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Making Rule 68 Offers Of Judgment In Employment Cases

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This practice note will help you navigate whether and how to make an offer of judgment in employment cases. Federal Rule of Civil Procedure 68 provides defendants with this tool to pressure plaintiffs to settle. Most states have their own offer of judgment analogue.

This practice note addresses, specifically in the employment context, the following Rule 68 issues:

- Purpose and procedure and potential benefit to the defendant
- Does the governing statute include attorney's fees in its definition of "costs?"
- Potential disadvantages of Rule 68 offers in single-plaintiff cases
- Factors to consider when deciding whether to make an offer of judgment
- Drafting the offer
- State law offers of judgment and the interplay of federal and state claims
- Offers of judgment and the mootness doctrine (including class/collective actions)

Lexis Practice Advisor's Employment Litigation topic contains a Rule 68 Offer of Judgment with drafting notes and alternate and optional clauses as well as a checklist on making Rule 68 offers of judgment.

Purpose and Procedure and Potential Benefit to the Defendant

The purpose of Rule 68 is to "prompt both parties to a suit to evaluate the risks and costs of litigation, and to balance them against the likelihood of success upon trial on the merits." Marek v. Chesny, 473 U.S. 1, 5 (1985). The rule permits defendants, at least 14 days prior to the date set for trial, to make an offer to the plaintiff which, if accepted, requires an entry of judgment against the defendant, on the terms provided for in the offer. Alternatively, if the plaintiff rejects or does not respond to the offer

within 14 days and subsequently receives a less favorable judgment at trial, the plaintiff must pay the defendant's post-offer costs and is not entitled to its own post-offer costs to which it might otherwise be entitled under several employment law statutes.

These statutes include Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(k); The Fair Labor Standards Act of 1938, 29 U.S.C. § 216(b); The Americans with Disabilities Act of 1990, 42 U.S.C. § 12205; The Age Discrimination and Employment Act of 1967, 29 U.S.C. § 626(b); and The Reconstruction Civil Rights Act, 42 U.S.C. § 1983 (§ 1983).

In addition, as explained in more detail below, under Title VII and § 1983, the defendant may also potentially block the plaintiff from obtaining his or her post-offer attorney's fees through a successful Rule 68 offer. Note that in all cases if the defendant wins on the merits, then Rule 68 does not apply. The defendant is therefore not entitled to payment from the plaintiff for its post-offer costs. Delta Air Lines v. August, 450 U.S. 346, 351-52 (1981).

Does the Governing Statute Include Attorney's Fees in Its Definition of "Costs?"

Depending on the statute governing the action, "costs" may include attorney's fees. In Marek v. Chesny, 473 U.S. 1 (1985), the U.S. Supreme Court explained that "where the underlying statute defines costs to include attorney's fees ... such fees are to be included as costs for the purposes of Rule 68." 473 U.S. at 9. In contrast, when the underlying statute defines attorney's fees separately from costs, attorney's fees are not included as costs for purposes of Rule 68.

Title VII and § 1983

For example, Title VII defines "costs" to include attorney's fees by stating that a court may allow the prevailing party "a reasonable attorney's fee (including expert fees) *as part of the costs*." 42 U.S.C. § 2000e-5(k) (emphasis added). Section 1983 also includes attorney's fees as a part of costs. 42 U.S.C. § 1988(b). Fee-shifting statutes in the employment discrimination context only provide for the prevailing plaintiff to obtain attorney's fees. See, e.g., Stanczyk v. City of New York, 752 F.3d 273, 280-82 (2d Cir. 2014) (§ 1983 case); 42 U.S.C. § 2000e-5(k). Thus, when a plaintiff rejects a defendant's Rule 68 offer, and then obtains less than that offer at trial, Rule 68 will not permit a prevailing defendant to obtain payment from the plaintiff for defendant's attorney's fees. See, e.g., Tai Van Le v. University of Pennsylvania, 321 F.3d 403, 411 (3rd Cir. 2003) (defendant not entitled to its own attorney's fees in Title VII case when plaintiff received a less favorable judgment than defendant's Rule 68 offer). However, the defendant may be entitled to have the plaintiff pay the defendant's post-offer costs.

> • **Hypothetical Case:** Early in a Title VII case, the defendant determines that the plaintiff's attorney's fees accrued up until that point are $2,000. The defendant determines that the plaintiff will likely accrue attorney's fees up to $10,000 to prosecute the entire action. Also, the defendant determines that the plaintiff's damages are calculable with certainty and are no more than $5,000. This may be a good case to consider an offer of judgment because under a fee-shifting statute, after trial a losing defendant may owe up to $15,000 — the plaintiff's total amount of attorney's fees and damages.

In this scenario, assume the defendant makes a Rule 68 offer of judgment for $5,100, inclusive of attorney's fees and costs incurred as of the date of the offer. If the plaintiff accepts the offer, the defendant will owe $5,100 — the amount of the offer. Further, the defendant will cease having to pay its own lawyer to litigate the case. If the plaintiff does not accept the offer, assume the plaintiff is the

prevailing party but only obtains $3,000 in damages at trial. The defendant will only be liable for $5,000 — the sum of (1) the damages plaintiff obtained at trial — $3,000, and (2) the amount of the plaintiff's attorney's fees that accrued up until the time the defendant made the Rule 68 offer — $2,000.

FLSA, ADA and ADEA

In contrast, the FLSA does not define costs as including attorney's fees by stating courts shall "allow a reasonable attorney's fee to be paid by the defendant, *and* costs of the action" (emphasis added). 29 U.S.C. § 216(b). The ADA and ADEA also do not include attorney's fees as a part of costs. 42 U.S.C. § 12205 (ADA); 29 U.S.C. § 626 (ADEA — incorporating fee-shifting provisions from the FLSA).

Therefore, the use of an offer of judgment in a FLSA, ADA or ADEA case will not stop the accrual of the plaintiff's attorney's fees at the time of the offer. It will stop the accrual of other costs. If the plaintiff prevails at trial — regardless of whether the defendant made a Rule 68 offer — the plaintiff will be entitled to its full attorney's fees under the FLSA, ADA or ADEA. See, e.g., Fegley v. Higgins, 19 F.3d 1126, 1134-35 (6th Cir. 1994); Brandt v. Magnificent Quality Florals Corp., 2011 U.S. Dist. LEXIS 113195, at *17-21 (S.D. Fla. Sept. 30, 2011); Nhan Tran v. Tran Thai, 2011 U.S. Dist. LEXIS 17504, at *4-5 (S.D. Tex. Feb. 23, 2011); Grochowski v. Ajet Construction Corp., 2002 U.S. Dist. LEXIS 5031, at *6 (S.D.N.Y. March 27, 2002).

Potential Disadvantages of Rule 68 Offers in Single-Plaintiff Cases

Below are some of the key potential disadvantages in making Rule 68 offers of judgment in a single-plaintiff case.

- **Entry of judgment against the defendant:** A Rule 68 offer of judgment may not be a good strategy in all employment cases. As stated above, an accepted offer results in a judgment being entered against the defendant. Defendants cannot keep the entries of a judgment confidential. If a defendant cannot accept a judgment for any reason — e.g., because of concern about the associated public stigma — an offer of judgment may not be the best approach.

- **Timing issues:** Another possible disadvantage depends upon the timing of when the defendant made the offer. The longer the defendant waits to make an offer, the longer the plaintiff's pre-offer attorney's fees will accrue. Especially in a low damages case, waiting too long can effectively remove Rule 68 as a tool if the plaintiff's pre-offer fees have accrued beyond the amount of actual damages. Moreover, a defendant will have to consider the possibility that an offer may be for more than the plaintiff would have recovered at trial. As indicated, this is one of the reasons why an early and accurate assessment of the litigation is important.

- **Hypothetical case revisited:** Let us modify our hypothetical case a bit. Now, the defendant has waited six months to tender an offer of judgment. Plaintiff's attorney's fees as of the date of the tender are now $7,000 but the plaintiff's damages are calculable with certainty and are still no more than $5,000. At this point, the plaintiff is entitled to $7,000 for his or her attorney's fees which have already accrued by the time the defendant chose to make the offer. Therefore, if the defendant wishes to tender an offer of judgment inclusive of attorney's

fees already accrued, the offer of judgment would need to be in excess of $7,000. At this point, an offer of judgment is a less attractive option because the defendant will be making an offer that is $2,000 above the plaintiff's actual damages.

- **Less impact in non-attorney's fee-shifting cases:** In non-attorney's fee-shifting cases, the pressure to accept a Rule 68 offer will likely be much weaker. Under federal law, costs only include expenses such as fees for printed transcripts, fees of the clerk or marshal, and docket fees. 28 U.S.C. § 1920. In this type of case, the plaintiff's penalty for deciding to continue to litigate rather than accept an offer is less severe because the measure of costs is usually much lower.

Factors To Consider When Deciding Whether to Make an Offer of Judgment

Some factors that you may consider when determining whether to offer a judgment pursuant to Rule 68 are set forth below:

- **The statutes at issue:** Does the claim involve a fee-shifting statute as defined by the Supreme Court in Marek v. Chesny, 473 U.S. 1, 9 (1985)? As a general proposition, the presence of such a statute in the lawsuit tips in favor of consideration of an offer of judgment.

- **Early and accurate assessment of the litigation:** If a defendant uses Rule 68, it is important that the offer actually puts pressure on the plaintiff to accept. To do so, defendant's initial evaluation must be accurate. An offer that is too low in light of the merits and likely damages of the case is not likely to apply such pressure. Furthermore, an offer that is too high may cause the employer to owe more than the plaintiff would have actually recovered through litigation.

- **Understanding client objectives:** Some employers may choose litigation over settlement because they do not want to "pay the plaintiff a penny." As in every case, it is important to communicate with the employer, understand its primary concerns, and provide appropriate litigation risk assessment.

- **Timing:** Early consideration of whether to make an offer of judgment is advisable. You can make an offer as early as right after the plaintiff files the complaint, and as late as 14 days before the date set for trial. Making an offer early in the case minimizes the amount of pre-offer costs the plaintiff can still recover, while maximizing the amount of post-offer costs the defendant can recover. In addition, the statute does not limit the number of offers a defendant can make in a case. If for some reason you do not make an offer of judgment early in the case, make sure to consider the amount of costs the plaintiff has already accrued at the time you make your offer. Remember that Rule 68 will not eliminate the plaintiff's pre-offer costs.

- **Offers of judgment and motions for summary judgment:** A defendant filing a motion for summary judgment, or with such a motion sub judice, should think

twice before making an offer of judgment at that time. Why? If the court grants the motion for summary judgment but the plaintiff accepts the offer within 14 days after service, pursuant to Rule 68, the court must enter the offer of judgment. Therefore, the defendant could win on a summary judgment motion; but, the plaintiff could snatch victory from the jaws of defeat by the court entering the offer of judgment anyway. See Perkins v. U.S. West Communs., 138 F.3d 336, 339 (8th Cir. 1998).

For additional considerations for making Rule 68 offers in class and collective actions, see the final section of this practice note.

Drafting the Offer

Below are key factors to consider when drafting a Rule 68 offer of judgment.

- **The importance of precision in drafting Rule 68 offers of judgment:** An offer of judgment is essentially a proposed contract. As in other contracts, ambiguities may be interpreted against the drafter. Accordingly, make sure that the terms of the offer are very clear. This includes specifying the sum of the offer and stating that the offer includes or excludes accrued costs and attorney's fees. If the amount of costs or attorney's fees are difficult to determine you can draft the offer to allow the court to determine the amount.

Failure to be precise could result in a court holding the offerer liable for additional costs beyond the amount as stated in the offer. See Tye v. Brock & Scott PLLC, 2010 U.S. Dist. LEXIS 8342, at *4-5 (M.D.N.C. Feb. 1, 2010). In Tye, the defendant made an offer to the plaintiff stating a specific amount "together with costs of this civil action as accrued." Id. The court held the defendant's offer was "ambiguous on whether attorney's fees were included in this amount or whether the plaintiff could later request attorney's fees." Id. Because the defendant drafted the offer, the court construed the ambiguity against the defendant and did not bar the plaintiff from seeking attorney's fees in addition to the amount the defendant (apparently) had intended in its offer of judgment. Id.; see also Sanchez v. Prudential Pizza Inc., 709 F.3d 689, 692-94 (7th Cir. 2013). The lesson here is that if a defendant wants to include or exclude accrued attorney's fees in his or her offer of judgment then the offer must unambiguously convey this point.

- **Do offers of judgment need to be unconditional?** Rule 68 requires an offer of judgment to be in writing and properly served upon the plaintiff pursuant to Fed R. Civ. P. 5. While the offer must allow for judgment to be entered against the offerer, the rule does not require an explicit admission of liability, and the offerer can actually disclaim liability in its offer. However, except for a few exceptions detailed below, the offer, must be unconditional. Therefore, it cannot require anything from the offeree, including confidentiality. See Simmons et al. v. United Mortgage & Loan Investment, et. al., 634 F.3d 754, 764 (4th Cir. 2011) (holding the defendant's letter did not constitute a Rule 68 offer because "[it] required the plaintiffs to keep the fact [and terms] of settlement ... confidential"); see also McCauley v. Trans Union LLC, 402 F.3d 340, 342 (2d Cir. 2005).

However, courts in the Seventh and Ninth Circuits have held that Rule 68 offers which are conditional upon unanimous acceptance of multiple plaintiffs are valid. Amati v. City of Woodstock, 176 F.3d 952, 958 (7th Cir. 1999); Lang v. Gates, 36 F.3d 73, 75 (9th Cir. 1994). The defendant can also make individual offers of judgment to each plaintiff, rather than one offer of judgment to all of the plaintiffs. In this scenario, if one individual plaintiff accepts, the merits of the litigation against that individual plaintiff are terminated. If the individual plaintiff does not accept, the amount of the offer will be compared to the amount that individual plaintiff receives at trial.

State Law Offers of Judgment and the Interplay of Federal and State Claims

State Law Offers of Judgment

Below is an analysis of offer of judgment rules in several states and how they might affect litigation strategies.

- **State statutes modeled on the federal rule:** The majority of states have enacted their own versions of offers of judgments. About half of those states are modeled on the federal rule changing only the amount of time a defendant can make and a plaintiff can accept an offer. See, e.g., Ala. R. Civ. P. 68 (defendant has 15 days prior to trial to make an offer; plaintiff has 10 days after service to accept).

- **State statutes that significantly differ from the federal rule:** However, some states diverge more substantively from what the federal rule allows. For example, some states allow both the plaintiff and the defendant to make offers in the same case. See, e.g., Colo. Rev. Stat. § 13-17-202; Haw. R. Civ. P. 68. In some of these states, the offers are labeled as settlements rather than judgments and do not require an entry of judgment. See, e.g., Colo. Rev. Stat. § 13-17-202. Others simply interchange the label of settlement and judgment. See, e.g., Haw. R. Civ. P. 68. In these states, when the plaintiff makes an offer of either settlement or seeking judgment to be entered against the defendant, and the defendant rejects it, if the plaintiff obtains more than what was offered in a final judgment, the defendant will be liable for the plaintiff's post-offer costs. Whereas when the defendant is the offering party, if the plaintiff obtains less than what was offered, the plaintiff will be liable for the defendant's post-offer costs.

- **State statutes that differ depending on which party makes the offer:** Some state statutes afford plaintiffs leeway in what they must recover to avoid paying the offerer's post-offer costs. For example, Florida permits either the plaintiff or the defendant to make an offer of judgment, but the statute differs depending upon which party is the offerer. If the defendant makes an offer of settlement for $100,000 and the plaintiff rejects it, the plaintiff must be awarded only $75,001 at trial, not $100,000 to avoid paying costs. Fla. Stat. Ann. § 768.79. This is because the plaintiff is offered a 25 percent "margin of error." In comparison, if the plaintiff makes an offer of settlement for $100,000 and the defendant rejects it, the defendant must be awarded $125,001 to avoid paying costs to the plaintiff. This puts more pressure on the defendant to accept a plaintiff's offer because he or she must receive an award of more than

125 percent of the rejected offer. See id.

- **Recovering attorney's fees:** While costs generally do not include attorney's fees, some state statutes specifically allow the offerer to recover its own attorney's fees. See, e.g., Nev. R. Civ. P. 68; Alaska Stat. Ann. § 09.30.065; Ga. Code. Ann. § 9-11-68. These statutes provide an extra benefit for offerers. This is because, under these statutes, if the offeree rejects an offer and fails to obtain a more favorable judgment, the offerer can avoid paying for the offeree's post-offer attorney's fees and can recover their own post-offer attorney's fees.

- **Carefully research state law distinctions:** Because different states have different rules regarding offers of judgments, it is important to research and understand how the relevant state rule operates when a party considers an offer of judgment in state court or, as described below, when the case is in federal court based on diversity of citizenship jurisdiction and the court applies that state's law.

Offers of Judgment When There Are State and Federal Claims

Below we discuss how having both state and federal law claims may affect the decision to make an offer of judgment.

- **Carefully research state law distinctions; diversity of citizenship:** In cases filed in federal court that contain both state and federal claims, your early case assessment should include the value of all claims. If the case contains an underlying state law claim and federal court jurisdiction is based upon diversity of citizenship, there is an issue as to whether Rule 68 or the corresponding state law of where the district sits will apply. The question is whether the state statute conflicts with Rule 68. When offers are made by defendants, Rule 68 will likely apply. However, it is unclear whether state statutes that provide for offers of judgments by plaintiffs conflict with Rule 68. Under this scenario, the court may determine what law applies based upon principles of avoiding forum shopping and inequitable administration of the law.

- **Federal question cases:** If federal court jurisdiction is based upon a federal question, but the complaint also asserts state law claims, and it is difficult to calculate the state law damages, or you believe being in state court may be advantageous, a defendant can make an offer of judgment regarding just the federal claims. If the plaintiff accepts the offer, only the state law claims would remain, possibly resulting in the court remanding the case to state court. In state court, the defendant could consider the potential use of the state law version of Rule 68.

Key Case Involving Offer of Judgment and Federal and Local Law Claims

In Wilson v. Nomura Securities International Inc., 361 F.3d 86 (2d Cir. 2004), the plaintiff alleged race and religious discrimination under Title VII, Section 1981, the New York State Executive Law and New

York City Human Rights Law (NYCHRL). The NYCHRL provides that "the court ... may award the prevailing party costs and reasonable attorney's fees." Wilson, 361 F.3d at 90. Early in the case the defendants tendered the following offer of judgment that the plaintiff accepted:

> Pursuant to Federal Rule of Civil Procedure 68, Defendants Nomura Securities International Inc., Frank Zayas and Anton Appel make an offer to allow judgment to be taken against them in the amount of $ 15,000.00 inclusive of all costs available under all local, state or federal statutes accrued to date. Wilson, 361 F.3d at 88.

The court held that the offer fully compensated the plaintiff for all of his rights to attorney's fees under Title VII. With respect to the NYCHRL, the court explained:

> When Wilson accepted the Rule 68 offer, he agreed that it covered his rights both to damages on all claims and to fees for the legal work performed with respect to his Title VII claim. Because the work performed on the Title VII claim was the same as that performed on the NYCHRL claim, Wilson's acceptance of the offer settled all rights to fees on that work, and he is not entitled to a second recovery. Wilson, 361 F.3d at 91.

Sounding a cautionary note to practitioners, a dissent compared the language of the offer itself, which only referenced "costs," to the NYCHRL, which separately mentions "costs" and "attorney's fees." Wilson, 361 F.3d at 91-92 (Newman, J., dissenting) ("Because that ruling imports into the word 'costs' a meaning that it does not have under applicable municipal law and unjustifiably rewards the defendants for their counsel's inattention to careful drafting, I respectfully dissent.")

The Mootness Doctrine (Including Class/Collective Actions)

Federal courts are sharply divided on whether, and under what circumstances, a Rule 68 offer of judgment can moot an action. The jurisdiction of federal courts is limited to "cases and controversies" under Article III of the U.S. Constitution. Accordingly, when "parties lack a legally cognizable interest in the outcome" of a case, the case will become moot and the court will not have subject matter jurisdiction to hear it. County of Los Angeles v. Davis, 440 U.S. 625, 631 (1979). Applying this principle to unaccepted offers of judgment has led to a variety of judicial opinions and, as of the writing of this practice note, the matter is far from settled.

Single-Plaintiff Cases

In single plaintiff cases, an accepted offer causes judgment to be entered against the defendant and the merits of the case to be terminated. There are few reported cases that deal with whether an unaccepted offer to a single plaintiff will cause the plaintiff's case to become moot.

Prior to the Supreme Court's recent decision in Gomez v. Campbell-Ewald Co., 136 S. Ct. 663 (2016), "circuits [had] concluded that if a defendant makes an offer of judgment in complete satisfaction of the plaintiff's claims in *a non-class action* ... [and the plaintiff does not accept] the plaintiff's claims are rendered moot." Lucero v. Bureau of Collection Recovery Inc., 639 F.3d 1239, 1243 (10th Cir. 2011) (emphasis in original).

As discussed in detail in the section below entitled "Gomez v. Campbell-Ewald Co.", the Supreme Court held in Campbell-Ewald that offers of complete relief, in and of itself, to individual plaintiffs, will not automatically moot their actions. 136 S. Ct. 663, 672 (2016). Even though the decision was in a class

action context, the Supreme Court did not expressly differentiate between collective or class action representatives and individual plaintiffs. It is possible, therefore, that courts will apply the Supreme Court's holding to single-plaintiff cases and offers of complete relief will no longer moot a plaintiff's claims in single-plaintiff cases.

Class and Collective Actions

Effect of Accepted Offer of Judgment

It is unclear whether a class or collective action representative's acceptance of a Rule 68 offer of judgment terminates the case of putative class members, or potential collective action plaintiffs who have not filed opt-in consent forms. Compare Aleman v. Innovative Electrical Services LLC, 2014 U.S. Dist. LEXIS 139008, at *6-9 (S.D.N.Y. 2014) (holding a collective action is rendered moot when the representative accepts a Rule 68 offer even when the certification motion is pending and opt-in plaintiffs are present) with Bamgbose v. Delta-T Group Inc., 724 F. Supp. 2d 510, 514-17 (E.D. Penn. 2010) (holding a collective action will not be rendered moot when the representative accepts a Rule 68 offer when the certification motion was dismissed but without prejudice and opt-in plaintiffs are present) and Mavris v. RSI Enterprises., 303 F.R.D. 561, 565 (D. Ariz. 2014) (vacated on other grounds) (stating "[a]cceptance of a Rule 68 offer may moot a named plaintiff's substantive claim for relief, but it need not moot her interest in representing the class") with Campion v. Old Republic Protection Co., 775 F.3d 1144, 1146-47 (9th Cir. 2014) (holding that when a class certification motion is denied in order for the underlying class action to continue, the representative must have a financial stake in the outcome of the case). Furthermore, Campbell-Ewald will likely impact future courts' analysis of the above scenario.

Effect of Unaccepted Job Offer

We discuss in this section whether underlying collective and class actions are rendered moot when the collective or class action representative does not accept a valid Rule 68 offer of judgment. Prior to Campbell-Ewald, it was unclear whether, and under what circumstances, an unaccepted offer of complete relief to a collective or class action representative would moot that representative's action. We discuss Campbell-Ewald in more detail below as well.

Underlying Collective Action Claim: Genesis Healthcare

The Supreme Court addressed the application of Rule 68 to collective action cases in Genesis Healthcare Corp. v. Symczyk, 133 S. Ct. 1523 (2013). The court considered whether a collective action where no employee (other than the representative plaintiff) had yet opted in, would be rendered moot because the collective action representative failed to accept a valid Rule 68 offer of judgment. The court expressly declined to reach the issue of whether an unaccepted Rule 68 offer for complete relief renders a plaintiff's individual claim moot, explaining that the plaintiff had conceded this to be true. Genesis Healthcare Corp., 133 S. Ct. at 1528-29. (As discussed below, the Supreme Court reached this issue in Campbell-Ewald). The Supreme Court in Genesis Healthcare emphasized that because the named plaintiff conceded her individual claim was moot, the underlying collective action in the case before it was moot as well. Id. at 1529.

Underlying Class Action Claims

As explained above, assuming a complete offer of relief to a collective action representative moots the individual's claim, the Supreme Court in Genesis Healthcare held that an underlying collective action is

rendered moot. However, whether a class action is rendered moot under these circumstances remains unclear. In this context, a body of case law has connected the effectiveness of the Rule 68 offer in mooting the case, to the timing of that offer to the class representatives.

In Sosna v. Iowa, 419 U.S. 393 (1975) the Supreme Court held that once a certification motion has been made (or a class has been certified), an underlying class action will remain regardless of whether the individual plaintiff's claim is rendered moot. This conclusion is less clear if the offer of judgment was prior to the filing of a class certification motion. See, e.g., Lucero v. Bureau of Collection Recovery Inc., 639 F.3d 1239, 1243 (10th Cir. 2011) ("some courts conclude that an offer of judgment renders the [class action] claim moot, while others conclude that it does not."); Weiss v. Regal Collections, 385 F.3d 337, 348 (3d Cir. 2004) (absent undue delay in filing motion for class certification an unaccepted offer of judgment will not render an underlying class action moot); Pitts v. Terrible Herbst Inc., 653 F.3d 1081, 1091 (9th Cir. 2011) (same); Stein v. Buccaneers Ltd. P'ship, 772 F.3d 698, 707 (11th Cir. 2014) (same).

Gomez v. Campbell-Ewald

As noted above, the Supreme Court revisited the issue explicitly left open in Genesis Healthcare — whether an unaccepted Rule 68 offer for complete relief would render a class or collective action representative's individual claim moot. Gomez v. Campbell-Ewald held that an offer of judgment for complete relief, by itself, does not moot an individual representative's claim (and the underlying class action was not moot). Campbell-Ewald, 136 S. Ct. at 672. However, the majority expressly left open the issue of "whether the result would be different if a defendant deposit[ed] the full amount of the plaintiff's individual claim in an account payable to the plaintiff and the court then enter[ed] judgment for the plaintiff in that amount." Id.

Chief Justice John Roberts, writing for the dissent, argued that because the plaintiff had been offered full relief, he could no longer "demonstrate an injury in need of redress" and "the defendant's interests [were no longer] adverse to the plaintiff." Id. at 679. Therefore, the case no longer met the case or controversy requirement under Article III of the U.S. Constitution and the federal court no longer had the power to hear the case. Id.

The dissent stated "[t]he good news is that this case is limited to its facts." Id. at 683. Because "the majority held an offer of complete relief is insufficient to moot a case ... [but did] not say that payment of complete relief leads to the same result" there is a possibility that should a defendant offer and actually tender complete relief to the plaintiff, the individual plaintiff's claim can still be rendered moot. Id. Rather than closing the book on these issues, the Supreme Court in Campbell-Ewald, merely added another chapter, and left this issue to be decided on another day.

Key practical takeaways from Campbell-Ewald: Following Campbell-Ewald, the effect of an accepted offer of judgment in the collective and class action context is still unclear as of the date of this practice note. However, Campbell-Ewald expressly made clear that simply making an offer of judgment for complete relief that a collective or class representative does not accept will not moot the individual plaintiff's claim (or the underlying collective or class action). The Campbell-Ewald Court did not address the use of an offer of judgment to limit costs in a class or collective action. As stated above, whether case law following Campbell-Ewald permits the direct tender of complete relief for the representative's individual claim to render the class or collective action moot remains to be determined. Counsel may also want to consider an alternative strategy of direct negotiations with the opposing party with the objective of reaching a favorable settlement agreement and seeking court approval of the settlement agreement.

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