

Offers of Judgment under FRCP Rule 68 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 (FRCP 68 or Rule 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 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 Judicial Review under the Fair Labor Standards Act
- Offers of Judgment and the Mootness Doctrine (Including Class/Collective Actions)

For an annotated Rule 68 Offer of Judgment, see [Offer of Judgment \(FRCP Rule 68\)](#). For a checklist concerning Rule 68 offers of judgment, see [Offers of Judgment Checklist \(FRCP Rule 68\) \(Employment Litigation\)](#).

Purpose and Procedure and Potential Benefit to Defendant

The purpose of FRCP 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) (Title VII); The Fair Labor Standards Act of 1938, 29 U.S.C. § 216(b) (FLSA); The Americans with Disabilities Act of 1990, 42 U.S.C. § 12205 (ADA); The Age Discrimination and Employment Act of 1967, 29 U.S.C. § 626(b) (ADEA); 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 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 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. Univ. of Pa.*, 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 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 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 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 Constr. Corp.*, 2002 U.S. Dist. LEXIS 5031, at *6 (S.D.N.Y. Mar. 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 above \$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, 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). See Offers of Judgment and Judicial Review under the Fair Labor Standards Act, below, for a discussion of the interplay between the mandatory provision of Rule 68 and FLSA settlements without court approval or Department of Labor (DOL) review.

For additional considerations for making Rule 68 offers in class and collective actions, see *Offers of Judgment and the Mootness Doctrine (Including Class/Collective Actions)*.

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 offeror 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 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); *Allen v. City of Grovetown*, 681 Fed. Appx. 841, 844-845 (11th Cir. 2017). 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 offeror, the rule does not require an explicit admission of liability, and the offeror 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 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, L.L.C.*, 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.

In addition, courts have held that an offer is valid even where a singular defendant makes an offer of judgment conditional upon the dismissal of claims against the other non-offering defendants. The court reasoned that Rule 68 merely requires that an offer of judgment be on "specified terms." Agreeing to enter judgment against the offering defendant only with the agreement to dismiss against the other defendants "was a clearly specified term." *Doe v. Spartanburg County School District Three*, 314 F.R.D. 174, 178-179 (D.S.C. 2016); see also *Roska v. Sneddon*, 366 Fed. Appx. 930, 939 (10th Cir. 2010) (holding that an offer was unconditional where it required the dismissal of the lawsuit); *De La Cruz v. State Farm Lloyds*, 2012 U.S. Dist. LEXIS 193472, at *4 (S.D. Tex. 2012) (finding that an offer requiring plaintiff to release all claims and causes of action which have or could have been brought in the lawsuit was not a conditional offer).

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.** Most 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 offeror'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 offeror. 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% "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% 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 offeror 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 offerors. This is because, under these statutes, if the offeree rejects an offer and fails to obtain a more favorable judgment, the offeror 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 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.

Offers of Judgment and Federal and Local Law Claims

In *Wilson v. Nomura Secs. Int'l, 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 defendants tendered the following offer of judgment that 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.")

Distinguishing *Wilson*, the district court in *Black v. Nunwood, Inc.* held that where "attorney's fees" and "costs" are defined separately in federal and/or local statutes, an offer of judgment that does not explicitly mention both opens the door for a post-entry of judgment motion for attorney's fees. 2015 U.S. Dist. LEXIS 66609, at *11 (S.D.N.Y. Apr. 30, 2015). In *Black*, plaintiff asserted claims under both the FLSA and the New York Labor Law (NYLL) and ultimately accepted an offer of judgment in the amount of \$30,000.00, inclusive of "any and all recoverable costs." *Id.* at *1, *3-4. Thereafter, plaintiff filed a motion for attorney's fees. *Id.* Recognizing that the federal and state statutes address costs and attorney's fees separately, the court granted the motion and explained:

Where the underlying statute clearly defines "costs" to include attorney's fees, attorney's fees are considered to be included in an offer of judgment [sic] that included "costs" but is silent as to the treatment of attorney's fees. On the other hand, when the underlying statute treats costs and attorney's fees separately, an offer of judgment providing for the payment of "costs" alone does not include attorney's fees. In such a case, an accepted offer of judgment

does not resolve the prevailing party's claim for attorney's fees.

Id. at *3-6; cf. *Bradford v. HSBC Mortg. Corp.*, 859 F. Supp. 2d 783, 797 (E.D. Va. 2012) (holding that "where the underlying statute defines 'costs' to exclude attorney's fees, those fees are not considered costs under Rule 68").

Offers of Judgment and Judicial Review under the Fair Labor Standards Act

Can a Rule 68 Offer of Judgment in an FLSA Case Be Entered without Judicial Review?

For many years courts have considered whether employees can validly release FLSA claims without court approval or DOL supervision. Below we discuss the key court analyses of this issue and how courts have dealt with the related issue of whether a court may enter a Rule 68 offer of judgment in an FLSA case without judicial review.

FLSA Settlements without Judicial Review or DOL Approval

In *Brooklyn Savings Bank v. O'Neil*, the Supreme Court held that an employee could not validly release and waive his or her right to liquidated damages by accepting delayed payment in the absence of a bona fide dispute as to whether the FLSA covered him or her. 324 U.S. 698, 703-704 (1945). Subsequently, in *D.A. Schulte v. Gangi*, the Supreme Court held that even if there is a bona fide dispute, an employee could not waive the remedy of liquidated damages under the FLSA. 328 U.S. 108, 114 (1946).

In *Lynn's Food Stores, Inc. v. United States*, the Eleventh Circuit held that FLSA claims could not be settled without district court approval or DOL supervision. 679 F.2d 1350, 1352-53 (11th Cir. 1982). The majority of federal courts follow this rule. See, e.g., *Morrison v. Veale*, 2017 U.S. Dist. LEXIS 205609, at *5 (M.D. Ala. 2017) (acknowledging the mixed rules regarding offers of judgment and holding that "what is clear is that in FLSA cases, Courts must still determine whether a settlement is a fair and reasonable resolution in order to give it final and binding effect"); *Davis v. JP Sports Collectibles Inc.*, 2016 U.S. Dist. LEXIS 179695, at *1-2 (M.D. Fla. Dec. 29, 2016); *Reitzig v. Concepts to Operations, Inc.*, 2016 U.S. Dist. LEXIS 140022, at *2 (D. Md. Oct. 7, 2016); *Wells v. KidHelp, Inc.*, 2015 U.S. Dist. LEXIS 132802, at *2-3 (N.D. Ohio Sept. 30, 2015); *Selk v. Pioneers Mem. Healthcare Dist.*, 159 F. Supp. 3d 1164, 1172 (S.D. Cali. Jan. 29, 2016); *Barbosa v. Nat'l Beef*

Packing Co., LLC, 2015 U.S. Dist. LEXIS 108821, at *18 (D. Kansas Aug. 18, 2015); Ramos v. Heights Realty Co. LLC, 2015 U.S. Dist. LEXIS 71201, at *1-2 (E.D.N.Y. May 29, 2015); Adams v. Bayview Asset Mgmt., LLC, 11 F. Supp. 3d 474, 476 (E.D. Penn. 2014); Prescott v. Prudential Ins. Co. of Am., 2011 U.S. Dist. LEXIS 147724, at *4 (D. Maine Dec. 20, 2011); but see Martin v. Spring Break '83 Prods., LLC, 688 F.3d 247, 254- (5th Cir. 2012) (allowing union to resolve members' claims of FLSA violations with employer); Martinez v. Bohls Bearing Equip. Co., 361 F. Supp. 2d 608, 633 (W.D. Tex. 2005) ("[A] private compromise of claims under the FLSA is permissible where there exists a bona fide dispute as to liability").

In *Cheeks v. Freeport Pancake House Inc.*, 796 F.3d 199 (2d Cir. 2015), the court held that the parties could not avoid judicial approval and settle FLSA cases prior to trial by finalizing written agreements and submitting stipulations for voluntary dismissal under Federal Rule of Civil Procedure (Rule) 41(a)(1)(A)(ii). In *Cheeks*, the parties attempted to settle their dispute privately and file a Rule 41(a)(1)(A)(ii) stipulation of dismissal with prejudice. *Id.* at 200. The district court refused to enter the parties' stipulation of settlement dismissing the plaintiff's claims with prejudice, holding that the parties could not enter into a private settlement of FLSA claims without judicial or DOL approval. The Second Circuit affirmed and remanded for further proceedings consistent with its opinion. The Second Circuit discussed both the language of Rule 41(a)(1)(A)(ii) and the "unique policy considerations underlying the FLSA" to hold that judicial scrutiny or supervision by the DOL is required before stipulating to the dismissal of an action with prejudice under Rule 41(a)(1)(A)(ii). *Id.* at 205-206. The court observed that Rule 41(a) creates an exception to the general rule that plaintiffs can voluntarily dismiss their claims without a court order for "applicable federal statutes." The Court recognized that treating the FLSA as such an exception furthered the purpose of the Act to "protect certain groups of the population from substandard wages [,] excessive hours," and manipulation by employers. *Id.* at 202.

For more information on releasing FLSA claims, see [Settlements and Resolutions of FLSA Claims and Potential FLSA Violations](#).

Analysis of Cases on Entering Rule 68 Offers of Judgment in FLSA Cases without Judicial Review or DOL Supervision

Courts have been grappling with whether Rule 68 offers of judgment require judicial review or DOL supervision prior to a judgment being entered.

No Judicial Approval Necessary in the Second Circuit

In *Mei Xing Yu v. Hasaki Rest., Inc.*, 2019 U.S. App. LEXIS 36222, at *7 (2d Cir. Dec. 6, 2019), the Second Circuit addressed "whether acceptance of a Rule 68(a) offer of judgment that disposes of an FLSA claim in litigation needs to be reviewed by a district court or the DOL for fairness before the clerk of the court can enter the judgment." Over a spirited dissent, the court held that it did not. The court explained that "[t]he question is one of statutory interpretation." *Yu*, 2019 U.S. APP. LEXIS 36222, at *7. Based on its reading of the plain language of Rule 68, and explaining, among other things, that "Rule 68(a)'s command that the clerk must enter judgment is mandatory and absolute," the Court reversed the decision of the district court. *Yu*, 2019 U.S. APP. LEXIS 36222, at *8. In response to the dissent's policy arguments, summarized below, the court explained:

We do not dwell here on policy considerations given that it is not possible on this record to perform a cost-benefit analysis as to the requirement of fairness hearings in Rule 68 settlements of the thousands of FLSA cases filed in this Circuit each year. And even if such an analysis were possible, that is not our job. As the Dissent would have it, this court should insert a paternalistic judicial fairness proceeding into Rule 68(a) settlements of FLSA claims that Congress does not require and the parties, represented by counsel, do not want.

Yu, 2019 U.S. APP. LEXIS 36222, at *33-34.

The dissent took sharp issue with the court's reading of the statute, at core arguing that Rule 68 permits exceptions to the general rule that the Clerk must enter judgment of an accepted offer of judgment where to do so would violate another statute or rule, and that the FLSA is such a statute. *Yu*, 2019 U.S. APP. LEXIS 36222, at *56. The dissent further stated that the Court's ruling could not be reconciled with *Cheeks*, because in *Cheeks* the court concluded that the FLSA falls "within Rule 41's 'applicable federal statute' exception." *Yu*, 2019 U.S. APP. LEXIS 36222, at *54. While the dissent conceded that Rule 68 itself did not contain the "any applicable statute" language set forth in Rule 41, "as the majority reluctantly recognizes, Rule 68 has, again and again, been interpreted to be subject to an analogous exception." *Yu*, 2019 U.S. APP. LEXIS 36222, at *56 (internal citations omitted). Under the court's holding, the dissent predicted "[e]mployers would simply use Rule 68(a) as an 'end run' to accomplish what *Cheeks* forbade." *Id.* The dissent argued that such a result would have the

negative policy consequences of subjecting employees to coercive settlements, in contravention of the FLSA.

The *Yu* decision is likely to be challenged. Accordingly, practitioners should exercise caution when relying on *Yu*, as it may be subject to reversal or modification on appeal.

District Courts' Approach in the Eleventh Circuit

Some district courts within the Eleventh Circuit have held that some level of judicial scrutiny is required to determine whether what in form purports to be a Rule 68 offer of judgment is, in fact, an offer of judgment, or is a settlement the parties are characterizing as an offer of judgment to avoid judicial scrutiny. See, e.g., *Dees v. Hydradry, Inc.*, 706 F. Supp. 2d 1227, 1240 (M.D. Fla. 2010) (stating "judicial inquiry [is required to] confirm[] both 'full compensation' and 'no side deal' (in other words, the absence of a compromise)"); see also *Walker v. Vital Recovery Servs.*, 300 F.R.D. 599, 602 (N.D. Ga., 2014). Once the court determines the offer is a legitimate Rule 68 offer, no further judicial inquiry is necessary. However, some courts in the Eleventh Circuit have held that a Rule 68 offer of judgment is in essence a formal settlement offer and thus regardless of whether the offer is pursuant to Rule 68, the court must determine if the offer is fair and reasonable. See, e.g., *Martinez v. Excel Hospitality, LLC*, 2017 U.S. Dist. LEXIS 9964, at *3-5 (N.D. Ga., Jan. 24, 2017); *Hernandez v. Rs1040Ez*, 2015 U.S. Dist. LEXIS 188081, at *2 (S.D. Fla. 2015).

Absent a ruling from the Supreme Court, federal courts around the country will likely continue to grapple with this issue.

Offers of Judgment and 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*," 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 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 Elec. Servs. L.L.C.*, 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 Grp., 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 Enters.*, 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 Prot. 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 Limited Partnership*, 772 F.3d 698, 707 (11th Cir. 2014) (same); *Nash v. CVS Caremark Corp.*, 683 F.Supp. 2d 195, 196 (D.R.I. 2010) ("[W]hether a controversy becomes moot following a Rule 68 offer depends on the factual circumstances, the cause of action, and the procedural status of the claims at issue. Moreover, nothing in Rule 68 itself suggests that it should be used as a vehicle for sabotaging claim-aggregating devices like 29 U.S.C. § 216(b) and Rule 23").

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 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 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 post-Campbell-Ewald issues to consider. 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). Below we discuss in detail the key issues that Campbell-Ewald left open.

- **Does a direct tender of complete relief moot an individual plaintiff's claims?** As stated above, the first issue left open by Campbell-Ewald is whether a direct tender of complete relief will moot an individual plaintiff's claims. Case law following Campbell-Ewald hints at under what circumstances a direct tender of complete relief for a representative's individual claim may cause a court to render his or her individual claim moot. Although the case law in this area continues to develop, in post Campbell-Ewald cases where plaintiffs have sought statutory damages and injunctions, courts have refused to render the individual plaintiffs' claims moot when the court had to take subsequent action to provide the plaintiffs with complete relief. *Wallace v. J.M. Romich Enters.*, 2018 U.S. Dist. LEXIS 101621, at *14-16 (W.D.N.Y. June 18, 2018) ("In sum, the law in this circuit is that a defendant's tender of complete relief to a plaintiff, by itself, does not moot a plaintiff's individual claim and deprive the court of subject matter jurisdiction if the plaintiff rejects the tender; however, even where a plaintiff rejects a defendant's tender of complete relief, if the defendant obtains leave to pay the complete relief into court, and then, at the defendant's request, judgment is entered in the plaintiff's favor, the claim becomes moot."); *Bell v. Survey Sampling Int'l, LLC*, 2017 U.S. Dist. LEXIS 36636, at *11-17 (D. Conn. Mar. 15, 2017); *Ung v. Universal Acceptance Corp.*, 2016 U.S. Dist. LEXIS 72861, at *13-15 (D. Minn. June 3, 2016); *Chen v. Allstate Ins. Co.*, 819 F.3d 1136, 1144-1146 (9th Cir. 2016). In *Bell*, *Ung*, and *Cheng*, the plaintiffs did not actually **receive** the relief they sought; rather, the defendants merely **offered** them full relief pending some action by the court.

In *Ung*, the plaintiff would not receive the equitable relief he sought until the court entered a stipulated injunction. 2016 U.S. Dist. LEXIS 72861, at *15-16. In *Chen*, the plaintiff would not receive the monetary relief he sought until the court entered a judgment which would release the funds from escrow. 819 F.3d at 1144-1146. In *Bell*, the plaintiff would not receive the monetary relief she sought until the court granted the defendant's motion to pay funds to the court, the funds were disbursed from the court to the plaintiff, and a judgment was entered in favor of the plaintiff. *Bell*, 2017 U.S. Dist. LEXIS 36636 at *11-17. In each of these cases, the respective defendants attempted to take advantage of the issue left open by Campbell-Ewald

by making a payment of complete relief to each respective plaintiff rather than merely offering complete relief. However, the courts held that the cases were not rendered moot because the courts had to take action to afford each respective plaintiff the full relief he or she sought.

It appears that how a defendant attempts to provide complete relief may be an important factor in determining whether a court will decide that a class representative's case is moot. Specifically, when defendants unconditionally provide class representatives with the full relief sought, some courts have held that their claims are moot. Compare *Bais Yaakov of Spring Valley v. ACT, Inc.*, 2016 U.S. Dist. LEXIS 148255, at *11-12 (D. Mass. Oct. 26, 2016) (holding when defendant sends to plaintiff's counsel a certified check "unconditionally tender[ing] to Plaintiff everything that Plaintiff seeks on an individual basis . . . Plaintiff no longer has a live individual claim."); *Bank v. Alliance Health Networks, LLC*, 2016 U.S. App. LEXIS 18849, at *2 (2d. Cir. Oct. 20, 2016) ("[W]here 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."); and *Geismann v. ZocDoc, Inc.*, 2017 U.S. Dist. LEXIS 118966, at *10-16 (S.D.N.Y. July 28, 2017) ("I agree with those cases finding that a defendant's full tender renders the action moot . . . when defendants deposited with the clerk of the court [money] comprising an amount securing a judgment satisfying all of plaintiff's monetary claims and an unconditional consent to a proper form of injunction the relevant law will no longer be that of contract, offer and acceptance or Rule 68; it will be the Constitutional requirement of a case or controversy."), remanded from 850 F.3d 507 (2d Cir. 2017), with *Pankowski v. BlueNRGY Grp. Ltd.*, 2016 U.S. Dist. LEXIS 170495, at *10-11 (S.D. Tex. Dec. 9, 2016) ("[T]his court sees no reason to find that the actual tender of settlement is any more binding on the other party than an offer of settlement in contract law. It is a distinction without a difference.") and *Getchman v. Pyramid Consulting, Inc.*, 2017 U.S. Dist. LEXIS 25081, at *5-10 (E.D. Miss. Feb. 23, 2017) (denying the motion to dismiss for lack of jurisdiction because "[defendant] made a tender offer of settlement via a check that was subsequently refused and returned by [plaintiff]. This is not materially different than if [defendant] had communicated an offer of settlement that [plaintiff] in turn rejected. In both scenarios, the 'unaccepted [offer]'—like any unaccepted contract offer—is a legal nullity, with no operative effect, and plaintiff is left without satisfaction of either her individual or her class claims.") (internal citations omitted); and *Johansen v. Liberty Mutual Group*, 2016 U.S. Dist. LEXIS 170027, at *17-18

(D. Mass. Dec. 8, 2016) (holding that where a defendant deposited funds into an escrow account and agreed to an injunction for the benefit of plaintiff, plaintiff's claims were not mooted when plaintiff rejected the offer of settlement and where, in any event, the offer did not offer complete relief).

For example, in *Leyse v. Lifetime Entm't Servs., LLC*, 2016 U.S. Dist. LEXIS 47877, at *5 (S.D.N.Y. Mar. 17, 2016), *aff'd* by 2017 U.S. App. LEXIS 2607, at *5-6 (2d Cir. Feb. 15, 2017), the court held that once the defendant had deposited the full relief sought in the complaint with the court, the court would enter judgment for the individual plaintiff, and the court would mark the case closed (in this case the class certification motion had already been denied and thus only the individual plaintiff's claims remained). See also *Kaplan v. Fulton St. Brewery, LLC*, 2018 U.S. Dist. LEXIS 79961, at *15-16 (D. Mass. May 11, 2018) (finding that "defendant's unconditional tender of checks [in excess of the maximum amount that plaintiffs could recover under applicable law] to the plaintiffs mooted their claims for monetary relief"); *Demmler v. ACH Food Cos.*, 2016 U.S. Dist. LEXIS 123540, at *10-13 (D. Mass. June 9, 2016) (holding where defendant tendered full relief to plaintiff, the court "cannot offer [Plaintiff] any more relief on his underlying claim" . . . and "[t]his dynamic served to moot [the individual case]"); *South Orange Chiropractic Ctr., LLC v. Cayan LLC*, 2016 U.S. Dist. LEXIS 49067, at *9-12 (D. Mass. Apr. 12, 2016) (holding where defendant tendered a bank check for complete relief to plaintiff (which was rejected), offered to deposit said offer with the court, and have the court enter judgment for the plaintiff, plaintiff's individual claims were rendered moot).

Similarly, in *Price v. Berman's Auto., Inc.*, 2016 U.S. Dist. LEXIS 35807, at *10 (D. Md. 2016), the court held that once the defendant issued an unconditional cashier's check and submitted proof of payment and delivery to the court, the court would dismiss the individual plaintiff's claim as moot. The court explained that dismissing the individual plaintiff's claim would afford him or her full relief with respect to that claim without an entry of judgment because there was no risk of non-payment. *Id.* at *8.

However, not all courts agree that the method of providing complete relief is a relevant factor. In *Fulton Dental, LLC v. Bisco, Inc.*, 860 F.3d 541 (7th Cir. 2017), the defendant moved for leave to deposit the full relief sought by plaintiff with the court pursuant to Rule 67. The court stated the defendant's logic, that all the defendant had to do to moot the case was to deposit

the estimated damages with the court, "overlook[ed] the fact that once the case is moot, the court lacks power to enter any judgment on the merits" which includes entering an injunction. The court stated "we see no principled distinction between attempting to force a settlement on an unwilling party through Rule 68 . . . and attempting to force a settlement on an unwilling party through Rule 67. In either case, all that exists is an unaccepted contract offer." Thus, the court held that plaintiff's individual claim remained alive and the plaintiff could move for class certification. See also *Brady v. Basic Research, L.L.C.*, 312 F.R.D. 304 (E.D.N.Y. Feb. 3, 2016).

- **If the individual class representative's claim is rendered moot, when is an underlying class action rendered moot?** Campbell-Ewald also did not address whether and under what circumstances an underlying class action is rendered moot if the individual class representative's claim is rendered moot. This section addresses this issue.

Soon after *Campbell-Ewald*, the Ninth Circuit explained that "when a defendant consents to judgment affording complete relief on a named plaintiff's individual claims before certification, but fails to offer complete relief on the plaintiff's class claims, a court should not enter judgment on the individual claims, over the plaintiff's objection, before the plaintiff has had a fair opportunity to move for class certification." *Chen*, 819 F.3d at 1147.

Following *Chen* and borrowing language from *Campbell-Ewald*, at least a handful of district courts have stated that an individual plaintiff should receive a "fair opportunity to show that class certification is warranted" prior to judicial consideration of whether the underlying class action case has been rendered moot. See, e.g., *Giesmann v. American Homepatient, Inc.*, 2016 U.S. Dist. LEXIS 78446, at *6-9 (E.D. Mo. Feb. 27, 2018); *Getchman v. Pyramid*, 2017 U.S. Dist. LEXIS 25081, at *6-9 (E.D. Mo. Feb. 23, 2017); *Brodsky v. HumanaDental Ins. Co.*, 2016 U.S. Dist. LEXIS 134235, at *8-15 (N.D. Ill. Sept. 29, 2016); *Tanasi v. New Alliance Bank*, 2016 U.S. Dist. LEXIS 127945, at *4-9 (W.D.N.Y. Sept. 20, 2016) (listing cases). It appears from these cases that before a court will dismiss the underlying class action as moot, the class representative must have a fair opportunity to move for class certification, even if the defendant has tendered complete payment on his or her individual claims. For example, if an individual class representative plaintiff files a complaint and very shortly thereafter a defendant tenders full payment to the class representative on his or her individual claims, the underlying class action will not be moot because the plaintiff has not had a fair opportunity to move for class certification. See *Bais Yaakov Spring Valley v. Educ. Testing Serv.*, 2017 U.S. Dist. LEXIS 70318, at *47-48 (S.D.N.Y. May

8, 2017).

Numerous cases support this proposition. The Third and Sixth Circuits have held that even if a defendant is able to moot an individual class representative's claim, the named plaintiff will still be able to continue pursuing the class action claims so long as there was no undue delay in moving for class certification. See *Wilson v. Gordon*, 822 F.3d 934, 949-51 (6th Cir. 2016); *Demmler*, 2016 U.S. Dist. LEXIS 123540, at *19-23 (granting a motion to dismiss the underlying class claims where plaintiff's individual claims were rendered moot and plaintiff had not yet moved for class certification because there is no record or evidence of "widespread whac-a-mole practice aimed at picking off a named plaintiff before class certification"); see also *Richardson v. Bledsoe*, 829 F.3d 273, 286 (3d Cir. 2016); *Susinno v. Work Out World, Inc.*, 2017 U.S. Dist. LEXIS 194930, at *9 (D. N.J. Nov. 28, 2017) (noting that "even if Plaintiff's individual claims were moot, she is entitled to seek class certification, under both the relation back doctrine and the picking off exception to mootness. Here, it is apparent that [defendant] sought settlement with Plaintiff, in an attempt to thwart class certification. However, to deny class certification at this point, based solely on Plaintiff's moot individual claim, would be to deprive her of a fair opportunity to show that certification is warranted.") (internal quotations omitted).

Grice v. Colvin offers an example of when plaintiffs had a fair opportunity to move for class certification and failed to do so. 2016 U.S. Dist. LEXIS 32823, at *23-24 (D. Md. Mar. 14, 2016). In *Grice*, the plaintiffs sued the Social Security Administration for applying their tax returns to social security overpayments. The plaintiffs' individual claims were rendered moot when the Social Security Administration refunded the named plaintiffs' overpayments and waived any remaining debt owed by the named plaintiffs to the Administration. While the lawsuit was ongoing, the plaintiffs made "motions" to certify the class; however, in each motion the plaintiffs sought a stay of the briefing. Thus, the court considered the motions mere "placeholders" and determined that the plaintiffs had not made a valid certification motion. The Court stated that if a named plaintiff no longer has a live claim of his or her own, in that "[his or her] [claim] [has] bec[o]me moot before a class was certified, the [underlying class action] must be dismissed." *Grice*, 2016 U.S. Dist. LEXIS 32823, at *23-24.

On the other hand, in the First Circuit, a case brought as a putative class action "must be dismissed as moot if no decision on class certification has occurred by the

time that the individual claims of all named plaintiffs have been fully resolved." *Cruz v. Farquharson*, 252 F.3d 530, 533 (1st Cir. 2001) (involving an immigration matter, but later being applied to cases involving Rule 68); see also *Demmler v. ACH Food Cos.*, 2016 U.S. Dist. LEXIS 123540, at *23-24 n.10 (D. Mass. June 9, 2016) (stating that the holding in *Cruz* is not inconsistent with *Campbell-Ewald*). For example, the court in *Demmler* held that where the claims of a plaintiff named as the putative class representative were dismissed as moot, the class action claims were no longer viable because no class was certified at the time of the dismissal. *Demmler*, 2016 U.S. Dist. LEXIS, at *19-21. Nevertheless, there is one narrow exception in the First Circuit to this general rule: the "inherently transitory exception" to mootness. The inherently transitory exception provides that where there is a demonstrated probability that the claims of a putative class action are likely to evade meaningful judicial review, the dismissal of the putative class representatives' individual claims will not moot the underlying class action. *Cruz*, 252 F.3d at 9-11; *South Orange Chiropractic Ctr., LLC v. Cayan LLC*, 2016 U.S. Dist. LEXIS 49067, at *14-21 (D. Mass. Apr. 12, 2016) (finding the exception applies because defendants exhibited a pattern of attempting to thwart judicial review by satisfying only named plaintiffs' individual claims prior to certification).

- **Key takeaways from post-Campbell-Ewald cases.** While *Campbell-Ewald* left open the possibility that defendants can moot an individual and an underlying class action claim by tendering complete relief to the named plaintiff, subsequent decisions suggest that it is difficult to do so even in jurisdictions that entertain the possibility. First, defendants must tender payment in a manner deemed acceptable to the court. Second, at least some courts are suggesting that the plaintiff must have had a fair opportunity to move for class certification and failed to do so.

As the law post-Campbell-Ewald continues to develop and to clarify under what circumstances, if any, a defendant will be able to moot an individual representative or underlying class action, you may 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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Offers of Judgment Checklist (FRCP Rule 68) (Employment Litigation)

A Lexis Practice Advisor® Checklist by A. Jonathan Trafimow , Lauren Bernstein, and Caitlyn Ryan, Moritt Hock & Hamroff LLP



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This checklist addresses the consequences of an offer of judgment under Federal Rule of Civil Procedure 68 (FRCP 68 or Rule 68), what you should consider in determining whether to make an offer of judgment, and what components you should include in the offer. Pursuant to Rule 68, up to 14 days prior to trial, a defendant can make an offer of judgment to pressure a plaintiff to settle a case.

For more information on Rule 68 offers of judgment, see [Offers of Judgment under FRCP Rule 68 in Employment Cases](#). For an annotated Rule 68 offer of judgment, see [Offer of Judgment \(FRCP Rule 68\)](#).

The Effects of Making an Offer of Judgment in Single-Plaintiff Cases

In a single-plaintiff case, an offer of judgment can:

- If accepted, cause the entire case to be complete and a judgment to be entered against your client
- If not accepted, cause the plaintiff to be liable for the defendant's post-offer costs, and cause the plaintiff to lose its right to his or her post-offer costs

- If not accepted and the underlying statute is defined as including attorney's fees as a part of costs, cause the plaintiff to be liable for the defendant's post-offer costs, and cause the plaintiff to lose its right to his or her post-offer costs and fees even when provided for by statute or contract
- Put pressure on the plaintiff to either accept an offer of judgment, or a settlement offer in the future, avoiding the time and costs associated with litigation

The Effects of Making an Offer of Judgment in Class and Collective Actions

In the class and collective action context, the law is less clear than in the single-plaintiff context. See [Offers of Judgment under FRCP Rule 68 in Employment Cases – Offers of Judgment and the Mootness Doctrine \(Including Class/Collective Actions\)](#).

Open issues include whether:

- If not accepted, and the defendant deposits full relief with the court or the representative plaintiff, is the representative's claim moot? Does the rule change depending upon if the individual is a collective or class action representative? See *Gomez v. Campbell-Ewald Co.*, 136 S. Ct. 663 (2016). For a full discussion of *Gomez v. Campbell-Ewald* and how courts have ruled on this issue, see the section entitled "Gomez v. Campbell-Ewald" in [Offers of Judgment under FRCP Rule 68 in Employment Cases](#).

- If a class action representative's individual claim is rendered moot, is the underlying class action claim moot, causing the case to be dismissed for lack of subject matter jurisdiction, and the defendant to avoid class action litigation? The majority of cases have ruled that unless a plaintiff has had a fair opportunity to move for class certification, the fact that a class representative's individual claims have been rendered moot will not likely cause the underlying class action claim to be dismissed for lack of subject matter jurisdiction. Nevertheless, the courts in at least one circuit have held to the contrary. For a full discussion of these cases, see [Offers of Judgment under FRCP Rule 68 in Employment Cases – Offers of Judgment and the Mootness Doctrine \(Including Class/Collective Actions\)](#).
- Can a Rule 68 offer of judgment in a Fair Labor Standards Act (FLSA) case be entered without judicial review? The Second Circuit has held that it can. See *Mei Xing Yu v. Hasaki Rest., Inc.*, 2019 U.S. App. LEXIS 36222, *at 3 (2d Cir. 2019). But district courts in the Eleventh Circuit are split. For a full discussion, see the section entitled “Can a Rule 68 Offer of Judgment in a FLSA Case Be Entered Without Judicial Review?” in [Offers of Judgment under FRCP Rule 68 in Employment Cases](#).

Deciding Whether to Make an Offer of Judgment

Consider the following issues when determining whether to make an offer of judgment.

- **Does the underlying claim involve a fee-shifting statute?** The Supreme Court has held that Rule 68 costs include expenses defined as costs in the underlying statute or contract of the lawsuit. *Marek v. Chesny*, 473 U.S. 1, 9 (1985). If a case involves a statute that defines attorney's fees as part of costs, a plaintiff may feel more pressure to accept a Rule 68 offer. On the other hand, if the case involves a statute that defines costs and attorney's fees separately, and the Rule 68 offer provides for costs alone, the plaintiff may feel less pressure to accept the Rule 68 offer because an accepted offer of judgment will not resolve the plaintiff's claim for attorney's fees. *Black v. Nunwood, Inc.*, 2015 U.S. Dist. LEXIS 66609, at *11 (S.D.N.Y. Apr. 30, 2015).
- **Evaluate both sides of the case.** To determine whether the use of Rule 68 is the best strategy and in turn to put pressure on the plaintiff to accept your offer, your evaluation must be as realistic as possible and your offer must be appropriate.

If you have a strong case:

- o Your client may want to pursue litigation or alternatively your client may want to use an offer of judgment anyway, to apply further pressure on the plaintiff to end the case.
- o You may want to wait until after a motion to dismiss or a motion for summary judgment has been decided.

If you have a weak case:

- o Consider using an offer of judgment to persuade the plaintiff to accept a premature settlement.
- o In a class or collective action, consider offering and depositing complete relief with the court, in the hopes that the court will then render the plaintiff's individual cause of action and/or their underlying class or collective action moot. While *Campbell-Ewald* left open this possibility, subsequent decisions suggest that it is difficult to moot the plaintiff's individual cause of action and/or the underlying class action, even in jurisdictions that entertain the possibility. Defendants must first tender payment to the individual plaintiff in a manner which is acceptable to the court. Then, to moot the underlying class action, some courts suggest that the plaintiff must have had a fair opportunity to move for class certification and failed to do so. For a full discussion of *Campbell-Ewald*, see the section entitled “*Gomez v. Campbell-Ewald*” in [Offers of Judgment under FRCP Rule 68 in Employment Cases](#).

- **If applicable, carefully research state law offer of judgment rules.** If your case is in state court or in federal court based on diversity of citizenship jurisdiction and the court applies a particular state's law, then you will need to become familiar with state law offer of judgment rules. Some states' offer of judgment rules differ from FRCP 68. These variations may significantly impact litigation strategy. For more information, see [Offers of Judgment under FRCP Rule 68 in Employment Cases – State Law Offers of Judgment and the Interplay of Federal and State Claims](#).
- **Understand the objectives of your client.** Rule 68 can be a useful tool in certain cases. As with every case, it is important to understand the goals and objectives of your client to be able to adequately counsel them.

You may not want to use offers of judgments for clients who:

- Are concerned about public stigma. This is because despite the rule allowing for disclaimers of liability, the offer cannot be confidential. Accepted offers will result in a judgment being entered against the defendant.

- Based upon principle, do not want to afford the plaintiff any relief
- Are concerned about an influx of new lawsuits by plaintiffs who have heard about a judgment being entered against them

Deciding When You Should Make a Rule 68 Offer

Consider the following issues in determining when to make a Rule 68 offer of judgment.

- **Timing.** Once you have decided it is appropriate to make a Rule 68 offer, you should make the offer as quickly as possible.

Making a Rule 68 offer quickly can:

- Minimize pre-offer costs the plaintiff can still recover despite being awarded less at trial as compared to your offer
- Maximize post-offer costs you can recover should the plaintiff receive less at trial as compared to your offer
- **Summary Judgment and Rule 68 Offers.** Consider whether you are going to, or have made, a motion for summary judgment.

If you believe that you are going to be making, or have already made a motion for summary judgment, be very careful about making any subsequent offers of judgment. Why?

Pursuant to FRCP 68 once the plaintiff has accepted an offer of judgment, the court **must** enter it. In a hypothetical case, suppose you move for summary judgment. While it is pending you make an offer of judgment to the plaintiff. Two days later the court grants summary judgment in your favor. The plaintiff, still having time to accept your offer under Rule 68, decides to accept. You have won on the merits, but it is unclear whether a court will enter the offer of judgment or deem it moot based on the entry of summary judgment. You do not want to put yourself in a position where the use of an offer of judgment will defeat a ruling on the merits in your favor.

If your case involves FLSA claims, consider whether your jurisdiction requires judicial scrutiny for a Rule 68 offer of judgment.

- Generally parties cannot settle FLSA claims without district court approval or the supervision of the Department of Labor (DOL). See *Lynn's Food Stores, Inc. v. United States*, 679 F.2d 1350, 1352-53 (11th Cir. 1982). For more information on releasing FLSA claims,

see [Settlements and Resolutions of FLSA Claims and Potential FLSA Violations](#).

- Some district courts located in the Eleventh Circuit have held that judicial review is required to ensure the offer is a legitimate Rule 68 offer and not a settlement. See, e.g., *Dees v. Hydradry, Inc.*, 706 F. Supp. 2d 1227, 1240 (M.D. Fla. 2010) (stating "judicial inquiry [is required to] confirm[] both 'full compensation' and 'no side deal' (in other words, the absence of a compromise)."); *Walker v. Vital Recovery Servs.*, 300 F.R.D. 599, 602 (N.D. Georgia, 2014). Once the court makes this determination, these courts hold that no further judicial inquiry is required. But cf. *Martinez v. Excel Hospitality, LLC*, 2017 U.S. Dist. LEXIS 9964, at *3-5 (N.D. Ga., Jan. 24, 2017) (holding that a Rule 68 offer of judgment is in essence a formal settlement offer and thus regardless of whether the offer is pursuant to Rule 68, the court must determine if the offer is fair and reasonable).
- The Second Circuit, on the other hand, over a spirited dissent, held that judicial approval is not required for Rule 68(a) offers of judgment settling FLSA cases. See *Mei Xing Yu v. Hasaki Rest., Inc.*, 2019 U.S. App. LEXIS 36222, at *3 (2d Cir. 2019). Note, however, that this decision is likely to be challenged. Accordingly, practitioners should exercise caution when relying on Yu, as it may be subject to reversal or modification on appeal.

What You Should Include in a Rule 68 Offer

To be valid the Rule 68 offer must meet the following requirements:

- The offer must be **in writing**.
- You must properly have it **served upon the plaintiff pursuant to FRCP 5**.
- The offer must **allow judgment to be entered against the defendant unconditionally**.
 - It can include a statement that the offer should not be construed as an admission of liability or damages to the plaintiff.
 - It cannot include confidentiality provisions.
 - It cannot place conditions upon the plaintiff except if there are multiple plaintiffs. If there are multiple plaintiffs, you can condition the offer upon unambiguous acceptance.

For an annotated Rule 68 offer of judgment, see [Offer of Judgment \(FRCP Rule 68\)](#).

Issues to Specify on the Rule 68 Offer of Judgment

Courts interpret Rule 68 offers as contracts. Therefore, the court will construe any ambiguity in the offer against the drafter. Make sure you specify:

- The **sum of the offer**
- Whether the offer **includes or excludes accrued costs and attorney's fees**
- **Whether you have already calculated the accrued costs and attorney's fees or are leaving it to the court** to determine a reasonable amount in the future.
- Whether it should be left to the court to determine a reasonable amount of attorney's fees depends upon the facts and circumstances of each case. For example, it may depend upon whether you are able to ascertain, with a level of certainty, the opposing party's accrued attorney's fees. If you are unable to calculate the fees, you may have to leave it to the court to determine this amount. In addition, it may depend upon your client's desire to settle irrespective of the precise amount of accrued attorney's fees. If you leave it to the court to ascertain the amount of reasonable attorney's fees, your client **will not know** the total amount he or she has just offered to the Plaintiff until the court determines what "reasonable" costs and attorney's fees entail.

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Jon is an experienced mediator for the United States District Court for the Eastern District of New York. He frequently writes and lectures on employment law topics, and has authored a book chapter, updated annually, entitled "Discrimination", published in the HR Guide to Employment Law: A Practical Compliance Reference (2009). Prior to joining the firm, Mr. Trafimow worked as a Motions Law Clerk for the United States Court of Appeals for the Second Circuit.

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