

**SUPPLEMENTAL COMMENTS**  
**TO THE ADVISORY COMMITTEE ON CIVIL RULES**  
**RE: PROPOSED AMENDMENTS TO FEDERAL RULES OF**  
**CIVIL PROCEDURE RULE 23**

**On Behalf of**

**NATIONAL CONSUMER LAW CENTER, INC. AND NATIONAL ASSOCIATION OF**  
**CONSUMER ADVOCATES**

**February 15, 2017**

The National Consumer Law Center (“NCLC”) and the National Association of Consumer Advocates (“NACA”) previously have submitted comments to certain of the proposed amendments to Federal Rules of Civil Procedure Rule 23 (“Rule 23”) and appeared to testify at the Advisory Committee on Civil Rules (“Advisory Committee”) hearing held in Washington, D.C., on November 3, 2016. At the November 3<sup>rd</sup> hearing, however, the Advisory Committee requested an update on the case law relating to class action practice subsequent to the Supreme Court’s decision in the case of *Campbell-Ewald Co. v. Gomez* (“*Campbell-Ewald*”).<sup>1</sup> NCLC and NACA appreciate the opportunity that the Advisory Committee and its Rule 23 Subcommittee have given us to participate throughout your deliberative process and to contribute to the consideration of potential amendments to Rule 23. We therefore are pleased to submit these supplemental comments in response to the Advisory Committee’s inquiry.

**I. INTRODUCTION**

Since the real purpose of extending offers or tenders of judgment to putative class representatives is to “pick off” the representative and thereby end the case by simply extending a

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<sup>1</sup> *Campbell-Ewald Co. v. Gomez*, \_\_\_ U.S. \_\_\_, 136 S. Ct. 663, 672, 193 L. Ed. 2d 571 (2016). Specifically, Professor Marcus inquired whether “since the Supreme Court’s *Campbell-Ewald* decision in January, are you aware if there’s been a pickup of pick off, so to speak, or has it gone away? Transcript Pg. 62.

small measure of relief to one or a few individuals, the most common scenario confronted by the courts is when a tender of judgment or Rule 68 offer is made prior to the plaintiff having had a fair opportunity to move to certify the class, or at least before the court has ruled on a certification motion. Some aspects of this issue were left unresolved by *Campbell-Ewald* and the preceding Supreme Court decision in *Genesis Healthcare Corp. v. Symczyk* (“*Genesis Healthcare*”).<sup>2</sup> As a result, the question of whether a class action can be defeated and the case dismissed by picking off the named plaintiff or plaintiffs will continue to be litigated in the next several years.

The clear, early prevailing trend in cases that have been decided by courts since *Campbell-Ewald*, however, has been to allow a putative class representative who has rejected a tender or Rule 68 offer a reasonable opportunity to move to certify a class, regardless of the effect the tender or offer has on the named plaintiff’s individual standing, thereby limiting the incentives for defendants to engage in pick off efforts.

This trend should not be surprising since for some period of time prior to *Campbell-Ewald*, a majority of federal courts believed that classes could not be so easily defeated. Behind this belief was the recognition of the salutary purposes informing Rule 23.<sup>3</sup> “One of the paramount values in our system of justice is efficiency. Class certification enables courts to treat common claims together, obviating the need for repeated adjudications of the same issues.”<sup>4</sup> Another important goal of the class action device is to “enhance the means for private attorney general enforcement and the resulting deterrence of wrongdoing.”<sup>5</sup>

A tender or offer of judgment to the named plaintiff in a putative class action runs counter to

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2 *Genesis Healthcare Corp. v. Symczyk*, \_\_\_ U.S. \_\_\_, 133 S. Ct. 1523, 185 L. Ed. 2d 636 (2013).

3 *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 809, 105 S. Ct. 2965, 86 L. Ed. 2d 628 (1985); *Deposit Guar. Nat’l Bank v. Roper*, 445 U.S. 326, 338 n.9, 100 S. Ct. 1166, 63 L. Ed. 2d 427 (1980).

4 *In re Gen. Motors Corp. Pick-up Truck Fuel Tank Products Liab. Litig.*, 55 F.3d 768, 783 (3d Cir. 1995).

5 *Id.* at 784. *Accord* *Boles v. Moss Codilis, L.L.P.*, 2011 WL 4345289 (W.D. Tex. Sept. 15, 2011).

the goals of Rule 23, because it is typically made to lay the groundwork for an argument that the class action cannot proceed because the case is moot. The argument has two critical components: first, that the offer of complete relief to the named plaintiff moots his or her individual claim whether or not the offer is rejected; and, second, that if the named plaintiff's individual claims are moot, then neither the plaintiff's interest in representing a class nor the claims of the absent members of an as-yet uncertified class present the court with a live case or controversy.

## II. SUPREME COURT AND COURT OF APPEALS DECISIONS PRIOR TO GOMEZ LARGELY RETAIN THEIR VITALITY

In *Deposit Guaranty National Bank v. Roper*,<sup>6</sup> the Supreme Court's initial examination of the subject, the evident conflict between the purposes of Rule 23 and permitting a stratagem aimed at derailing class actions by "picking off" the named plaintiff to succeed, led the Supreme Court to reject a claim of mootness. In *Roper* the Court considered whether putative class representatives retain a live interest in appealing the denial of class certification subsequent to the entry of judgment in their favor over their objections. The district court had denied class certification and later entered judgment for the named plaintiffs based on the defendant's offer of the maximum amount that each named plaintiff could have recovered in the action. The Court held that the plaintiffs nevertheless retained an interest in the class action so that their appeal of the denial of class certification was not moot. The Court wrote:

A district court's ruling on the certification issue is often the most significant decision rendered in these class-action proceedings. 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.<sup>8</sup>

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<sup>6</sup> *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 63 L. Ed. 2d 427, 100 S. Ct. 1166 (1980).

<sup>8</sup> *Id.* 445 U.S. at 339.

Justice Rehnquist further stated in his concurring opinion:

The distinguishing feature here is that the defendant has made an unaccepted offer of tender in settlement of the individual putative representative's claim. The action is moot in the Art. III sense only if this Court adopts a rule that an individual seeking to proceed as a class representative is required to accept a tender of only his individual claims. So long as the court does not require such acceptance, the individual is required to prove his case and the requisite Art. III adversity continues. Acceptance need not be mandated under our precedents since *the defendant has not offered all that has been requested in the complaint (i.e., relief for the class)* and any other rule would give the defendant the practical power to make the denial of class certification questions unreviewable.<sup>9</sup>

Likewise, in the decision reviewed by the Supreme Court in *Roper*, the Fifth Circuit had noted that the “notion that a defendant may short-circuit a class action by paying off the class representatives either with their acquiescence, or, as here, against their will, deserves short shrift. Indeed, were it so easy to end class actions, few would survive.”<sup>10</sup>

The policies expressed in the *Roper* opinions would appear to support the view that an offer or tender of judgment does not foreclose a plaintiff from seeking to represent a class without regard to the stage of the litigation at which the offer was made. The holding of the case, however, was that a named plaintiff could appeal from an allegedly erroneous denial of class certification (once final judgment had been entered) when the offer of complete relief, and consequent entry of judgment on the named plaintiff's individual claims, came after the ruling on class certification. Strictly speaking, it did not address what occurs at the district court prior to any judgment being entered that might be appealed. The Supreme Court's decision the same day in *United States Parole Commission v. Geraghty*<sup>11</sup> likewise held that a named plaintiff whose individual claim becomes moot following the denial of class certification may maintain an appeal challenging the denial of certification.

The argument that the mootness holding in *Genesis Healthcare*—finding the case moot

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<sup>9</sup> *Id.* 445 U.S. at 341–342 (emphasis supplied).

<sup>10</sup> *Roper v. Conserve, Inc.*, 578 F.2d 1106, 1110 (5th Cir. 1978), *cert. granted*, 440 U.S. 945 (1979), *aff'd sub nom. Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 100 S. Ct. 1166, 63 L. Ed. 2d 427 (1980), *rev'd on other grounds*, 319 F.3d 732 (5th Cir. 2003).

<sup>11</sup> *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 100 S. Ct. 1202, 63 L. Ed. 2d 479 (1980).

because the individual named plaintiff’s claim had been mooted by a Rule 68 offer of judgment—does not apply to class actions is supported not only by *Roper* and *Geraghty* but also from within the decision itself. A class action complaint, unlike a collective action complaint, asserts claims on behalf of a juridically created entity—the class—that are not satisfied by relief to the named plaintiff. Putative class representatives have an interest in representing the class and an economic interest in the class action. The majority opinion goes out of its way on a number of occasions to distinguish between collective actions asserted under section 216(b) of the Fair Labor Standards Act (FLSA) and cases pursued as class actions under Rule 23 of the Federal Rules of Civil Procedure, noting that “Rule 23 actions are fundamentally different from collective actions under the FLSA.”<sup>12</sup>

The Court in *Genesis Healthcare* pointed out that “a putative class acquires an independent legal status once it is certified under Rule 23 . . . [but] ‘conditional certification’ [under the FLSA] does not produce a class with an independent legal status. . . . So even if respondent were to secure a conditional certification ruling on remand, nothing in that ruling would preserve her suit from mootness.”<sup>13</sup> The Court’s conclusion on this point reflected the fact that named plaintiffs in FLSA collective actions, unlike named plaintiffs in class actions, represent others only if those employees affirmatively opt in as additional individual plaintiffs; unlike class action plaintiffs, they have no claim to a right to represent others by reason of having filed suit and obtained class certification.

Accordingly, the Court in *Genesis Healthcare* did not have to consider the application of the analysis of the named plaintiff’s right to represent a class in *Geraghty*.<sup>14</sup> Instead, *Genesis Healthcare* observed that *Geraghty*’s holding that “a corrected ruling on appeal ‘relates back’” to the erroneous denial of class certification did not apply because there was “no certification decision to which

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12 *Genesis Healthcare Corp. v. Symczyk*, \_\_\_ U.S. \_\_\_, 133 S. Ct. 1523, 1529, 185 L. Ed. 2d 636 (2013).

13 *Id.* 133 S. Ct. at 1530.

14 *U.S. Parole Comm’n v. Geraghty*, 445 U.S. 388, 100 S. Ct. 1202, 63 L. Ed. 2d 479 (1980).

respondent’s claim could have related back.”<sup>15</sup> In contrast, *certification* of a class clearly preserves a suit from being rendered moot based upon an individual settlement or Rule 68 offer,<sup>16</sup> and relation of such a certification decision back to the time of filing of a class action complaint can thus establish the needed case or controversy throughout the pendency of the action.<sup>17</sup>

Nonetheless, defendants since *Genesis Healthcare* have pointed to passages in the majority’s opinion in that case that appear to limit or call into question the holdings of *Roper* and *Geraghty*,<sup>18</sup> as well as other decisions involving class actions, as evidence that the Court’s mootness analysis should be extended to class actions as well.<sup>19</sup> Similarly, in *Campbell-Ewald*, Chief Justice Robert’s dissent kept the issue alive by stating that the “Court does not reach the question whether Gomez’s claim for class relief prevents this case from becoming moot” and that “under this Court’s precedents Gomez does not have standing to seek relief based solely on the alleged injuries of others, and Gomez’s interest in sharing attorney’s fees among class members or in obtaining a class incentive award does not create Article III standing.”<sup>20</sup>

By contrast, however, in her *Genesis Healthcare* dissent, Justice Kagan wrote that nothing allows a court, “prior to certification, [to] eliminate the entire suit by acceding to a defendant’s proposal to make only the named plaintiff whole.”<sup>21</sup> Likewise, and most recently, the majority

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15 *Genesis Healthcare Corp. v. Symczyk*, \_\_\_ U.S. \_\_\_, 133 S. Ct. 1523, 1530, 185 L. Ed. 2d 636 (2013) (quoting *United States Parole Comm’n v. Geraghty*, 445 U.S. 388, 404, n.11, 100 S. Ct. 1202, 63 L. Ed. 2d 479 (1980)).

16 *Sosna v. Iowa*, 419 U.S. 393, 399, 95 S. Ct. 553, 42 L. Ed. 2d 532 (1975) (“When the [d]istrict [c]ourt certified the propriety of the class action, the class of unnamed persons described in the certification acquired a legal status separate from the interest asserted by [plaintiff].”). *See also* *Deposit Guar. Nat’l Bank v. Roper*, 445 U.S. 326, 342, 63 L. Ed. 2d 427, 100 S. Ct. 1166 (1980) (“There is general agreement that, if a class has been properly certified, the case does not become moot simply because the class representative’s individual interest in the merits of the litigation has expired. In such a case the absent class members’ continued stake in the controversy is sufficient to maintain its viability under Art. III.”); *Roper v. Consurve, Inc.*, 578 F.2d 1106 (5th Cir. 1978), *cert. granted*, 440 U.S. 945 (1979), *aff’d sub nom.* *Deposit Guar. Nat’l Bank v. Roper*, 445 U.S. 326, 100 S. Ct. 1166, 63 L. Ed. 2d 427 (1980), *rev’d on other grounds*, 319 F.3d 732 (5th Cir. 2003).

17 *See* *Stein v. Buccaneers Ltd. P’ship*, 772 F.3d 698, 705 (11th Cir. 2014).

18 *U.S. Parole Comm’n v. Geraghty*, 445 U.S. 388, 100 S. Ct. 1202, 63 L. Ed. 2d 479 (1980).

19 *See* *Genesis Healthcare Corp. v. Symczyk*, \_\_\_ U.S. \_\_\_, 133 S. Ct. 1523, 1529–1532, 185 L. Ed. 2d 636 (2013).

20 *Campbell-Ewald Co. v. Gomez*, \_\_\_ U.S. \_\_\_, 136 S. Ct. 663, 679 fn 1, 193 L. Ed. 2d 571 (2016)

21 *Id.* 133 S. Ct. at 1536.

opinion in *Campbell-Ewald* stated, even more forcefully, that “a would-be class representative with a live claim of her own *must* be accorded a fair opportunity to show that certification is warranted.”<sup>22</sup>

The issue thus remains alive and to be decided by the Supreme Court itself.

At the present, however, a few points seem paramount. First, in many federal Circuits, the precepts of *Roper* and *Geraghty* remain the operative law. In fact, no federal Circuit has accepted the argument that a class must already be certified before the offer of complete relief is tendered to the named plaintiff in order to avoid mootness.

Prior to *Campbell-Ewald*, when addressing Rule 68 offers of judgment, many courts had looked, implicitly or explicitly, to the judicial value of having claims affecting numerous individuals heard on a class-wide basis and held that a putative class action is not rendered moot by an unaccepted complete individual offer of judgment, even if the offer is made before a class motion has been filed, provided that the plaintiff has not been dilatory in seeking class certification. Although the views in these decisions as to principles of efficiency usually assumed the possibility that an unaccepted Rule 68 offer of judgment could moot a plaintiff’s case if a plaintiff had been dilatory, now that the Supreme Court has held that an unaccepted Rule 68 offer of judgment does not moot a case, it makes the principles of these decisions even stronger.

A well-reasoned decision by the Third Circuit paved the way for these decisions.<sup>23</sup> In *Weiss v. Regal Collections*, the court held that, “[a]bsent undue delay in filing a motion for class certification, therefore, where a defendant makes a Rule 68 offer to an individual claim that has the effect of mooting possible class relief asserted in the complaint, the appropriate course is to relate the certification motion back to the filing of the class complaint.”<sup>24</sup> *Weiss* wisely avoided the problem of

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22 *Campbell-Ewald Co. v. Gomez*, \_\_\_ U.S. \_\_\_, 136 S. Ct. 663, 672, 193 L. Ed. 2d 571 (2016) (emphasis added).

23 *Weiss v. Regal Collections*, 385 F.3d 337 (3d Cir. 2004).

24 *Id.* at 348. The Third Circuit since has stated that *Campbell-Ewald* did not overrule *Weiss* regarding the relation

making the timing of the motion for class certification determinative. It recognized that doing so would create an incentive for the plaintiff to rush to move for class certification, perhaps without proper discovery, in order to avoid offers of judgment that might moot the action.

The Fifth Circuit, drawing upon *Weiss v. Regal Collections* and the Supreme Court's *Roper* decision, likewise held that, as long as the plaintiff does not unduly delay in moving for collective action or class certification, the ultimate decision on such a motion should relate back to the filing of the complaint and avoid mootness even if the named plaintiff's individual claims became moot before the motion was filed.<sup>25</sup> The First, Ninth and Tenth Circuits also held that a named plaintiff in a proposed class action for monetary relief may proceed to seek class certification when an unaccepted offer of judgment is tendered in satisfaction of the plaintiff's individual claim before the court could reasonably be expected to rule on a timely class certification motion.<sup>26</sup>

Given the majority circuit view on this topic, it is unsurprising that, even prior to *Campell-Ewald*, the large majority of district courts addressing the issue also have held that an unaccepted

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back exception to mootness. *Richardson v. Bledsoe*, 829 F.3d 273, 283 (3d Cir 2016). The *Bledsoe* decision addressed whether the plaintiff had a fair opportunity to move for class certification, and whether plaintiff had engaged in undue delay.

25 *Murray v. Fidelity Nat'l Fin. Inc.*, 594 F.3d 419 (5th Cir. 2010); *Sandoz v. Cingular Wireless, L.L.C.*, 553 F.3d 913 (5th Cir. 2008). *See also Zeidman v. J. Ray McDermott & Co.*, 651 F.2d 1030 (5th Cir. 1981).

26 *Bais Yaakov of Springs Valley v. ACT, Inc.*, 798 F.3d 45 (1st Cir 2015); *Pitts v. Terrible Herbst, Inc.*, 653 F.3d 1081, 1091–1092 (9th Cir. 2011); *Lucero v. Bureau of Collection Recovery, Inc.*, 639 F.3d 1239, 1250 (10th Cir. 2011). *See also Russell v. United States*, 661 F.3d 1371 (Fed. Cir. 2011) (following *Pitts* as providing law of regional circuit and noting that, while named plaintiff's individual claim was mooted by tender of a full refund, neither this nor refunds to some but not all of the other putative class members mooted putative class action).

Until 2015, the Seventh Circuit had not agreed with this approach to class actions. In *Damasco v. Clearwire Corp.*, 662 F.3d 891 (7th Cir. 2011), the court held that the dispositive consideration is the timing of the offer in relation to the motion for class certification: if no motion for class certification has been filed before the offer is made, the putative class action is moot; but if a motion for certification is on file—even a pro forma motion filed simultaneously with the complaint and not expected to be ruled on until much later—the class claims may proceed. *Id.* at 896.

This decision had led plaintiffs at the outset of cases to file “place holder” motions for class certification, which in turn were almost invariably denied without prejudice or otherwise held in abeyance—a kind of legal fiction. However, in *Chapman v. First Index, Inc.*, 796 F.3d 783 (7th Cir. 2015), the Seventh Circuit explicitly overruled *Demasco*.

offer, made before a certification motion or ruling, does not moot the class claim.<sup>27</sup> State courts presented with the conflict between an offer of settlement or judgment and a putative class action frequently used this analysis, too, and generally do not find mootness.<sup>28</sup>

*Genesis Healthcare* prompted vigorous efforts by class action defendants to argue that an offer of judgment for complete relief to a named plaintiff moots the plaintiff's efforts to represent a class if the offer is made at any time before the class is certified. The Supreme Court's holding that an FLSA collective action cannot proceed if the named plaintiff's individual claim becomes moot before any other plaintiffs have opted in rested largely on the differences between FLSA collective actions and Rule 23 class actions. The argument proffered is that a named class representative does not have any special right or standing to assert a claim beyond that of his or her own—and it cannot be that a procedural rule (Rule 23) designed to amalgamate claims can itself create a substantive right. Thus the argument is that, under *Genesis Healthcare*, there is no difference whether the case is a collective action under the FLSA or a class action under any other legal basis: a litigant must have

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27 Compare *Jones-Barley v. McCabe, Weisberg & Conway, P.C.*, 59 F. Supp. 3d 617 (S.D.N.Y. 2014) (class claims not moot), *Weitzner v. Sanofi Pasteur, Inc.*, 2014 WL 1786500 (M.D. Pa. May 5, 2014) (class claims not moot), *aff'd*, 819 F.3d 61 (3rd Cir. 2016), *Kensington Physical Therapy, Inc. v. Jackson Therapy Partners, L.L.C.*, 974 F. Supp. 2d 856 (D. Md. 2013) (class claims not moot), and *Sandusky Wellness Ctr., L.L.C. v. Medtox Scientific, Inc.*, 2013 WL 3771397, at \*2 (D. Minn. July 18, 2013) (class claims not moot), with *Mey v. N. Am. Bancard, L.L.C.*, 2014 WL 6686773 (E.D. Mich. Nov. 26, 2014) (class claims moot), vacated and remanded, 2016 WL 3613395 (6<sup>th</sup> Cir. July 6, 2016), *Hooks v. Landmark Indus., Inc.*, 2014 WL 2981229 (S.D. Tex. July 1, 2014) (class claims moot), vacated, 797 F.3d 309 (5th Cir. 2015), and *Franco v. Allied Interstate, L.L.C.*, 2014 WL 13291 (S.D.N.Y. Apr. 2, 2014) (class claims moot), appeal pending, No. 14-1464 (2d Cir.).

28 See, e.g., *Wallace v. GEICO Gen. Ins. Co.*, 183 Cal. App. 4th 1390, 1397–1399 (Cal. Ct. App. 2010) (reversing order to strike class allegations, remanding for further class proceedings, and refusing to consider failure to file motion for class certification as basis for mootness, as that was not the basis for lower court's ruling); *Stratton v. Am. Indep. Ins. Co.*, 2011 WL 2083933, at \*1, \*7 (Del. Sup. Ct. May 11, 2011) (rejecting mootness; a “cease-fire may not be pressed upon them by paying their claims”); *Frazier v. Castle Ford, Ltd.*, 59 A.3d 1016, 1026 (Md. 2013) (under state class action rules, “a tender of individual relief to the putative class representative does not moot a class action if the individual plaintiff has not had a reasonable opportunity to seek class certification, including any necessary discovery”; “[i]f all a defendant need do to defeat a class action is to satisfy the class representative's claim immediately after suit is filed, many meritorious class actions will never get off the ground”); *Napowski v. First Nat'l Bank of Atlanta*, 797 N.Y.S.2d 99, 99 (N.Y. App. Div. 2005) (no mootness in putative class action alleging bank's late payment fee to be breach of contract after bank attempted to refund individual customer fee; plaintiff was not yet required to move for class certification); *Hoban v. Nat'l City Bank*, 2004 WL 2610543, at \*1, \*5 (Ohio Ct. App. Nov. 18, 2004) (putative class action not moot after individual plaintiff's account was credited by bank accused of breaching contract by imposing finance charge on account with 0% annual percentage rate; putative class representative had not had “reasonable opportunity” to file a motion for certification, as the bank had moved to stay class-wide discovery and moved for summary judgment).

individual standing to pursue a claim or else there is no case or controversy. The logic states further that, if a named plaintiff's claim therefore becomes moot *before* a ruling on class certification, the district court loses authority to rule on certification, and offers or tenders of judgment made before a certification ruling are therefore effective to accomplish what the offers in *Roper* did not: complete derailment of the class action.

So far, these defense arguments have met with no success in the federal courts of appeals. Two circuits, the Eleventh and Ninth, held that prior decisions—establishing that class claims are not mooted by pre-certification offers of judgment to the named plaintiff as long as the plaintiff has not delayed unreasonably in seeking class certification—remain good law after *Genesis Healthcare*.<sup>29</sup> Although this conclusion was an alternative holding in both cases, as these courts also held that the offer of judgment did not moot the named plaintiff's individual claims in the first place, the holdings have been viewed as binding precedent.<sup>30</sup> And the Ninth Circuit reaffirmed this position yet again post-*Campbell-Ewald*.<sup>31</sup> The Seventh Circuit likewise held after *Genesis Healthcare* that a pre-certification offer of judgment does not moot a plaintiff's effort to represent a class if the plaintiff's effort to certify the class have been "diligent."<sup>32</sup> Two other circuits have also issued opinions stating that the collective-action mootness analysis of *Genesis Healthcare* does not apply to class actions and that an offer of judgment to a named plaintiff does not moot class claims, but later events unrelated to the mootness question rendered the opinions non-precedential.

There are good arguments as to why the distinction between FLSA collective actions and

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29 *Stein v. Buccaneers Ltd. P'ship*, 772 F.3d 698 (11th Cir. 2014); *Gomez v. Campbell-Ewald Co.*, 768 F.3d 871 (9th Cir. 2014), *aff'd*, *Campbell-Ewald v. Gomez*, \_\_\_ U.S. \_\_\_, 136 S. Ct. 663, 193 L. Ed. 2d 571 (2016), *as revised* (Feb. 9, 2016).

30 *Family Medicine Pharmacy, L.L.C. vs. Perfumania Holdings, Inc.*, 2016 WL 3676601 (S.D. Ala. July 5, 2016) ("[E]ven if a defendant successfully 'picks off' a named plaintiff's individual claims via Rule 68 offer of judgment before adjudication of class certification issues, there remains a live controversy and, hence, no Article III jurisdictional problem. . . . Defendants' jurisdictional argument is soundly defeated by *Stein*.").

31 *Chen v. Allstate Ins. Co.*, 819 F.3d 1136 (9th Cir. 2016) (reaffirming that *Pitts v. Terrible Herbst, Inc.*, 653 F.3d 1081, 1089 (9th Cir. 2011), remains the law in the Ninth Circuit).

32 *McMahon v. LVNV Funding, L.L.C.*, 744 F.3d 1010, 1019 (7th Cir. 2014).

Rule 23 class actions should not matter. Most arguments address whether a putative class representative has a right or, concomitantly, a responsibility to the putative class. The view that a class representative has such an obligation or right is grounded in *Roper* and *Geraghty*. In general, many courts have been of the view, as stated by a decision from the Ninth Circuit, that “the Federal Rules of Civil Procedure give the proposed class representative the right to have a class certified if the requirements of the Rules are met.”<sup>33</sup>

Some of these decisions draw upon a separate line of mootness analysis—the line of cases permitting federal courts to hear disputes that are inherently transitory, such as often have arisen in the civil rights context, in which by the time a case is litigated the named plaintiff would no longer be in the situation that caused the alleged breach of constitutional rights and hence would be litigating a “moot” claim. Accordingly, when the claims are inherently transitory, the “relation back” doctrine adopted by *Weiss* and other decisions is properly invoked to preserve the merits of a case for judicial resolution because, were it otherwise, mooting a class action would permit the defendant always to evade review of the merits or even a class certification decision itself.<sup>34</sup>

While the Supreme Court in *Campbell-Ewald* did not explicitly invoke the purposes of Rule

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33 *Pitts v. Terrible Herbst, Inc.*, 653 F.3d 1081, 1089 (9th Cir. 2011). *Accord* *Chen v. Allstate Ins. Co.*, 819 F.3d 1136 (9th Cir. 2016). *See also* *Kensington Physical Therapy, Inc. v. Jackson Therapy Partners, L.L.C.*, 974 F. Supp. 2d 856 (D. Md. 2013) (“[S]pecial mootness rules apply in the class action context, where the named plaintiff purports to represent an interest that extends beyond his own” (citation omitted)); *Lamberson v. Fin. Crimes Services, L.L.C.*, 2011 WL 1990450, at \*4 (D. Minn. Apr. 13, 2011) (“In a class action complaint, the named plaintiff, as the putative class representative, has a special role of assuming responsibility for the entire class of persons.” (citing *Johnson v. U.S. Bank Nat’l Ass’n*, 276 F.R.D. 330, 332 (D. Minn. 2011)), *adopted by*, 2011 WL 1990447 (D. Minn. May 23, 2011).

34 *Pitts v. Terrible Herbst, Inc.*, 653 F.3d 1081, 1087–1088 (9th Cir. 2011) (citing, *inter alia*, *Sosna v. Iowa*, 419 U.S. 393, 402 n.11, 95 S. Ct. 553, 42 L. Ed. 2d 532 (1975), and *Gerstein v. Pugh*, 420 U.S. 103, 110 n.11, 95 S. Ct. 865, 43 L. Ed. 2d 54 (1975)). *See, e.g.*, *Craftwood II, Inc. v. Tomy Int’l, Inc.*, 2013 WL 3756485, at \*4 n.4 (C.D. Cal. July 15, 2013) (“Acceptance [of a Rule 68 pick off offer] need not be mandated under our precedents since the defendant has not offered all that has been requested in the complaint (i.e., relief for the class) and any other rule would give the defendant the practical power to make the denial of class certification questions unreviewable.” (quoting *Deposit Nat’l Guar. Bank, Jackson, Miss. v. Roper*, 445 U.S. 326, 341–342, 100 S. Ct. 1166, 63 L. Ed. 2d 427 (1980) (Rehnquist, J., concurring))). *See also* *South Orange Chiropractic Ctr. L.L.C. v. Cayan*, 2016 WL 1441791 (D. Mass. Apr. 12, 2016) (tender of complete relief moots individual claims, but class action not mooted if claims are inherently transitory as to evade judicial review).

23 or the idea of “relation back” and claims evading review, it did express similar concerns about the power that allowing the pick-off strategy would give defendants to cut off class-wide liability, referring to the offer of individual relief to proposed class representatives as a “strategy” and a “gambit” and observing that “Campbell sought to avoid a potential adverse decision, one that could expose it to damages a thousand-fold larger than the bid Gomez declined to accept.”<sup>35</sup> The majority decried such efforts as an effort to “place the defendant in the driver’s seat.”<sup>36</sup>

### III. Decisions Since *Campbell-Ewald*

In the immediate aftermath of *Campbell-Ewald*, most district courts have looked to the majority’s decision’s statement—that “a would-be class representative with a live claim of her own must be accorded a fair opportunity to show that certification is warranted”<sup>37</sup>—to reject offers and tenders of judgment that would have prevented the plaintiff from proceeding to class certification. In what was probably the first such case, and literally days after the *Campbell-Ewald* decision, the defendant sought to moot the plaintiff’s case and avoid liability for potential class claims by moving to deposit funds into a court account. The court refused to allow the deposit, in part based on the “the Supreme Court’s directive that ‘a would-be class representative with a live claim of her own *must be accorded a fair opportunity* to show that certification is warranted.’”<sup>38</sup> Although a minority of courts have disagreed<sup>39</sup>, most subsequent decisions have concurred.<sup>40</sup>

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35 *Campbell-Ewald Co. v. Gomez*, \_\_\_ U.S. \_\_\_, 136 S. Ct. 663, 672, 193 L. Ed. 2d 571 (2016).

36 *Id.* 136 S. Ct. at 672.

37 *Id.*

38 *Brady v. Basic Research, L.L.C.*, 312 F.R.D. 204 (E.D.N.Y. 2016); *See also Brady v. Basic Research, L.L.C.*, 2016 WL 1735856 (E.D.N.Y. May 2, 2016).

39 *Heard v. SSA*, 170 F. Supp. 3d 124 (D. D.C. 2016) (defendant refunded monies to plaintiff; case is moot despite class allegations and pending motion for class certification; court declines to extend *Genesis Healthcare* holding in FSLA context to Rule 23 class action; case does not represent “pick off” tactic that should insulate case from mootness merely because class certification motion is pending; *Grice v. Colvin*, 2016 WL 1065806 (D. Md. Mar. 14, 2016)(satisfaction of named plaintiff’s claim moots individual action, leaving no plaintiff with a live claim; action must be dismissed because claims became moot before a class was certified).

40 *Richardson v. Bledsoe*, 829 F.3d 273 (3d Cir 2016) (mooting of named plaintiff’s case generally moots entire

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case if plaintiff has had fair opportunity to seek class certification, but here plaintiff did not; plaintiff's failure to file motion for certification before motion to dismiss did not constitute undue delay); *Chen v. Allstate Ins. Co.*, 819 F.3d 1136, 1138 (9th Cir. 2016)(TCPA)(claim moot when plaintiff "actually received complete relief," not when offered or tendered. Even if court could enter judgment involving complete relief on plaintiff's individual claims, not appropriate because "would be class representative with a live claim of her own must be accorded a fair opportunity to show that certification is warranted," citing *Campbell-Ewald*, 136 S. Ct. at 672); *South Orange Chiropractic Center, LLC v. Cayan, LLC*, 2016 WL 1441791 (D. Mass. Apr. 12, 2016)(TCPA)(class action not mooted if claims are inherently transitory as to evade judicial review); *Bais Yaakov of Spring Valley v. ACT, Inc.*, 2016 WL 6275592 (D. Mass. Oct. 26, 2016)(individual claims moot upon tender of complete recovery; class claims not moot because they are inherently transitory as to evade judicial review, and certification may relate back to filing of complaint); *Practice Mgmt. Support Servs., Inc. v. Cirque du Soleil, Inc.*, 2016 WL 5720381 at \*4 (N.D. Ill. Sept. 30, 2016) (declining to enter judgment over plaintiff's objection while timely motion for class certification is pending, noting "clear rule" of *Campbell-Ewald* that "would-be class representative with a live claim of her own must be accorded fair opportunity to show that certification is warranted"); *Fitzhenry v. Career Educ. Corp.*, 2016 U.S. Dist. LEXIS 26244, at \*11 (N.D. Ill. Mar. 1, 2016) ("a settlement offer that may satisfy Plaintiff's individual demands does not moot his case" when he has also asserted claims on behalf of a class); *Brodsky v. Humanadental Co.*, 2016 WL 5476233 (N.D. Ill. Sept. 29, 2016)(TCPA)(inappropriate to enter judgment on named plaintiff's individual claims over plaintiff's objections before plaintiff has had fair opportunity to move for class certification); *Fauley v. Royal Canin U.S.C., Inc.*, 143 F. Supp. 3d 763 (N.D. Ill. 2016)(TCPA)(denial of motion to permit payment to plaintiff of entire amount of individual relief sought; inappropriate to enter judgment on named plaintiff's claims before plaintiff has fair opportunity to move for class certification); *Rocco, Inc. v. EOG Resources, Inc.*, 2016 WL 6610896 (D. Kan. Nov. 9, 2016) (class action not moot because "picking off" exception to mootness applies and class claims relate back; motion for certification had been diligently pursued and plaintiff did not accept settlement offer); *Family Medicine Pharmacy, LLC v. Perfumania Holdings, Inc.*, 2016 WL 3676601 (S.D. Ala. July 5, 2016)(TCPA)(neither rejection of tender of payment nor offer of complete relief moots a named plaintiff's case, noting *Campbell-Ewald* "directive" that "a would-be class representative with alive claim of her own must be accorded a fair opportunity to show that certification is warranted," and avoids putting defendant "in the driver's seat in class actions my means of a gambit designed to avoid potential, greater adverse decision"; even if Rule 68 offer succeeded in mooting named plaintiff's claims, class remains alive, and named plaintiff may pursue them); *Edwards v. Oportun, Inc.*, 2016 WL 4203853 (N.D. Cal. June 14, 2016) (TCPA) (unconditional tender of funds insufficient to moot individual and class claims where plaintiff rejected offer, court has not ordered requested injunctive relief and entered judgment, and plaintiff has not had fair opportunity to move for class certification); *Ung vs. Universal Acceptance Corp.*, 2016 WL 3136858 (D. Minn. June 3, 2016); *Yaakov v. Varitronics, L.L.C.*, 2016 WL 806703, at \*1 (D. Minn. Mar. 1, 2016) (relying on *Campbell-Ewald* and denying defendant's motion to deposit funds into a court account because "there is no purpose to the deposit defendant seeks to make other than to moot the case, and . . . [p]laintiff has not yet had a fair opportunity to show that class certification is warranted. . . ."), *aff'd*, 2016 WL 1735815 (D. Minn. May 2, 2016); *Radha Giesmann P.C. v. American Homepatient, Inc.*, 2016 WL 3407815 (E.D. Mo. June 26, 2016) (inappropriate to allow defendant to tender payment by Rule 67 deposit into court where purpose is to establish mootness before plaintiff has fair opportunity to show that certification is warranted); *Tegtmeier v. PJ Iowa, L.C.*, 2016 WL 3265711 (S.D. Iowa May 18, 2016) (Rule 67 motion to deposit funds with court for purpose of compelling finding of mootness denied, citing *Campbell-Ewald* for proposition that "a would-be class representative with a live claim of her own must be accorded a fair opportunity to show that certification is warranted", and noting that efforts to 'pick off' individual plaintiffs to thwart class certification is disapproved); *Bais Yaakov of Spring Valley v. Graduation Source, LLC*, 167 F. Supp. 3d 582 (S.D.N.Y. 2016) (defendant deposited full amount of statutory damages with court and assented to injunctive relief requested by plaintiff; individual claim remains live because court has not entered judgment in favor of plaintiff; because live claim remains, court bound by *Campbell-Ewald* to afford plaintiff fair opportunity to show class certification is warranted; defendant may renew request for judgment based upon complete relief after discovery and upon failure to certify a class); *Jarzyna v. Home Properties, L.P.*, 2016 WL 4417277 (E.D. Pa. Aug. 18, 2016) (inappropriate to use Rule 67 to deposit tender with court for purpose of procuring settlement of individual claims; even if appropriate, deposit would not afford complete relief because individual plaintiff has personal stake in class claims; if deposit request granted and plaintiff's claims moot, plaintiff may seek class certification under relation back doctrine, and must be given fair opportunity to show that certification is warranted) .

In short, this area of law remains to be determined more conclusively in cases being litigated in trial courts and, now more often, reviewed at the appeal court level. However, at this point it appears that a clear and consistent pattern of decisions is developing among those courts that if a plaintiff rejects an offer of judgment or tender of settlement, even if their individual claims nonetheless may be mooted, they will be given a reasonable opportunity to move for class certification on behalf of the class that they seek to represent. Therefore, the incentives for defendants to engage in pick off efforts in order eliminate putative class actions are neither certain or definitive. As a result, although there seems to have been a slight uptick in the number of pick offs attempted since the *Campbell-Ewald* decision, particularly ones accompanied by a tender of payment, the number has been less than anticipated and the trend may reverse itself if the prevailing application of the case law by the courts continues to develop along its current path.

NCLC and NACA remain available to answer any additional questions or provide any further information that we can for the Advisory Committee or its Rule 23 Subcommittee regarding the proposed amendments to Rule 23. Please feel free to contact us if we can be of assistance. Thank you for your consideration in these matters.