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Offers of Judgment in Employment Litigation After Campbell-Ewald and Fulton Dental

Analyzing the Viability of Rule 68 or Rule 67 as a Strategic Tool
for Employers to Moot Individual, Class and Collective Claims

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Offers of Judgment in Employment Litigation After *Campbell-Ewald* and *Fulton Dental*

Analyzing the Viability of Rule 68 or Rule 67 as a Strategic Tool for Employers to Moot Individual, Class and Collective Claims

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Fed. R. Civ. P. 68. Offer of Judgment

(a) MAKING AN OFFER; JUDGMENT ON AN ACCEPTED OFFER. At least 14 days before the date set for trial, a party defending against a claim may serve on an opposing party an offer to allow judgment on specified terms, with the costs then accrued. If, within 14 days after being served, the opposing party serves written notice accepting the offer, either party may then file the offer and notice of acceptance, plus proof of service. The clerk must then enter judgment.

(b) UNACCEPTED OFFER. An unaccepted offer is considered withdrawn, but it does not preclude a later offer. Evidence of an unaccepted offer is not admissible except in a proceeding to determine costs.

(c) OFFER AFTER LIABILITY IS DETERMINED. When one party's liability to another has been determined but the extent of liability remains to be determined by further proceedings, the party held liable may make an offer of judgment. It must be served within a reasonable time—but at least 14 days—before the date set for a hearing to determine the extent of liability.

(d) PAYING COSTS AFTER AN UNACCEPTED OFFER. If the judgment that the offeree finally obtains is not more favorable than the unaccepted offer, the offeree must pay the costs incurred after the offer was made.

Offers of Judgment - Overview

- R.68 permits a “party defending against a claim” to make an “offer of judgment” to the party prosecuting the claim
- R.68 offer of judgment is a risk-shifting tool: If the plaintiff rejects the offer and ultimately obtains a less favorable judgment, plaintiff must pay for defendant’s costs incurred *after* making of offer
- R.68 provides cost certainty to offeree

Offers of Judgment - Purpose

R.68 offers of judgment:

- “encourage settlements and avoid protracted litigation.” Advisory Committee’s Notes on Fed. R. Civ. P. 68
- “provide[] an additional inducement to settle in those cases in which there is a strong probability that the plaintiff will obtain a judgment but the amount of recovery is uncertain.” *Delta Airlines, Inc. v. August*, 450 U.S. 346, 352 (1981)
- “require plaintiffs to ‘think very hard’ about whether continued litigation is worthwhile.” *Marek v. Chesny*, 473 U.S. 1, 11 (1985)

Offers of Judgment - Scope

Rule 68:

- is not restricted to use by defendants; it also applies to counterclaims, cross-claims, or third-party claims
- does not apply if the defendant prevails (i.e., the defendant is not entitled to payment from the plaintiff for defendant's post-offer costs)
- does not apply when the defendant makes a settlement offer
- does not eliminate the plaintiff's pre-offer costs (regardless of whether the plaintiff accepts or rejects the Rule 68 offer)

Offers of Judgment - Cost Shifting

3 possible scenarios (assuming a rejected Rule 68 offer):

1. Defendant wins: R.68 does not apply, because plaintiff did not obtain a favorable judgment. Defendant can seek costs under Rule 54.
2. Plaintiffs wins and judgment is *less* than the Rule 68 offer: R.68's cost-shifting applies. Plaintiff pays defendant's costs from date of offer. As prevailing party, plaintiff may seek costs up to date of R.68 offer, but pays its own post-offer costs.
3. Plaintiff wins and judgment is *greater* than R.68 offer: R.68 does not apply; Defendant pays for all of its own costs; Plaintiff may seek costs under Rule 54 for the entire suit.

Offers of Judgment - How it works

- **Timing of Offer:** The offer of judgment must be made at least 14 days prior to the date set for trial.
 - Alternatively, if liability has been determined, but the amount is unresolved, the defendant may serve the offer of judgment within “a reasonable time,” but at least 14 days, before any hearing scheduled to determine liability. Fed. R. Civ. P. 68(c).

Offers of Judgment - How it works, cont'd.

- **Timing for Response:** Plaintiff has 14 days to decide whether to accept
 - Unaccepted offer is considered withdrawn (Fed. R. Civ. P. 68(b))
 - Multiple offers are permissible (Fed. R. Civ. P. 68(b))
 - Some courts, including 7th Circuit, have held that offers are irrevocable during 14-day period, while others have held that offers may be revoked in limited circumstances. *See Sanchez v. Prudential Pizza, Inc.*, 709 F.3d 689, 692 (7th Cir. 2013) (“Rule 68 offers may not be revoked during the 14-day period established by the Rule.”); *Cesar v. Rubie’s Costume Co.*, 219 F.R.D. 257, 259 (E.D.N.Y. 2004) (holding that R.68 offer was revocable because it contained material mistake).

Offers of Judgment - How it works, cont'd.

- **Form:** Offer must specify terms on which defendant will consent to judgment, and it must provide for plaintiff's "costs then accrued."
 - Precision matters. Be specific and clear in offer. Ambiguities will be resolved against offerer/drafter. *Sanchez v. Prudential Pizza, Inc.*, 709 F.3d 689, 690 (7th Cir. 2013).
- **Negotiability:** Rule 68 offers are non-negotiable.
- **No Discretion by District Court:**
 - If offer is accepted, court must enter judgment. Fed. R. Civ. P. 68(a).
 - If offer is rejected, cost-shifting goes into effect.

Offers of Judgment - How it works, cont'd.

- **Types of Offers:**

- Lump sum: Costs do not need to be itemized; offer may specify instead that offered judgment includes damages, costs, attorney's fees, and interest incurred through date of offer
- Itemized: Specify \$X amount for damages and interest and \$Y amount for costs and attorney's fees
- Lump sum for damages only: Specify \$X amount for damages and interest and permit court to determine costs and attorney's fees
 - **N.B.:** If offer does not mention costs, still considered valid (if timely); trial court should deem costs to be included in offer and should conduct appropriate proceedings to determine amount (to be *added* to offered lump-sum judgment. *Marek v. Chesny*, 473 U.S. 1, 6 (1985)).

Offers of Judgment -Attorneys' Fees

One complication ... are attorneys' fees included as part of "Costs"

- Need to look to the governing statute's definition of "costs"
- "All costs properly awardable in an action are to be considered within the scope of Rule 68 'costs.'" *Marek*, 473 U.S. at 9.

Offers of Judgment - Attorneys' Fees

- If “the underlying statute defines ‘costs’ to include attorney’s fees, . . . such fees are to be included as costs for purposes of Rule 68.” *Marek*, 473 U.S. at 9
- If underlying statute defines attorneys’ fees separately from costs, attorneys’ fees are not covered by R.68

Statute Defines Costs to Include Attorneys’ Fees	Statute Defines Costs Separately from Attorneys’ Fees
Section 1983, Title VII	FLSA, ADA, ADEA

Offers of Judgment - Attorneys' Fees

Statute Defines Costs to Include Attorneys' Fees

Are defendant's fees recoverable?

Pre-offer: No.

Post-offer: Depends on the Circuit and depends on the statute's attorneys' fees provision.

Are plaintiff's fees recoverable?

Pre-offer: Yes.

Post-offer: A rejected Rule 68 offer of judgment potentially enables a defendant to cut off the accrual of the plaintiff's attorneys' fees incurred post-offer, i.e., making the plaintiff responsible for their own attorneys' fees post-offer.

Offers of Judgment - Attorneys' Fees

Statutes Define Costs Separately From Attorneys' Fees

Are defendant's fees recoverable?

Pre/Post-offer: No.

Are plaintiff's fees recoverable?

Pre/Post-offer: If the plaintiff ultimately prevails at trial—regardless of whether the defendant made a Rule 68 offer—the plaintiff will be entitled to its full attorneys' fees. *See Fegley v. Higgins*, 19 F.3d 1126, 1134 (6th Cir. 1994).

Offers of Judgment - Sample Language

- Pursuant to Rule 68 of the Federal Rules of Civil Procedure, Defendant hereby offers to allow Judgment to be entered against it in this action for the amount of \$XXX including all of Plaintiff's claims for relief. Attorneys' fees and costs are included as a part of Defendant's offer. This offer of judgment is not to be construed as an admission of liability by Defendant, but is made strictly for the purposes specified in Federal Rule of Civil Procedure 68 and is intended to compromise a disputed claim.

Offers of Judgment - Sample Language

- Pursuant to Rule 68 of the Federal Rules of Civil Procedure, Defendant hereby offers to allow Judgment to be entered against it in this action for compensatory and statutory damages in the amount of \$XXX and reasonably attorneys' fees, litigation expenses, and costs of suit incurred by Plaintiff as of the date of this offer in relation to this case in the amount of \$XXX. This offer of judgment is intended to resolve all of Plaintiff's claims in this action, including, without limitation, any and all claims for compensatory damages, statutory damages, attorneys' fees, litigation expenses, and costs of suit. This offer of judgment is not to be construed as an admission of liability by Defendant, but is made strictly for the purposes specified in Federal Rule of Civil Procedure 68 and is intended to compromise a disputed claim.

Strategic Considerations in Single Plaintiff Employment Litigation

- **Entry of Judgment Against the Defendant:**
 - Client must be willing to accept judgment being entered against it
 - Judgments are a matter of public record
 - Amount of payment may be reflected in the judgment
 - Possible concerns regarding public stigma or copycat suits

Strategic Considerations in Single Plaintiff Employment Litigation

- **Timing:**
 - An early and accurate assessment of liability is important
 - Make the offer as early as practicable
 - There are significant benefits to making a Rule 68 offer before discovery if the defendant has enough information to assess damages and evaluate an offer
 - Weeks before trial is too late

Strategic Considerations in Single Plaintiff Employment Litigation

Types of Cases that are Prime Candidates for a Rule 68 Offer

- Fee-shifting cases: If attorneys' fees are defined as part of costs, a R.68 offer puts pressure on the plaintiff, because it potentially cuts off plaintiff's ability to recover attorneys' fees
- Wage and hour cases: It is relatively easy to ascertain what plaintiffs' damages are likely to be, so R.68 offer carries more weight and greater risk if plaintiff rejects it

Strategic Considerations in Single Plaintiff Employment Litigation

Is Settlement Just a Better Way To Go?	
Rule 68 Offer	Settlement Offer
Leverage to prompt or reinvigorate stalled settlement negotiations	More negotiation
Recovery of costs	Confidential discussions
In subset of cases, can cut off plaintiff's accrual of attorneys' fees	Confidential settlement
	Defendant does not need to accept judgment against it

Strategic Considerations in Single Plaintiff Employment Litigation

- **State Law Offers of Judgment**
 - Although most states that have enacted their own versions of offers of judgment have modeled them on the federal rule, some state statutes differ significantly from the federal rule
 - Research state law application and distinctions when considering making an offer of judgment

Fed. R. Civ. P. 67. Deposit into Court

(a) DEPOSITING PROPERTY. If any part of the relief sought is a money judgment or the disposition of a sum of money or some other deliverable thing, a party—on notice to every other party and by leave of court—may deposit with the court all or part of the money or thing, whether or not that party claims any of it. The depositing party must deliver to the clerk a copy of the order permitting deposit.

(b) INVESTING AND WITHDRAWING FUNDS. Money paid into court under this rule must be deposited and withdrawn in accordance with 28 U.S.C. §§2041 and 2042 and any like statute. The money must be deposited in an interest-bearing account or invested in a court-approved, interest-bearing instrument.

Rule 67 Deposits into Court - Purpose & Limitations

- “The core purpose of Rule 67 is to relieve a party who holds a contested fund from responsibility for disbursement of that fund among those claiming some entitlement thereto.” *Alstom Caribe, Inc. v. George P. Reintjes Co.*, 484 F.3d 106, 113 (1st Cir. 2007)
- A court generally has discretion whether to allow a Rule 67 deposit. *LTV Corp. v. Gulf States Steel, Inc. of Alabama*, 969 F.2d 1050, 1063 (D.C. Cir. 1992), cert. denied, 506 U.S. 1022 (1992)
- “Sections 2041 and 2042 do not give any party an unrestricted right to remove money from the court’s registry.” *Fulton Dental, LLC v. Bisco, Inc.*, 860 F.3d 541, 545 (7th Cir. 2017)

Case Law Interpreting R.68

- Campbell-Ewald v. Gomez, 136 S. Ct. 663 (2016)
- Fulton Dental, LLC v. Bisco, Inc., 860 F.3d 541 (7th Cir. 2017)

Campbell-Ewald v. Gomez

136 S. Ct. 663 (2016)

- In *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct 1523 (2013), named-plaintiff conceded R.68 offer of judgment (full relief) mooted her personal claim, but sought to continue as class representative
- *Genensis* court held that, lacking any claim of her own, named-plaintiff could not serve as class representative

Campbell-Ewald v. Gomez

136 S. Ct. 663 (2016)

- Gomez filed putative class action against advertising agency alleging that its text message ads violated Telephone Consumer Protection Act
- Campbell-Ewald served R.68 offer of judgment for complete relief of the damages allowable under the TCPA, plus litigation costs

Campbell-Ewald v. Gomez

136 S. Ct. 663 (2016)

- After Gomez allowed offer to expire, Campbell-Ewald filed MTD for lack of subject matter jurisdiction under Rule 12(b)(1)
 - Gomez's claim was mooted by R.68 because no Article III case or controversy existed once named-plaintiff was offered full satisfaction of claim
- Campbell-Ewald argued, because class had not yet been certified, class claims were similarly mooted

Campbell-Ewald v. Gomez

136 S. Ct. 663 (2016)

- Court held, under basic principles of contract law, an unaccepted offer is a legal nullity, does not bind either party, and therefore does not moot dispute
- Mootness is controlled solely by plaintiff:
 - If plaintiff accepts offer of full relief, case is moot and defendant won't face class action (unless and until plaintiff's attorney finds another individual to serve as class representative)
 - If plaintiff turns down the offer, case continues

Campbell-Ewald v. Gomez

136 S. Ct. 663 (2016)

- Open question ... would the result “be different if a defendant deposits the full amount of the plaintiff’s individual claim in an account payable to the plaintiff, and the court then enters a judgment for the plaintiff in that amount”?
- Roberts’s dissent—another option ... deposit certified check with trial court for full amount due
 - Roberts notes that majority opinion held merely “that an offer of complete relief is insufficient to moot a case” but not that “payment of complete relief leads to the same result.”
- Deposits would be made on the condition that the money is released to plaintiff upon dismissal

Fulton Dental, LLC v. Bisco, Inc.

860 F.3d 541 (7th Cir. 2017)

- In Dec. 2015, plaintiff dental clinic filed class action against defendant company for allegedly violating TCPA
- In Jan. 2016—two days after the *Campbell-Ewald* decision—defendant made R.68 offer to plaintiff to settle its individual claims, plus injunctive relief, fees, and costs

Fulton Dental, LLC v. Bisco, Inc.

860 F.3d 541 (7th Cir. 2017)

- Relying on *Campbell-Ewald* that “an unaccepted settlement offer or offer of judgment does not moot a plaintiff’s case,” plaintiff rejected offer
- Seeking to test *Campbell-Ewald* open issue, Bisco moved for leave to deposit \$3,600—maximum possible damages plaintiff could receive, plus fees and costs—with district court under R.67
 - Argued plaintiff’s claim was moot

Fulton Dental, LLC v. Bisco, Inc.

860 F.3d 541 (7th Cir. 2017)

- District court dismissed case on basis that defendant's R.67 deposit and acquiescence to adverse injunctive order mooted class representative's claim
- Seventh Circuit reversed, noting that *Campbell-Ewald* “drew no distinction between unaccepted R.68 settlement offers and other unaccepted settlement or contract offers”

Fulton Dental, LLC v. Bisco, Inc.

860 F.3d 541 (7th Cir. 2017)

- Court saw “no principled distinction between attempting to force a settlement on an unwilling party through R. 68, as in *Campbell-Ewald*, and attempting to force a settlement on an unwilling party through R. 67.”
- But, luckily for defendants, Court did not stop there ...

Fulton Dental, LLC v. Bisco, Inc.

860 F.3d 541 (7th Cir. 2017)

- Court endorsed new procedure (foregoing R.67 maneuver):
 - Make a full deposit directly into class representative’s “individual account” where she has the ability to access and exercise control over deposited funds (as opposed to court’s registry under R.67, where there is no such control); and
 - Couple deposit with affirmative defense, such as accord and satisfaction, payment, estoppel, or waiver

Fulton Dental, LLC v. Bisco, Inc.

860 F.3d 541 (7th Cir. 2017)

- Court noted that full compensation may need to include value that class representative derives in serving as class representative, not just maximum statutory damages plus costs and fees
- But, Court provided no guidance on how to value this “representative” benefit

Post-*Campbell-Ewald* and -*Fulton* *Dental* Cases

- Majority of circuit/district courts hold that tendering full relief to named-plaintiff will NOT moot class action before named-plaintiff given opportunity to attempt certification
 - In *Wilson v. Gordon* (822 F.3d 934, 942 (6th Cir. 2016)), Sixth Circuit found that “picking off” exception—which allows class members to retain a live interest in case after named-plaintiff’s claim becomes moot, still viable after *Campbell-Ewald*

Post-Campbell-Ewald and -Fulton Dental Cases

- But 2nd Circuit held, although unaccepted R.68 offer for complete relief does not *moot* case—i.e., it does not strip district court of jurisdiction—judgment could nevertheless be entered for plaintiff where defendant made court deposit of full amount of damages recoverable by named-plaintiff
 - *Leyse v. Lifetime Entm't Services, LLC*, 679 Fed. Appx. 44, 48 (2d Cir. 2017) (summary order)

Post-Campbell-Ewald and -Fulton Dental Cases

- Mass. District Court held that defendant could successfully moot both named-plaintiff's individual claim and class claims by tendering a \$75 check to named-plaintiff, which exceeded the maximum statutory damages allowed for alleged violations of Massachusetts Consumer Protection Act
 - *Demmler v. ACH Food Companies, Inc.*, 15-13556-LTS, 2016 WL 4703875, at *4 (D. Mass. June 9, 2016)

Post-*Campbell-Ewald* and -*Fulton* *Dental* Cases

- In granting defendant's MTD, *Demmler* court found:
 - Plaintiff's claims were mooted because check amounted to unconditional payment rather than settlement offer;
 - Because class had not yet been certified, it lacked legal status and had no independent interests; and
 - Action was not eligible for "inherently transitory" exception to class action mootness doctrine because no evidence that defendant had attempted to "pick off" named-plaintiffs to insulate itself from review

Post-*Campbell-Ewald* and -*Fulton* *Dental* Cases

- *Demmler* court also noted two other items of interest:
 - Court acknowledged that class action may not have been mooted if class certification motion pending at time of tender, such as if named-plaintiff had filed certification motion simultaneously with complaint
 - Court left open whether defendant's pre-suit tender following demand sufficient to moot claim, regardless of whether certification motion filed simultaneously with lawsuit

Using Rule 68 in Arbitrations

- Parties can design arbitration process to fit needs
 - Arbitration is a creature of contract
 - Arbitration clauses enforced with few exceptions
 - Employers have latitude to include provisions in arbitration clauses to streamline process (making it faster and cheaper)

Using Rule 68 in Arbitrations

- Incorporating Rule 68 into clause worth considering
- If not in clause, attempting to invoke R. 68 (or comparable state statute) as applicable substantive law governing arbitration risky
 - *See WPH Architecture, Inc. v. Vegas VP, LP*, 360 P. 3d 1145 (Sup.Ct.Nev. 2015); *cf.* Cal. Civ. Proc. Code 998 (explicitly providing that California's offer of judgment statute applies to arbitration proceedings)

Impact of Importing Rule 68 in Arbitrations

Under 28 U.S.C. 1920, “taxable costs” include:

- (1) Fees of the clerk and marshal;
- (2) Fees for printed or electronically recorded transcripts;
- (3) Fees and disbursements for printing and witnesses;
- (4) Fees for exemplification and the costs of making copies of any materials;
- (5) Docket fees; and
- (6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services.

Impact of Importing Rule 68 in Arbitrations

- Arbitration “costs” typically far exceed “costs” recoverable in litigation
 - Provider’s filing fees (may be thousands of dollars)
 - Arbitrator(s) compensation (may also be substantial)
- Arbitration’s “enhanced” costs raises stakes if R. 68 offer declined in arbitration
 - Caution—if R. 68 incorporated “as is,” arbitration panel may decide to award only modest “normal” costs recoverable under 28 U.S.C. 1920

Advantages of Importing Rule 68 in Arbitration

- Offer of judgment may encourage an “unreasonable” Claimant to settle
- Greater recoverable costs owed to Respondent if Claimant “guesses wrong” adds pressure on Claimant to accept offer

Modifying Rule 68 in Arbitrations

- Amending Federal Rules requires a protracted, cumbersome process
- Possible changes to Rule 68 have been suggested
 - nycbar.org/pdf/report/uploads/20072454ReportonRule68oftheFed.RulesofCivilProcedure.pdf
- In contrast, parties in arbitration free to alter Rule as they see fit

Possible Modifications to Rule 68 in Arbitrations

- Changing “offer of judgment” to “formal offer of settlement” may be beneficial
 - Can be cumbersome to enter judgment if no court proceeding is pending
 - Parties may prefer to avoid filing a public judgment
 - But, triggering “offer” should be defined carefully (to avoid discouraging settlement discussions)

Possible Modifications to Rule 68 in Arbitrations

- To avoid uncertainty, modify R.68 to define “recoverable costs” as filing fees and arbitrator compensation (instead of “costs” under 28 U.S.C. 1920)
- Expand “costs” definition to include attorney’s fees
 - Drastically raises stakes for party weighing offer
 - Danger of being held unconscionable if included in mandatory arbitration clause promulgated by employer
 - Distinguish between provision cutting off claimant’s attorney’s fees, and awarding post-offer attorney’s fees to Respondent (more problematic)

Possible Modifications to Rule 68 in Arbitrations

- Expand “costs” definition to include ESI costs
 - Deterrent effect on excessive electronic discovery
 - But beware danger of overreaching:
 - *CBT Flint Partners LLC v. Return Path, Inc.*, ___ F.3d ___ (Fed. Cir. 2013) (fees allowed under 28 U.S.C. 1920 for “exemplification and copying” of ESI intended to be “modest” and “limited” so must exclude expenses related to key word searches, document review, and de-duplicating)
 - *Accord Country Vintner of N.C. v. E. & J. Gallo Winery*, 718 F.3d 249 (4th Cir. 2013); *Race Tires America, Inc. v. Hoosier Racing Tire Corp.*, 674 F. 3d 158 (3d Cir. 2012)

Possible Modifications to Rule 68 in Arbitrations

- Modify Rule to be available to both parties
 - Enable Claimants to trigger the Rule by making formal settlement demand
 - Would not change landscape since if Claimant prevails to any degree—recovering either more or less than he or she demanded—Respondent would typically be charged with arbitration costs

Possible Modifications to Rule 68 in Arbitrations

- Modify Rule to tweak time limits:
 - Parties could agree to earlier deadline for making offer under Rule so as to encourage earlier settlements
 - Earlier deadline would increase post-offer costs (and attorney's fees, if included in costs)

Rule 68 Offers in Class/Collective Actions

- “Costs” recoverable under R.68 in most cases exclude significant costs (such as atty’s fees)
- Courts conflicted about handling cost-limiting offer in class action context (defendant makes R.68 offer to individual plaintiff before class certification)
 - Issue usually before court in considering plaintiff’s motion to strike offer, rather than defendant’s motion to dismiss

Rule 68 Offers in Class/Collective Actions

- 3 basic responses:
 - Strike the offer, relying on various policy and legal grounds;
 - Refuse to strike, but declare Rule 23(e) prohibits enforcing it as a settlement; or
 - Refuse to take any action because offer is not yet ripe

Rule 68 Offers in Class/Collective Actions

- *Mey v. Monitronics, Int'l* (N. D. W. Va. Mar. 22, 2012) refused to strike
 - If case proceeds through class cert, defendant's offer effectively "disappears" because plaintiff will have changed from individual to class and offer will no longer be enforceable against named-plaintiff
 - If case does not proceed to class cert, plaintiff will be held to cost requirements imposed by R.68(d)

Other Implications for Plaintiff Rejecting Offer of Full Relief

- Named-plaintiff who rejects offer for full relief may face greater scrutiny on his/her ability to represent class
 - Seventh Circuit suggested that “[f]ailure to accept a fully compensatory offer also may suggest that the plaintiff is a bad representative of the class.” (*Chapman v. First Index Inc.*, 796 F.3d 783, 787 (7th Cir. 2015))
 - Court added, such a representative “has nothing to gain (implying poor incentives to monitor counsel) and may have giving up something the class values (here, an injunction that would have stopped any further improper faxing).”

Other Implications for Plaintiff Rejecting Offer of Full Relief

- *Chapman* Court questioned “whether a spurned offer of complete compensation should be deemed an affirmative defense, perhaps in the nature of estoppel or waiver”
- Defendants have already started to assert these defenses
 - *See, e.g., Williams v. Amazon.com Inc.*, 312 F.R.D. 497, 498 (N.D. Ill. 2015) (FCRA putative class action, noting denial of defendants’ MSJ brought under *Chapman*’s estoppel/waiver principle on ground that defendants had not offered plaintiff complete relief)

Takeaways

- Following *Campbell-Ewald*, federal courts generally hostile to defendants' efforts to moot class claims through R.68 offers (but split exists)
 - 3rd, 4th and 6th Circuits hold an unaccepted R.68 offer of judgment could moot plaintiff's claim
 - 1st, 2nd, 5th, 7th 9th and 11th Circuits hold the R.68 offer does not moot plaintiff's claim

Takeaways

- Going farther than making mere offer of payment, class action may be mooted through tender before class cert motion filed (e.g. *Demmler*)
- In future, courts likely to focus on extent to which there is a pattern/practice of “picking off” individual plaintiffs’ claims to evade conduct review

Takeaways

- *Fulton Dental* (7th Cir.) - depositing full satisfaction directly into named-plaintiff's individual account may be effective to moot claims
- *Leyse v. Lifetime* (2nd Cir.) - entry of judgment for plaintiff proper where defendant deposits funds in amount equal to maximum recoverable for plaintiff's individual claims (even if plaintiff rejects offer)
- *Demmler* (D. Mass.) - leaves open possibility that defendant can tender to named-plaintiff in response to demand and successfully moot future class action filed by that plaintiff

Takeaways

- Effectiveness of suggested tactics will be resolved because class action defendants—especially in TCPA and similar class actions—have nothing to lose by attempting to execute “pick-off” strategy

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