole. Yet an offer for complete relief made to putative representatives of a class or in a collective action prior to certification (whether accepted or not) threatens to preclude judicial

review of legal issues common to putative class members if the offer would moot the case. Thus, a party defending the claim can, for a relatively small price, obtain an unfair and procedurally asymmetric strategic advantage if courts apply Justice Thomas’ assumption in *Symczyk* and deem the mootness doctrine to apply to unaccepted Rule 68 offers.<sup>76</sup>

Litigations involving class and collective actions ought to be recognized as falling outside of the procedural paradigm contemplated by Rule 68 until plaintiffs are afforded a reasonable period of time to seek certification of the class or collective action.<sup>77</sup> Because Rule 68 imposes costs upon an offeree who obtains a judgment that is not more favorable than the one offered, the Rule, if applied in the class or collective action context prior to certification, pits the interests of a putative class representative against those of the putative class.<sup>78</sup> This should be avoided.

In light of the foregoing, Rule 68 should be amended to provide for a bright-line prohibition against a Rule 68 offer to a representative of a putative class prior to a district court’s ruling on a motion to certify a class action, provided a motion to certify a class is made within a reasonable period of time. Following certification, the power of the “pick-off play” will be weakened, because one can reasonably expect that class lawyers should be able to enlist additional class representatives if the initial representatives either accept the offer or are dismissed.

### b. Arguments Opposing Amendments of Rule 68

The reasoning of *Symczyk* leaves no doubt that, to the extent a rejected Rule 68 offer moots an individual’s claim, the presence of collective-action allegations does not affect the mootness analysis.<sup>79</sup> Indeed, this rule would apply before or after certification of the collective action, at least until additional individuals opt in to join the action. Moreover, while the Supreme Court in *Symczyk* distinguished collective actions from class actions for purposes of its analysis,<sup>80</sup> the better reasoning for class actions is exemplified by the Seventh Circuit’s approach in *Damasco*: if no motion for class certification is pending and no class has been certified, a Rule 68 offer of judgment that provides a named plaintiff with complete relief properly moots the action.<sup>81</sup>

Dismissing a class action on mootness grounds before class certification, or of a collective action before other individuals opt in to formally join the action, has no impact on the claims of individuals other than the named plaintiff. As the Supreme Court explained in *Symczyk*:

While settlement may have the collateral effect of foreclosing unjoined claimants from having their rights vindicated in *respondent’s* suit, such putative plaintiffs remain free to vindicate their rights in their own suits. They are no less able to

have their claims settled or adjudicated following respondent's suit than if her suit had never been filed at all.<sup>82</sup>

The same holds true in class actions prior to certification of the class.

This furthers the goal of obtaining the speedy resolution of cases, especially where cases involve small claims of questionable merit. Otherwise, the costs of litigation, especially given the necessity of engaging in often extensive discovery to assess the propriety of certification, can compel defendants to pay unjustified sums to resolve worthless or even frivolous claims. Defensible actions can become too expensive to oppose. The Seventh Circuit noted these concerns in *Greisz*:

The class action is a valuable economizing device, especially when there is a multiplicity of small claims, but it is also pregnant with well-documented possibilities for abuse. The smaller the individual claim, the less incentive the claimant has to police the class lawyer's conduct, and the greater the danger, therefore, that the lawyer will pursue the suit for his own benefit rather than for the benefit of the class. The lawyer for a plaintiff class has not only an impaired incentive to be the faithful agent of his (nominal) principal, but also the potential to do great harm both to the defendant because of the cost of defending against a class action and to the members of the class because of the preclusive effect of a judgment for the defendant on the rights of those class members who have not opted out of the class action.<sup>83</sup>

The current balance of the tensions between Rule 68 and Rule 23 is the correct one. Accordingly, no amendment to Rule 68 should be made to provide special treatment with respect to class actions.

Moreover, collective actions under the FLSA should be accorded no different treatment than individual actions. Collective actions do not have absent class members, as is the case in class actions; instead, a potential member of the collective becomes part of the action only by affirmatively opting to join the case and becoming a party. Thus, when the claims of a named plaintiff in a collective action are mooted, whether by a Rule 68 offer of judgment or otherwise, the suit properly should be dismissed.

In light of the foregoing, Rule 68 should not be amended to exclude, or accord special treatment to, class actions or collective actions.

## Endnotes

1. FED. R. CIV. P. 68 (2009). Offer of Judgment
  - (a) **Making an Offer; Judgment on an Accepted Offer.** At least 14 days before the date set for trial, a party defending against a claim may serve on an opposing party an offer to allow judgment on specified terms, with the costs then accrued. 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.
  - (b) **Unaccepted Offer.** An unaccepted offer is considered withdrawn, but it does not preclude a later offer. Evidence of an unaccepted offer is not admissible except in a proceeding to determine costs.
  - (c) **Offer After Liability Is Determined.** When one party's liability to another has been determined but the extent of liability remains to be determined by further proceedings, the party held liable may make an offer of judgment. It must be served within a reasonable time—but at least 14 days—before the date set for a hearing to determine the extent of liability.
  - (d) **Paying Costs After an Unaccepted Offer.** If the judgment that the offeree finally obtains is not more favorable than the unaccepted offer, the offeree must pay the costs incurred after the offer was made.
2. Where a cause of action will permit a plaintiff to recover attorney's fees and costs, the term "complete relief" includes those items.
3. See *McCauley v. Trans Union, L.L.C.*, 402 F.3d 340, 342 (2d Cir. 2005); *O'Brien v. Ed Donnelly Enters., Inc.*, 575 F.3d 567, 574-75 (6th Cir. 2009). Editor's Note: Since the Executive Committee's approval of this Report, the Second Circuit has weighed in further on this issue, which is addressed in the Addendum hereto.
4. See *Greisz v. Household Bank (Ill.), N.A.*, 176 F.3d 1012, 1015 (7th Cir. 1999); *Rand v. Monsanto Co.*, 926 F.2d 596, 598 (7th Cir. 1991). Editor's Note: Since the Executive Committee's approval of this Report, the Seventh Circuit has weighed in further on this issue, which is addressed in the Addendum hereto.
5. See *Weiss v. Regal Collections*, 385 F.3d 337, 340 (3d Cir. 2004) (citing *Rand* for the proposition that "[a]n offer of complete relief will generally moot the plaintiff's claim, as at that point the plaintiff retains no personal interest in the outcome of the litigation"); see also *Symczyk v. Genesis HealthCare Corp.*, 656 F.3d 189, 195 (3d Cir. 2011) (same), *rev'd on other grounds*, \_\_\_ U.S. \_\_\_, 133 S. Ct. 1523 (2013) [hereinafter *Symczyk*].
6. *Diaz v. First Am. Home Buyers Prot. Corp.*, 732 F.3d 948, 954-55 (9th Cir. 2013); see also *Gomez v. Campbell-Ewald Co.*, 786 F.3d 871, 875-76 (9th Cir. 2014), *cert. granted*, \_\_\_ U.S. \_\_\_, 135 S. Ct. 2311 (2015).
7. *Symczyk*, *supra* note 5, at 1528-29. Editor's Note: Since the Executive Committee's approval of this Report, the Supreme Court granted certiorari to address the issues presented in this Report, which is addressed in the Addendum hereto. See *Campbell-Ewald Co. v. Gomez*, \_\_\_ U.S. \_\_\_, 135 S. Ct. 2311 (2015).
8. *Id.* at 1527.
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.* at 1528.
13. *Id.*
14. *Id.*
15. *Id.* at 1529.
16. *Id.*
17. *Id.*



18. *Id.*
19. *Id.* at 1530.
20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.* (citing *Sosna v. Iowa*, 419 U.S. 393, 399 (1975) (holding that a certified class action is not rendered moot when the named plaintiff's claim becomes moot); *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 404 n.11 (1980) (extending *Sosna* to denials of class certification where the named plaintiff's individual claim remained viable at the time of the denial)).
25. *Symczyk*, *supra* note 5, at 1530-31.
26. *Id.* at 1531.
27. *Id.*
28. *Id.*
29. *Id.* at 1531-32.
30. 445 U.S. 326, 332-34 (1980) [hereinafter *Roper*].
31. *Symczyk*, *supra* note 5, at 1532.
32. The Court specifically noted that it need not address the continuing viability of *Roper* given that it was distinguishable on its facts from the case at bar. *Symczyk*, *supra* note 5, at 1532 n.5.
33. *Id.* at 1533-34 (Kagan, J., dissenting) (quoting *Chafin v. Chafin*, 568 U.S. \_\_\_, 133 S. Ct. 1017, 1023 (2012); FED. R. CIV. P. 68(b)).
34. *Symczyk*, *supra* note 5, at 1534-35.
35. *Id.* at 1536.
36. *Id.*
37. *Id.* at 1537.
38. *McCauley*, 402 F.3d at 342. The Second Court succinctly expressed its reasoning as follows:
- When Trans Union acknowledged that it owes McCauley \$240, but offered the money with the requirement that the settlement be confidential, Trans Union made a conditional offer that McCauley was not obliged to take. Because judgment was then entered in Trans Union's favor, Trans Union was relieved of the obligation to pay the \$240 it admittedly owes, and McCauley, by his refusal of a conditional settlement offer, wound up with nothing. We therefore cannot conclude that the rejected settlement offer, by itself, moots the case so as to warrant entry of judgment in favor of Trans Union.
- Id.*; but see Editor's Note, *supra* note 3.
39. *Id.*; see also *Cabala v. Crowley*, 736 F.3d 226, 231 (2d Cir. 2013) (holding case not moot where purported Rule 68 offer did not include required offer of judgment); *Doyle v. Midland Credit Mgmt.*, 722 F.3d 78, 81 (2d Cir. 2013) (dismissing case as moot even if offer did not comply with technical requirements of Rule 68); but see Editor's Note, *supra* note 3.
40. *McCauley*, 402 F.3d at 342; but see Editor's Note, *supra* note 3.
41. 233 F.3d 508, 512 (7th Cir. 2000).
42. *McCauley*, 402 F.3d at 342.
43. *Id.*; but see Editor's Note, *supra* note 3. It is beyond the scope of this report to examine whether a default judgment would have either a *res judicata* or collateral estoppel effect.
44. 575 F.3d 567, 574-75 (6th Cir. 2009).
45. 694 F.3d 935, 949 (8th Cir. 2012).
46. *Greisz*, 176 F.3d at 1016; but see Editor's Note, *supra* note 4.
47. *Id.*
48. See *Weiss*, 385 F.3d at 340 (quoting *Rand* for the proposition that "[o]nce the defendant offers to satisfy the plaintiff's entire demand, there is no dispute over which to litigate and a plaintiff who refuses to acknowledge this loses outright, under Fed. R. Civ. P. 12(b)(1), because he has no remaining stake.").
49. *Diaz*, 732 F.3d at 954-55. This holding may conflict with the Ninth Circuit's prior decision in *Pitts v. Terrible Herbst, Inc.*, 653 F.3d 1081, 1091-92 (9th Cir. 2011) (stating that, if class certification is denied, then Rule 68 offer to putative class representative might moot case).
50. *Diaz*, 732 F.3d at 952-53; see also *Gomez v. Campbell-Ewald Co.*, 786 F.3d 871, 875-76 (9th Cir. 2014), cert. granted, \_\_\_ U.S. \_\_\_, 135 S. Ct. 2311 (2015) (discussed in the addendum). In *Bais Yaakov of Spring Valley v. ACT, Inc.*, the District of Massachusetts also followed *Diaz* and Justice Kagan's dissent. 987 F. Supp. 2d 124 (D. Mass. 2013), *aff'd*, No. 14-1789, 2015 U.S. App. LEXIS 14718 (1st Cir. Aug. 21, 2015). Likewise, the District of New Hampshire, "strongly persuaded by Justice Kagan's dissent" and those cases adopting its reasoning, denied a defendant's motion to dismiss after the plaintiff rejected a Rule 68 offer for the maximum available relief. *Boucher v. Rioux*, No. 14-CV-141-LM, 2014 U.S. Dist. LEXIS 124917, at \*17-18 (D. N.H. Sept. 8, 2014).
51. 772 F.3d 698 (11th Cir. 2014).
52. *Id.* at 709.
53. *Id.* at 703.
54. *Id.* at 709.
55. FED. R. CIV. P. 68(b).
56. FED. R. CIV. P. 68(d).
57. *Symczyk*, *supra* note 5, at 1533 (Kagan J., dissenting) (quoting *Chafin*, 133 S. Ct. at 1019) (internal quotation marks omitted); see also *Knox v. Service Employees Intern. Union, Local 1000*, \_\_\_ U.S. \_\_\_, 132 S. Ct. 2277, 2287 (2012) ("[A]s long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot.") (quoting *Ellis v. Railway Clerks*, 466 U.S. 435, 442 (1984) (internal quotation marks omitted)).
58. *Cabala*, 736 F.3d at 228; see also *McCauley*, 402 F.3d at 342 (holding that rejected Rule 68 offer did not moot case, but directing district court to enter default judgment in plaintiff's favor); but see Editor's Note, *supra* note 3.
59. See *O'Brien*, 575 F.3d at 574-75.
60. *McCauley* is not helpful in this analysis because, "[a]t oral argument, both parties agreed that entry of a default judgment would satisfactorily resolve this case." 402 F.3d at 342 (emphasis added).
61. 385 F.3d 337, 344 n.12 (3d Cir. 2004).
62. 473 U.S. 1, 3-12 (1985).
63. *Id.* at 33 n.49.
64. *Roper*, *supra* note 30, at 339; see also *Symczuk*, *supra* note 5, at 1530 (citing *Sosna*, 419 U.S. at 399; *United States Parole Comm'n*, 445 U.S. at 404 n.11).
65. *Weiss*, 385 F.3d at 348.
66. *Sandoz v. Cingular Wireless LLC*, 553 F.3d 913, 920-21 (5th Cir. 2008).
67. *Diaz*, 732 F.3d at 952 (citing *Pitts v. Terrible Herbst, Inc.*, 653 1081, 1091-92 (9th Cir. 2011)).
68. *Lucero v. Bureau of Collection Recovery Inc.*, 639 F.3d 1239, 1249-50 (10th Cir. 2011). We are unaware of any Second Circuit decision addressing this issue. See *Jones-Bartley v. McCabe, Weisberg & Conway, P.C.*, 59 F. Supp. 3d 617 (S.D.N.Y. Nov. 6, 2014):
- But, neither the Supreme Court nor the Second Circuit has ruled on whether class claims should be dismissed...when a Rule 68 offer of judgment for full relief is made...prior to the filing of a motion for class certification, or on the effect [on class claims] of a Rule 68 offer made prior to resolution of a Rule 23...certification motion (internal quotation marks omitted).

69. 662 F.3d 891, 895 (7th Cir. 2011), *overruled by Chapman v. First Index, Inc.*, Nos. 14-2773 & 14-2775, 2015 U.S. App. LEXIS 13767, at \*8 (7th Cir. Aug. 6, 2015) (see Editor's Note, *supra* note 4). *Damasco* arose in the context of an offer of settlement being made in Illinois state court prior to removal to federal court and prior to a request for class certification. 662 F.3d at 893. However, the act of removal had no bearing on the Court of Appeals' decision.
70. 29 F.3d 1145, 1149 (7th Cir. 1994); *but see* Editor's Note, *supra* note 4.
71. 176 F.3d at 1015; *but see* Editor's Note, *supra* note 4.
72. 623 F.3d 389, 413 (7th Cir. 2010); *but see* Editor's Note, *supra* note 4.
73. *Damasco*, 662 F.3d at 896-97; *but see* Editor's Note, *supra* note 4.
74. *Symczyk*, *supra* note 5, at 1529 (citation omitted); *see also Gomez v. Campbell-Ewald Co.*, 768 F.3d 871, 875-76 (9th Cir. 2014).
75. *Symczyk*, *supra* note 5, at 1530, 1532.
76. *See Symczyk*, *supra* note 5, at 1529 ("We, therefore, assume, without deciding, that petitioners' Rule 68 offer mooted respondent's individual claim.").
77. *See Stein*, 772 F.3d at 709 (holding that Rule 68 offer to named plaintiff prior to class certification motion could not moot purported class claim); *Davies v. Riddle & Assocs., P.C.*, 579 F. Supp. 2d 692, 697 (E.D. Pa. 2008) (recognizing conflict of interest that arises between putative class representative and putative class when offer of judgment is made prior to class certification); *Schaake v. Risk Mgmt. Alternatives, Inc.*, 203 F.R.D. 108, 110 (S.D.N.Y. 2001) (holding Rule 68 offer providing full relief under Fair Debt Collection Practices Act cannot render action moot where offer is made prior to decision on class certification); *see also Martin v. Mabus*, 734 F. Supp. 1216, 1222 (S.D. Miss. 1990) (where the Southern District of Mississippi construed Rule 68 offers to be inapplicable to all stages of a class action on the ground that Rule 23 requires court approval of class settlements).
78. *See, e.g., Gay v. Waiters' & Dairy Lunchmen's Union, Local No. 30*, 86 F.R.D. 500, 503 (N.D. Cal. 1980) ("Where the class representative's potential liability for costs is substantial compared to his personal stake in a successful outcome, an inherent conflict of interest is created by the mandatory operation of Rule 68."); *see also Weiss*, 385 F.3d at 344 n.12 (recognizing conflict of interest presented by Rule 68 offers in class action context).
79. *Symczyk*, *supra* note 5, at 1529 ("[T]he mere presence of collective-action allegations in the complaint cannot save the suit from mootness once the individual claim is satisfied.").
80. *Id.* at 1530.
81. 662 F.3d at 896.
82. *Id.* at 1531.
83. 176 F.3d at 1013.

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\*Principal authors of the report.

# Addendum

Since the Executive Committee approved the report entitled “Rule 68 Offers of Judgment and Mootness, Especially for Collective or Class Actions” (the “Initial Rule 68 Report”), important developments have occurred that are likely to result in greater certainty regarding whether Rule 68 offers of judgment may be employed by defendants to moot the claims of individual plaintiffs who purport to assert claims on behalf of a class or collective action.

On May 14, 2015, the Second Circuit ruled in *Tanasi v. New Alliance Bank* that “under the law of our Circuit, an unaccepted Rule 68 offer alone does not render a plaintiff’s individual claims moot before the entry of judgment against the defendants.”<sup>1</sup> In the court below, Judge William M. Skretny denied the defendants’ motion to dismiss the action based upon plaintiff’s rejection of a Rule 68 offer, finding that although the plaintiff’s individual claims were mooted by the unaccepted offer of judgment, his putative class claims were not.<sup>2</sup>

The Second Circuit affirmed, but on alternative grounds. Acknowledging that “our prior case law has not always been entirely clear on this subject,”<sup>3</sup> the court sought “to clarify and reiterate that it remains the established law of this Circuit that a ‘rejected settlement offer [under Rule 68], by itself, [cannot render] moot[] [a] case.’”<sup>4</sup> Thus, the court did not reach the question of whether the existence of putative class action claims would “provide an independent basis for Article III justiciability.”<sup>5</sup> The First Circuit, however, did reach this question recently, holding that “a rejected and withdrawn offer of settlement of the named plaintiff’s individual claims in a putative class action made before the named plaintiff moved to certify a class did not divest the court of subject matter jurisdiction by mooted the named plaintiff’s claims.”<sup>6</sup>

On August 6, 2015, the Seventh Circuit overruled its prior precedent, including *Damasco v. Clearwire Corp.*,<sup>7</sup> which was cited in the Initial Rule 68 Report, to hold that an unaccepted offer under Rule 68 did not moot an individual claim.<sup>8</sup> The Seventh Circuit adhered to the dissent of Justice Kagan in *Genesis Healthcare Corp. v. Symczyk*,<sup>9</sup> and pushed it a step farther by reasoning that if an offer could moot a claim by promising to give the plaintiff all that could be won in litigation, the case would be moot upon making the offer, thus preventing any relief to be awarded at all.<sup>10</sup>

In addition, on May 18, 2015, the Supreme Court granted certiorari in *Campbell-Ewald Co. v. Gomez*,<sup>11</sup> to address the questions:

1. Whether a case becomes moot, and thus beyond the judicial power of Article III, when the plaintiff receives an offer of complete relief on his claim.
2. Whether the answer to the first question is any different when the plaintiff has asserted a class claim under Federal Rule of Civil Procedure 23, but receives an offer of complete relief before any class is certified.

In *Campbell-Ewald Co.*, the Ninth Circuit ruled that neither the plaintiff’s individual claims nor class claims he asserted were rendered moot by an unaccepted offer of judgment.<sup>12</sup> The U.S. Chamber and the Business roundtable filed a brief as *amici curiae* in support of the petition for certiorari.

## Endnotes

1. 786 F.3d 195, 197 (2d Cir. 2015).
2. *Id.* at 196.
3. *Id.* at 199.
4. *Id.* at 200.
5. *Id.* at 197.
6. *Bais Yaakov of Spring Valley v. ACT, Inc.*, No. 14-1789, 2015 U.S. App. LEXIS 14718, at \*1 (1st Cir. Aug. 21, 2015).
7. 662 F.3d 891, 895 (7th Cir. 2011).
8. *See Chapman v. First Index, Inc.*, 796 F.3d 783, 786 (7th Cir. 2015). The court did not technically rule on whether the offer would moot a class action prior to class certification as the court affirmed the district court’s decision to deny a proposed reformulation of the class four years after the lawsuit had begun.
9. 133 S. Ct. 1523, 1532-37 (2013).
10. *See Chapman* 796 F.3d at 787 (“As soon as the offer was made, the case would have gone up in smoke, and the court would have lost the power to enter the decree.”).
11. 135 S. Ct. 2311 (2015).
12. 768 F.3d 871, 874-75 (9th Cir. 2014).