HOW A CLASS ACTION PLAINTIFF'S REQUEST FOR ATTORNEY'S FEES CAN PREVENT MOOTNESS DESPITE A DEFENDANT'S TENDER OF DAMAGES

Lyuba Shamailova†

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† Executive Editor, *Cardozo Law Review*. J.D. Candidate (June 2018), Benjamin N. Cardozo School of Law; B.A., New York University, 2012. I would like to thank Vice Dean Myriam Gilles for her endless advice, patience, and support during the Note writing process; Professor Stewart Sterk for his thoughtful guidance; the editors of the *Cardozo Law Review*—including Patrick Glackin, Renee Shafran, and Chelsea Donenfeld—for their hard work in preparing this Note for publication; and most importantly, my parents, Nasim and Laura, and my sister, Elizabeth: none of this would be possible without you. All mistakes are my own.

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INTRODUCTION

Until recently, federal courts have grappled with whether a class action defendant's settlement offer—made pursuant to Federal Rule of Civil Procedure 68[1] and not yet accepted by a pre-certification plaintiff—will render the putative class action lawsuit[2] moot.[3] In other words, if a defendant offers to pay a putative class representative her sought-after damages, does this offer, in and of itself, moot her claim—and potentially, the claim of every successive putative class representative that replaces her? The stakes in this seemingly prosaic question were high as a finding that settlement offers moot class litigation would enable defendants to pick off individual putative class representatives seriatim by merely offering to settle their claims until the statute of limitations for the class expired.[4] After a circuit split developed,[5] the Supreme Court finally answered this question in early

1 Federal Rule of Civil Procedure 68 allows the party defending against a claim—typically, the defendant—to make a settlement offer to a plaintiff in hopes of settling a dispute before it proceeds to trial. *See* FED. R. CIV. P. 68(a) ("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."); *see also infra* Section I.C (discussing Rule 68 offers of settlement).

2 After a plaintiff initiates a class action by filing a complaint in court, she must also file a motion to certify the class. In order for certification to be granted by the court, the putative class representative must plead and prove the requirements of Federal Rule of Civil Procedure 23(a) and (b). *See* FED. R. CIV. P. 23(a)–(b). If a motion for certification is not filed, the representative plaintiff will be unable to procure relief for the putative class because the class is not yet a juridical entity. Until a class is certified, the plaintiff remains a *putative* class representative and only becomes an actual class representative if and when the class is certified. *See* SHRIVER CENTER, FEDERAL PRACTICE MANUAL FOR LEGAL AID ATTORNEYS 7.2 (Jeffrey S. Gutman et al. eds., 2015), http://federalpracticemanual.org/chapter7/section2; *infra* Section I.B.

3 Campbell-Ewald Co. v. Gomez, 136 S. Ct. 663, 669 (2016) ("We granted certiorari to resolve a disagreement among the Courts of Appeals over whether an unaccepted offer can moot a plaintiff's claim, thereby depriving federal courts of Article III jurisdiction.").

4 Genesis Healthcare Corp. v. Symczyk, 133 S. Ct. 1523, 1531–32 (discussing plaintiff's argument regarding defendant's pick-off strategies); Jay Edelson & Ryan D. Andrews, *Pick-Offs After* Campbell-Ewald*: Some Predictions*, LAW360 (Jan. 21, 2016, 9:38 PM), http://www.law360.com/media/articles/748756/pick-offs-after-campbell-ewald-some-predictions.

5 Before the Supreme Court's decision in *Campbell-Ewald*, the Ninth, Tenth, and Eleventh Circuits held that a defendant's unaccepted settlement offer did not moot the putative class action. *See* Stein v. Buccaneers P'ship, 772 F.3d 698, 709 (11th Cir. 2014); Diaz v. First Am. Home Buyers Prot. Corp., 732 F.3d 948 (9th Cir. 2013); Lucero v. Bureau of Collection Recovery, Inc., 639 F.3d 1239 (10th Cir. 2011). The Second Circuit adopted an intermediate approach by holding that where a plaintiff has not accepted a defendant's offer of full relief, the case is not moot because "the controversy . . . is still alive." McCauley v. Trans Union, L.L.C., 402 F.3d 340, 342 (2d Cir. 2005). However, the Second Circuit also held that, in such circumstances, the court should enter a default judgment against the defendant for the amount of the settlement offer. *Id.* The Third, Fourth, Fifth, Sixth, and Seventh Circuits held that a defendant's unaccepted settlement offer moots the plaintiff's individual claim. *See* Warren v.

2016 in *Campbell-Ewald Co. v. Gomez*, ruling that under basic principles of contract law, an unaccepted settlement offer made before certification of a class does not moot a plaintiff's putative class action.[6]

But while the majority opinion resolved this long-standing question, it chose to reserve judgment on an important related question of whether a defendant's tender of settlement offer funds to an account payable to the plaintiff works to moot the plaintiff's claim.[7] In separate dissents from the *Campbell-Ewald* majority opinion, both Chief Justice Roberts and Justice Alito suggested that a defendant who fully tenders an amount of money to settle the putative class representative's requested damages moots the litigation.[8] So while Chief Justice Roberts rejected the majority's holding,[9] he explained that he was not overly concerned about its impact because even under the majority's rule, a defendant's tender of settlement offer funds to the putative class representative should be enough to moot the case.[10] In a separate dissent, Justice Alito agreed with Roberts.[11]

Sessoms & Rogers, P.A., 676 F.3d 365 (4th Cir. 2012); O'Brien v. Ed Donnelly Enters., Inc., 575 F.3d 567 (6th Cir. 2009); Krim v. pcOrder.com, Inc., 402 F.3d 489 (5th Cir. 2005); Weiss v. Regal Collections, 385 F.3d 337 (3d Cir. 2004); Chathas v. Local 134, 233 F.3d 508 (7th Cir. 2000).

6 *Campbell-Ewald*, 136 S. Ct. at 670–72 ("In sum, an unaccepted settlement offer or offer of judgment does not moot a plaintiff's case, so the District Court retained jurisdiction to adjudicate Gomez's complaint."); *see also infra* Section II.B.

7 *See Campbell-Ewald*, 136 S. Ct. at 672 ("We need not, and do not, now decide whether the result would 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 judgment for the plaintiff in that amount. That question is appropriately reserved for a case in which it is not hypothetical."); *see also* Amanda R. Lawrence et al., *What Companies Can Expect After* Campbell-Ewald, LAW360 (Jan. 26, 2016, 10:30 AM), https://www.law360.com/articles/750513/what-companies-can-expect-after-campbell-ewald.

8 *Campbell-Ewald*, 136 S. Ct. at 678 (Roberts, C.J., dissenting); *id.* at 685 (Alito, J., dissenting) ("Today's decision . . . does not prevent a defendant who actually pays complete relief—either directly to the plaintiff or to a trusted intermediary—from seeking dismissal on mootness grounds."); *see also* Edelson & Andrews, *supra* note 4 (noting that while the majority did not decide whether a pre-certification putative class action would be mooted upon a defendant's tendering of settlement offer funds to the individual putative class action plaintiff, the dissenting opinions of Chief Justice Roberts and Justice Alito "invite defendants to do exactly that").

9 *Campbell-Ewald*, 136 S. Ct. at 678 (Roberts, C.J., dissenting). In Chief Justice Roberts's view, when a defendant makes a settlement offer to the plaintiff for complete relief, there is no longer a live dispute or controversy for the court to resolve and therefore, the plaintiff's case becomes moot and warrants dismissal. *Id.*; *see also infra* text accompanying notes 107–18; Section III.B.

10 *Campbell-Ewald*, 136 S. Ct. at 683 (Roberts, C.J., dissenting) ("The good news is that this case is limited to its facts. The 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. For aught that appears, the majority's analysis may have come out differently if Campbell had deposited the offered funds with the District Court. This Court leaves that question for another day . . . ." (emphasis added)).

11 *See id.* at 685 (Alito, J., dissenting) ("Today's decision . . . does not prevent a defendant who actually pays complete relief—either directly to the plaintiff or to a trusted intermediary—from seeking dismissal on mootness grounds."); *infra* note 119 and accompanying text.

The reasoning employed by the Chief Justice and Justice Alito is compelling. It is grounded in traditional mootness doctrine: once a pre-certification putative class representative is afforded complete relief via a tender of demanded damages, she will no longer have a live dispute with the defendant.[12] However, in most cases a class representative's complaint demands not only damages, but also payment of her attorney's fees.[13] This Note does not dispute that a defendant's tender of damages sought by the class representative in her complaint satisfies the representative's demand for damages, thus mooting the case. However, this Note argues that the class representative plaintiff's demand for attorney's fees cannot be as easily satisfied because absent a specific demand, the defendant will be unable to accurately estimate the plaintiff's attorney's fees.[14] Therefore, even if the defendant's tender of damages satisfies the plaintiff's demand for *damages*, the defendant will be unable to provide complete relief because it will not know exactly what amount of *attorney's fees* the plaintiff has incurred.[15]

Some might argue that the inability to accurately estimate attorney's fees should not stand in the way of an otherwise valid Rule 68 offer. On this view, one might assert that by tendering damages to the class representative plaintiff and informing her that it will pay whatever reasonable attorney's fees she has incurred, the defendant has effectively afforded the plaintiff complete relief, thus warranting dismissal of the suit on mootness grounds.[16] Class action defendants will favor this approach.[17] It provides the individual pre-certification putative class representative with complete relief while also allowing defendants to avoid being held liable for hefty damages to an entire class if the action

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12 *Campbell-Ewald*, 136 S. Ct. at 678 (Roberts, C.J., dissenting); *id.* at 683 (Alito, J., dissenting). *See generally* Camreta v. Greene, 563 U.S. 692 (2011); DaimlerChrysler Corp. v. Cuno, 547 U.S. 332 (2006); Lewis v. Continental Bank Corp., 494 U.S. 472 (1990); Allen v. Wright, 468 U.S. 737 (1984); Chicago & Grand Trunk Ry. Co. v. Wellman, 143 U.S. 339 (1892).

13 Class action plaintiffs are generally entitled to attorney's fee awards under fee-shifting statutes and the common fund doctrine. Theodore Eisenberg & Geoffrey P. Miller, *Attorney Fees in Class Action Settlements: An Empirical Study*, 1 J. EMPIRICAL LEGAL STUD. 1, 29–30 (2004) ("When a class action settles (or when, in rare cases, it results in a judgment for the class on the merits), class counsel is generally entitled to a fee award, either under a fee-shifting statute or through application of the common fund doctrine."). The general rule in the United States is that a litigation's prevailing party is not entitled to collect attorney's fees from the losing party. *See* Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 257 (1975). However, Congress has allowed for exceptions to this rule with fee-shifting statutes. *Id.* at 257–58. In the class action context, under the common fund doctrine, the costs of litigation (including attorney's fees) are recoverable from the common fund of damages that have either been judicially awarded to the class or agreed to by the parties via settlement. *See* Kickham Hanley P.C. v. Kodak Retirement Income Plan, 574 F. Supp. 2d 314, 316–17 (W.D.N.Y. 2008).

14 *See infra* text accompanying notes 170–77.

15 *See infra* note 177 and accompanying text.

16 *See infra* note 178 and accompanying text.

17 Edelson & Andrews, *supra* note 4 (discussing how in the wake of the *Campbell-Ewald* decision, defendants are expected to attempt to continue pick-off strategies by "delivering to the district courts or plaintiff's counsel envelopes of cash").

proceeds long enough to reach class certification.[18]

But this Note argues that such an approach runs counter to the Court's decision in *Campbell-Ewald*. This is because if a defendant informs the plaintiff that it will pay her any attorney's fees the plaintiff has incurred, the defendant is actually making the plaintiff *an offer* to pay her attorney's fees and, under *Campbell-Ewald*, a mere offer of settlement cannot moot a plaintiff's case.[19] Accordingly, if a plaintiff includes a demand for attorney's fees in her complaint or is represented by counsel on a non–*pro bono* basis, a fair reading of *Campbell-Ewald* prevents a defendant from tendering attorney's fees to the plaintiff as a means of mooting the case.

Part I of this Note provides a general overview of and background information on federal mootness jurisprudence, federal class action lawsuits, and settlement offers in federal litigation. Part II discusses how the Supreme Court of the United States in *Campbell-Ewald Co. v. Gomez* resolved the question of whether a pre-certification settlement offer moots a plaintiff's putative class action. It reviews the majority's rationale as well as the dissents of Chief Justice Roberts and Justice Alito. Part III explores the question left unanswered by the Court in *Campbell-Ewald*: whether a plaintiff's action will be mooted upon the defendant's pre-certification tender of settlement offer funds to the putative class representative. It discusses what Chief Justice Roberts and Justice Alito suggest the answer to this question should be, as indicated in their *Campbell-Ewald* dissents, and how some lower federal courts have approached this question. Part IV proposes that in cases where a putative class representative plaintiff demands payment of attorney's fees by the defendant, the plaintiff's interest in recouping attorney's fees will prevent mooting despite a defendant's tender of settlement funds and it explains why this is so.

I. MOOTNESS, CLASS ACTIONS, AND FEDERAL SETTLEMENT OFFERS UNDER RULE 68

Three doctrinal areas converge in any analysis of a defendant's attempt to tender an offer of attorney's fees plus damages in order to moot a class representative's claim and to ultimately avoid class litigation altogether: the law of mootness, grounded in Article III of the U.S. Constitution; class actions, governed by Federal Rule of Civil Procedure 23; and settlement offers, governed by Federal Rule of Civil Procedure 68.

18 *See infra* text accompanying note 105.
19 Campbell-Ewald Co. v. Gomez, 136 S. Ct. 663, 670 (2016).

A. *Mootness: The Case-or-Controversy Requirement*

The concept of adversarial legalism runs throughout our constitutional democracy[20] and is premised on the notion that only those with real stakes in the outcome of litigation are best-suited to zealously adjudicate their claims.[21] At the core of this concept lies Article III, section 2 of the Constitution, which requires the existence of actual "cases" or "controversies" before a federal court may adjudicate a legal claim.[22] Interpreting this constitutional provision, the Supreme Court has repeatedly held that federal courts should exercise their adjudicatory authority only when necessary, in the last resort, to determine real controversies between individuals.[23] If a dispute between

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20 *See* ROBERT A. KAGAN, ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW 3 (2003). Kagan categorizes the characteristics of the American governance and legal process system by referring to them as "adversarial legalism," noting that

> [d]ifferent nations . . . implement the rule of law in different ways. Compared to other economically advanced democracies, American civic life is more deeply pervaded by legal conflict and by controversy about legal processes. The United States more often relies on lawyers, legal threats, and legal contestation in implementing public policies, compensating accident victims, striving to hold governmental officials accountable, and resolving business disputes. American laws generally are more detailed, complicated, and prescriptive. Legal penalties in the United States are more severe. And American methods of litigating and adjudicating legal disputes are more costly and adversarial.

Id.

21 Camreta v. Greene, 563 U.S. 692, 702 (2011) ("So long as the litigants possess the requisite personal stake, an appeal presents a case or controversy . . . .").

22 *See* U.S. CONST. art. III, § 2 ("The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."). In 1793, President Washington asked the Justices of the Supreme Court to provide guidance on what rights and obligations the United States had with respect to the then ongoing war between Great Britain and France. Chief Justice Jay refused to provide an opinion on the matter to the President, thus creating a prohibition against the issuance of advisory opinions by the federal courts to the two other branches of government. This principle was derived out of Article III of the Constitution, which extended the adjudicatory authority of the federal courts only to a list of "Cases" and "Controversies." *See id.*; *Campbell-Ewald*, 136 S. Ct. at 678–79 (Roberts, C.J., dissenting) (discussing basic mootness principles and their history); Hobson v. Hansen, 265 F. Supp. 902, 915 (D.D.C. 1967) ("There is no constitutional principle that federal judges may not engage officially in nonjudicial duties. There is the constitutional principle that Article III courts may not engage in adjudicatory or decisional functions except in those 'cases' and 'controversies' referred to in Article III. The first Chief Justice of the United States illustrated the distinction. He led the Court in declining to give advisory opinions to President Washington; but a few years later when still Chief Justice he saw no constitutional objection to becoming the American negotiator with England of the important Jay treaty which bears his name.").

23 Chicago & Grand Trunk Ry. Co. v. Wellman, 143 U.S. 339, 345 (1892) (holding that federal courts only have jurisdiction to decide cases "in the last resort, and as a necessity in the

parties does not present a case or controversy, the case is moot, and, consequently, the court will lack subject-matter jurisdiction over it, "hav[ing] no business deciding it, or expounding the law in the course of doing so."[24]

Mootness doctrine requires the involved parties to demonstrate that they have a personal stake in the outcome of the lawsuit—and that this stake exists not only at the beginning of the lawsuit but persists throughout the course of the lawsuit—in order for there to be a case or controversy fit for federal-court adjudication.[25] Parties can prove that they have a personal stake in a lawsuit in different ways.[26] The plaintiff can prove this by establishing standing to sue, which itself requires a showing of an injury on the part of the plaintiff that is traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the relief requested by the plaintiff.[27] Meanwhile, a defendant can demonstrate a personal stake by showing that she has an "ongoing interest in the dispute."[28] If at some point during the litigation, either party is no longer able to demonstrate a personal stake in the outcome of the litigation, there no longer exists a case or controversy.[29] The dispute then becomes moot and unfit for federal adjudication, warranting dismissal by the court.[30]

B. *Federal Class Action Lawsuits*

The class action lawsuit is a form of representative litigation which allows individual litigants to adjudicate and resolve claims they hold in

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determination by real, earnest, and vital controversy between individuals").

24 DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 341 (2006) ("If a dispute is not a proper case or controversy, the courts have no business deciding it, or expounding the law in the course of doing so.").

25 Camreta v. Greene, 563 U.S. 692, 701 (2011) ("To ensure a case remains fit for federal-court adjudication, the parties must have the necessary stake not only at the outset of litigation, but throughout its course." (citation omitted) (internal quotation marks omitted)); Arizonans for Official English v. Arizona, 520 U.S. 43, 67 (1997) ("To qualify as a case fit for federal-court adjudication, an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed.").

26 *Campbell-Ewald*, 136 S. Ct. at 678–79 (2016) (Roberts, C.J., dissenting).

27 *Id.* at 678 ("A plaintiff demonstrates a personal stake by establishing standing to sue, which requires a personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." (citation omitted) (internal quotation marks omitted)).

28 *Id.* at 678–79 ("A defendant demonstrates a personal stake through an ongoing interest in the dispute." (citation omitted) (internal quotation marks omitted)).

29 *Id.* at 679 ("The personal stake requirement persists through every stage of the lawsuit. It is not enough that a dispute was very much alive when suit was filed; the parties must continue to have a personal stake in the outcome of the lawsuit to prevent the case from becoming moot." (citation omitted) (internal quotation marks omitted)).

30 *Id.* ("If either the plaintiff or the defendant ceases to have a concrete interest in the outcome of the litigation, there is no longer a live case or controversy. A federal court that decides the merits of such a case runs afoul of the prohibition on advisory opinions.").

common with and on behalf of absent class members and, most controversially, to bind such class members to the outcome that is achieved, despite their absence.[31] Class litigation originates in equity, providing a procedural device that enables large groups of people to enforce their rights no matter the size of the class or the complexity of their claims.[32]

Federal Rule of Civil Procedure 23 governs federal class action lawsuits.[33] Subsection (a) of the rule requires the party moving to certify a class action to show[34] that (1) the class is of a sufficient size such that joinder is impracticable,[35] (2) class members' claims share common questions of law or fact,[36] (3) there exist class representatives whose claims are typical of the rest of the class,[37] and (4) the class representatives will adequately represent the interests of the class.[38]

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31 WILLIAM B. RUBENSTEIN, NEWBERG ON CLASS ACTIONS § 1:1 (5th ed. 2016) [hereinafter NEWBERG ON CLASS ACTIONS] ("Class actions are a form of representative litigation. One or more class representatives litigate on behalf of many absent class members, and those class members are bound by the outcome of the representative's litigation. Ordinarily, such vicarious representation would violate the due process principle that one is not bound by a judgment *in personam* in a litigation in which he has not been made a party by service of process. However, the class action serves as an exception to this maxim so long as the procedural rules regulating class actions afford absent class members sufficient protection." (citation omitted) (internal quotation marks omitted)).

32 Charles Alan Wright, *Class Actions*, 47 F.R.D. 169, 169 (1970) ("The class action was an invention of equity mothered by the practical necessity of providing a procedural device so that mere numbers would not disable large groups of individuals, united in interest, from enforcing their equitable rights nor grant them immunity from their equitable wrongs." (citation omitted) (internal quotation marks omitted)); NEWBERG ON CLASS ACTIONS, *supra* note 31, at § 1:13 ("Like England, class actions in the United States were an outgrowth of the compulsory joinder rule that prevailed in courts of equity.").

33 FED. R. CIV. P. 23. The rule was amended in 1966, and the amendments were largely viewed as an attempt to encourage use of class actions. *See* NEWBERG ON CLASS ACTIONS, *supra* note 31, at § 1:15.

34 NEWBERG ON CLASS ACTIONS, *supra* note 31, at § 3:1 ("Rule [23] requires that a party moving for class certification demonstrate that the proposed class and class representatives meet all of the requirements of Rule 23(a) (numerosity, commonality, typicality, and adequacy) . . . .").

35 FED. R. CIV. P. 23(a) ("One or more members of a class may sue or be sued as representative parties on behalf of all members only if . . . the class is so numerous that joinder of all members is impracticable . . . ."). This requirement is known as the "numerosity" requirement. *See* NEWBERG ON CLASS ACTIONS, *supra* note 31, at § 1:2.

36 FED. R. CIV. P. 23(a) ("One or more members of a class may sue or be sued as representative parties on behalf of all members only if . . . there are questions of law or fact common to the class . . . ."). This requirement is known as the "commonality" requirement. The numerosity and commonality requirements of Rule 23(a) focus on the class itself. *See* NEWBERG ON CLASS ACTIONS, *supra* note 31, at § 1:2.

37 FED. R. CIV. P. 23(a) ("One or more members of a class may sue or be sued as representative parties on behalf of all members only if . . . the claims or defenses of the representative parties are typical of the claims or defenses of the class . . . ."). This requirement is known as the "typicality" requirement. *See* NEWBERG ON CLASS ACTIONS, *supra* note 31, at § 1:2.

38 FED. R. CIV. P. 23(a) ("One or more members of a class may sue or be sued as representative parties on behalf of all members only if . . . the representative parties will fairly and adequately protect the interests of the class."). This requirement is known as the

In addition to meeting the requirements of subsection (a) of Rule 23, a party seeking to certify a class must also meet the standards set out in subsection (b) of Rule 23.[39] In particular, certification of a class action which seeks monetary damages requires a finding that "questions of law or fact common to members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy."[40]

By the 1990s, the use of class actions had grown substantially,[41] but

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"adequacy" requirement. Unlike the numerosity and commonality requirements of Rule 23(a), the typicality and adequacy requirements focus on whether the named plaintiff is a qualified representative of the class. *See* NEWBERG ON CLASS ACTIONS, *supra* note 31, at § 1:2.

39 *See* FED. R. CIV. P. 23(b) ("A class action may be maintained if Rule 23(a) is satisfied and if: (1) prosecuting separate actions by or against individual class members would create a risk of: (A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or (B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests; (2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole; or (3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include: (A) the class members' interests in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by or against class members; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the likely difficulties in managing a class action."); NEWBERG ON CLASS ACTIONS, *supra* note 31, at § 3:1 ("Rule [23] requires . . . that the case fits into one of the categories of Rule 23(b)."). In general, Rule 23(b)'s different categories for when class actions are appropriate demonstrate that the rule aims to provide for use of the class action lawsuit in situations where requiring individual lawsuits instead would create some sort of shortcomings for the class members. *See* NEWBERG ON CLASS ACTIONS, *supra* note 31, at § 1:3 ("In short, the four types of class action cases share the common feature that each aims to address a particular shortcoming that arises when only individual litigation is permitted.").

40 *See* FED. R. CIV. P. 23(b); NEWBERG ON CLASS ACTIONS, *supra* note 31, at § 1:3 ("Finally, subdivision (b)(3) permits a class action in all other circumstances where the prerequisites of Rule 23(a) are met and, in addition, the court determines that questions of law or fact common to members of the class *predominate* over any questions affecting only individual members and that a class action is *superior* to other available methods for the fair and efficient adjudication of the controversy. This is the most common category for money damage cases, especially small-claims class actions." (emphasis added)).

41 Rule 23 was amended in 1966 to include many of the aforementioned requirements from subsections (a) and (b) of the rule. These amendments were viewed as an attempt to encourage more frequent use of class actions. *See* Robert H. Klonoff, *The Decline of Class Actions*, 90 WASH. U. L. REV. 729, 736 (2013) ("Modern Rule 23, which originated in 1966, was a bold and well-intentioned attempt to encourage more frequent use of class actions." (citation omitted) (internal quotation marks omitted)). Immediately following the adoption of the new amendments to Rule 23, there was no sudden increase in the numbers of class actions in federal courts. This was because federal courts needed time to develop class action procedural doctrine and, at the time, federal courts had limited jurisdiction over class actions. By the 1980s, federal class action doctrine was more developed and consequently, the number of class action lawsuits initiated in federal court grew. *See* NEWBERG ON CLASS ACTIONS, *supra* note 31, at § 1:16

with this growth came criticism of the device,[42] which led to several changes to the rules of procedure governing federal class action lawsuits.[43] Importantly, Rule 23 was amended to provide for immediate appellate review in the form of an interlocutory appeal.[44] Today, Rule 23(f) provides defendants with immediate appellate review of trial orders—such as those certifying a class—in a class action lawsuit without first having to secure a final judgment.[45] To require defendants to first secure a final judgment could mean risking a potentially bankrupting verdict at trial with no guarantee of ultimately prevailing on the issue of class certification on appeal.[46]

("Class action practice took off only slowly after enactment of the 1966 Rule, not reaching the level that it occupies today for several decades; what seems in retrospect like a slow pace of development can be explained by several key factors. First, a series of practices under the Rule had to be refined through doctrinal developments in the courts . . . . Second, federal court jurisdiction over class suits was limited and state court class actions not yet well developed. . . . By the 1980s, the conditions were in place for class actions to grow, and class action practice did just that in the succeeding years.").

42 By the 1990s, some thought use of the class action had grown too much and that class action practice needed to be curtailed. *See* NEWBERG ON CLASS ACTIONS, *supra* note 31, at § 1:16 ("By the 1990s, many thought that the pendulum had swung too far and that class action practice had to be reined in."). It was during this time that the class action lawsuit experienced heavy criticism. *See* Klonoff, *supra* note 41, at 737–38 ("During this time [the 1980s and 1990s], while many plaintiff lawyers amassed great wealth, the class action device began to receive significant unfavorable press. Because of the high stakes, defendants often felt compelled to settle large class actions rather than risk a potentially bankrupting judgment. And, in most of these cases, defendants settled without having had an opportunity for immediate appellate review of the decision granting class certification.").

43 NEWBERG ON CLASS ACTIONS, *supra* note 31, at § 1:16. In reaction to the fact that many thought

> class action practice had to be reined in . . . Congress enacted a series of measures to control securities class actions, and the Supreme Court rendered a series of decisions that curtailed mass tort class actions. Then in 2005, both the Court and Congress expanded federal subject-matter jurisdiction over class suits, the latter in the hopes that enabling the defendants to remove class actions from state to federal courts would spell the death knell of those cases.

Id.

44 FED. R. CIV. P. 23(f) ("A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule if a petition for permission to appeal is filed with the circuit clerk within 14 days after the order is entered. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders."); Klonoff, *supra* note 41, at 739 ("The Advisory Committee on Civil Rules began looking at possible amendments to Rule 23 in 1991 and recognized a need for an interlocutory appellate remedy.").

45 *See* FED. R. CIV. P. 23(f); Klonoff, *supra* note 41, at 739 ("The [Advisory] Committee [on Civil Rules] concluded that both plaintiffs and defendants needed interlocutory review. . . . For defendants, securing a final judgment meant risking a potentially bankrupting verdict at trial, with no guarantee of ultimately prevailing on class certification.").

46 Rule 23(f) provides plaintiffs with the opportunity to seek review of a trial court's denial of class certification without having to first take the case to trial and obtaining a final judgment, thereby incurring expensive discovery before getting the chance to request an appellate court to overturn the denial of certification. FED. R. CIV. P. 23(f); Klonoff, *supra* note 41, at 739 ("For plaintiffs, securing review of a denial of class certification (absent an interlocutory appeal) meant taking an individual plaintiff's case to trial and obtaining a final judgment, thereby

Despite the changing history of federal class action lawsuits over time,[47] the overarching purpose of class actions has remained the same: class actions exist to resolve the claims of many individuals at the same time, thereby decreasing the likelihood of repetitious litigation, and providing plaintiffs with a method of obtaining relief for claims that would otherwise be too small to warrant individual litigation.[48] Class action lawsuits are used by plaintiffs for a variety of different reasons and in a variety of different industries (e.g., discrimination lawsuits against corporate employers, product liability and false advertising cases, lawsuits against pharmaceutical companies alleging failure to disclose dangerous side effects, securities litigation, impact litigation, and so on).[49] This means that a ruling on the question reserved in *Campbell-Ewald*—whether a class action is mooted upon a defendant's tender of settlement funds to an individual plaintiff before certification of a class—will have a widespread impact on the ability of groups of individuals with common claims to obtain relief for claims too small to otherwise warrant individual litigation.

C. *Settlement Offers in Federal Litigation*

Federal Rule of Civil Procedure 68 governs settlement offers in federal cases.[50] The rule is primarily intended to promote and encourage settlement of disputes and to avoid litigation.[51] Accordingly, it provides

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incurring expensive discovery, often with only a slight hope of ultimately overturning the denial of certification on appeal.").

47 *See* NEWBERG ON CLASS ACTIONS, *supra* note 31, at §§ 1:14, 1:15 (discussing the changes made to Rule 23 over time, including amendments mentioned above).

48 *See An Important Win in the Supreme Court for Class Actions*, N.Y. TIMES (Jan. 21, 2016), http://www.nytimes.com/2016/01/21/opinion/an-important-win-in-the-supreme-court-for-class-actions.html ("Class-action suits are a critical type of litigation that allows people with relatively small claims to band together to hold corporations liable for wrongdoing. A single lawsuit by one individual is often not worth a lawyer's time, even if a company has violated the rights of large numbers of people. That's why it's crucial to allow all those harmed to seek the same relief in a single suit."); *see also* Wright, *supra* note 32, at 170 ("By establishing a technique whereby the claims of many individuals can be resolved at the same time, the class suit both eliminates the possibility of repetitious litigation and provides small claimants with a method of obtaining redress for claims which would otherwise be too small to warrant individual litigation." (citation omitted) (internal quotation marks omitted)).

49 *See* David Marcus, *The Public Interest Class Action*, 104 GEO. L.J. 777 (2016); *Class Action Attorney: Answers About Class Action Lawsuits*, LIEFF CABRASER HEIMANN & BERNSTEIN, http://www.lieffcabraser.com/about-us/class-action-faq (last visited Sept. 6, 2017).

50 FED. R. CIV. P. 68.

51 Marek v. Chesny, 473 U.S. 1, 5 (1985) ("The plain purpose of Rule 68 is to encourage settlement and avoid litigation. The Rule prompts both parties to a suit to evaluate the risks and costs of litigation, and to balance them against the likelihood of success upon trial on the merits." (citation omitted)); Staffend v. Lake Cent. Airlines, Inc., 47 F.R.D. 218, 219 (N.D. Ohio 1969) ("The purpose of Rule 68 is to encourage settlements and to avoid protracted litigation." (citation omitted) (internal quotation marks omitted)); *see also* Robert G. Bone, *"To Encourage Settlement": Rule 68, Offers of Judgment, and the History of the Federal Rules of Civil Procedure*,

that a defendant may—at least fourteen days before trial is set to commence—serve upon an opposing party an offer to allow judgment on its terms.[52] If, within fourteen days of being served, the plaintiff serves written notice of acceptance of the defendant's offer, then either party may file the offer and notice of acceptance[53] and the court clerk will enter judgment.[54] Under Rule 68, if an offer is unaccepted by the plaintiff, it is considered withdrawn, but this does not preclude a later offer.[55]

While Rule 68 was primarily intended to promote settlements and avoid litigation,[56] another purpose behind the rule was to protect defendants from unnecessary court costs.[57] For instance, the rule imposes a penalty on a plaintiff that has received a settlement offer and rejected it but subsequently obtains a judgment from the court that is less favorable to her than the settlement offer by requiring that such a plaintiff pay the defendant's post-offer costs.[58] This potential penalty is meant to make the plaintiff think hard before rejecting a settlement offer.[59]

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102 NW. U. L. REV. 1561, 1566 (2008) ("The universally accepted view today is that Rule 68 was included in the FRCP to encourage settlement and avoid litigation." (citation omitted) (internal quotation marks omitted)).

52 FED. R. CIV. P. 68(a) ("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.").

53 *Id.* ("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.").

54 *Id.* ("The clerk must then enter judgment.").

55 FED. R. CIV. P. 68(b) ("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.").

56 *See* sources cited *supra* note 51.

57 *See* CHARLES ALAN WRIGHT ET AL., 12 FED. PRAC. & PROC. CIV. § 3001.1 (2d ed. 1997) (discussing how "Rule 68 is designed to insulate defendants willing to consent to judgment against incurring the costs of further litigation"); Bone, *supra* note 51, at 1570–76 (discussing how Rule 68 was aimed at preventing defendants from incurring unnecessary court costs).

58 FED. R. CIV. P. 68(d) ("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."); *see* Bone, *supra* note 51, at 1565–66 (illustrating Rule 68's potential penalty against plaintiffs who reject settlement offers by explaining that "[t]o understand how the Rule works, suppose John sues Mary for breach of contract seeking $100,000 in damages. Suppose that Mary serves a written offer of judgment on John agreeing to accept a final judgment in the amount of $30,000. Rule 68 gives John [fourteen] days to consider the offer. If he accepts, judgment is entered for $30,000. If he rejects and recovers a judgment 'not more favorable than the unaccepted offer' (i.e., not greater than $30,000), John must pay 'the costs incurred after the offer was made.' This means he must pay Mary's post-offer costs as well as his own").

59 *See* Bone, *supra* note 51, at 1566 ("The cost-shifting penalty imposed on a plaintiff who fails to improve on an offer at trial is supposed to make the plaintiff think very hard before rejecting the settlement offer." (citation omitted) (internal quotation marks omitted)). Because of this penalty scheme, the rule provides a way for defendants who know they owe relief to the plaintiff and who are willing to provide it to avoid the costs of litigation. *Id.* at 1570–76 (discussing how Rule 68 was aimed at preventing defendants from incurring unnecessary court costs).

Initially, there was opposition to the application of Rule 68 to class action lawsuits[60] and some pro–class action advocates sought an amendment to the rule which would exclude class actions from its purview altogether.[61] These advocates feared the potentially coercive effect that the rule would have on representative plaintiffs[62] who would be incentivized to accept settlement offers in order to avoid the penalty imposed by Rule 68.[63] Further, there was the concern that defendants would use Rule 68 settlement offers to pick off individual putative class representatives by serially making offers to each representative plaintiff until the statute of limitations for the class's claim would expire, thus frustrating the purpose of class actions through gamesmanship and permitting inefficient use of judicial resources.[64]

Despite these concerns, it is now settled that Rule 68 applies to class action lawsuits just as it does to other types of federal litigation.[65] For instance, in *Ambalu v. Rosenblatt*, the district court found that

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60 *See* WRIGHT ET AL., *supra* note 57, at § 3001.1 ("There have been suggestions that, even as currently written, Rule 68 ought not apply in class actions. . . . There is much force to the contention that, as a matter of policy, the rule should not be employed in class actions. Class actions can only be settled with the approval of the court, and the judge is not required to acquiesce in the desire of the class representative that the case be settled. Thus, if Rule 68 is generally intended to galvanize plaintiffs to settle cases or face adverse consequences if they do not, it would not seem to work in class actions because plaintiffs do not have unfettered power to do so."); *see also* McDowall v. Cogan, 216 F.R.D. 46, 51 (E.D.N.Y. 2003) ("It follows that if a defendant wishes to make an offer of judgment prior to class certification in the interests of effecting a reasonable settlement and avoiding the costs and inefficiencies of litigation, it must do so to the putative class and not to the named plaintiff alone. If it makes its offer only to the class representative, it cannot then seek to impose costs on him after judgment is rendered pursuant to Rule 68, as it will not have directed its offer to the proper offeree.").

61 *See* WRIGHT ET AL., *supra* note 57, at § 3007 ("Ordinarily unadopted proposals to amend the Civil Rules are of little ongoing interest to the bench and bar, but with Rule 68 there is reason to note the efforts to change the rule. . . . [T]he proposals that have been made . . . included . . . excluding class and derivative actions from the operation of Rule 68 . . . .").

62 *Id.* at § 3001.1 ("In addition, the potential coercive impact of the rule on the class representative could create a conflict of interest for him or her since possible personal responsibility for defendant's costs for a full class action may be far out of proportion to the class representative's stake in a possible individual recovery. . . . Concerns of this character have prompted reformers to propose excluding class actions explicitly from the operation of Rule 68.").

63 *See* sources cited *supra* note 58.

64 *See* Genesis Healthcare Corp. v. Symczyk, 133 S. Ct. 1523, 1531–32 (2013) (discussing putative collective action plaintiff's argument regarding defendant's pick-off strategies); Edelson & Andrews, *supra* note 4; *infra* text accompanying note 159.

65 *See* WRIGHT ET AL., *supra* note 57, at § 3001.1 ("There have been suggestions that, even as currently written, Rule 68 ought not apply in class actions. . . . There is much force to the contention that, as a matter of policy, the rule should not be employed in class actions. Class actions can only be settled with the approval of the court, and the judge is not required to acquiesce in the desire of the class representative that the case be settled. Thus, if Rule 68 is generally intended to galvanize plaintiffs to settle cases or face adverse consequences if they do not, it would not seem to work in class actions because plaintiffs do not have unfettered power to do so. . . . Despite these concerns, there is little authority for invalidating Rule 68 in class actions.").

nothing in Rule 68 or Rule 23 prevented a defendant from making an offer of judgment to a putative class representative prior to certification of the class.[66] Other courts have followed this reasoning.[67]

After resolution of this issue, the primary question that preoccupied federal courts was whether a pre-certification Rule 68 offer could moot a plaintiff's class action—that is, until the Supreme Court's ruling in *Campbell-Ewald*.[68]

II. *Campbell-Ewald*: A Defendant's Pre-Certification Settlement Offer Will Not Moot a Plaintiff's Putative Class Action

A. *Development of Doctrine*

In 1975, the Supreme Court determined that *post*-certification of a class, the mootness of the named plaintiff's individual claim does not render the entire class action moot because a dispute or controversy may still exist between the defendant and members of the class represented by the named plaintiff.[69] This comports with mootness doctrine, as well as the law of class actions, because once a class is certified, it achieves legal status separate from the representative plaintiff, and can therefore be engaged in live disputes with the defendant even if the class representative no longer is.[70] However, the

66 Ambalu v. Rosenblatt, 194 F.R.D. 451, 453 (E.D.N.Y. 2000) (The plaintiff "responds that a Rule 68 offer of judgment does not apply in a class action context and that [the defendant] has not offered to compensate the class. . . . Though plaintiff's arguments may have some validity after class certification, they do not apply to the present case. No class has been certified and no motion has been made for certification. Therefore nothing prevents the defendant from attempting to facilitate settlement by making a pre-certification Rule 68 offer of judgment." (citation omitted)).

67 *See* Mallory v. Eyrich, 922 F.2d 1273 (6th Cir. 1991) (court allowed application of Rule 68 after the defendant made a Rule 68 offer and plaintiffs accepted in a suit brought as a class action). *But see* McDowall v. Cogan, 216 F.R.D. 46, 51 (E.D.N.Y. 2003) ("It follows that if a defendant wishes to make an offer of judgment prior to class certification in the interests of effecting a reasonable settlement and avoiding the costs and inefficiencies of litigation, it must do so to the putative class and not to the named plaintiff alone. If it makes its offer only to the class representative, it cannot then seek to impose costs on him after judgment is rendered pursuant to Rule 68, as it will not have directed its offer to the proper offeree.").

68 *See* WRIGHT ET AL., *supra* note 57, at § 3001.1 ("Although use of Rule 68 offers in class actions raises a variety of questions mentioned above, the main issue that has preoccupied the courts worried about Rule 68 offers in class actions is somewhat different—whether a Rule 68 offer can moot a class action.").

69 Sosna v. Iowa, 419 U.S. 393 (1975).

70 *Id.* at 402 ("Our conclusion that this case is not moot in no way detracts from the firmly established requirement that the judicial power of Art. III courts extends only to 'cases and controversies' specified in that Article. There must not only be a named plaintiff who has such a case or controversy at the time the complaint is filed, and at the time the class action is certified by the District Court pursuant to Rule 23, but there must be a live controversy at the time this Court reviews the case. The controversy may exist, however, between a named defendant and a

related question of whether an unaccepted settlement offer made by the defendant to a putative class representative *before* certification of a class works to moot the case was not then answered and had since then plagued federal courts.[71]

In 2013, the Supreme Court encountered a variation on this question in the context of a Fair Labor Standards Act (FLSA) suit in *Genesis Healthcare Corp. v. Symczyk* but chose to reserve judgment because the question was not properly before it.[72] There, the plaintiff, who had previously been employed by the defendant, filed a complaint on behalf of herself and all other persons similarly situated alleging that the defendant violated the FLSA by automatically deducting thirty minutes of time worked for meal breaks even when the employees performed compensable work during those breaks.[73] In response to the plaintiff's complaint, the defendant filed an answer and simultaneously served the plaintiff with an offer of judgment under Rule 68.[74] After the plaintiff failed to respond to the defendant's offer in the time permitted by Rule 68, the defendant filed a motion to dismiss for lack of subject-matter jurisdiction, alleging that the action was rendered moot by its offer of complete relief to the plaintiff.[75]

The Court acknowledged the circuit split that existed at the time among the courts of appeals regarding the question of whether an unaccepted offer that fully satisfies a plaintiff's claim is sufficient to render the claim moot.[76] However, the Court explained it could not decide this question because it was not properly before it: the plaintiff had waived the issue when she conceded the point in her trial briefs and failed to raise the argument in her brief in opposition to the defendant's petition for certiorari.[77] Having decided not to resolve the question of

member of the class represented by the named plaintiff, even though the claim of the named plaintiff has become moot." (citation omitted)).

71 Campbell-Ewald Co. v. Gomez, 136 S. Ct. 663, 666 (2016) ("Is an unaccepted offer to satisfy the named plaintiff's individual claim sufficient to render a case moot when the complaint seeks relief on behalf of the plaintiff and a class of persons similarly situated? This question, *on which Courts of Appeals have divided*, was reserved in *Genesis Healthcare Corp. v. Symczyk*." (emphasis added)); *id.* at 669 ("We granted certiorari to resolve a disagreement among the Courts of Appeals over whether an unaccepted offer can moot a plaintiff's claim, thereby depriving federal courts of Article III jurisdiction.").

72 *See* Genesis Healthcare Corp. v. Symczyk, 133 S. Ct. 1523, 1528–29 (2013); *see also infra* text accompanying note 77.

73 *Genesis Healthcare*, 133 S. Ct. at 1527.

74 *Id.*

75 *Id.*

76 *Id.* at 1528–29.

77 *Id.* ("[W]e do not reach this question, or resolve the split, because the issue is not properly before us. . . . [R]espondent's waiver of the issue would still prevent us from reaching it. In the District Court, respondent conceded that '[a]n offer of complete relief will generally moot the [plaintiff's] claim, as at that point the plaintiff retains no personal interest in the outcome of the litigation.' Respondent made a similar concession in her brief to the Court of Appeals, and failed to raise the argument in her brief in opposition to the petition for certiorari. We, therefore, assume, without deciding, that petitioners' Rule 68 offer mooted respondent's

whether an unaccepted offer made by a defendant in full satisfaction of plaintiff's demands is sufficient to render the putative class action moot, the Court then held that the plaintiff's class action suit was rendered moot when her individual claim became moot since no other claimants had, at that point, opted into the class.[78]

In a dissenting opinion, Justice Kagan wrote that she would have reached the question that the majority chose to reserve judgment on and would have held that a defendant's unaccepted offer of judgment satisfying an individual putative class action plaintiff's claim cannot moot a class action.[79] She based her rationale on traditional contract principles, explaining that "[a]n unaccepted settlement offer—like any unaccepted contract offer—is a legal nullity, with no operative effect."[80] But ultimately, the *Genesis Healthcare* Court left this question open to be answered in a subsequent case.

B. Campbell-Ewald Co. v. Gomez

After a few years of silence on this issue, in May 2015, the Supreme Court granted certiorari to hear a case that presented this question and answer it: *Campbell-Ewald Co. v. Gomez*.[81] The Ninth Circuit, which heard the case below, decided that a defendant's unaccepted settlement offer—for the full amount of the named plaintiff's individual claim and made before the named plaintiff files a motion for class certification—does not moot a class action.[82] After granting the defendant's petition for certiorari, the Supreme Court ultimately affirmed.[83]

The facts of *Campbell-Ewald* are straightforward. In 2000, the Campbell-Ewald Company—a nationwide advertising and marketing communications agency—was hired by the United States Navy to execute a multimedia recruiting campaign.[84] Campbell-Ewald proposed sending text messages to young adults as part of the campaign and the

individual claim." (citation omitted)).

78 *Id.* at 1529 ("In the absence of any claimant's opting in, respondent's suit became moot when her individual claim became moot, because she lacked any personal interest in representing others in this action.").

79 *Id.* at 1533 (Kagan, J., dissenting) ("[A]n unaccepted offer of judgment cannot moot a case. 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.").

80 *Id.* at 1533–34 ("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. Nothing in Rule 68 alters that basic principle; to the contrary, that rule specifies that an unaccepted offer is considered withdrawn. So assuming the case was live before—because the plaintiff had a stake and the court could grant relief—the litigation carries on, unmooted." (citation omitted) (internal quotation marks omitted)).

81 Campbell-Ewald Co. v. Gomez, 135 S. Ct. 2311 (2015) (mem.).

82 Gomez v. Campbell-Ewald Co., 768 F.3d 871 (9th Cir. 2014), *aff'd*, 136 S. Ct. 663 (2016).

83 *Campbell-Ewald*, 136 S. Ct. at 674.

84 *Id.* at 667.

Navy approved.[85] Then, Campbell-Ewald sent text messages via a third party to cellular phone users who had consented to receiving solicitations by text message.[86] Gomez was a recipient of such text messages but alleged that he had not consented to receiving unsolicited messages.[87] He filed a class action complaint against Campbell-Ewald for violating the Telephone Consumer Protection Act (TCPA).[88]

Before Gomez's deadline to file a motion for class certification had lapsed, Campbell-Ewald made a settlement offer on Gomez's individual claim by offering to pay him all the monetary damages he demanded in his complaint.[89] Gomez did not accept and allowed the offer to lapse by failing to respond within the time specified in Rule 68.[90] Campbell-Ewald then filed a motion to dismiss under Federal Rule of Civil Procedure 12(b)(1) for lack of subject-matter jurisdiction, arguing that its settlement offer provided Gomez with complete relief and thus mooted his individual claim.[91] The defendant further asserted that since Gomez's individual claim was mooted before class certification, the entire class action also became moot.[92] The district court denied the motion[93] and the case proceeded to discovery, during which Campbell-Ewald moved for summary judgment on unrelated sovereign immunity grounds.[94] The district court granted Campbell-Ewald summary judgment.[95] On appeal, the Ninth Circuit reversed the summary judgment motion but agreed that Gomez's class action was not

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85 *Id.*

86 *Id.*

87 *Id.*

88 *Id.*

> The Telephone Consumer Protection Act . . . 47 U.S.C. § 227(b)(1)(A)(iii), prohibits any person, absent the prior express consent of a telephone-call recipient, from "mak[ing] any call . . . using any automatic telephone dialing system . . . to any telephone number assigned to a paging service [or] cellular telephone service." A text message to a cellular telephone, it is undisputed, qualifies as a "call" within the compass of § 227(b)(1)(A)(iii).

Id. at 666–67 (citation omitted); *see also* 47 U.S.C. § 227 (b)(1) (2012).

89 *Campbell-Ewald*, 136 S. Ct. at 667–68.

90 *Id.* at 668 ("Gomez did not accept the settlement offer and allowed Campbell's Rule 68 submission to lapse after the time, 14 days, specified in the Rule.").

91 *Id.* ("Campbell thereafter moved to dismiss the case pursuant to Federal Rule of Civil Procedure 12(b)(1) for lack of subject-matter jurisdiction. No Article III case or controversy remained, Campbell urged, because its offer mooted Gomez's individual claim by providing him with complete relief."); *see also* FED. R. CIV. P. 12(b)(1) ("Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion: (1) lack of subject-matter jurisdiction.").

92 *Campbell-Ewald*, 136 S. Ct. at 668 ("Gomez had not moved for class certification before his claim became moot, Campbell added, so the putative class claims also became moot.").

93 *Id.*

94 *Id.* ("After limited discovery, Campbell moved for summary judgment on a discrete ground. The U.S. Navy enjoys the sovereign's immunity from suit under the TCPA, Campbell argued.").

95 *Id.*

mooted.[96] The Supreme Court of the United States granted certiorari to resolve both issues.[97]

Justice Ginsburg delivered the opinion of the Court, joined by Justices Kennedy, Breyer, Sotomayor, and Kagan.[98] The Court noted that in her *Genesis Healthcare* dissent, Justice Kagan actually addressed the question presented in this case, i.e., whether an unaccepted settlement offer made by the defendant to an individual plaintiff before certification of a class should work to moot the putative class action.[99] The Court found persuasive Justice Kagan's use of traditional contract principles to determine that such an offer would not moot the action.[100] The *Campbell-Ewald* majority chose to adopt Kagan's *Genesis Healthcare* approach and used basic contract law to hold that Campbell-Ewald's pre-certification settlement offer, once rejected by Gomez, did not work to moot Gomez's putative class action.[101] The Court determined that because Gomez had not accepted Campbell-Ewald's settlement offer, the offer remained only a proposal and, as such, bound neither Campbell-Ewald nor Gomez.[102] And because the settlement offer had then expired, Gomez had not been granted complete relief and his TCPA complaint remained unsatisfied.[103] Accordingly, Gomez's individual claim was not mooted by the expired settlement offer and neither was the putative class action.[104]

Justice Ginsburg warned that to hold otherwise would "place the defendant in the driver's seat" since a defendant in a putative class action could avoid class action liability by simply making the class representative a settlement offer, and doing so serially until the statute of limitations on the class's claim runs out.[105] But Justice Ginsburg also explicitly stated that the Court was not deciding whether a defendant's tendering of the full amount of the plaintiff's individual sought-after

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96 *Id.* ("The Court of Appeals for the Ninth Circuit reversed the summary judgment entered for Campbell. The appeals court disagreed with the District Court's ruling on the immunity issue, but agreed that Gomez's case remained live." (citation omitted)).

97 *Id.* at 669.

98 *Id.* at 666.

99 *Id.* at 669–70. The Court found that this case was very similar to *Genesis Healthcare* but that, unlike Gomez, the plaintiff in *Genesis Healthcare* did not dispute in the lower courts that the defendant's offer mooted her individual claim. *Id.* at 669–70 ("[U]nlike the case Gomez mounted, Symczyk did not dispute in the lower courts that Genesis HealthCare's offer mooted her individual claim. Because of that failure, the *Genesis Healthcare* majority refused to rule on the issue. Instead, the majority simply assumed, without deciding, that an offer of complete relief pursuant to Rule 68, even if unaccepted, moots a plaintiff's claim." (citation omitted)) (explaining why the Court in *Genesis Healthcare* refused to rule on the issue of whether a pre–certification settlement offer providing complete relief to an individual plaintiff moots the entire putative class action).

100 *Id.* at 670.

101 *Id.* at 670–71.

102 *Id.*

103 *Id.* at 672.

104 *Id.*

105 *Id.*

damages to an account payable to the plaintiff would moot the plaintiff's class action: this question would be reserved for a case in which it was not hypothetical.[106]

Chief Justice Roberts, joined by Justices Scalia and Alito, disagreed with the majority.[107] In a dissenting opinion, the Chief Justice reviewed basic principles of mootness: that courts can only decide proper cases or controversies,[108] that a case or controversy exists when both the plaintiff and defendant have a personal stake in the lawsuit,[109] and that the personal stake must exist at every stage of litigation.[110] In applying these principles to the facts of *Campbell-Ewald*, the Chief Justice found that the defendant's offer to pay Gomez all asserted statutory damages constituted an offer to fully remedy Gomez's alleged injury.[111] When Campbell-Ewald offered to fully redress Gomez's injury, there was no longer a case or controversy for the district court to decide and the case was moot.[112]

The Chief Justice argued that the majority's reliance on contractual principles was misplaced in the context of mootness.[113] While he agreed that Gomez's failure to accept the settlement offer made the offer a nullity as a matter of contract law,[114] Chief Justice Roberts explained that the relevant inquiry under Article III was not whether there existed a valid contract, but rather whether there was an extant case or controversy for the district court to decide.[115] According to Roberts, "Article III does not require the parties to affirmatively agree on a settlement before a case becomes moot."[116] Yet, despite his disagreement with the majority, Chief Justice Roberts was not overly concerned about the case's impact because according to him, most defendants would likely skip the step of making an offer and simply tender settlement funds directly into an account for the benefit of the plaintiff—thus avoiding the trap set by the majority's approach.[117] And, on the Chief Justice's view, such an approach would moot the plaintiff's case, and presumably, the class action as well.[118]

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106 *Id.*
107 *Id.* at 677 (Roberts, C.J., dissenting).
108 *Id.* at 678.
109 *Id.*
110 *Id.* at 679.
111 *Id.*
112 *Id.*
113 *Id.* at 680.
114 *Id.* at 682.
115 *Id.*
116 *Id.* at 680.
117 *Id.* at 683 ("The good news is that this case is limited to its facts. The 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. For aught that appears, the majority's analysis may have come out differently if Campbell had deposited the offered funds with the District Court. This Court leaves that question for another day . . . .").
118 See *infra* Section III.B for further discussion of Chief Justice Roberts's analysis of this

Justice Alito filed a separate dissent in which he addressed a different concern regarding a defendant's financial ability to pay the settlement funds that it has offered.[119]

Despite these dissenting protests, the rule after the Supreme Court's ruling in *Campbell-Ewald* is clear: a mere settlement offer made to an individual plaintiff before certification of a class will not act to moot the putative class action.[120]

III. Will a Defendant's Pre-Certification Tender of Settlement Offer Funds to the Plaintiff Moot a Putative Class Action?

A. *Approaches of Circuit and District Courts*

The Supreme Court's ruling in *Campbell-Ewald* resolved a question that had long been unanswered by ruling that a defendant's pre-certification settlement offer to remedy an individual plaintiff's claim for damages will not moot the putative class action.[121] However, the related question of whether a pre-certification tender of settlement funds moots a putative class action had been left unanswered by the Supreme Court,[122] leaving lower federal courts to grapple with the issue.

Several circuit courts have attempted to answer this question. In

issue.

[119] *Campbell-Ewald*, 136 S. Ct. at 683 (Alito, J., dissenting) ("I write separately to emphasize what I see as the linchpin for finding mootness in this case: There is no real dispute that Campbell would make good on its promise to pay Gomez the money it offered him if the case were dismissed. Absent this fact, I would be compelled to find that the case is not moot." (citation omitted) (internal quotation marks omitted)). Justice Alito required that upon a defendant's offer of complete relief to the plaintiff on a damages claim, the case will be dismissed as moot but only if the defendant can make absolutely clear that the plaintiff will receive the offered relief. Justice Alito looked to a series of voluntary cessation cases in which the Supreme Court held that when a plaintiff seeks an injunction against a defendant, a defendant's voluntary cessation of the challenged conduct will not ordinarily render a case moot. If the defendant in such a case wants to obtain dismissal on the basis of mootness, it must make "absolutely clear [that] the allegedly wrongful behavior could not reasonably be expected to recur." *Id.* Alito translated this rule to cases involving claims for damages: "When a defendant offers a plaintiff complete relief on a damages claim, the case will be dismissed as moot if—but only if—it is 'absolutely clear' that the plaintiff will be able to receive the offered relief." *Id.* He then explained that there was little doubt regarding Campbell-Ewald's ability to "make good" on its promise to pay Gomez the settlement funds. *Id.* at 684. Then, in anticipation of the next stage of doctrinal development, Justice Alito explained that there was one surefire way that a defendant like Campbell-Ewald could make absolutely clear that it would pay the relief it has offered: by tendering the money to the plaintiff. *Id.* at 684–85.

[120] *Id.* at 670–71 (majority opinion).

[121] *Id.*

[122] *Id.* at 672 ("We need not, and do not, now decide whether the result would 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 judgment for the plaintiff in that amount. That question is appropriately reserved for a case in which it is not hypothetical.").

Mey v. North American Bancard, L.L.C., where a class action defendant mailed the plaintiff a cashier's check totaling the plaintiff's asserted damages, which the plaintiff returned,[123] the Sixth Circuit held that the defendant's tender did not moot the class action.[124] The court explained that under the particular facts of the case, the plaintiff might have been entitled to more relief than that provided by the defendant in its tendered check.[125] Thus, the defendant had not shown that its tender satisfied the plaintiff's demand for relief, and as such, the court held that the tender could not moot the plaintiff's claims.[126] While the Sixth Circuit's *Mey* ruling did not foreclose the possibility of a tender mooting a plaintiff's class action under different circumstances, the Ninth Circuit has adopted a categorical rule that a pre-certification class action will only become moot when the class representative actually receives complete relief on her claim, but not when that relief is merely offered or *tendered*.[127] The Ninth Circuit found relevant that the individual representative plaintiff had not yet had a fair chance to demonstrate that certification was warranted.[128] District courts have also weighed in on this question.[129]

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123 Mey v. N. Am. Bancard, L.L.C., 655 F. App'x 332, 336 (6th Cir. 2016) ("NAB . . . mail[ed] Mey's attorney a cashier's check for $4,500. . . . Though Mey promptly returned the check, NAB argues that because the *Campbell-Ewald* Court drew a distinction between offering funds, which does not moot a plaintiff's claim, and tendering funds, which does, NAB's act of sending Mey a cashier's check is a tender that moots Mey's claims." (citation omitted) (internal quotation marks omitted)).

124 *Id.*

125 *Id.* ("NAB now admits that it made three calls to Mey, not just the one call that NAB mentioned in its Rule 68 offer of judgment. But the district court never made any finding as to just how many calls NAB made, and NAB's recent admission to making three suggests that there may be more that Mey and NAB are not aware of. The upshot is that at this point, whether $4,500 provides Mey with all the relief she is entitled to remains unclear. That lack of clarity means that NAB cannot show that Mey has received all of the money damages she has claimed.").

126 *Id.* at 337 ("On the record before us, we cannot conclude that NAB's tender provides Mey everything that she asked for as an individual plaintiff, which means that Mey's individual claims are not moot and can proceed in the district court.").

127 Chen v. Allstate Ins. Co., 819 F.3d 1136, 1138 (9th Cir. 2016) ("Under Supreme Court and Ninth Circuit case law, a claim becomes moot when a plaintiff actually receives complete relief on that claim, not merely when that relief is offered or tendered.").

128 *Id.* at 1138–39 ("Assuming arguendo a district court could enter a judgment according complete relief on a plaintiff's individual claims over the plaintiff's objections, thereby mooting those claims, such action is not appropriate here. As the Supreme Court said in *Campbell-Ewald*, 136 S. Ct. at 672, '[w]hile a class lacks independent status until certified, a would-be class representative with a live claim of her own must be accorded a fair opportunity to show that certification is warranted.' Because Pacleb has not yet had a fair opportunity to move for class certification, we will not direct the district court to enter judgment, over Pacleb's objections, on his individual claims." (citing Sosna v. Iowa, 419 U.S. 393, 399 (1975))).

129 For instance, the District of Maryland held that depositing a full settlement offer would moot an individual plaintiff's claims against individual defendants. Gray v. Kern, 143 F. Supp. 3d 363, 367 (D. Md. 2016); Price v. Berman's Auto., Inc., No. 14-763, 2016 WL 1089417, at *4 (D. Md. Mar. 18, 2016). The Southern District of New York ruled that once the defendant has furnished full relief, the plaintiff cannot object to entry of judgment in its favor. *See* Leyse v. Lifetime Entm't Servs., L.L.C., 171 F. Supp. 3d 153 (S.D.N.Y. 2016).

B. *Roberts's and Alito's Approach*

Chief Justice Roberts spent most of his dissenting opinion in *Campbell-Ewald* explaining why he would hold that a defendant's pre-certification settlement offer to remedy an individual plaintiff's claim to damages does work to moot the putative class action.[130] In his discussion, he explained that if there were concerns regarding the defendant's ability to pay, the defendant could easily dispel such concerns if it tendered a check of settlement funds to the plaintiff by depositing a check with the trial court.[131] Further, the Chief Justice suggested that although he disagreed with the majority, he was not very troubled by the effect its ruling would have because defendants that are willing to settle can simply tender the funds to the plaintiff in order to moot the case.[132] Taken together, this means that, for the Chief Justice, a pre-certification tender of settlement funds would most certainly work to moot a plaintiff's putative class action. However, the Chief Justice did not discuss what effect, if any, the pre-certification putative class representative plaintiff's request for attorney's fees would have on his proposition that tendering settlement funds to the plaintiff should moot the entire case.[133]

Similarly, Justice Alito's dissent in *Campbell-Ewald* indicated that although he disagreed with the Court's holding, he too was not concerned about its effect.[134] He explained that the majority's ruling did not prevent a defendant that has tendered complete relief to the plaintiff from seeking dismissal on mootness grounds.[135] Justice Alito's separate dissenting opinion was also concerned with the defendant's financial ability to pay the offered funds, but he made it clear that one surefire way to demonstrate such ability would be to actually tender the funds to the plaintiff.[136] Finally, like Chief Justice Roberts, Justice Alito did not discuss what effect the plaintiff's requested attorney's fees would have

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130 *See Campbell-Ewald*, 136 S. Ct. at 678 (Roberts, C.J., dissenting).

131 *Id.* at 680 ("[T]o the extent there is a question whether Campbell is willing and able to pay, there is an easy answer: have the firm deposit a certified check with the trial court.").

132 *Id.* at 683 ("The good news is that this case is limited to its facts. The 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. For aught that appears, the majority's analysis may have come out differently if Campbell had deposited the offered funds with the District Court.").

133 *Id.*

134 *Id.* at 685 (Alito, J., dissenting).

135 *Id.* ("Today's decision . . . does not prevent a defendant who actually pays complete relief—either directly to the plaintiff or to a trusted intermediary—from seeking dismissal on mootness grounds.").

136 *See id.* at 684 ("How, then, can a defendant make 'absolutely clear' that it will pay the relief it has offered? The most straightforward way is simply to pay over the money. The defendant might hand the plaintiff a certified check or deposit the requisite funds in a bank account in the plaintiff's name."); *supra* note 119 and accompanying text.

on his analysis.[137]

IV. PROPOSAL: A PUTATIVE CLASS REPRESENTATIVE'S INTEREST IN RECOUPING ATTORNEY'S FEES SHOULD PREVENT MOOTING OF A PUTATIVE CLASS ACTION DESPITE A DEFENDANT'S PRE-CERTIFICATION TENDER OF SETTLEMENT OFFER FUNDS

A. *Prior Rulings by the Supreme Court: The Potential of* Roper

Outside of the class action context, the Supreme Court has held that a plaintiff's interest in recouping attorney's fees incurred in litigation from the defendant is not sufficient to establish standing or to avoid mootness in the absence of any other stake in the outcome of the litigation.[138] Thus, at least for non–class action lawsuits, an interest in attorney's fees alone will not be enough to create a case or controversy that is sufficient to prevent mooting under Article III.[139]

Notwithstanding this established rule in non–class action cases, in *Deposit Guaranty National Bank v. Roper*, the Court indicated that attorney's fees *may* suffice to prevent mootness in a pre-certification class action lawsuit.[140] In *Roper*, the defendant in a class action lawsuit tendered to the representative plaintiffs the maximum amounts they would have been entitled to *after* the district court denied the plaintiffs certification of the class.[141] The plaintiffs rejected the defendant's offer and made a counteroffer in an attempt to reserve their right to appeal the court's certification ruling.[142] The district court nevertheless entered judgment for the plaintiffs in the amount of the defendant's offer and dismissed the action.[143] In response, the plaintiffs sought review of the certification ruling in the Fifth Circuit.[144] On appeal, the defendant argued that the case had been mooted by the entry of judgment in the plaintiffs' favor.[145] The Fifth Circuit rejected the defendant's

137 *Campbell-Ewald*, 136 S. Ct. at 684 (Alito, J., dissenting).

138 Steel Co. v. Citizens for Better Env't, 523 U.S. 83, 107 (1998) ("Obviously . . . a plaintiff cannot achieve standing to litigate a substantive issue by bringing suit for the cost of bringing suit. The litigation must give the plaintiff some other benefit besides reimbursement of costs that are a byproduct of the litigation itself.").

139 U.S. CONST. art. III, § 2; Lewis v. Cont'l Bank Corp., 494 U.S. 472, 480 (1990) ("[An] interest in attorney's fees is, of course, insufficient to create an Article III case or controversy where none exists on the merits of the underlying claim.").

140 Deposit Guar. Nat'l Bank. v. Roper, 445 U.S. 326, 340 (1980).

141 *Id.* at 329.

142 *Id.*

143 *Id.* at 330.

144 *Id.*

145 *Id.*

argument.[146]

The Supreme Court granted certiorari[147] and held that the district court's decision to deny class certification was a procedural ruling collateral to the substantive merits of the case; therefore, the plaintiffs could appeal the decision[148] if they retained a personal stake in the litigation despite the defendant's tender of settlement funds to the named plaintiffs satisfying their individual grievances.[149] The plaintiffs argued their personal stake was their economic interest in seeking to shift part of the costs of the litigation to unnamed members of the class who would benefit if the named plaintiffs were to prevail and ultimately certify the class.[150] For the Court, this was enough of an interest to sustain the named plaintiffs' right to appeal the district court's certification ruling.[151] Moreover, the Court explained that to hold otherwise would be to allow defendants to "pick . . . off" each individual named plaintiff until the statute of limitations for the claims of the class expired, thus frustrating the purpose of class actions and sanctioning inefficient use of judicial resources.[152]

One potential interpretation of the Supreme Court's ruling in *Roper* is that despite a defendant's pre-certification tendering of settlement offer funds to an individual putative class representative, the

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146 The Fifth Circuit reasoned that Rule 23 created in representative plaintiffs a fiduciary-type obligation to act in a representative capacity on behalf of the putative class by seeking certification at the outset of the litigation and by appealing an adverse certification ruling. For the Fifth Circuit, this obligation was enough of an interest to prevent mooting even though defendant had tendered settlement offer funds. *Id.* at 330–31.

147 *Id.* at 331.

148 *Id.* at 336 ("We view the denial of class certification as an example of a procedural ruling, collateral to the merits of a litigation, that is appealable after the entry of final judgment. The denial of class certification stands as an adjudication of one of the issues litigated. . . . [T]he respondents here, who assert a continuing stake in the outcome of the appeal, were entitled to have this portion of the District Court's judgment reviewed. We hold that the Court of Appeals had jurisdiction to entertain the appeal only to review the asserted procedural error, not for the purpose of passing on the merits of the substantive controversy.").

149 *Id.* ("Federal appellate jurisdiction is limited by the appellant's personal stake in the appeal.").

150 *Id.* ("Respondents have maintained throughout this appellate litigation that they retain a continuing individual interest in the resolution of the class certification question in their desire to shift part of the costs of litigation to those who will share in its benefits if the class is certified and ultimately prevails.").

151 *Id.* at 340 ("We conclude that on this record the District Court's entry of judgment in favor of named plaintiffs over their objections did not moot their private case or controversy, and that respondents' individual interest in the litigation—as distinguished from whatever may be their representative responsibilities to the putative class—is sufficient to permit their appeal of the adverse certification ruling.").

152 *Id.* at 339 ("To deny the right to appeal simply because the defendant has sought to 'buy off' the individual private claims of the named plaintiffs would be contrary to sound judicial administration. Requiring multiple plaintiffs to bring separate actions, which effectively could be 'picked off' by a defendant's tender of judgment before an affirmative ruling on class certification could be obtained, obviously would frustrate the objectives of class actions; moreover it would invite waste of judicial resources by stimulating successive suits brought by others claiming aggrievement.").

representative nonetheless retains a stake in the lawsuit—namely, her interest in spreading the cost of attorney's fees amongst the entire class—which prevents mooting of the putative class action.[153] An alternative view is that *Roper*'s ruling is limited to the procedural interests involved, i.e., that a representative plaintiff may appeal a district court's denial of class certification even where the defendant has made an offer of settlement in satisfaction of the representative plaintiff's individual grievance.

An analysis of the Supreme Court's decisional law in this area suggests that the latter interpretation of *Roper* is correct. For example, the Court has long held that after a class has been certified, a class action is not rendered moot by the mooting of the representative plaintiff's individual claim.[154] The Court extended this principle in *United States Parole Commission v. Geraghty*[155]—decided on the same day as *Roper*[156]—by holding that where the district court has *denied* certification, the class action will not be mooted by the subsequent mooting of the representative plaintiff's individual claim if the denial of certification is reversed on appeal.[157] This ruling suggests that the personal stake in *Roper* which allowed the representative plaintiff to appeal was her interest in reversing the district court's procedural denial of class certification rather than any substantive economic stake in shifting the cost of attorney's fees.[158] Thus, any language in *Roper* regarding the plaintiff's interest in shifting the cost of attorney's fees was mere dictum.[159] The Court's analysis in *Genesis Healthcare Corp. v. Symczyk* supports this reading of *Roper* as well because the *Genesis Healthcare* Court confirmed that *Geraghty* is only applicable where the representative plaintiff's claim remains live at the time the district court

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153 This interpretation of *Roper* is supported by the fact that the *Roper* Court found the putative class representative plaintiff's economic interest in her desire to shift part of the costs of the litigation to unnamed members of the class who would benefit if she prevailed and ultimately certified the class was enough of an interest to allow the plaintiff to appeal a district court's denial of class certification. *See supra* text accompanying notes 148–51.

154 Sosna v. Iowa, 419 U.S. 393, 401 (1975).

155 U.S. Parole Comm'n v. Geraghty, 445 U.S. 388 (1980).

156 *See id.* at 388; *Roper*, 445 U.S. at 326.

157 *Geraghty*, 445 U.S. at 404 ("[A]n action brought on behalf of a class does not become moot upon expiration of the named plaintiff's substantive claim, even though class certification has been denied. The proposed representative retains a 'personal stake' in obtaining class certification sufficient to assure that Art. III values are not undermined. If the appeal results in reversal of the class certification denial, and a class subsequently is properly certified, the merits of the class claim then may be adjudicated pursuant to the holding in *Sosna*.").

158 *Id.* ("Our holding is limited to the appeal of the denial of the class certification motion. A named plaintiff whose claim expires may not continue to press the appeal on the merits until a class has been properly certified. If, on appeal, it is determined that class certification properly was denied, the claim on the merits must be dismissed as moot." (citing *Roper*, 445 U.S. at 336–37)).

159 Alexander H. Schmidt, *Why the Supreme Court's Next Mootness Decision Could Doom Rule 23's Private Attorney General Paradigm*, 30 ANTITRUST 75 (2016), http://www.whafh.com/wp-content/uploads/2016/03/Antitrust-Spring16-Schmidt.pdf.

denies class certification.[160] Further, the majority's opinion in *Campbell-Ewald* did not rely on *Roper* to support its holding that a pre-certification settlement offer would not moot a representative plaintiff's putative class action lawsuit.[161]

The Supreme Court's treatment of *Roper* in subsequent class action mootness cases such as *Geraghty*,[162] *Genesis Healthcare*,[163] and *Campbell-Ewald*[164] suggests that *Roper*'s language regarding a representative plaintiff's interest in shifting the cost of attorney's fees to the entire class and the ill effects of defendants' "pick off" strategies was mere dictum.[165] Thus, the theory that attorney's fees constitute an interest that could prevent mooting of the plaintiff's putative class action despite the defendant's tender of settlement funds to the plaintiff cannot be substantially grounded in *Roper* for support.

B. *Using the* Campbell-Ewald *Majority and Dissenting Opinions to Prevent Mootness*

As discussed above, it would be misguided to use *Roper* to substantiate the theory that the plaintiff's interest in recouping attorney's fees is sufficient to prevent mooting despite a defendant's tender of settlement offer funds.[166] However, as explained below, the majority and dissenting opinions in *Campbell-Ewald*, taken together, provide ample support for this theory.

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160 *See* Genesis Healthcare Corp. v. Symczyk, 133 S. Ct. 1523, 1530 (2013). ("*Geraghty* is inapposite, because the Court explicitly limited its holding to cases in which the named plaintiff's claim remains live at the time the district court denies class certification. Here, respondent had not yet moved for 'conditional certification' when her claim became moot, nor had the District Court anticipatorily ruled on any such request. Her claim instead became moot prior to these events, foreclosing any recourse to *Geraghty*. There is simply no certification decision to which respondent's claim could have related back." (citations omitted)). It should also be noted that in *Genesis Healthcare*, the Court did not find *Roper* dispositive in the context of collective lawsuits, as opposed to class actions. *Id.* at 1531–32; *see also supra* Section II.A.

161 *See* Campbell-Ewald Co. v. Gomez, 136 S. Ct 663 (2016); Schmidt, *supra* note 159, at 78 ("On January 20, 2016, the Court decided in Gomez's favor, affirming 6–3. Justice Ginsburg's five-member majority decision, which both Justices Kennedy and Breyer joined, was confined to the narrow issue presented—whether an unaccepted offer could moot a named plaintiff's individual claim—and is notable as much for what it omits as what it says. In finding that unaccepted offers cannot moot claims, the majority quoted the portion of Justice Kagan's *Genesis Healthcare* dissent that relied on Rule 68's terms and general contract principles and stated, 'We now adopt Justice Kagan's analysis,' but it did not mention Justice Kagan's reliance on *Roper* or even cite that case. Nor did the majority discuss the most potentially consequential aspect of *Genesis Healthcare*'s dicta deconstructing *Roper*, namely, whether a class representative with moot individual claims still has an Article III stake in representing absent members of a putative class that is sufficient to avoid having the class's claims mooted.").

162 *See supra* text accompanying notes 155–58.

163 *See supra* note 160 and accompanying text.

164 *See supra* text accompanying note 161.

165 *See* Schmidt, *supra* note 159, at 74; *see also supra* notes 154–60 and accompanying text.

166 *See supra* note 165 and accompanying text.

The rule adopted by the majority in *Campbell-Ewald* was that a defendant's mere offer to provide the putative class representative with all damages requested in the representative's complaint before certification of the class would not suffice to moot the putative class action.[167] Although Chief Justice Roberts and Justice Alito did not support adoption of this rule,[168] they explained that even under such a rule, a defendant's tender of a representative's requested damages pre-certification of a class will result in the mooting of the putative class action because the representative will no longer have any dispute to resolve with defendant since she has received all requested relief.[169] However, where the putative class representative requests attorney's fees as well as damages from the defendant, the defendant will be unable to tender complete relief to the representative.[170] This is because even if the defendant tenders the representative's requested damages, it cannot tender her attorney's fees because it will not know what they are with absolute certainty.[171]

In *Campbell-Ewald*, there were no attorney's fees at issue, because the statute on which the putative class representative's claim was based did not provide for an attorney's fee award.[172] Presumably, however, Chief Justice Roberts and Justice Alito would also support the idea that once the defendant tenders to the class representative her attorney's fees plus any requested damages, the putative class action would be mooted because complete relief will have been granted to the class representative, eradicating any case or controversy.[173]

However, the defendant will never know with certainty what the putative class representative's attorney's fees will be because attorney's fees in class actions are not easy to estimate.[174] Defendants could rely on empirical studies that provide estimates of the portion of class action

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167 Campbell-Ewald Co. v. Gomez, 136 S. Ct. 663, 672 (2016); *supra* text accompanying notes 101–06.

168 *See Campbell-Ewald*, 136 S. Ct. at 678 (Roberts, C.J., dissenting); *id.* at 683 (Alito, J., dissenting); *supra* notes 108–19 and accompanying text.

169 *See Campbell-Ewald*, 136 S. Ct. at 678 (Roberts, C.J., dissenting); *id.* at 683 (Alito, J., dissenting); *supra* Section III.B.

170 *See infra* notes 174–77 and accompanying text (explaining why a defendant will be unable to provide complete relief to individual pre-certification putative class action plaintiffs in instances where the plaintiffs seek payment of attorney's fees in their complaint as well as damages).

171 *See infra* notes 174–77 and accompanying text.

172 *Campbell-Ewald*, 136 S. Ct. at 668 ("The settlement offer did not include attorney's fees, Campbell observed, because the TCPA does not provide for an attorney's-fee award.").

173 *See id.* at 678 (Roberts, C.J., dissenting); *id.* at 683 (Alito, J., dissenting); *supra* text accompanying notes 107–19.

174 Theodore Eisenberg & Geoffrey P. Miller, *What Is a Reasonable Attorney Fee? An Empirical Study of Class Action Settlements*, 31 CORNELL L.F. 2 (2003) ("Determining an appropriate fee is a difficult task facing trial court judges in class action litigation. But courts rarely rely on empirical research to assess a fee's reasonableness, due, at least in part, to the relative paucity of available information. Existing empirical studies of attorney fees in class action cases are limited in scope, and generally do not control for important variables.").

settlement amounts which consist of plaintiff's attorney's fees.[175] But such numbers are mere estimates of what a particular class representative's attorney's fees could be and cannot be relied upon to determine with certainty the exact amount of attorney's fees each plaintiff has incurred pre-certification of the class. Further, courts have different methodologies for calculating attorney's fees.[176]

If attorney's fees are difficult to estimate, it is reasonable to assume that upon tendering settlement offer funds to the putative class representative, any estimation a defendant makes of the representative's attorney's fees will be off by some amount. When the defendant tenders settlement funds to the class representative but underestimates her attorney's fees, the class representative will not have been afforded complete relief and—even under Chief Justice Roberts's and Justice Alito's approaches—the putative class action should not be mooted.[177]

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175 *See, e.g.*, Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. EMPIRICAL LEGAL STUD., 811 (2010) (study showing trends in class action settlement amounts, including attorney's fees amounts agreed to by defendants in the settlements). There is some indication that there exists a relationship between attorney's fees and class size. Theodore Eisenberg & Geoffrey P. Miller, *Attorneys' Fees and Expenses in Class Action Settlements: 1993-2008* 3 (Cornell Law Faculty Working Papers, Paper No. 64, 2009). The Eisenberg and Miller study shows that there is a substantial relationship between attorney's fees and class recovery size: "regardless of the methodology for calculating fees ostensibly employed by the courts, the overwhelmingly important determinant of the fee was simply the size of the recovery obtained by the class." *Id.* Defendants could point to this premise in an effort to show that attorney's fees are in fact somewhat easy to estimate, since the size of a class will help determine the fee. However, if a defendant hopes to tender settlement offer funds pre-certification of a class, there will be no class and thus no class size from which a defendant can extrapolate a corresponding attorney's fee amount.

176 Sara Randazzo, *Lawyers' Class-Action Payouts Face Court Challenge*, WALL ST. J. (Nov. 27, 2015 1:47 PM), http://www.wsj.com/articles/lawyers-class-action-payouts-face-court-challenge-1448650039?mg=id-wsj ("Some federal circuits require the percentage method be used in class actions where a 'common fund' is being split between attorneys and their clients. But two states have rejected the use of percentages in such cases, and in New York earlier this year, a federal judge denied a proposed 33% fee in favor of hourly compensation. The final fees in class actions are ultimately up to judges."). There are two rival approaches used by courts to determine the appropriate amount of attorney's fees: the lodestar method and the percentage method. The lodestar method of calculating attorney's fees starts with ascertaining the number of adequately documented hours expended on the litigation and then multiplying this number by a reasonable hourly rate. *See* Hensley v. Eckerhart, 461 U.S. 424, 433 (1983); Randazzo, *supra* note 176. The percentage-of-recovery method applies a particular percentage to the total amount of recovery made available to the class. *See* Waters v. Int'l Precious Metals Corp., 190 F.3d 1291, 1295–98 (11th Cir. 1999) (affirming a fee award of 33.3% of the total amount made available to the class and determining that attorney's fees may be determined based on the total fund, not just actual payout to the class); Adam Moskowitz & Rachel Sullivan, *The Right Way to Calculate Attorney's Fees in Class Actions*, LAW360 (Dec. 4, 2015 10:45 AM), http://www.law360.com/articles/733534/the-right-way-to-calculate-atty-fees-in-class-action;
Randazzo *supra* note 176. However, both of these methods are triggered and applied if a class has been certified and in the scenarios explored in this Note, the putative class representative plaintiff has not yet filed a motion to certify the class, therefore certification has not yet been granted.

177 *See* Campbell-Ewald Co. v. Gomez, 136 S. Ct. 663, 678 (Roberts, C.J., dissenting); *id.* at 683 (Alito, J., dissenting); *supra* Section III.B. It should be noted that if the defendant *overestimates* the plaintiff's attorney's fees upon tendering settlement offer fees to the plaintiff,

Class action defendants may argue that tendering funds to the putative class representative plaintiff in the amount she has claimed in damages, informing her that it will pay any and all attorney's fees she has incurred, and requesting an invoice indicating the amount of her attorney's fees will effectively provide the individual class representative with all requested relief. Chief Justice Roberts and Justice Alito likely would be convinced that, in this scenario, the putative class representative has been afforded complete relief.[178]

However, when the defendant informs the class representative plaintiff that it will pay her attorney's fees, but does not actually tender the fees to her, all the defendant has done is make a mere *offer*. And, under the rule adopted by the majority in *Campbell-Ewald*, a mere *offer* to provide to the putative class representative her requested relief does not moot the putative class action.[179]

The consequences of the majority's holding in *Campbell-Ewald* are that if a putative class representative's complaint seeks damages as well as attorney's fees from the defendant, defendants can tender damages to the class representative, but can only make a mere offer to pay the representative's attorney's fees since they are difficult—if not impossible—to estimate.[180] Since an offer to provide relief to a pre-certification putative class representative can never moot the putative class action,[181] a class representative's request for attorney's fees as well as damages can prevent mooting of the putative class action *even if* the defendant has tendered to the representative plaintiff sufficient funds to satisfy her individual grievance.

Defendants may argue that adoption of this proposal will unfairly expose them to liability for hefty damages to an entire class despite their willingness to compensate the individual putative class representative for her injuries because, without mooting, the action will likely proceed long enough to reach class certification.[182] However, a holding that tendering of offer funds to a pre-certification putative class representative does not moot the action will not necessarily disadvantage the defendant if certification is truly unwarranted because

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the plaintiff will have been afforded complete relief (and more), and thus the case may very well be mooted.

178 Chief Justice Roberts and Justice Alito's dissents support the proposition that a defendant's tender will moot the putative class action, which suggests that they are receptive to finding mootness upon a tender of damages with an expression by the defendant that it will pay all of the plaintiff's requested attorney's fees. See Section III.B for a discussion of Chief Justice Roberts and Justice Alito's dissents in *Campbell-Ewald*.

179 *See Campbell-Ewald*, 136 S. Ct. at 672; *supra* text accompanying notes 101–07.

180 *See supra* notes 173–76 and accompanying text (discussing the difficulty of estimating attorney's fees).

181 *Campbell-Ewald*, 136 S. Ct. at 672; *supra* text accompanying notes 101–06 (under the rule adopted by the majority in *Campbell-Ewald*, a mere offer to provide to the named plaintiff her requested relief does not moot the putative class action).

182 *See supra* text accompanying note 18.

under Federal Rule of Civil Procedure 23(f), defendants who believe a district court's decision to certify a class is misguided are entitled to interlocutory appeal of such a decision.[183] Therefore, a defendant can avoid a large unwarranted payout to an entire class of individuals by immediately appealing the district court's decision to certify the class.[184] Further, Federal Rule of Civil Procedure 68 is a procedural safeguard against plaintiffs' prolonging of the adjudicatory process for longer than is necessary.[185] Under Rule 68, if a plaintiff rejects a settlement offer, and the court later determines that the defendant was liable to the plaintiff for less than the settlement offer, the plaintiff will have to pay post-offer costs incurred by the defendant.[186] This will incentivize pre-certification putative class representatives to accept offers made by defendants because to reject them would be to bear the risk of paying the defendant's post-offer costs.[187]

Finally, adopting this Note's proposal will serve the overall purposes of class actions generally because plaintiffs whose claims are otherwise too small to warrant individual litigation will be able to continue to provide relief for themselves and others similarly situated and judicial resources will not be wasted.[188] But if tendering of damages to the pre-certification putative class action plaintiff is instead held to moot the putative class action, then defendants will be incentivized to pick off each named plaintiff of a class, until the statute of limitations on the class's claim runs out.[189] This will save defendants time and money, but it will likely leave many members of the aggrieved class without relief.

CONCLUSION

The question left unresolved by the Supreme Court in *Campbell-Ewald*—namely, whether a tender of settlement offer funds to a putative class representative will moot a pre-certification putative class action—is of great consequence. If the Court ultimately adopts a rule that a tender of offer funds to a pre-certification putative class representative does act to moot the putative class action, defendants will save money and the individual representative plaintiff will have been granted the relief she sought. However, other members of the putative class will be

183 *See supra* notes 44–46 and accompanying text.

184 *See supra* notes 44–46 and accompanying text.

185 FED. R. CIV. P. 68(d) ("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."); *see also supra* notes 58–59 and accompanying text.

186 *See supra* text accompanying notes 58–59.

187 *See supra* text accompanying notes 58–59.

188 *See supra* Section I.B (discussing the purpose of class actions).

189 *See supra* text accompanying notes 64, 152.

left without relief and they will bring suits seeking relief from the defendant, who will likely work quickly to pick off each member of the class that brings a class action before any of them have a chance to certify the class. Most likely, many members of the putative class will never be granted relief due to the eventual expiration of the applicable statute of limitations.

These consequences may be enough to discourage the Court from adopting a rule which dictates that a tender of settlement offer funds moots a putative class action. But even if they are not, the putative class representative's interest in attorney's fees will always prevent mooting in such instances. If and when the Court is confronted with this question in a future case, if the putative class representative demands both attorney's fees *and* damages, the Court need not look further than the rule it adopted in *Campbell-Ewald* to provide an answer. This is because the putative class representative's demand for attorney's fees cannot be as easily satisfied as her demand for damages since attorney's fees are virtually impossible to accurately estimate, rendering the defendant incapable of actually tendering attorney's fees to the putative class representative. All that the defendant will be capable of doing in such a scenario is offering to pay all of the putative class representative's demanded attorney's fees. When the defendant does so, it is making an offer to provide the putative class representative with complete relief and under the majority's rule in *Campbell-Ewald*, a mere offer to provide relief *cannot* act to moot the putative class action. Thus, if a putative class representative includes a demand for attorney's fees in her complaint, a defendant will not be able to tender such fees to the representative, but will only be able to offer to pay them and any such offer cannot moot the putative class action case under the rule adopted in *Campbell-Ewald*.