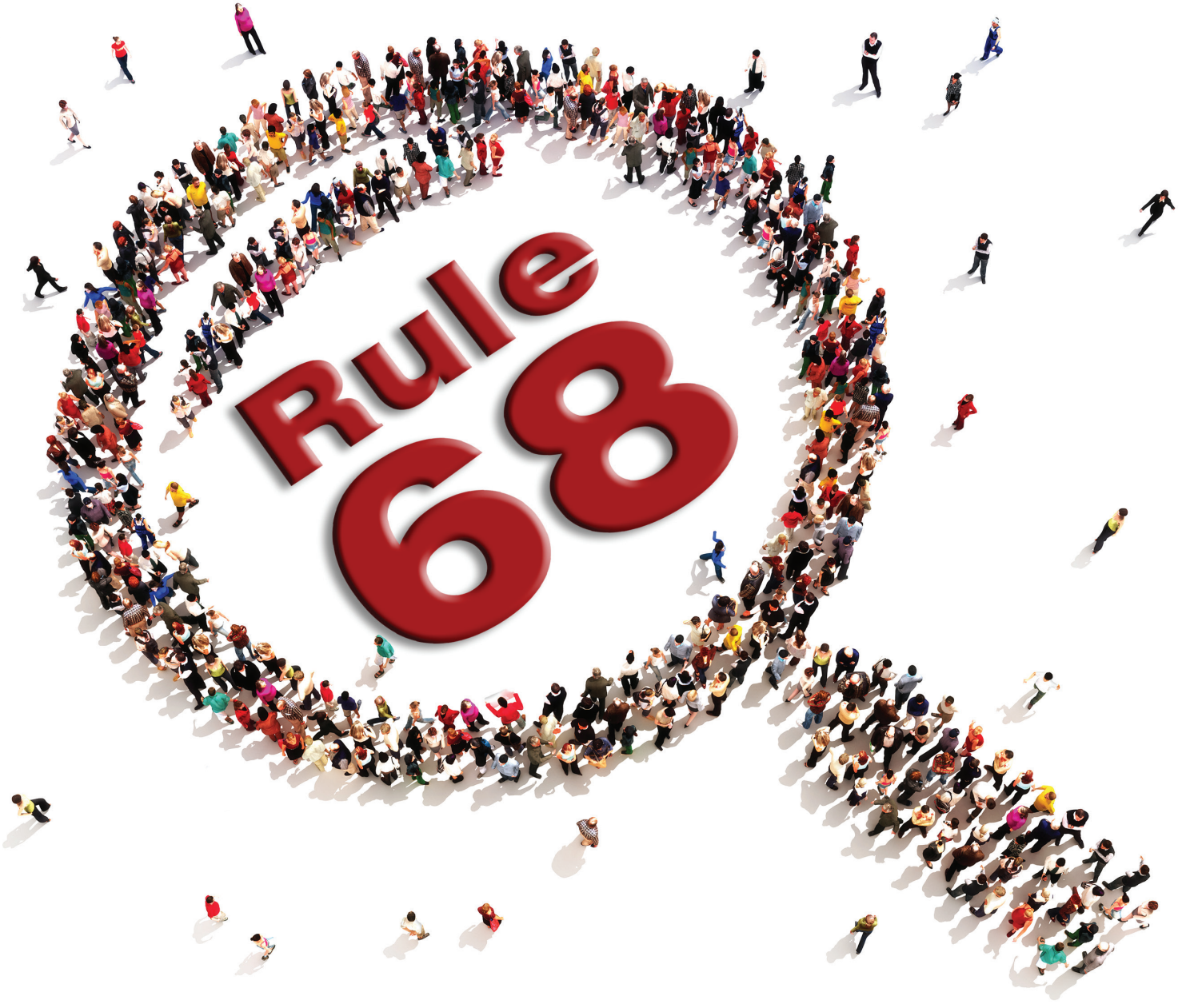
Avoid Significant Exposure, and Attorneys' Fees

By Matthew D. Berkowitz and Joseph A. Smith

Using Rule 68 Offers of Judgment to End Class Actions Early and Quickly



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You arrive at your office early Monday morning only to learn that your company, Drinkle Plastics, has been served with a nationwide class action lawsuit. The named plaintiff, Paul Paulson, on behalf of himself and all others similarly situated, alleges federal consumer protection violations against Drinkle in connection with certain communications made to many of its customers. Although only statutory damages are sought, you are keenly aware that thousands of Drinkle's customers were sent the allegedly unlawful communications. You quickly realize that if the complaint's proposed class is certified, Drinkle may face significant exposure. This comes on the heels of Drinkle paying millions of dollars to settle a class action in which the plaintiffs alleged that Drinkle's product was defective.

Faced with the prospect of a very large class and believing that Paulson has suffered no damages beyond the $1,000 statutory sum, you query whether you can quickly eliminate the class, and the lawsuit, by making Paulson an offer of judgment under Rule 68 of the Federal Rules of Civil Procedure that affords him full relief. If Paulson accepts the offer he will no longer have a personal stake in the outcome of the lawsuit. Therefore, Paulson would lack standing and the class action would be dismissed as moot. But what if Paulson does not accept the offer of judgment? What if his attorneys convince him to ignore or reject the offer in the hope of receiving a large portion of any settlement or verdict as reward for serving as the lead plaintiff? Would Paulson and the class' claims be rendered moot?

Recently, the Supreme Court answered that question in the negative. In *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663 (2016), the Court held that an unaccepted Rule 68 offer does not moot a lead plaintiff's claim, even if the offer provided the plaintiff with complete relief. Relying upon Justice Kagan's colorful dissent in *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523 (2013), and basic contract principles, the *Campbell* majority reasoned that an unaccepted offer is just that—an unaccepted offer with no binding effect.

Despite the Court's ruling, Rule 68 offers of judgment remain a powerful tool for defense counsel to resolve a class action prior to class certification. Of particular interest in *Campbell* is the issue raised by Chief Justice Roberts' dissenting opinion—whether the result would be different if a defendant deposits the full amount of the plaintiff's individual claim in the court registry or an account for the plaintiff, and the court then enters judgment for the plaintiff in that amount. The Court left that question for another day. *Campbell*, 136 S. Ct. at 672.

Faced with the prospect of a very large class and believing that Paulson has suffered no damages beyond the $1,000 statutory sum, you query whether you can quickly eliminate the class, and the lawsuit, by making Paulson an offer of judgment under Rule 68 of the Federal Rules of Civil Procedure that affords him full relief.

This article will explain and address the issue left unresolved by the Court. First, we will examine Rule 68 and its function, both in the context of an individual claim and a class action. Next, we will review the decisions and issues raised in *Genesis* and *Campbell*. Then, we will examine recent cases and trends that have emerged since *Campbell*, and explain why Chief Justice Roberts' proposed solution should lead to a different and positive result for the defense bar. Finally, we will offer Rule 68 strategies and practice tips that businesses and attorneys can use to confront individual and class action claims.

Rule 68 Empowers the Defendant Corporation

Federal Rule of Civil Procedure 68 provides a defendant with the opportunity to eliminate the prospect of potentially costly litigation quickly. Rule 68's unquestionable purpose is to encourage settlement and avoid lengthy litigation. Under Rule 68, a defendant may serve a formal settlement offer upon the plaintiff to "allow judgment on specified terms, with the costs then accrued." Fed. Civ. P. 68(a). If the plaintiff accepts within 14 days, judgment is entered against the defendant for the specified amount plus costs, and the case is over. If the plaintiff rejects the offer, or simply lets the 14 days lapse, the Rule 68 offer is considered withdrawn. If the plaintiff fails to accept the offer and ultimately obtains a judgment at trial for less than the Rule 68 offer, the plaintiff is liable for the costs incurred by the defendant after the offer was made. Fed. R. Civ. P. 68.

While Rule 68 presents an opportunity for a quick and favorable resolution, there are a few consequences to be mindful of if the offer is accepted. First, the defendant is agreeing to pay a claim that may be disputed or defensible. Second, an offer that does not properly specify costs or has technical failures may cause the defendant to pay much larger costs than expected. And third, the defendant is agreeing to have a judgment entered against it, which could have consequences in and of itself. Nevertheless, the potential benefits of a Rule 68 offer may outweigh potential negatives.

The benefits of Rule 68 are particularly clear in cases where liability is almost certain. An accepted Rule 68 offer ends the litigation. It guards against a significant adverse verdict and may save hundreds of thousands of dollars (if not more) in defense costs. In short, an accepted Rule 68 offer allows the defendant to control the outcome.

Even without acceptance, the benefits of Rule 68 can be significant. Simply making a Rule 68 offer may provide a defendant with leverage in litigation. As noted above, if the plaintiff fails to accept the offer and obtains a lesser amount at trial, the plaintiff will be responsible for the defendant's costs incurred during litigation. Although such recoverable costs generally do not include attorneys' fees, the costs still may be significant, especially where there is extensive discovery. Additionally, there are some instances in which attorneys' fees are recoverable.

Perhaps more importantly, a Rule 68 offer (accepted or rejected) can stop the "meter" on the plaintiff incurring otherwise recoverable attorneys' fees. The Supreme Court has held that when the underlying statute at issue allows for the shifting of "attorneys' fees" within the definition of "costs," such fees are included as costs for purposes of Rule 68. *See Marek v. Chesny*, 473 U.S. 1 (1973). For example, in cases brought under Title VII and the Civil Rights Act, the costs recoverable by the plaintiff in a Rule 68 offer include attorneys' fees. Because attorneys' fees are defined as "costs" under the statute, they are stopped once a Rule 68 offer of judgment is made and rejected, assuming a plaintiff obtains a lesser judgment at trial. *See Id.*

Similarly, the Telephone Consumer Protection Act (TCPA) provides that attorneys' fees "shall be taxed and collected as part of the costs in the case." 47 U.S.C. §206; 42 U.S.C. §2000e-5(k). Therefore, the accrual of attorneys' fees in a TCPA case may be halted when an offer of judgment is made. Contrast this with the Fair Labor Standards Act (FLSA) and the Fair Credit Reporting Act (FCRA), both of which define attorneys' fees as separate from costs recoverable. Accordingly, in cases based on the FLSA or FCRA, Rule 68 offers do not stop the "meter" on the plaintiff's attorneys' fees.

The fear of having to pay the defendant's costs, and the potential of having a claim for attorneys' fees "frozen," makes a Rule 68 offer of judgment an effective tool in defending a suit filed by a single plaintiff who makes an excessive demand. When used in cases with statutorily-dictated damages—damages that are often nominal—Rule 68 can be even more effective. A defendant can offer the exact amount that plaintiff would be entitled to at trial on his best day, seemingly eliminating the very reason for plaintiff's case. Compounded by the possibility that the accrual of plaintiff's attorneys' fees would be stopped as well, the plaintiff and his attorney may be reluctant to drag out the litigation.

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Rule 68 May Be Even More Effective In Class Actions

In the context of class actions, Rule 68 may provide even greater leverage. Federal Rule of Civil Procedure 23 allows a plaintiff to file suit on behalf of countless named individuals. The plaintiff, however, will need to move to show that they can satisfy Rule 23's requirements of numerosity, commonality, typicality, and adequate representation. Satisfying the elements of Rule 23 may require extensive discovery. But generally, limited or no discovery occurs prior to class certification. In such a case, a defendant may be able to increase leverage by serving a Rule 68 offer prior to certification and discovery. This is because the named plaintiff is faced with the proposition that he or she may be liable for all remaining litigation costs.

It is generally established that if the class representative accepts a Rule 68 offer, his or her individual claim is moot. Under Article III of the Constitution, there must be a live case or controversy for a matter to proceed before the court. By accepting a Rule 68 offer prior to class certification, there is no live controversy and the pre-certification putative class has no separate legal standing. Consequently, the class may not proceed. *See Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523 (2013); *see also Holstein v. City of Chicago*, 29 F.3d 1145 (7th Cir. 1994); *Weiss v. Regal Collections*, 385 F.3d 337 (3d Cir. 2004); *Brown v. Philadelphia Housing Authority*, 350 F.3d 338 (3d Cir. 2003).

This approach, often referred to as "picking off the plaintiff" by the plaintiffs' bar, allows a defendant to stop litigation early and before it exhausts substantial resources. Consequently, courts may require that the plaintiff be given the opportunity to perform at least some pre-certification discovery or be given adequate time to move for certification before a binding Rule 68 offer can be made. *See Campbell*, 136 S. Ct. 663 (2016). Despite this limitation, a Rule 68 offer still provides tangible benefits to a defendant.

At the very least, an accepted offer ends the individual plaintiff's case. If the plaintiff's attorney only named a single representative plaintiff, counsel will need to find another plaintiff and refile the case if he or she decides to continue to pursue claims against the company. This may take days or even months. But even a small delay in refiling may be beneficial as the statute of limitations may run on other potential class members' claims. Furthermore, the originally named plaintiff may have been the only known individual that tied the putative class to a particular forum or venue. Thus, a class action that was expected to be litigated in a generally unfavorable court may end up being refiled in a jurisdiction that is more favorable or familiar to the defendant. Of course, the defendant may be able to make a Rule 68 offer to each subsequently named plaintiff, thereby repeating this cycle of stopping litigation early. Nonetheless, the desirability of repeated offers of judgment is mixed.

But what happens if a Rule 68 offer is rejected or not accepted by the named plaintiff, despite offering the plaintiff complete relief? The Supreme Court attempted to answer this in two cases, but the dissents in both cases only served to raise additional questions that will likely need to be resolved by the Court in the future.

A *Genesis* of Controversy

In *Genesis Healthcare Corp. v. Symczyk*, the Supreme Court examined whether an unaccepted offer of judgment prior to class certification mooted the entire lawsuit. A divided Court answered in the affirmative. In *Genesis*, the plaintiff, a former employee of Genesis, sued on behalf of herself and similarly situated employees for alleged violations of the Fair Labor Standards Act, which is similar to Rule 23. Genesis served the plaintiff with an offer of judgement pursuant to Rule 68 that fully satisfied the plaintiff's individual claim. The plaintiff allowed the offer to lapse by failing to respond within the time specified by Rule 68. 133 S. Ct. at 1527. The plaintiff did not dispute that her individual claim was mooted by the time lapse or by her rejection of the offer of judgment. *Id.* at 1528-29. Because of this waiver, the Supreme Court assumed, without formally deciding, that an offer of complete relief, pursuant to Rule 68, even if unaccepted, moots a plaintiff's claim. Thus, without deciding the threshold issue, the Court proceeded to consider whether the action remained justiciable on the basis of the collective action allegations. *Id.* at 1529. The Court held that because the plaintiff lacked a personal stake in the lawsuit, the entire suit was moot and could not be maintained. *Id.*

Justice Kagan, writing for the dissent, passionately disagreed. Initially, Justice Kagan suggested that it was highly improper for the majority to make their threshold assumption. Justice Kagan then went on to explain that she would have held that "an unaccepted offer of judgment cannot moot a case." *Genesis*, 133 S. Ct. at 1533. She reasoned:

> When a plaintiff rejects such an offer—however good the terms—her interest in the lawsuit remains just what it was before. And so too does the court's ability to grant her relief. An unaccepted settlement offer—like any unaccepted contract offer—is a legal nullity, with no operative effect. As every first-year law student learns, the recipient's rejection of an offer 'leaves the matter as if no offer had ever been made.'"

Genesis, 133 S. Ct. at 1533.

Because the majority did not directly address whether a rejected offer of judgment that affords the plaintiff complete relief moots a plaintiff's claim, this issue was left open for lower courts to decide. Without clear guidance from the Supreme Court, many lower courts adopted the dissent's view that an unaccepted offer of judgment did not moot a plaintiff's and a class' claims. For example, the Ninth Circuit explicitly adopted the dissent's position that an unaccepted Rule 68 offer of judgment does not render the claim moot. *Diaz v. First Am. Home Buyers Prot. Corp.*, 732 F.3d 948, 953-955 (9th Cir. 2013). The court held that based on the principles articulated by Justice Kagan in her *Genesis* dissent, "once [the defendant's] offer lapsed, it was, by its own terms and under Rule 68, a legal nullity." *Id.* The Eleven Circuit also adopted Justice Kagan's reasoning in vacating a district court's dismissal of a plaintiff's claim following an unaccepted Rule 68 offer. *See Stein v. Buccaneers Ltd. P'ship*, 772 F.3d 698, 702–704 (2014). Meanwhile other jurisdictions relied on the *Genesis* majority and pre-*Genesis* rulings to conclude that an unaccepted offer for complete relief did moot a plaintiff's claim. *See Malone v. Portfolio Recovery Associates, LLC* (W.D. Ky. 2015).

> While Rule 68 presents an opportunity for a quick and favorable resolution, there are a few consequences to be mindful of if the offer is accepted.

Campbell-Ewald: Answering One Question, but Raising Another

While *Genesis* opened the door for using a Rule 68 offer to "pick off" the named plaintiff (even when the offer was not accepted), in January 2016, the Supreme Court's decision, in *Campbell-Ewald Co. v. Gomez* slammed that door shut. In *Campbell*, Gomez filed a class action complaint against Campbell-Ewald on behalf of a nationwide class of individuals who had received, but had not consented to receipt of text messages. Gomez alleged that the text messages violated the Telephone Consumer Protection Act (TCPA). Prior to class certification, Campbell-Ewald made a Rule 68 offer of judgment. The offer provided Gomez with complete relief, including the satisfaction of his treble-damage claim. Gomez allowed the offer to lapse after the 14-day time frame specified by the Rule.

In an opinion written by Justice Ginsburg, the majority adopted Justice Kagan's reasoning that an unaccepted Rule 68 offer was the same as any other unaccepted settlement offer—it had no legal force. Applying basic contract principles, Justice Ginsburg explained: "Campbell's settlement bid and Rule 68 offer of judgment, once rejected had no continuing efficacy. Absent Gomez's acceptance, Campbell's settlement offer remained only a proposal, binding neither Campbell nor Gomez." *Campbell-Ewald*, 136 S. Ct. at 670. Thus, the Court concluded that without an operative settlement, "the parties remained adverse; both retained the same stake in the litigation that they had at the outset." *Id.* at 670–71. Accordingly, the Court held that an unaccepted offer of judgment, even if the offer provides the plaintiff with full and complete relief, does not moot a plaintiff and the putative class' claims. *Id* at 672.

Of particular interest in the *Campbell* decision was the Court's query as to "whether the result would have been different if a defendant deposits the full amount of the plaintiff's individual claim in an account payable to the plaintiff, and the court then enters judgment for the plaintiff in that amount." *Campbell-Ewald*, 136 S. Ct. at 672. The Court left that question for another day.

Although the door was left open by the majority, the exception was raised by Chief Justice Roberts and Justice Alito in their dissents. The Chief Justice argued that the plaintiff's claims were moot because "Campbell agreed to fully satisfy Gomez's claims" and "[t]hat makes the case moot." *Campbell-Ewald*, 136 S. at 678. In criticizing the majority, Justice Roberts wrote: "The question, however, is not whether

there is a contract; it is whether there is a case or controversy under Article III. If the defendant is willing to give the plaintiff everything he asks for, there is no case or controversy to adjudicate, and the lawsuit is moot." *Id.* at 682.

In closing, Justice Roberts stressed that "[t]he majority holds that an *offer* of complete relief is insufficient to moot a case. The majority does not say that *payment* of complete relief leads to the same result." *Campbell-Ewald*, 136 S. Ct. at 683 (emphasis in original). "The majority's analysis may have come out differently if Campbell had deposited the offered funds with the District Court." *Id.* In joining in the dissent, Justice Alito opined that "outright payment is the surest way for a defendant to make the requisite mootness showing." *Id.* at 684. He suggested that this can be accomplished by the defendant handing the plaintiff a certified check or depositing the requisite funds in a bank account in the plaintiff's name. Alternatively, citing Federal Rule Civil Procedure 67, Justice Alito suggested that a defendant might deposit the money with the district court on the condition that the money be released to the plaintiff when the court dismisses the case as moot.

Post-*Campbell*: Testing the Dissent's Theory

Since *Campbell*, courts have generally followed the majority and ruled against parties that attempted to moot class actions with an unaccepted Rule 68 offer. Many of these cases had been stayed until after the *Campbell* decision was issued. However, as of April 2016, only a few courts have considered and ruled on the question raised by Justice Roberts and Justice Alito—whether a claim could be satisfied, and thus mooted, by the defendant depositing the money in the court's registry in conjunction with the Rule 68 offer of judgment.

In *Brady v. Basic Research, LLC*, the district court considered the defendant's motion to deposit money in the court's registry in conjunction with a Rule 68 offer. 2016 WL 462916 (E.D.N.Y. Feb. 3, 2016). The plaintiffs argued that the defendant was seeking to misuse Rule 67 to deposit money in the court's registry and improperly moot the plaintiffs' claims. The court agreed with the plaintiffs and denied the defendants Rule 67 motion. In doing so, the court found that defendants were not seeking to "relieve themselves of the burden of administering an asset," in contradiction to the Supreme Court's directive that "'a would-be class representative with a live claim of her own must be accorded a fair opportunity to show that certification is warranted." *Id.* at *2.

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In *Bais Yaakov of Spring Valley v. Varitronics, LLC*, a Minnesota district court also considered the defendant's motion to deposit money into the court's registry under rule 67 as part of a Rule 68 offer. 2016 WL 806703 (D. Minn. Mar. 1, 2016). Again, relying on *Campbell*, the court denied the defendant's motion as it found that the only purpose of the deposit was to "moot the case, and as Plaintiff has not yet had a fair opportunity to show that class certification is warranted." *Id.* at *1.

In one case, defendants were at least temporarily successful in depositing settlement monies into a court's registry. *See Bais Yaakov of Spring Valley v. Graduation Source, LLC*, 2016 WL 872814 (S.D.N.Y. March 7, 2016). In *Graduation Source*, following the *Campbell* decision, the defendant wrote to the court requesting permission to deposit $9,200, the statutory maximum recoverable on the plaintiff's individual claims, into the court's registry. The court granted the defendant permission to deposit the funds into the court's registry and instructed the plaintiff to show cause within 30 days why judgment should not be entered in favor of the plaintiff. However, following the plaintiff's response, the court vacated the earlier order and did not enter judgment against the plaintiff, finding it was necessary to afford the plaintiff "fair opportunity to show that class certification is warranted." *Id.* at *1.

Most recently, in April 2016, the Ninth Circuit rejected a defendant's attempts to moot the plaintiff's compliant and the class by depositing $20,000 into an escrow account and agreeing to an injunction. *Chen v. Allstate Ins. Co.*, 2016 WL 1425869 (9th Cir. Apr. 12, 2016). In *Chen*, the plaintiff filed a class action against Allstate, alleging he received unsolicited automated calls to his cellphone. *Id.* at *1. On appeal, Allstate deposited $20,000 in full settlement of the plaintiff's monetary claims in an escrow account and agreed to stop sending "non-emergency telephone calls and short message service messages," and requested that the case be dismissed. *Id.* Relying on Ninth Circuit precedent and *Campbell*, the court rejected Allstate's attempt to moot the claim. The court reasoned that the plaintiff had not actually received all of the relief and Allstate failed to comply with Justice Roberts' hypothetical by not "unconditionally relinquish[ing]" any claim to the funds—as its motion stated that if the court denied Allstate's motion to dismiss, the funds would revert to Allstate. *Id.* at *8. The court further found that dismissing the case would deny the class representative the "fair opportunity to move for class certification." *Id.* at 9.

These rulings make it likely there will be no definite resolution until the matter is decided by the Supreme Court. It is unclear how the Court will rule, and it is complicated by the recent death of Justice Antonin Scalia, who joined Roberts' dissent. The Court decided *Campbell* with a five member majority, with Justice Thomas concurring in judgment but disagreeing in reasoning. It is likely that Justice Thomas would join the other, more conservative Justices on this issue should it be presented to the Court. However, no longer will Justices Roberts and Alito need to convince only one of the five-member majority to establish that depositing funds with the court could moot a plaintiff's claim even without acceptance of a Rule 68 offer. Now they must persuade either two of the orig-

inal majority (this may be possible given the majority's query), or one of the majority and the to-be-determined future Justice. This is further clouded by the current stalemate in the Senate as to the confirmation of President Obama's nominee, Merrick Garland, who agreed with Justice Roberts in 85 percent of cases when they were both on the D.C. Circuit Court of Appeals. Until the next Justice is confirmed, the likelihood of success for Justice Roberts' proposal is uncertain.

Practice Pointers: Eliminate the Class Early

Now that you are familiar with Rule 68 Offers of Judgment and how to use them as a tool to defeat putative class actions, you are ready to turn back to Paul Paulson's class action suit against Drinkle. You have decided that you want to make Paulson an offer of judgment potentially to moot his claims and the class. But first you need to determine a dollar figure that affords Paulson full and complete relief. As noted earlier, liability is clear and you are confident that Paulson has not suffered any actual harm or damages beyond the $1,000 statutory sum. You are also confident that Paulson would not be able to establish treble damages, punitive damages, or any other damages.

However, Paulson may be entitled to his attorneys' fees under the statute. Therefore, the offer of judgment must take into account such fees. The attorneys' fees generally should be offered in one of two ways. It can be offered inclusively or exclusively. If the offer of judgment includes attorneys' fees, you will have to estimate Paulson's attorneys' fees to date. Although it may sting, it is better to overestimate his fees to ensure that you would be offering him full relief. You cannot imagine that the fees exceed $10,000 at this nascent stage, based on what you know about the case and given that the complaint was just filed. You think that the real number is less than $5,000, but you do not want to take the chance of later learning Paulson's attorney reasonably incurred more than $5,000 in conducting his initial investigation and drafting the complaint. Therefore, you are comfortable with spending the extra $5,000 now rather than the extra $500,000 later.

Additionally, you may wish to add a few thousand dollars to the offer just to be sure that all possible costs are accounted for; thereby reducing the possibility that Paulson will later argue that the offer failed to afford him complete relief. Therefore, you decide to make an offer of judgment of $20,000, despite firmly believing that his damages and attorneys' fees are far less. In short, you want to make the offer sufficiently attractive so that Paulson thinks twice before rejecting it. The offer, which is generally done by letter, should state that the offer of $20,000 represents all the relief that Paulson could recover in the action and the sum includes all statutory and actual damages, as well as any other damages and any costs and expenses including reasonable attorneys' fees and expenses incurred to date.

Your best chance of mooting Paulson's claims and getting the case dismissed would be to follow *Campbell-Ewald's* dissent's suggestion of moving the court to put the amount of the offer in the court's registry (with a copy of a verified check) at the time of making the offer of judgment.

If you decide to make the offer of judgment exclusive of attorneys' fees and costs, then you may wish to offer $5,000, for example, which would include statutory and actual and other damages. In addition, the offer should state that Drinkle will pay for any and all reasonable attorneys' fees and costs incurred by Paulson and his attorneys in this matter to date, as permitted by law and determined by the court.

Whether you make the offer inclusive or exclusive of attorneys' fees, expect Paulson's attorney to argue that the offer did not afford Paulson complete relief. Courts have gone in many different directions on this issue. However, the chances of the court siding with you greatly increase if you make it clear that Drinkle is willing to provide Paulson with all the possible relief that he is entitled to—including attorneys' fees and costs. At worst, you may be able to stop the "meter" on Paulson's attorneys' fees, and successfully argue that Paulson is not entitled to recover attorneys' fees incurred after the date of the offer of judgment if he recovers less at trial than the amount of the offer.

Assuming you decide to offer Paulson $5,000, plus his reasonable attorneys' fees and costs incurred to date (with such reasonable attorneys' fees and costs to be determined later by motion), the next step is to determine how the offer should be made so as to moot Paulson's claims in light of *Genesis* and *Campbell*. As suggested by *Campbell*, you may wish to send the check or deposit the funds contemporaneously with making the offer. This, however, may not be a viable solution. For example, if Paulson is inclined to reject the offer, he will not cash the check. Accordingly, your best chance of mooting Paulson's claims and getting the case dismissed would be to follow *Campbell-Ewald's* dissent's suggestion of moving the court to put the amount of the offer in the court's registry (with a copy of a verified check) at the time of making the offer of judgment.

The court may follow *Campbell's* dissent and the majority's passive approval and grant the relief requested. Paulson's claim would be fully satisfied and the lawsuit would be subject to dismissal. As a result, you saved Drinkle from significant exposure and attorneys' fees. At worst, even if the court disagreed with your approach, you immediately put pressure on Paulson and his counsel and established leverage. Moreover, you may have saved Drinkle hundreds of thousands of dollars in attorneys' fees by arguably stopping the "meter." If nothing else, you set yourself up to handle the next case at the Supreme Court.