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Makeshift Justice and Mootness: The Mauling of FRCP Rule 68

Michelle Ferrare*

I. Introduction

From inception, federal courts have been courts of limited jurisdiction.¹ This limitation stems from Article III, section II of the Constitution, which dictates that federal courts may preside only over “cases” and “controversies.”² In developing the implications of this requirement, federal courts have articulated the doctrines of mootness and standing.³ Thus, they dismiss cases “[w]hen the issues presented in a case are no longer ‘live’ or the parties lack a legally cognizable interest in the outcome, the case becomes moot and the court no longer has subject matter jurisdiction.”⁴ In part, this saves the Court’s resources, but it also adheres to the principles articulated by the founding fathers in drafting of the Constitution.⁵ To meet the case or controversy requirement of Article III, section II, a plaintiff’s complaint must establish that a dispute involving “the legal rights of litigants in actual controversies” is at issue.⁶ A plaintiff

*Student at Seton Hall University School of Law. Thank you Professor Charles Sullivan for your continued guidance through the editing process, and for putting up with me during my time at Seton Hall Law. Thank you Katherine Nunziata for your time and effort in editing this paper.

¹ U.S. CONST. ART. III, § 2.

² U.S. CONST. ART. III, § 2, CL. 2.

³ *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (“Though some of its elements express merely prudential considerations that are part of judicial self-government, the core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III.”).

⁴ J. Evan Gibbs, *Mooting the Mootness Issue As Moot?: Symczyk’s Impact on FSLA Litigation in Florida and Beyond*, 87 FLA. Bar J. at 38, 40 (2013) (quoting *Weiss v. Regal Collections*, 385 F.3d 337, 340 (3d Cir. 2004)).

⁵ *The Mootness Doctrine in the Supreme Court*, 88 HARV. L. REV. 373, 374 (1974).

⁶ *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 471(1982) (quoting *Liverpool, New York & Philadelphia S.S. Co. v. Commissioners of Emigration*, 113 U.S. 33, 39 (1885)).

may lose his personal stake in the suit when the defendant offers to surrender all that the plaintiff is seeking in the litigation⁷.

Congress adopted the Federal Rules of Civil Procedure (FRCP) in 1938 in attempt to create uniformity among lower courts.⁸ Rule 68 was part of the original Federal Rules but has been amended four times over the past six decades.⁹ It was designed to “to encourage settlement and avoid litigation.”¹⁰ The rule allows a defending party to offer settlement to the plaintiff.¹¹ If the plaintiff accepts,¹² the court will enter the judgment on the terms of the offer.¹³ This judgment serves “as a resolution of the liability of the defendant and has both res judicata and collateral estoppel effects upon the plaintiff’s claims.”¹⁴ If, on the other hand, the plaintiff declines the offer and continues to pursue

⁷ David Hill Koysza, *Preventing Defendants from Mooting Class Actions by Picking Off Named Plaintiffs*, 53 DUKE L.J. 781, 786 (2003); see *Greisz v. Household Bank (Illinois), N.A.*, 176 F.3d 1012, 1015 (7th Cir. 1999) (“Such an offer, by giving the plaintiff the equivalent of a default judgment ... eliminates a legal dispute upon which federal jurisdiction can be based.”).

⁸ See Erwin Chemerinsky & Barry Friedman, *The Fragmentation of Federal Rules*, 46 MERCER L. REV. 757, 757 (1995) (“The lengthy debate that prefaced the adoption of the rules focused upon the value of a national set of rules [T]he rules’ proponents carried the day by arguing that procedure ought to be the same across the federal courts”).

⁹ The Advisory Committee Notes to Rule 68 refer to and explain amendments to Rule 68 made in 1946, 1966, 1987, 2007 and 2009. The Committee’s Notes make it obvious that these amendments uniformly have been changes of little consequence. See FED. R. CIV. P. 68 advisory committee’s notes.

¹⁰ *Marek v. Chesny*, 473 U.S. at 5 (1985) (describing the Court’s interpretation of Rule 68’s purpose). See also *Delta Air Lines, Inc.*, 450 U.S. at 352 (“The purpose of Rule 68 is to encourage the settlement of litigation.”).

¹¹ FED. R. CIV. P. 68 (“a party defending against a claim may serve” an offer of judgment on an adverse party”). See *Delta Air Lines, Inc.*, 450 U.S. at 346 (“The Rule has no application to offers made by the plaintiff.”).

¹² FED. R. CIV. P. 68(A) (emphasis added) (“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.” (emphasis added)).

¹³ FED. R. CIV. P. 68

¹⁴ Michael E. Solimine & Bryan Pacheco, *State Court Regulation of Offers of Judgment and Its Lessons for Federal Practice*, 13 OHIO ST. J. ON DISP. RESOL. 51, 54 (1997) (citing Gregory P. Crinion, *Offers of Judgment: The Federal Rule*, 65 WIS. LAW. 30 (1992)). While this was the first time a federal law had included this type of provision, state legislatures had drafted similarly styled laws, which served as the basis for Rule 68. See FED. R. CIV. P. 68 advisory committee’s note, reprinted in 12A Charles A. Wright et al., *FEDERAL PRACTICE AND PROCEDURE* 577 (1982). Federal Rule 68 was modeled after 2 MINN. STAT. S 9323 (Mason 1927).

the litigation, Rule 68 includes a cost-shifting provision, which may leave the plaintiff liable for costs¹⁵ incurred by the defendant from the date of the offer forward.¹⁶

This Note argues that the Supreme Court should have resolved the circuit split currently in existence on the effect of a Rule 68 offer as mooting a plaintiff's claim when the offer would provide the plaintiff with all the relief she would obtain were she successful at trial. Part II of this Note presents an overview of the relevant case law, and explains how appellate courts have interpreted Rule 68. That case law begins with the Third Circuit decision in *Weiss v. Regal Collections*, where the court held that "an offer for the entirety of a plaintiff's claim will generally moot the claim"¹⁷ when ruling on a case implicating the Fair Debt Collection Practices Act. Three years later, the Sixth Circuit took a more moderate approach in a Fair Labor Standards Act (FLSA) case, *O'Brien v. Ed Donnelly Enters., Inc.*, deciding that "an offer of judgment that satisfies a plaintiff's entire demand moots the case,"¹⁸ but protecting the plaintiff's interest by requiring entry of an order pursuant to the defendant's offer of judgment to ensure that the plaintiff received the offered settlement.¹⁹

In 2013, the Supreme Court handed down *Genesis Healthcare Corp. v. Symczyk*.²⁰ Despite having the opportunity to settle the circuit split at this time, the Supreme Court chose to defer ruling on the issue, reasoning that Symczyk had conceded this point when

¹⁵ Rule 68 does not define the term "costs." The Supreme Court, however, has held that "costs" was "intended to refer to all costs properly awardable under the relevant substantive statute or other authority." *Marek*, 473 U.S. at 9. "Costs" under Rule 68, therefore, depending on the underlying decisional authority, may in appropriate instances include the defendants' post-offer attorney fees. See 12 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3006.2 at 131 (2d ed. 1997).

¹⁶ Fed. R. Civ. P. 68(d).

¹⁷ *Weiss*, 385 F.3d at 340.

¹⁸ *O'Brien*, 575 F.3d at 574.

¹⁹ *Weiss*, 385 F.3d at 340.

²⁰ *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. at 1533.

arguing in front of the circuit court. The result of this decision is a wider disparity in application of Rule 68 between appellate decisions, and a lack of coherency for those attempting to decipher the true meaning of the federal rule.

Later in 2013, the Ninth Circuit ruled in *Diaz v. First Am. Home Buyers Prot. Corp.*, and deepened the circuit split. The Ninth Circuit relied upon Justice Kagan's passionate dissent in *Genesis Healthcare Corp.*, and held that an unaccepted offer of judgment was a legal nullity, insufficient to moot a plaintiff's claim. Finally, Part II analyzes the most recent decision from the Second Circuit in *In Re Tremont Group Holdings* in which the court sided with the Seventh Circuit and determined that the defendant's offer of judgment served to moot the plaintiff's claim. Part III analyzes Rule 68 by addressing the ways circuit courts have misinterpreted the rule, and the problems associated with these interpretations. Part IV concludes.

II. Divergent Paths and Differing Appellate Analysis of the Application of Rule 68

A. The Third Circuit Creates Controversy

In 2004 the Third Circuit became the first appellate court to hold that an unaccepted Rule 68 offer of judgment could moot a plaintiff's claim.²¹ In *Weiss*, the plaintiff brought a class action under the Fair Debt Collection Practices Act (FDCPA) seeking monetary relief, declaratory relief, and an injunction against the defendant.²² The defendant debt collection company, Regal Collections, made an offer of judgment to Weiss prior to her filing for class certification.²³ The offer was for the full amount

²¹ *Weiss*, 385 F.3d at 340.

²² *Id.*

²³ *Id.*

recoverable by her under the FDPA, \$1,000.²⁴ The offer of judgment did not touch upon the other forms of relief that Weiss was seeking. Even though plaintiff did not accept the offer, the District Court dismissed Weiss's claims as moot.²⁵ Arguing on appeal to the Third Circuit, Weiss contended that the offer of judgment did not constitute full relief because it did not provide all forms of relief sought in the complaint.²⁶ The Third Circuit held that the plaintiff was not entitled to the other relief sought in the complaint, and affirmed the dismissal. The plaintiff never received the \$1,000 she had been offered.²⁷

B. The Sixth Circuit Attempts a Moderate Approach

In 2009 the Sixth Circuit took a more moderate approach than the Third Circuit had previously adopted. In *O'Brien v. Ed Donnelly Enterprises, Inc.* the O'Brien instituted action against her employer, claiming the defendant was in violation of the Fair Labor and Standards Act (FLSA). The majority agreed with the Third Circuit, which had held that that "an offer of judgment that satisfies a plaintiff's entire demand moots the case."²⁸ But the court refused to go as far as the Third Circuit in mooting the case regardless of whether plaintiff ever received any compensation. Instead, the Sixth Circuit adopted a more moderate approach, holding that the appropriate response is to "enter judgment in favor of the plaintiffs in accordance with the defendants' Rule 68 offer of judgment."²⁹

C. The Supreme Court Punts on the Issue

²⁴ *Id.*

²⁵ Weiss, 385 F.3d at 340.

²⁶ *Id.*

²⁷ *Id.*

²⁸ O'Brien., 575 F.3d at 574.

²⁹ *Id.* at 575.

In 2013 the Supreme Court failed to address the issue of whether a defendant's unaccepted Rule 68 offer of judgment moots a Plaintiff's claim when it offers full relief. *Genesis Healthcare Corp. v. Symczyk* recognized a growing circuit split on the issue.³⁰ Despite awareness of the inconsistent applications of Rule 68 in lower courts, the Supreme Court chose to punt by handing down a limited, fact-specific holding which offered little guidance to circuit courts attempting to resolve whether an unaccepted offer of judgment had the ability to moot a plaintiff's claim.³¹

Petitioner was the class representative in a class action suit and alleged that the defendants had violated the FLSA by failing to pay compensation to employees for work completed during lunch and dinner breaks.³² The Defendants served the plaintiff with a Rule 68 offer of judgment in the amount of \$7,500, meant to represent all of her lost wages.³³ The Plaintiff did not acknowledge the offer within the ten-day window, and the Defendant moved to dismiss the suit, claiming that the court lacked subject matter jurisdiction because the claim was moot under Article III's case or controversy requirement.³⁴ The District Court held that the plaintiff's claim was fully satisfied by the Rule 68 offer and dismissed the plaintiff's claim for lack of subject matter jurisdiction. The plaintiff was not awarded any form of relief.³⁵

The Third Circuit reversed in part, reasoning that the District Court's decision would undermine the judicial process. Specifically, it feared that the holding would allow class representative plaintiffs to be picked off "with strategic Rule 68 offers before

³⁰ See *Genesis HealthCare*, 133 S. Ct. at 1528-29 ("Courts of Appeals disagree whether an unaccepted offer that fully satisfies a plaintiffs claim is sufficient to render the claim moot.").

³¹ *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. at 1533.

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

certification could short circuit the process, and, thereby, frustrate the goals of collective actions."³⁶ It held that if, on remand, the District Court found that the plaintiff's motion to certify the action as a class action was untimely, or failed on the merits, the Rule 68 offer of judgment would render the plaintiff's claim moot.³⁷ This signified a shift from their previous holding in *Weiss*, at least for class actions.

On certiorari, the Supreme Court failed to address the central issue of whether an unaccepted Rule 68 offer of judgment can render a plaintiff's claim moot. Although recognizing the circuit split on the issue, the Supreme Court stopped short of providing a resolution, simply stating that "the issue is not properly before us" because the respondent had waived it.³⁸ Given that waiver, the majority held that the plaintiff's suit became moot "because she lacked any personal interest in representing others in this action...the mere presence of collective-action allegations in the complaint cannot save the suit from mootness once the individual claim is satisfied."³⁹

Justice Kagan filed a passionate dissent, accusing the majority of sidestepping the proper issue.⁴⁰ Unwilling to accept that the plaintiff's claim was moot, Justice Kagan stated that "an unaccepted settlement offer—like any unaccepted contract offer—is a legal nullity, with no operative effect."⁴¹ She relied on a Supreme Court decision from the 2012 term, in which the Court held that "[a]s long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot."⁴²

³⁶ *Id.* at 1527.

³⁷ *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523, 1529 (2013).

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ 133 S.Ct. 1523, 1532-37 (2013) (Kagan, J., dissenting).

⁴¹ *Id.* at 1532 (Kagan, J., dissenting).

⁴² *Chafin v. Chafin*, 568 U.S. —, —, 133 S.Ct. 1017, 1023, 185 L.Ed.2d 1 (2012)

Justice Kagan viewed Rule 68 as allowing a plaintiff to reject an offer of settlement since paragraph (d) of the rule establishes that, after a rejection, the litigation continues, with the possibly penalty of costs.⁴³ From this, Justice Kagan concluded that the rule "provides no appropriate mechanism for a court to terminate a lawsuit without the plaintiff's consent."⁴⁴ Finally, and most powerfully, she stated that the rule itself provides that "[a]n unaccepted offer is considered withdrawn."⁴⁵ The failure to address the substantive issue of the case limited the usefulness of the Supreme Court's holding, and ensured that this would not be the end of the battle over whether an unaccepted Rule 68 offer of judgment can moot a plaintiff's claim.

Despite this, circuit courts have not shied away from the issue. In contrast to the Supreme Court, appellate courts have written intricate opinions providing explanation as to the way in which they have been grappling with the rule. The Supreme Court's lack of direction has splintered lower courts, and created a deepening circuit split on the issue.

D. The Ninth Circuit Gives the Nod to Nullification and Aligns with Justice Kagan

The Ninth Circuit was the next appellate court to weigh in on the issue of whether an unaccepted offer of judgment can render a plaintiff's claim moot.⁴⁶ Faced with a homeowner plaintiff claiming breach of contract and misrepresentation against her insurance company, the complaint reached the Ninth Circuit on appeal after the plaintiff

⁴³ Mike Dorf, *Was Justice Kagan's Snarkiness in Genesis Healthcare v. Symczyk Justified?*, DORF ON LAW (July 22, 2013, 3:22), available at <http://www.dorfonlaw.org/2013/07/was-justice-kagans-snarkiness-in.html>.

⁴³ *Genesis Healthcare Corp.*, at 1533–34 (Kagan, J., dissenting).

⁴⁴ *Id.* at 1534 (Kagan, J., dissenting).

⁴⁵ FED. R. CIV. P. 68(b).

⁴⁶ The Ninth Circuit had faced a similar issue in *Pitts v. Terrible Herbst, Inc.* No. 10-15965, 2011 WL 3449473 (9th Cir. Aug. 9, 2011).

allowed a Rule 68 offer of judgment to expire.⁴⁷ The defendant claimed that the unaccepted offer would have provided the plaintiff with full relief, and the plaintiff's failure to accept the offer rendered the claim moot because there was no remaining controversy.⁴⁸

The District Court granted the defendant's motion to dismiss and the plaintiff appealed to the Ninth Circuit,⁴⁹ which held that "an unaccepted Rule 68 offer that would fully satisfy a plaintiff's claim is insufficient to render the claim moot."⁵⁰ This holding was deferential towards of the purpose and language of the rule, and respectful of the principles of the mootness doctrine, which provide that "[a] case becomes moot only when it is impossible for a court to grant 'any effectual relief whatever to the prevailing party'." ⁵¹ This holding was the first time an appellate court had deemed Rule 68 incapable of mooting a plaintiff's claim. In doing so, the majority borrowed directly from Justice Kagan's dissent in *Genesis Healthcare Corp.*⁵²

E. The Second Circuit Deepens the Division

In July 2014, petitioners in *In Re Tremont Group Holdings* petitioned the Supreme Court for certiorari, claiming that the Second Circuit Court of Appeals wrongly dismissed their claims as moot.⁵³ Its investors sued Tremont, an investment group, after the news of Bernie Madoff's ponzi scheme broke. They alleged that Tremont breached its

⁴⁷ Diaz v. First Am. Home Buyers Prot. Corp., 732 F.3d 948 (9th Cir. 2013).

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.* at 950.

⁵¹ Diaz, 732 F.3d at 954-55 (9th Cir. 2013) (quoting *Knox v. Serv. Employees Int'l Union*, — U.S. —, 132 S.Ct. 2277, 2287 (2012) (quoting *City of Erie v. Pap's A.M.*, 529 U.S. 277, 287 (2000)).

⁵² Diaz., 732 F.3d at 948.

⁵³ *In re Tremont Sec. Law, State Law & Ins. Litig.*, 542 F. App'x 43, 46 (2d Cir. 2013).

duty of care for failure to properly vet Madoff and that the Group heavily participated in the fraudulent funds without properly determining the “value, source or existence.”⁵⁴

Tremont attempted to settle with Haines and Zamrowski in May of 2012, and offered the petitioners \$130,000⁵⁵ in a Rule 68 offer of judgment, with the amount meant to represent the petitioners’ full losses, plus interest.⁵⁶ The petitioners returned the check and rejected the offer within ten days.⁵⁷ They claimed that the amount offered by Tremont did not cover their full claim because it did not account for attorney’s fees and court fees, nor did it account for “the class of individuals whom petitioners were representing.”⁵⁸

On appeal to the Second Circuit, Tremont argued that the district court did not have jurisdiction under Article III after the Rule 68 offer because that offer rendered the plaintiffs’ claims moot.⁵⁹ Petitioners countered that it would have been unethical to accept an offer that failed to address the entire class, and that the offer itself did not make the plaintiffs whole. Petitioners argued that the “class action does not become moot upon offer of tender to the named plaintiff because the plaintiff still has a ‘personal stake’ in obtaining class certification on appeal.”⁶⁰

The Second Circuit rejected the Petitioners’ reasoning, stating that neither Haines nor Zamrowski were class representatives, and therefore did not have a duty to represent interests of the class.⁶¹ The Court then went on to affirm the dismissal of the Petitioners’

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *In re Tremont Sec. Law, State Law & Ins. Litig.*, 542 F. App’x 43, 46 (2d Cir. 2013).

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Deposit Guaranty National Bank, Jackson, Miss. v. Roper*, 445 U.S. 326 (1980).

⁶¹ *In re Tremont Sec. Law, State Law & Ins. Litig.*, 542 F. App’x 43, 47 (2d Cir. 2013).

claim as moot, relying on a case from the Seventh Circuit which held “[O]nce the defendant offers to satisfy the plaintiff’s entire demand, there is no dispute over which to litigate ... because he has no remaining stake.”⁶² The order dismissing the Petitioners’ claim did not require Tremont to reinstate its offer or pay the \$130,000 it had offered back in October.

The Petitioners responded by petitioning the Supreme Court for certiorari.⁶³ With the Second, Seventh, Ninth, Third and Sixth Circuits producing three different resolutions to the issue, the Supreme Court should have granted certiorari in *In Re Tremont Holdings* and capitalized on the opportunity to resolve the split. Instead, the Supreme Court denied the petition.⁶⁴ The Supreme Court should have established that a Rule 68 unaccepted offer of relief cannot render a plaintiff’s claim moot because an unaccepted offer is a legal nullity and a legal nullity does not have the power to render a plaintiff’s claim moot.

III. Analysis

A. The Language of Rule 68 and Misconceptions of the Rule

Rule 68 consists of four parts.⁶⁵ Most pertinent to this note is paragraph (b), which reads “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.”⁶⁶ This note argues that it is illogical to find that an unaccepted offer eliminates a plaintiff’s interest in his or her claim because the rule explicitly states that an unaccepted offer is withdrawn.⁶⁷ The rule goes further to pronounce the withdrawn offer

⁶² *Id.* (quoting *Breisen v. Motorola, Inc.*, 656 F.3d 701, 706 (7th Cir.2011)).

⁶³ *Haines v. Arthur E. Lange Revocable Trust*, 135 S. Ct. 270 (2014)

⁶⁴ *Id.*

⁶⁵ Fed. R. Civ. P. 68.

⁶⁶ Fed. R. Civ. P. 68(b).

⁶⁷ *Id.*

inadmissible outside of a proceeding to determine costs.⁶⁸ These statements definitively limit the power of the unaccepted offer to a specific realm, one that does not include mooting a plaintiff's claim. Even if one accepts the misguided premise that an unaccepted offer of judgment does render a plaintiff's claim moot, any resultant dismissal would have to somehow revive the offer that arguably mooted the plaintiff's claim.⁶⁹ Dismissing a claim for mootness based on an offer that is no longer open means that the court is rejecting a claim when the plaintiff still has a case or controversy and a significant interest in the litigation.

The Supreme Court, lower courts and legal commentators, agree that the purpose of Rule 68 is to encourage settlement.⁷⁰ The Supreme Court has highlighted this fact itself, stating, "the plain purpose of Rule 68 is to encourage settlement and avoid litigation."⁷¹ By including a cost-shifting provision, Congress intended to ensure that, if a plaintiff in bad faith, or poor legal judgment, continues litigation which results in an award that is equal or less than the defendant's previous offer of judgment, the plaintiff is responsible for costs incurred by the defendant after the rejection of the offer.⁷² At its core, the provision makes an unreasonable plaintiff bear the burden of liability for his or her irrationality.⁷³

The cost-shifting provision "can be a powerful motivator for a recalcitrant plaintiff to seriously consider proposed terms of settlement and avoid the need for

⁶⁸ Fed. R. Civ. P 68 (d)

⁶⁹ See *infra*.

⁷⁰ Marek, 473 U.S. at 5 (describing the Court's interpretation of Rule 68's purpose). See also *Delta Air Lines, Inc.*, 450 U.S. at 352 (1981) ("The purpose of Rule 68 is to encourage the settlement of litigation.").

⁷¹ Marek, 473 U.S. at 5.

⁷² David A. Anderson & Thomas D. Rowe, Jr., *Empirical Evidence on Settlement Devices: Does Rule 68 Encourage Settlement?*, 71 CHI.-KENT L. REV. 519, 521 (1995)

⁷³ *Id.*

protracted litigation.”⁷⁴ By penning part (d), legislatures put plaintiffs on notice that unreasonable continuation of a case would result in *cost-shifting* and unfavorable financial repercussions.⁷⁵

If the drafters intended for an unaccepted offer of judgment for full relief to moot a plaintiff’s claim, it would have been unnecessary to include a cost-shifting provision in the rule, as the litigation would have presumably ended after the rejection of the offer. Additionally, if the drafters of the rule intended Rule 68 to have a lawsuit termination mechanism, one could have been explicitly drafted into the provisions of the rule. There is a counter-argument that an interpretation of the Constitution that supports lawsuit termination mechanism would supersede legislative intent. This note concedes that if the Supreme Court were to come to the conclusion that an unaccepted offer can moot a plaintiff’s claim, legislative intent would be an irrelevant consideration.

Finally, Congress has amended Rule 68 on four separate occasions.⁷⁶ Proposed amendments to an existing Rule undergo “at least seven stages of formal comment and review, in a process involving five separate institutions: the Advisory Committee on Civil Rules, the Standing Committee on Rules of Practice and Procedure, the Judicial Conference of the United States, the Supreme Court, and Congress.”⁷⁷ Therefore, this rule has received critical, and careful analysis on four separate occasions since its inception. The rule establishes that an unaccepted offer is considered withdrawn, and

⁷⁴ Andrew L. Turscak, Jr., *Litigation Strategy, Cost-Shifting and Offers of Judgment: The Underutilized Rule 68 Device*, AM. BANKR. INST. J., April 2011, at 42, 91.

⁷⁵ The cost-shifting provision of Rule 68 (d) is not triggered if judgment is in favor of the defendant. *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 352 (1981). This holding has been critiqued as arbitrary and contrary to the rule’s purpose. See J. Karen Arnold, Note, *Delta Air Lines, Inc. v. August: Taking the Teeth out of Rule 68*, 43 U. PITT. L. REV. 765, 765 (1982).

⁷⁶ See Note 6, *infra*.

⁷⁷ Catherine T. Struve, *The Paradox of Delegation: Interpreting the Federal Rules of Civil Procedure*, 150 U. PA. L. REV. 1099, 1103 (2002).

articulates cost-shifting provisions in the case that the plaintiff refuses an offer that turns out to be better than the final resolution plaintiff receives from litigation.⁷⁸ There is simply no evidence in any of this history of intent to allow a Rule 68 offer to moot a case. The congressional silence on the issue suggests what this note argues: the rule is meant to *promote* settlement rather than *force* settlement. This is a reasonable interpretation given the Supreme Court’s continued deference to this language.

The goal of promoting settlement is evidenced by the risks that drafters associated with the failure to accept a reasonable offer. For example, a plaintiff who rejects an offer under Rule 68 risks having to pay the costs the defendant incurred after the offer. Further, this plaintiff will not be permitted “to recover its own post-offer costs, even if he or she prevails in judgment.”⁷⁹ Thus, the Supreme Court in *Maerk* stated “Civil rights plaintiffs - along with other plaintiffs - who reject an offer more favorable than what is thereafter recovered at trial will not recover attorney's fees for services performed after the offer is rejected.”⁸⁰ Thus, plaintiffs who fail to accept an offer will suffer downstream ramifications.⁸¹ At no point in the explanation of these risks or ramifications does the decision touch upon the risk of being forced to accept the settlement.

B. Two Interpretations of One Rule: Emphasizing Congressional Intent Over Judicial Lawmaking

In his article titled “*To Encourage Settlement: Rule 68, Offers of Judgment, and the History of the Federal Rules of Civil Procedure*,” Robert Bone argues that there are

⁷⁸ FED. R. CIV. P. 68(d).

⁷⁹ Ian H. Fisher, *Federal Rule 68, A Defendant's Subtle Weapon: Its Use and Pitfalls*, 14 DEPAUL BUS. L.J. 89, 91 (2001).

⁸⁰ See *Marek*, 473 U.S. at 6.

⁸¹ *Id.*

two models of Rule 68,⁸² the settlement promotion model and the unreasonable plaintiff model.⁸³ Bone writes that the settlement promotion model is premised on the idea that settlement of litigation is “desirable and ought to be encouraged because it saves litigation costs and produces a mutually agreeable resolution.”⁸⁴ The unreasonable plaintiff model has a separate focus, which “is on continuing to litigate a suit unreasonably.”⁸⁵

Bone argues that, even under the unreasonable plaintiff model, a plaintiff is within his or her right to continue litigating a claim even after an unaccepted offer of judgment which would provide the plaintiff full relief.⁸⁶ Just because a plaintiff rejects an offer for full relief, plaintiff may not be unreasonable. Bone argues that “litigation is a gamble, and perfect reasonable gambling choices do not always succeed.”⁸⁷ When a plaintiff believes that a defendant’s offer is less than the recourse she can receive through continued litigation, she has the right to pursue that good faith belief because it is impossible to know the necessity of continued litigation without verification at trial.⁸⁸ If a judge is convinced that no reasonable juror would award the plaintiff more than what is being offered, the judge needs to require by order that the defendant pay the plaintiff the

⁸² Robert G. Bone, “*To Encourage Settlement*”: *Rule 68, Offers of Judgment, and the History of the Federal Rules of Civil Procedure*, 102 NW U. L. REV. 1561, 1566 (2008). See also Jay Horowitz, *Rule 68: The Settlement Promotion Tool That Has Not Promoted Settlements*, 87 DENV. U. L. REV. 485, 490 (2010).

⁸³ Robert G. Bone, “*To Encourage Settlement*”: *Rule 68, Offers of Judgment, and the History of the Federal Rules of Civil Procedure*, 102 NW U. L. REV. 1561, 1566 (2008).

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ Robert G. Bone, “*To Encourage Settlement*”: *Rule 68, Offers of Judgment, and the History of the Federal Rules of Civil Procedure*, 102 NW U. L. REV. 1561, 1566 (2008).

⁸⁷ *Id.*

⁸⁸ *Id.* (“When the party does her best to predict the outcome but the outcome turns out differently from her prediction, the resulting litigation costs may become unnecessary ex-post, but that does not make them unnecessary ex-ante, nor does it make the party’s rejection of the offer unreasonable in any meaningful sense.”).

amount offered, rather than allowing the defendant to walk away from the litigation without compensating the plaintiff, as has occurred in decisions discussed in this article.

In concluding that a plaintiff is entitled to continue litigation even if a court later determines the continuance unnecessary or irrational, Bone relies on the language of Rule 68; specifically the cost shifting measures provided in part (d), which “protects a defendant from an unreasonable plaintiff.”⁸⁹

As applied to the mootness question, the Supreme Court does not need to establish extra safeguards that have not been approved by Congress because Congress has explicitly drafted language in the rule as a safety valve for Defendants who are forced to continue defending a claim after offering full relief to an unreasonable plaintiff. If the threat and use of unreasonable litigation was a serious social problem, lawmakers have the ability to respond through the legislative process and amend Rule 68.⁹⁰

C. Applying Contract Principles to Offers of Judgment

The Supreme Court has held that offers of judgment “be governed by background contract principles.”⁹¹ In other instances, the Court has applied contract principles to determine when, and if, an offer of judgment is revocable.⁹² The Court’s use of contract

⁸⁹ *Id.*

⁹⁰ Brandon T. McDonough, *Subject Matter Jurisdiction Peek-A-Boo the Confusing State of Rule 68*, BENCH & B. MINN., September 2013, at 19, 20 (“Rule 68 could be amended to specify that an unaccepted offer of complete relief does not affect subject matter jurisdiction. If that issue was properly presented to the Supreme Court, the *Symczyk* dissenters would only need one additional vote from the pool of five justices who abstained on the issue in *Symczyk*. There is a reasonable likelihood that the subject matter jurisdiction peek-a-boo issue could be resolved by amendment.”).

⁹¹ *Fisher v. Stolaruk Corp*, 110 FRD 74, 76 (ED Mich 1986). *See also* *Mallory v. Eyrich*, 922 F.2d 1273, 1279 (6th Cir.1991); *Radecki v. Amoco Oil Co.*, 858 F.2d 397, 400 (8th Cir.1988).

⁹² *Fisher*, 110 FRD at 76.

principles as the backbone of Rule 68 is significant. Future litigants should be able to look to these same principles when attempting to clarify others aspects of the rule.⁹³

General principles of contract law dictate that an offeree's offer, "generally gives the second party the power to accept that offer and create a binding contract unless it is revoked before acceptance occurs."⁹⁴ Further, contract law also states that an unaccepted offer has no legal effect, and is a legal nullity.⁹⁵ For example, in *Rogers v. United States*,⁹⁶ the Court held that an unaccepted offer from the government to the Cherokee Indians "which, not having been assented to by the eastern Cherokees, is now a mere nullity."⁹⁷

Stemming from this awareness, Rule 68 itself states that an unaccepted offer is not admissible into evidence, asserting, "A plaintiff may not introduce evidence of a Rule 68 offer as evidence at trial for liability or damages. Rather, it may only be introduced to the court in a proceeding to determine collateral matters like costs or attorney's fees."⁹⁸ This language evidences congressional intent to apply contractual principles to the interpretation of the rule, as the language symmetrically aligns with contractual principles.⁹⁹ By allowing defendants to use the unaccepted offer in a manner that defies the language of the rule, and the supporting legal principles governing the rule, some

⁹³ See *Nordby v. Anchor Hocking Packaging CO.*, 199 F.3d 390, 392 (7th Cir. 1999) (offers of judgment are analogous to contractual offers); *But see Said v. Va. Commonwealth Univ.*, 130 F.R.D. 60, 63 (E.D. Va. 1990) ("Rule 68 offer of judgment ... has characteristics that distinguish it from a normal contract.").

⁹⁴ *Id.* See RESTATEMENT (SECOND) OF CONTRACTS § 35(1) (1981) ("An offer gives to the offeree a continuing power to complete the manifestation of mutual assent by acceptance of the offer."); *id.* at § 36(1) ("An offeree's power of acceptance may be terminated by (a) rejection or counter-offer by the offeree, or (b) lapse of time, or (c) revocation by the offeror, or (d) death or incapacity of the offeror or offeree.").

⁹⁵ *Rogers v. United States*, 1857 U.S. Ct. Cl. LEXIS 203 (Ct. Cl. 1857).

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ Fed. R. Civ. P. 68.

⁹⁹ *Id.*

courts have entirely sidestepped the legislative intent, and embarked on their own judicial lawmaking adventure.

D. Placing Emphasis on Litigant's Rights

Some courts argue that allowing an unaccepted offer of full relief to moot a plaintiff's claim promotes fairness and minimizes unnecessary and resource-consuming litigation. It is undeniable that removing a case from the docket of the court reduces litigation and in turn saves judicial resources. But the improper removal of a plaintiff's case from the judicial system undercuts the purpose of the system itself and reduces a plaintiff's confidence in the legal process.¹⁰⁰ When circuit courts dismiss a plaintiff's claim with prejudice for lack of subject matter jurisdiction, and do not address the fact that the plaintiff has still not been compensated for her injury, the unfairness is evident. Resources *should* be allocated towards litigating claims in which the plaintiff has not yet been compensated.¹⁰¹ This implicates cases where the plaintiff has not accepted an offer of judgment or settlement, as the plaintiff has not yet been made whole, and should be provided the opportunity to argue for compensation. The Supreme Court should not be persuaded by the incomplete argument that a broad interpretation of Rule 68 is best for the judicial system because dismissing suits will reduce the court's workload. Instead, the

¹⁰⁰ Dismissing a plaintiff's claim without providing that the defendant reinstates his offer of judgment as a predicate for dismissal will result in increased litigation. Brandon T. McDonough, *Subject Matter Jurisdiction Peek-A-Boo the Confusing State of Rule 68*, BENCH & B. MINN., Sept. 2013, at 19, 20

¹⁰¹ See Martin H. Redish, *The Federal Courts, Judicial Restraint, and the Importance of Analyzing Legal Doctrine*, 85 COLUM. L. REV. 1378, 1386 (1985) ("If one myopically focuses upon the administrative dangers caused by docket size, one is likely to accept most judicial attempts to curb those dockets, for the very reason that they have that effect. A critical examination of the development of specific judicial doctrines affecting the scope of the courts' jurisdiction, however, highlights the existence of values other than docket reduction and underscores the reasons for the provision of federal jurisdiction in the first place").

Supreme Court should be influenced by the ramifications that dismissing lawful complaints could have on the entire judicial process.

Further, if one accepts the mootness premise, the court was divested of subject matter jurisdiction at the moment that the defendant offered the plaintiff full relief.¹⁰² Consequently, this implies that the court lacks the ability to order the parties to complete any action in the dismissal order. If the dismissal order does not require payment, and after the dismissal order, the offeror decides not to pay, the plaintiff is forced to go back to the court and attempt to remedy the situation. Unless the plaintiff accepted, the failure to follow through on the offer would not be a breach of contract, which would leave the plaintiff's only recourse to attempt to reinstate the original complaint, and explain the defendant's deficient conduct. This frustrating scenario, where the defendant's intention to pay was not sincere, has occurred.¹⁰³ While the plaintiff is not precluded from returning to court if his or her claims remain uncompensated by the defendant after dismissal because the case or controversy springs back, finding mootness to this situation creates a maddening, cyclical process.

Some district courts have explicitly addressed this issue. For example, a potential return to court was expressly contemplated by the disposition in *Rollins v. Sys. Integration, Inc.*:¹⁰⁴ "Should Systems Integration fail to pay Rollins in accordance with its offer of judgment, Rollins is free to re-file his suit."¹⁰⁵ The offeror could renew the offer after the plaintiff returns to court, once again divesting the court of subject matter

¹⁰² Brandon T. McDonough, *Subject Matter Jurisdiction Peek-A-Boo the Confusing State of Rule 68*, BENCH & B. MINN., Sept. 2013, at 19, 20.

¹⁰³ See Def.'s Mem. in Opp. to Pl.'s R. 60 Mtn., *Johnson v. Midwest ATM*, No. 11-cv-1926, Doc. 57, 09/28/2012.

¹⁰⁴ *Rollins v. Sys. Integration, Inc.*, No. 4:05-CV-408-Y, 2006 WL 3486781, at *5 (N.D. Tex. Dec. 4, 2006).

¹⁰⁵ *Id.*

jurisdiction, forcing the court to dismiss the action. If the offeror again refuses to pay per the terms of the offer, the plaintiff must again institute action.¹⁰⁶ This sequence could, in theory, continue endlessly. This process does not serve the purposes of Rule 68 but rather frustrates them.

This cycle also may demonstrate that an unaccepted offer of judgment does not divest the court of subject matter jurisdiction because of an established exception to the mootness doctrine, “capable of repetition yet evading review.”¹⁰⁷ This exception to mootness applies in cases where a named plaintiff had a live claim at the time a complaint was filed, and where the claim may arise again with respect to that plaintiff; the litigation then may continue notwithstanding the named plaintiff’s current lack of a personal stake. This exception to the mootness doctrine allows the court to decide a suit, despite inherent justiciability issues if the issue is “(1) ‘of a type likely to happen to the plaintiff again,’ and (2) ‘of inherently limited duration so that it is likely to always become moot before federal court litigation is completed.’”¹⁰⁸ If a plaintiff must continuously bring a defendant to court, only to find that the claim is dismissed because of the mootness doctrine, (as in the previous example of a defendant who fails to conform to the terms of his or her offer of judgment), a plaintiff’s claim would fall within this exception. This would mean that an unaccepted offer of judgment does not divest the court of subject matter jurisdiction because, without a court order ordering the defendant to adhere to the terms of the offer, the plaintiff is tossed out of court with little protection.

¹⁰⁶ Brandon T. McDonough, *Subject Matter Jurisdiction Peek-A-Boo the Confusing State of Rule 68*, Bench & B. Minn., September 2013, at 19, 20 (*citing* Rollins v. Sys. Integration, Inc. See 2006 WL 3486781, at *5) (A potential return to court was expressly contemplated by the disposition).

¹⁰⁷ U.S. Parole Comm’n v. Geraghty, 445 U.S. 388, 398 (1980). For a detailed explanation of the development of this exception, see Kenneth H. Leggett, Note, *Article III Justiciability and Class Actions: Standing and Mootness*, 59 TEX. L. REV. 297, 301–03 (1981).

¹⁰⁸ ERWIN CHEMERINSKY, FEDERAL JURISDICTION §2.5.5 (6th ed. 2011).

E. Shortcomings of Proposed Solutions to the “Buy-Off Problem”

The ability of a defendant to moot a plaintiff’s claim with an unaccepted offer of judgment creates the “Buy-Off Problem.”¹⁰⁹ This term refers to the concern that defendants facing a possible class-action suit would have the ability to “moot each successive case before a decision on certification is reached, and that the defendants would essentially have the option to preclude a viable class action, at his or her sole discretion, from ever reaching the certification stage.”¹¹⁰

Generally, plaintiffs can sue individually, or join with other parties who have claims arising under a similar set of facts or circumstances. In this situation the judge is able to address all parties and determine the set of facts on which the claims rest. In the class action context, the judge faces a unique situation. He or she must rely almost entirely on the class certification evidence to determine whether there are absent parties that are similarly situated to the class representative filing suit. Therefore, the named representative must offer proof that a class exists at the time of certification.

The “Buy- Off Problem”¹¹¹ would undermine the class action process by creating a barrier between named plaintiffs and class-action certification.¹¹² Consequently, for an

¹⁰⁹ This problem is also referred to as the “pick-off” problem. See *Deposit Guar. Nat’l Bank v. Roper*, 445 U.S. 326, 339 (1980) (lamenting the fact that named plaintiffs’ claims “effectively could be ‘picked off’ by a defendant’s tender of judgment”).

¹¹⁰ J. Evan Gibbs, *Mooting the Mootness Issue As Moot?: Symczyk's Impact on FSLA Litigation in Florida and Beyond*, 87 FLA. Bar J. at 38, 40 (2013) (citing *Sandoz*, 553 F.3d at 920 (citing *Zeidman v. J. Ray McDermott & Co.*, 651 F.2d 1030, 1050 (5th Cir. 1981))).

¹¹¹ See David Hill Koysza, Note, *Preventing Defendants from Mooting Class Actions by Picking Off Named Plaintiffs*, 53 DUKE L.J. 781, 789–90 (2003) (discussing how permitting defendants to pick off named plaintiffs may, in fact, contravene one of the purposes of Rule 68—to avoid unnecessary and protracted litigation).

¹¹² A tension between Rule 68 and Rule 23 exacerbates this problem. A court has no discretion in entering judgment if a plaintiff accepts a Rule 68 offer, but Rule 23(e) requires court approval of a class action settlement, even in certain circumstances when a class has not yet been certified. Jack Starcher, *Addressing What Isn't There: How District Courts Manage the Threat of Rule 68's Cost-Shifting Provision in the Context of Class Actions*, 114 COLUM. L. REV. 129, 155 (2014) (“Therefore the Rule 68 offer is directly at odds with the language of Rule 23(e), implying that an individual Rule 68 offer is improper when made to a

offer of judgment to have effect upon the justiciability of the class action as a whole, the offer must be delivered prior to the plaintiff's motion for class certification.¹¹³ Some commentators have gone as far as to argue that Rule 68 is designed for use by single defendant in a case involving a single plaintiff, and is not meant to be applied in the class action setting.¹¹⁴ Some courts have even held that aspects of Rule 68 cannot be applied to class action suits¹¹⁵ because of the disparate burdens¹¹⁶ the rule would place on class representatives.¹¹⁷

The Federal Rules of Civil Procedure do not compel a plaintiff to immediately file a motion for certification.¹¹⁸ Rule 23(c)(1)(A) necessitates only that the motion is filed “at an early practicable time after a person sues...as a class representative.”¹¹⁹ Allowing defendants to force plaintiffs into filing a motion for class certification by recognizing

plaintiff seeking to represent a class.”); See *McDowall*, 216 F.R.D. at 48; see FED. R. CIV. P. 23(e), 28 U.S.C. app. (2000) (repealed 2003) (“[A] class action shall not be dismissed or compromised without the approval of the court ...”); *but see* *Tucker v. Shelby Mut. Ins. Co.*, 343 So. 2d 1357 (Fla. Dist. Ct. App. 1977) at 1359. In *Tucker*, a minor and her father brought a personal injury action for injuries sustained in a car accident. The plaintiffs contended that the offer of judgment procedure could not apply because it conflicted with another Florida statute requiring judicial approval of settlements in actions on behalf of minors. The court determined that the reasonable interpretation was for the court to approve an offer made for the benefit of a minor before the clerk entered judgment on the offer.

¹¹³ David Hill Koysza, *Preventing Defendants from Mooting Class Actions by Picking Off Named Plaintiffs*, 53 DUKE L.J. 781, 790 (2003).

¹¹⁴ Jay N. Varon, *Promoting Settlements and Limiting Litigation Costs by Means of the Offer of Judgment: Some Suggestions for Using and Revising Rule 68*, 33 AM. U. L. REV. 813, 838 (1984) (citing Seymour, *Rule 68 Offers of Judgment in Class Actions*, 4 ATTY FEE AWARDS REP. (HBJ) No. 5, at 3-4 (Aug. 1981)).

¹¹⁵ This position could create wasteful incentives for plaintiffs. Because the mere presence of class claims can immunize a plaintiff against the harmful effects of a Rule 68 offer, plaintiffs may be encouraged to defensively raise frivolous class claims. See Eran B. Taussig, *Broadening the Scope of Judicial Gatekeeping: Adopting the Good Faith Doctrine in Class Action Proceedings*, 83 ST. JOHN'S L. REV. 1275, 1277-78 (2009) (discussing problem of frivolous class claims and suggesting means of curbing them, including heightened certification requirements and good faith standard for class claims).

¹¹⁶ David Hill Koysza, *Preventing Defendants from Mooting Class Actions by Picking Off Named Plaintiffs*, 53 DUKE L.J. 781, 785 (2003) (“In the class action context, named plaintiffs have the burden of pleading facts that bring the action within the rubric of Rule 23.”).

¹¹⁷ *Gay v. Waiters' and Dairy Lunchmen's Local No. 30*, 86 F.R.D. 500 (N.D. Cal. 1980) (The court held the mandatory cost-shifting provisions of Rule 68 inapplicable to class actions.).

¹¹⁸ FED. R. CIV. P. 23(c)(1)(A).

¹¹⁹ *Id.*

that a Rule 68 offer may moot the individual's claim and thus prevent class certification would undermine the plaintiff's statutory right.¹²⁰

The "Buy-Off Problem" also places future members of the not-yet-certified class at risk of being deprived of the chance to recover under the class action mechanism¹²¹ because defendants facing a possible class action suit may prevent such persons from being class representatives by mooting their individual claim.¹²² This practice undercuts judicial efficiency, and undermines the policy goals of class actions¹²³ "because allowing plaintiffs to be 'picked off' before a class is certified may waste judicial resources by 'stimulating successive suits brought by others claiming [the same] aggrievement.'¹²⁴

Class actions are vital to the judicial process¹²⁵, and a plaintiff's ability to have his or her action certified is an important tool in the litigation process.¹²⁶ Some courts, including the Seventh Circuit, see a viable to solution to the "buy-off" problem.¹²⁷ The Seventh Circuit believes this solution would preserve litigants' rights while also allowing

¹²⁰ See M. Andrew Campanelli, *You Can Pick Your Friends, but You Cannot Pick Off the Named Plaintiff of A Class Action: Mootness and Offers of Judgment Before Class Certification*, 4 DREXEL L. REV. 523, 524 (2012).

¹²¹ See Weiss, 385 F.3d at 344 ("As sound as is Rule 68 when applied to individual plaintiffs, its application is strained when an offer of judgment is made to a class representative.")

¹²² Jack Starcher, *Addressing What Isn't There: How District Courts Manage the Threat of Rule 68's Cost-Shifting Provision in the Context of Class Actions*, 114 COLUM. L. REV. 129, 139-40 (2014).

¹²³ See Ryan Patrick Phair, Comment, *Resolving the "Choice-of-Law Problem" in Rule 23(b)(3) Nationwide Class Actions*, 67 U. CHI. L. REV. 835, 837 (2000) (concisely setting forth the policy goals facilitated by class actions).

¹²⁴ *Id.* at 140 (citing *Deposit Guar. Nat'l Bank of Jackson v. Roper*, 445 U.S. 326, 339 (1980)).

¹²⁵ David Hill Koysza, *Preventing Defendants from Mooting Class Actions by Picking Off Named Plaintiffs*, 53 DUKE L.J. 781, 784 (2003) ("Simply put by Justice William O. Douglas, the class action is 'one of the few legal remedies the small claimant has against those who command the status quo'.") (quoting *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 186 (1974) (Douglas, J., dissenting in part)).

¹²⁶ *Id.* ("Properly certified class actions have become a significant means by which to implement some of the nation's most important civil rights legislation."). See John W. Welch, Comment, *Continuation and Representation of Class Actions Following Dismissal of the Class Representative*, 1974 DUKE L.J. 573, 573 n.2 (observing that the class action device has been vital to enforcing the Civil Rights Act of 1964).

¹²⁷ David Hill Koysza, *Preventing Defendants from Mooting Class Actions by Picking Off Named Plaintiffs*, 53 DUKE L.J. 781, 784 (2003) ("Simply put by Justice William O. Douglas, the class action is 'one of the few legal remedies the small claimant has against those who command the status quo'.")

unaccepted offers of judgment to moot a plaintiff's claim.¹²⁸ The court contends that, by allowing representative plaintiffs to move to certify their suit as a class action at the time the complaint is filed, the buy-off problem can be averted.¹²⁹ This resolution interprets the mootness doctrine as "flexible."¹³⁰ This interpretation implies that, while a plaintiff's claim may be moot, the court will allow a plaintiff time to establish facts necessary for certification.¹³¹ This suggests that two plaintiffs with the same claims may receive different treatment, and disparate results, depending if one plaintiff is able to certify her claim as a class action.

This suggestion, besides adding an unnecessary and premature matter to the courts' docket, falls short of being a practical solution because it fails to address the plaintiff's burden in certifying and maintaining a class action,¹³² and the requisite time and effort required to ascertain all information that would be necessary for the plaintiff to achieve certification of the class.¹³³ This proposal may result in plaintiffs being unable to obtain certification for class actions that otherwise would have been certified in due time, because the plaintiff was rushed to achieve certification, and did not have proper time to

¹²⁸ *Id.* at 781.

¹²⁹ *See* *Martin v. PPP, Inc.*, 719 F. Supp. 2d 967, 973 (N.D. Ill. 2010) (quoting *White*, 2007 WL 1297130, at *7) ("This could cause some waste of judicial resources if the same class action suit was brought repeatedly ... only to be mooted time and time again. This can be avoided ... by filing a motion for class certification immediately.").

¹³⁰ For a concise summary of the class action exceptions to the mootness doctrine, *see* ERWIN CHERMERINSKY, *FEDERAL JURISDICTION* §2.5.5 (6th ed. 2011).

¹³¹ *Id.*

¹³² Class representatives must bear the costs of depositions; if an action ultimately proves unsuccessful, numerous depositions will have increased substantially the cash outlay that representatives cannot recover. Jay N. Varon, *Promoting Settlements and Limiting Litigation Costs by Means of the Offer of Judgment: Some Suggestions for Using and Revising Rule 68*, 33 AM. U. L. REV. 813, 848 (1984).

¹³³ *See* *Gay v. Waiters' and Dairy Lunchmen's Local No. 30*, 86 F.R.D. 500 (N.D. Cal. 1980) (The court noted that when a substantial disparity exists between the representatives' personal outlay and their likely benefit from a favorable outcome, there will be a strong incentive to accept a possibly unfavorable offer of judgment).

discover all relevant information.¹³⁴ This is an unfavorable outcome, as courts have already stated their preference for allowing the class-action process to ‘play out’¹³⁵ because of the important role that class action suits play in the legal system.¹³⁶

The Seventh Circuit addressed the argument that a rushed certification process may have potential to harm the plaintiff, and undermine plaintiffs’ rights. It countered that a plaintiff could request a delay from the district court for additional discovery.¹³⁷ Despite the Seventh Circuit’s suggestions, a delay for additional discovery before certification presents a separate, significant problem.¹³⁸ The Seventh Circuit is essentially advising a plaintiff to file a consciously inadequate motion with the plaintiff’s complaint, followed by a stay to provide time for proper discovery to be accompanied. After the completion of this discovery stage (which could plausibly take months, if not years), the plaintiff should file the ‘real’ motion that will more accurately reflect the available evidence. This process would force district courts to “conduct the pointless evaluation of a proxy certification motion and the inevitable motion for stay to permit discovery.”¹³⁹ This would result in a waste of judicial resources, and would undermine the values upon which Rule 68 is premised.

¹³⁴ *Wilder Chiropractic, Inc. v. Pizza Hut of S. Wis., Inc.*, 754 F. Supp. 2d 1009, 1015 (W.D. Ill. 2010) (citing *Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672, 676 (7th Cir. 2001) (“The need for preliminary discovery may make it impossible in many cases to file a motion for class certification along with the complaint.”))).

¹³⁵ *See Weiss*, 385 F.3d at 344 (“As sound as is Rule 68 when applied to individual plaintiffs, its application is strained when an offer of judgment is made to a class representative.”).

¹³⁶ Catherine M. Sharkey, *Punitive Damages as Societal Damages*, 113 *YALE L.J.* 347, 402–03 (2003) (quoting *Shaw v. Toshiba Am. Info. Sys., Inc.*, 91 F. Supp. 2d 942, 951 (E.D. Tex. 2000)); *see also* John Bronsteen & Owen Fiss, *The Class Action Rule*, 78 *NOTRE DAME L. REV.* 1419, 1419 (2003) (“The class action has many uses. The most compelling occurs when someone inflicts a small harm on each member of a large group of people.”).

¹³⁷ *Id.*

¹³⁸ *See Weiss*, 385 F.3d at 337 (“As sound as is Rule 68 when applied to individual plaintiffs, its application is strained when an offer of judgment is made to a class representative.”).

¹³⁹ *Id.*

Rather than prematurely forcing a plaintiff's hand in a way that may have damaging ramifications on future class members, or denying plaintiffs full opportunity to argue their interests in a court of law, the Supreme Court should adopt a rule which states that an unaccepted Rule 68 offer of judgment does not render a plaintiff's claim moot.

F. The Problems with the Sixth Circuit's Moderate Approach

The Sixth Circuit has attempted to interpret Rule 68 in a way that protects litigants, and preserves the values of the mootness doctrine.¹⁴⁰ This more moderate approach requires the defendant to reinstate his offer of judgment to prevail on a mootness claim.¹⁴¹ The court will then enter judgment against the defendant¹⁴², providing the plaintiff with the relief offered, and the litigation will concluded.¹⁴³ The Sixth Circuit also would not allow mootness once a class was certified – or a motion for certification was filed.¹⁴⁴ While requiring the defendant to reinstate his offer is obviously fairer than the Second Circuit's approach, the Sixth Circuit's interpretation still fails to address the underlying issue; the plaintiff has not been given the opportunity to fully litigate his or her claim in a court of law. This opportunity is a procedural centerpiece of the American legal system, and denial of this right can have serious consequences, including establishing a slippery slope that erodes litigants' rights.

Despite its shortcomings, the Sixth Court has gone farther than other appellate courts. Specifically, the court attempts to protect plaintiffs' rights, while also

¹⁴⁰ *O'Brien*, 575 F.3d at 567.

¹⁴¹ *Id.* at 574.

¹⁴² *Mallory v. Eyrich*, 922 F.2d 1273, 1279 (6th Cir. 1991) (“Rule 68 operates automatically, requiring that the clerk ‘shall enter judgment’ upon the filing of an offer, notice of acceptance and proof of service. This language removes discretion from the clerk or the trial court as to whether to enter judgment upon the filing of the accepted offer.”).

¹⁴³ *O'Brien*, 575 F.3d at 568.

¹⁴⁴ *Id.*

appropriately addressing the limitations of Rule 68 in the context of subject matter jurisdiction. The Sixth Circuit explains that “if a tender made to the individual plaintiff while the motion for certification is pending could prevent the courts from ever reaching the class action issues, that opportunity is at the mercy of a defendant, even in cases where a class action would be most clearly appropriate.”¹⁴⁵ The court is obviously concerned about providing defendants with too much power over a litigant’s claim.¹⁴⁶ This fear should extend beyond the class action context.¹⁴⁷ The ramifications of enabling defendants to engage in posturing that precludes litigation from reaching a point in which the issues are best presented to the court undercuts a lead plaintiff’s role in fully exploring potential class action claims.

The Sixth Circuit’s moderate approach fails to treat similarly situated plaintiffs in analogous manners.¹⁴⁸ Two plaintiffs with identical claims can have disparately different outcomes depending on how quickly they petition the court for certification. Defendants will undoubtedly grow wise to the loophole in the Sixth Circuit’s holdings. Rather than waiting to see if the individual claim remains a lone, sole suit, or manifests into a larger class action, defendants will act quickly, and will offer a Rule 68 offer of judgment on the individual plaintiff’s claim before the plaintiff has the ability to petition the court for certification. The result is, once again, the “Buy-Off Problem.”¹⁴⁹

V. Conclusion

¹⁴⁵ Carroll v. United Compucred Collections, Inc., 399 F.3d 620, 625 (6th Cir. 2005) (quoting Brunet v. City of Columbus, 1 F.3d 390, 399 (6th Cir.1993)).

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ For a detailed overview of this tactic, see George J. Krueger & Kit Applegate, Commentary, *Recent Amendments to Rule 23 Provide Defendants an Opportunity to Render the Case Moot*, 19 ANDREWS DEL. CORP. LITIG. REP. 13 (2004).

The Supreme Court should have granted certiorari in *In Re Tremont Holdings* and should have resolved the current circuit split by establishing that an unaccepted Rule 68 offer of judgment does not render a plaintiff's claim moot because an unaccepted offer is a legal nullity, and the plaintiff still holds an interest in pursuing the litigation. The Rules of Civil Procedure are meant to promote uniformity, and provide parties with rules of "fair play".¹⁵⁰ Appellate decisions that allow an unaccepted offer of judgment to moot a plaintiff's claim before the plaintiff has proper opportunity to litigate frustrate justice. The Supreme Court failed to grasp an opportunity to reconcile the opposing holdings a few years prior. The result of the decision to not issue a firm holding in *Genesis* has been controversy and confusion in the lower courts. *In Re Tremont Holdings* was another missed opportunity for the Supreme Court to provide a necessary protection to plaintiffs who are being abused by defendants who are abusing Rule 68 offers of judgment.

¹⁵⁰ *Id.*