CONTINUING TO LITIGATE AFTER YOU HAVE WON: COURTS DEFY ARTICLE III TO AVOID MOOTING TCPA CLASS ACTIONS, DESPITE DEFENDANTS' RULE 68 OFFERS OF COMPLETE RELIEF

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ABSTRACT

Every day, thousands of ordinary Americans receive unwelcome faxes, text messages, and prerecorded telephone calls (frequently referred to as "robo-calls"). The proliferation of these unwelcome messages has increased at an astronomical rate. In 2015, the Federal Trade Commission (FTC) reported that it received approximately 150,000 complaints each month. This dramatic increase occurred despite Congress's enactment of the Telephone Consumer Protection Act (TCPA) in 1991, which was meant to restrict dramatically such unwelcome calls, texts, and faxes, and to protect the privacy interests of consumers. Because the recovery under the TCPA is limited to $500 per violation, many consumer suits under the TCPA are filed as class actions under Federal Rule of Civil Procedure 23. The Rule 23 class action mechanism appears to be tailored to such small regulatory actions. However, defense counsel, confronted by the increasing number of class actions filed against their clients, searched for an effective response to fend off these class actions aggressively and advocate for their clients. Defense counsels' "weapon of choice" appears to be Federal Rule of Civil Procedure 68.

Rule 68 permits defense counsel to serve an offer of judgment on the opposing party. The rule is a procedural one, intended to encourage settlement and avoid litigation. The rule achieves these goals by shifting costs: "If the judgment that the offeree finally obtains is not more favorable than the unaccepted offer, the offeree must pay costs incurred after the offer was made." One thing not addressed by the language of Rule 68 is the effect, if any, of an unaccepted offer on the justiciability of the plaintiff's claim under the Constitution's Case or Controversy Clause. In TCPA class actions, one strategy used by defense counsel to fend off suits has been to make a Rule 68 offer of judgment to the named class

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representative for the statutory maximum that a plaintiff could recover on his individual claim, prior to plaintiff's filing of a motion for class certification*, in order to moot the named representative's individual claim and the entire class action. In other words, defense counsels' position is that when the named plaintiff is offered all that he could possibly receive from suit and has not yet moved to certify a class, there is no longer a case or controversy under Article III, and the case is moot.*

In Gomez v. Campbell-Ewald Co.*, the Supreme Court attempted to resolve a Circuit Court split as to whether a Rule 68 offer of judgment, made before a plaintiff moves to certify the class, moots the named plaintiff's claim and the entire class action. However, rather than resolving the split, the Court's opinion only provided a temporary solution, and the Court postponed a definitive resolution of the matter for another day. The* Gomez *majority noted: "[w]e 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." This Article takes the position that both Article III and the Supreme Court's precedent compel the conclusion that a defendant's Rule 68 offer of complete relief, when made before the plaintiff moves for class certification, moots not only the plaintiff's individual claim, but also the entire action. The article maintains a contrary conclusion would run afoul of Article III and undermine the "personal stake" requirement set forth in the Supreme Court's Article III jurisprudence. Because this Article was in final production at the time the Supreme Court issued its recent decision in* Gomez*, the Court's decision is addressed in the Author's Addendum, provided at the end of the Article.*

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"[T]he only persons before this Court who appear to have any interest are the defendants and a lawyer who no longer has a client."†

"You cannot persist in suing after you've won." ‡

I. INTRODUCTION

Every day, thousands of ordinary Americans receive unwelcome faxes, text messages, and prerecorded telephone calls (frequently referred to as "robo-calls").[1] The proliferation of these unwelcome messages has increased at an astronomical rate. In 2009, The Federal Trade Commission (FTC) reported that it received approximately 60,000 complaints regarding robo-calls each month.[2] However, by 2015 that number had jumped to 150,000 complaints each month.[3] This dramatic increase occurred despite Congress's enactment of the Telephone Consumer Protection Act (TCPA) in 1991,[4] which was meant to restrict unwelcome calls, texts, and faxes dramatically,

† U.S. Parole Comm'n v. Geraghty, 445 U.S. 388, 424 (1980) (Powell, J., dissenting).

‡ Greisz v. Household Bank, (Ill.), N.A., 176 F.3d 1012, 1015 (7th Cir. 1999).

1. *Rage Against Robocalls: Solutions to Stop the Onslaught Might Finally be Within Reach*, CONSUMER REPORTS (July 28, 2015), http://www.consumerreports.org/cro/magazine/2015/07/rage-against-robocalls/index.htm.

2. *Ringing Off the Hook: Examining the Proliferation of Unwanted Calls (1 day or sooner): Hearing on Do-Not-Call Registry Before the Senate Special Committee on Aging*, 114th Cong., 2015 WLNR 17411862 (June 10, 2015) [hereinafter *Special Committee*].

3. *Id.* In addition, the Federal Communications Commission (FCC) also reported receiving approximately 215,000 complaints regarding robo-calls in 2014. Tom Wheeler, *Another Win for Consumers*, FCC BLOG (May 27, 2015), https://www.fcc.gov/news-events/blog/2015/05/27/another-win-consumers.

4. *See* Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394.

and to protect the privacy interests of consumers.[5]

Predictably, the rise in unwelcome robo-calls, text messages, and faxes has resulted in an increase in consumer litigation cases. The Consumer Financial Protection Bureau (CFPB) reported that "TCPA lawsuits increased nearly 30 percent from September 2013 to September 2014."[6] Because the recovery under the TCPA is limited to $500 per violation,[7] many consumer suits under the TCPA are filed as class actions under Federal Rule of Civil Procedure 23.[8] In fact, the Federal Communications Commission (FCC) reported that its monthly statistics show an increase in the number of TCPA class action lawsuits.[9] This is not surprising. Class actions under Rule 23 offer plaintiffs opportunities to file suits, including TCPA actions, "that for economic reasons might not be brought otherwise."[10] Without the class action mechanism, many aggrieved plaintiffs would simply be unable to file suit to vindicate their rights.[11] That certainly is true of litigating suits under

5. S. Rep. No. 102-178, at 1 (1991), *as reprinted in* 1991 U.S.C.C.A.N. 1968, 1968; *see also* Sherman v. Yahoo! Inc., 997 F. Supp. 2d 1129, 1132 (S.D. Cal. 2014) ("The TCPA was enacted to 'protect the privacy interests of residential telephone subscribers by placing restrictions on unsolicited, automated telephone calls to the home and to facilitate interstate commerce by restricting certain uses of facsimile machines and automatic dialers.'" (quoting Satterfield v. Simon & Schuster, Inc., 569 F.3d 946, 954 (9th Cir. 2009)).

6. *Consumer Litigation Cases Increase in September*, ACA INT'L (Oct. 20, 2014), http://www.acainternational.org/cfpbarticle-consumer-litigation-cases-increase-in-september-33847.aspx.

7. 47 U.S.C. § 227(b)(3)(B) (2012). However, if the conduct is willful, the consumer may recover treble damages. *Id.* § 227(b)(3)(C). Recently, a bill was introduced in the U.S. Senate to amend the TCPA "to improve the enforcement of prohibitions on robo-calls, including fraudulent robo-calls." S. 1540, 114th Cong. (2015).

8. *Consumer Litigation Cases Increase in September*, *supra* note 6 (noting that the FTC's monthly statistics "show an uptick in class-action lawsuits related to the TCPA. Twenty-four of the 193 TCPA lawsuits in September 2014 were class-action cases."); *see also* FED. R. CIV. P. 23.

9. *In re* Rules and Regulation Implementing the Tel. Consumer Prot. Act, FCC Red., 15–72, ¶ 6 (July 10, 2015), https://www.fcc.gov/document/tcpa-omnibus-declaratory-ruling-and-order.

10. *See* Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326, 338 (1980) (noting that class actions are "a natural outgrowth of the increasing reliance on the 'private attorney general' for the vindication of legal rights").

11. *See id.* at 339 ("Where it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the class action device.").

the TCPA, where plaintiffs would be forced to weigh the prospects of recovering limited statutory damages against the potentially staggering costs of litigation. The Rule 23 class action mechanism appears to be tailored to such small regulatory actions.[12] Defense counsels, confronted by the increasing number of class actions filed against their clients, searched for an effective response to fend off these class actions aggressively and advocate for their clients.[13] Defense counsels' "weapon of choice" appears to be Federal Rule of Civil Procedure 68.[14]

Rule 68 permits defense counsel to serve an offer of judgment on the opposing party.[15] The rule is procedural and intended "to encourage settlement and avoid litigation."[16] The rule achieves these goals by shifting costs: "If the judgment that the offeree finally obtains is not more favorable than the unaccepted offer, the offeree must pay costs incurred after the offer was made."[17] One matter not addressed by the language of Rule 68 "is the effect, if any, of an unaccepted offer on the justiciability of the plaintiff's claim under the Constitution's Case or Controversy Clause."[18] In TCPA class actions, one strategy used by defense counsel to fend off suits has been to make a Rule 68 offer of judgment to the named class representative for the statutory maximum that the plaintiff could recover on his individual claim, *prior* to the plaintiff's filing of a motion for class certification, in order to moot the named representative's individual claim and the entire class action.[19] In other words, defense counsels' position is when the named

12. *See id.* ("The aggregation of individual claims in the context of a class-wide suit is an evolutionary response to the existence of injuries unremedied by the regulatory action of government.").

13. *See* Daniel Fisher, *Supreme Court Mulls Potentially Devastating Defense Against Class Actions: Surrender*, FORBES (Oct. 14, 2015), http://www.forbes.com/sites/danielfisher/2015/10/14/supreme-court-mulls-potentially-devastating-defense-against-class-actions-surrender/.

14. *See id.*; *see also* FED R. CIV. P. 68.

15. FED. R. CIV. P. 68(a).

16. Lary v. Rexall Sundown, Inc., 74 F. Supp. 3d 540, 545 (E.D.N.Y. 2015) (quoting Marek v. Chesny, 473 U.S. 1, 5 (1985)).

17. FED. R. CIV. P. 68(d).

18. Tanasi v. New All. Bank, 786 F.3d 195, 198–99 (2d Cir. 2015).

19. *See, e.g.*, Yaakov v. ACT, Inc., 987 F. Supp. 2d 124, 125–27 (D. Mass. 2013), *aff'd*, 798 F.3d 46 (1st Cir. 2015). A defendant's Rule 68 offer of judgment in a class action typically is made during one of the following time frames: (1) after a motion to certify the class has been granted; (2) after a motion to certify the class has been denied; (3) when a motion to certify the class is pending; and (4) before a plaintiff has moved to certify the class. *This Article focuses only on the last scenario*, i.e., the effect of Rule 68

plaintiff is offered all that he could possibly receive from suit and has not yet moved to certify a class, there is no longer a case or controversy under Article III, and the case is moot.[20] In other words, "you cannot persist in suing after you've won."[21]

The circuit courts are split[22] as to whether such an offer, made before a

offers made *before* a plaintiff moves for class certification. Regarding the first scenario, the Supreme Court already has held that a class action does not become moot when the class representative's claim becomes moot *after* the court certifies the class because "[w]hen the District Court 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 Appellant." Sosna v. Iowa, 419 U.S. 393, 399, 403 (1975). The Supreme Court also has addressed the second scenario, holding if the plaintiff's individual claim becomes moot *after* the court *denies* certification of the class, the action does not become moot because the class representative retains a "personal stake" in obtaining class certification which allows him to appeal the denial of certification. U.S. Parole Comm'n v. Geraghty, 445 U.S. 388, 404 (1980). The third scenario, which involves the use of Rule 68 offers of judgment made when a certification motion is pending, is the subject of a separate circuit split. *See, e.g.*, Bank v. Spark Energy Holdings LLC, No. 4:11-CV-4082, 2013 WL 5724507, at *6 (S.D. Tex. Oct. 18, 2013) (discussing split on mootness effect of Rule 68 offer made when motion to certify class is pending); *Lary*, 74 F. Supp. 3d at 549–50 (noting a similar split between district courts of the Second Circuit).

20. *See Tanasi*, 786 F.3d at 198–99 ("A case becomes moot [pursuant to Article III's Case or Controversy Clause] . . . when it is impossible for a court to grant 'any effectual relief whatever to the prevailing party.'" (quoting Knox v. Serv. Emps. Int'l Union, Local 1000, 132 S. Ct. 2277, 2287 (2012))).

21. Greisz v. Household Bank (Ill.), N.A., 176 F.3d 1012, 1015 (7th Cir. 1999); *see also* Bradley Girard, Note, *Don't Try This at Home: The Troubling Distortion of Rule 68*, 103 GEO. L.J. 723, 723 (2015) (arguing that mooting a claim based on "an unaccepted Rule 68 offer is supported neither by the Rule's text nor by the Supreme Court's interpretation of the rule"); David Marc Rothenberg, Comment, *Changing the Rule Changes the Game: A Rule 68 Offer for Complete Relief Should Never Moot an Individual's Claim*, 65 EMORY L.J. 155, 161 (2015) (noting "nothing in Rule 68 discusses mootness" of a claim based on an offer of final judgment).

22. As this Article was being finalized for print, the Supreme Court "temporarily" resolved the split, leaving key questions unanswered and further "muddying the waters." *See* Cambell-Ewald Co. v. Gomez, 136 S. Ct. 663, 672 (2016) (holding an unaccepted Rule 68 offer does not moot a case, but noting "[w]e need not, and do not, now decide whether the result would be different if a defendant deposits the full amount of a plaintiff's individual claim in an account payable to that plaintiff, and the court then enters judgment for that plaintiff in that amount"). In essence, the Court deferred definitively deciding the issue and left it for another day. The Court's decision will be addressed in greater detail in the "Author's Addendum" provided at the end of this article. The *Gomez* majority adopted an approach advocated by Justice Kagan in her dissenting opinion in *Genesis Healthcare*: namely, an unaccepted Rule 68 offer is a "legal

plaintiff moves to certify the class, moots the named plaintiff's claim and the entire class action.[23] This Article posits that both Article III and the Supreme Court's precedent compel the conclusion that a defendant's Rule 68 offer of complete relief,[24] when made before the plaintiff moves for class

nullity, with no operative effect," and an unaccepted Rule 68 offer, therefore, cannot moot a case. *Id.* at 670. Justice Kagan's position, adopted by the *Gomez* majority, is criticized in this Article and is contrary to the position taken by the Author. As a result, this Article's criticisms remain sound and apply with equal force after the Supreme Court's decision in *Gomez*. The *Gomez* decision changes neither the Author's position nor the appropriateness of the criticisms contained in this Article.

23. *See supra* text accompanying note 22. The circuit split is discussed in depth *infra*, at Part IV; *see also* Genesis Healthcare Corp. v. Symczyk, 133 S. Ct. 1523, 1528–29 (2013) (discussing the Circuit Split on whether a Rule 68 offer of complete relief moots a plaintiff's individual claim and stating, "[W]e do not reach this question, or resolve the split, because the issue is not properly before us"); *Yaakov*, 987 F. Supp. 2d at 127 (discussing the circuit split as to whether the Rule 68 offer, made before a plaintiff moves to certify the class, moots the entire action). This Article is particularly timely because a ruling from the Supreme Court on this issue is expected in mid-2016. Gomez v. Campbell-Ewald Co., 768 F.3d 871 (9th Cir. 2014), *cert. granted*, 135 S. Ct. 2311 (May 18, 2015). The circuits are also split regarding the proper procedure to dispose of such cases. *See* Kaye v. Amicus Mediation & Arbitration Grp., Inc., 300 F.R.D. 67, 74 (D. Conn. 2014). For example, should such cases be dismissed via *sua sponte* dismissal, a motion to dismiss, forced entry of judgment, etc. However, the proper procedural method to dispose of the action is not the primary focus of this Article. This Author maintains that the court has the authority to dismiss *sua sponte*. See *infra* note 273, for additional information on the latter point.

24. As will be discussed in Part V.B., *infra*, the putative class has no legal presence separate from the plaintiff prior to certification. *Gomez*, 136 S. Ct. at 672 (ruling "a class lacks independent status until certified"); *Sosna*, 419 U.S. at 399 (explaining class is not present separate from a named plaintiff until class is certified); *Genesis Healthcare*, 133 S. Ct. at 1530 (same). Therefore, there should be no obligation to include relief for the putative class in the offer made before the plaintiff has moved to certify the class. However, the Author is aware that some view an offer made to the named representative only, which excludes the putative class, as an incomplete offer of relief. *See, e.g.*, *Genesis Healthcare*, 133 S. Ct. at 1536 (Kagan, J., dissenting) (noting that an offer to the named plaintiff alone is not an offer of complete relief because it does not give the plaintiff all she requested, i.e., relief for the class) (quoting Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326, 341 (1980) (Rehnquist, J., concurring)); *see also* Charvat v. Nat'l Holdings Corp., No. 2:14-cv-2205, 2015 WL 3407657, at *7–8 (S.D. Ohio May 26, 2015) (holding offer under Rule 68 in TCPA class action that satisfied the named plaintiff's claim only was incomplete and could not moot the entire action, regardless of the timing of the certification motion); Sandusky Wellness Ctr., LLC v. Medtox Sci., Inc., Civil No. 12-2066 (DSD/SER), 2013 WL 3771397, at * 2 (D. Minn. July 18, 2013) (holding, in a TCPA action, "[t]o moot the claim of a putative class representative, a Rule 68 offer must provide complete relief for both the individual and class claims"); *see also* Weitzner v. Sanofi Pasteur, Inc., 7 F. Supp. 3d 460, 467–68 (M.D. Pa. 2014) (ruling TCPA class action

certification, moots not only the plaintiff's individual claim but also the entire action. This Article maintains that a contrary conclusion would run afoul of Article III and undermine the "personal stake" requirement set forth in the Supreme Court's Article III jurisprudence. Part II of this Article provides background information necessary to understand the problem. Part III examines relevant United States Supreme Court precedent involving the mootness doctrine. Part IV explains the circuit split regarding the legal effect of Rule 68 offers of judgment made before a plaintiff moves for class certification. Part V examines interests of a plaintiff that could potentially survive an offer of complete relief under Rule 68 to satisfy the case or controversy requirement of Article III. Part VI addresses possible solutions to the problem that will not run afoul of Article III or distort the personal stake requirement, and Part VII contains the conclusion.

II. BACKGROUND

A. *The TCPA*

Congress enacted the TCPA in 1991 in response to numerous complaints from consumers regarding the increased number of robo-calls, junk faxes, and unsolicited text messages they were receiving.[25] The TCPA makes it unlawful for any person to make a call "using any automatic telephone dialing system or an artificial or prerecorded voice," unless the caller has received prior consent, the call is for emergency purposes, or one of several other exceptions apply.[26] The TCPA was amended in 2005 to add the Junk Fax Prevention Act, which prohibits sending "unsolicited advertisements" to a telephone facsimile machine using "any telephone facsimile machine, computer, or other device," unless the sender has a prior

was not moot when Rule 68 offer was made to the named plaintiff only and no motion to certify the class had been filed); Mey v. Frontier Commc'ns Corp., No. 3:13-CV-01191-MPS, 2014 WL 6977746, at *3–4 (D. Conn. Dec. 9, 2014) (refusing to moot TCPA class action while certification motion is pending when Rule 68 offer is made to the named plaintiff only). The Author maintains this approach (which considers the offer incomplete if it does not include the uncertified class) ignores the main question: namely, whether a plaintiff with a personal stake remains in the action after a Rule 68 offer is made that satisfies the named plaintiff's claim and before a motion for certification has been filed. The uncertified class lacks such a presence, unless the Supreme Court decides to overrule its earlier precedent.

25. Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, § 2, 105 Stat. 2394, 2394–95; S. REP. NO. 102-178, at 1 (1991), *as reprinted in* 1991 U.S.C.C.A.N. 1968, 1969; *see also* Sherman v. Yahoo! Inc., 997 F. Supp. 2d 1129, 1132 (S.D. Cal. 2014).

26. *See* 47 U.S.C. § 227(b)(1)(A) (2012).

business relationship with the recipient.[27] Unsolicited calls that advertise property, goods, or services are also prohibited if they are made with automatic dialing systems or use prerecorded voices.[28] The TCPA allows a private right of action where the aggrieved party may sue to recover its "actual monetary loss . . . or . . . $500 in damages" per violation.[29] However, if the violation was willful, the party may obtain treble damages.[30] A party also may obtain injunctive relief to halt violations of the Act.[31] TCPA lawsuits may be filed in federal or state courts.[32] However, the TCPA predated, by over a decade, the passage of the Class Action Fairness Act.[33] Rather than intending TCPA actions to be filed as class actions, there is evidence Congress intended such suits to be filed in small claims courts to simplify recovery.[34] Although most jurisdictions permit TCPA class actions under Rule 23, many courts have held that Rule 23 is not the appropriate mechanism to litigate such actions.[35] Finally, unlike the Fair Labor Standards Act (FLSA), which permits a plaintiff to sue as a private attorney general on "behalf of . . . other[s] . . . similarly situated,"[36] Congress included no such

27. Junk Fax Prevention Act of 2005, Pub. L. No. 109-21, §2, 119 Stat. 359, 359 (codified as amended at 47 U.S.C. § 227(b)(1)(C)). "The term 'unsolicited advertisement' means any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission, in writing or otherwise." 47 U.S.C. § 227(a)(5).

28. 47 U.S.C. § 227(b)(1). "The term 'telephone solicitation' means the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person, but such term does not include a call or message (A) to any person with that person's prior express invitation or permission, (B) to any person with whom the caller has an established business relationship, or (C) by a tax exempt nonprofit organization." *Id.* § 227(a)(4).

29. *Id.* § 227(b)(3)(B).

30. *Id.* § 227(b)(3).

31. *Id.* § 227(b)(3)(A).

32. Mims v. Arrow Fin. Servs., LLC, 132 S. Ct. 740, 747 (2012).

33. *Compare* Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394, *with* Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4.

34. *See* 137 CONG. REC. S16204 (daily ed. Nov. 7, 1991) (Statement of Sen. Hollings) ("[The] private right of action provision . . .will make it easier for consumers to recover damages. . . . The provision would allow consumers to bring an action in State court. . . .[I]t is my hope that States will make it as easy as possible for consumers to bring such actions, preferably in small claims courts.").

35. *See* Deborah F. Buckman, Annotation, *Propriety of Class Actions Under Telephone Consumer Protection Act, 47 U.S.C.A. § 227*, 30 A.L.R. Fed. 2d 537, § 4–5 (2008) (collecting cases maintaining that a class action may be appropriate under the TCPA, and cases that hold the opposite).

36. The FLSA permits employees not only to sue on their own behalf, but also to

provision in the TCPA.[37]

B. *Offers of Judgment Under Federal Rule of Civil Procedure 68*

Federal Rule of Civil Procedure 68 permits defendants to make an offer of judgment to opposing counsel "[a]t least 14 days before the date set for trial."[38] The offer may be made "on specified terms, with the costs then accrued."[39] If opposing counsel accepts the offer within 14 days after being served, "either party may then file the offer and notice of acceptance, plus proof of service," and the clerk must enter judgment.[40] The rule provides that an unaccepted offer is "considered withdrawn"; however, "it does not preclude a later offer."[41] The rule operates as a cost-shifting mechanism with the purpose of encouraging settlement and avoiding litigation;[42] because "[i]f the judgment that the offeree finally obtains is not more favorable than the unaccepted offer, the offeree must pay costs incurred after the offer was made."[43] No language contained in Rule 68 bars its application to class actions under Rule 23.[44] In fact, an earlier proposed amendment to Rule 68 attempted to bar application of the rule to class actions, but the amendment failed.[45]

bring an action on behalf of "other employees similarly situated." 29 U.S.C. § 216(b) (2012). When the suit is brought on behalf of others similarly situated, it is referred to as a "collective action." Genesis Healthcare Corp. v. Symezyk, 133 S. Ct. 1523, 1527 (2013).

37. *See* 47 U.S.C. § 227 (2012).

38. FED. R. CIV. P. 68(a).

39. *Id.*

40. *Id.*

41. *Id.*

42. Lary v. Rexall Sundown, Inc., 74 F. Supp. 3d 540, 545 (E.D.N.Y. 2015) (quoting Marek v. Chesny, 473 U.S. 1, 5 (1985)).

43. FED. R. CIV. P. 68(d).

44. *See id.*; *Lary*, 74 F. Supp. 3d at 555 ("It is well settled that Rule 68 applies to class actions."). However, as is discussed later in this Article, Rule 68 has not been uniformly applied in class actions prior to certification of the putative class. *See infra* Part IV (discussing circuit split).

45. *See* Proposed Amendment to Rule 68, 102 F.R.D. 407, 433 (1984); *see also* Lucero v. Bureau of Collection Recovery, Inc., 639 F.3d 1239, 1244 (10th Cir. 2011). The amendment stated, in pertinent part, "this rule [(i.e., Federal Rule of Civil Procedure 68)] shall not apply to class or derivative actions under Rules 23, 23.1, and 23.2." 102 F.R.D. at 433.

C. *The Problem: The Intersection Between the Mootness Doctrine and Rule 68*

The U.S. Constitution, Article III, limits federal courts' jurisdiction to only "cases" or "controversies."[46] This limitation ensures that federal courts only resolve "the legal rights of litigants in actual controversies."[47] Supreme Court jurisprudence interpreting the "case or controversy" requirement has consistently held Article III requires a "plaintiff [to] demonstrate that he possesses a legally cognizable interest, or a 'personal stake,' in the outcome of the [litigation]."[48] "A corollary to [the] case-or-controversy requirement is that 'an actual controversy must be extant at [every] stage[] of" litigation, from the moment the complaint is filed, throughout all stages of review.[49] If the actual controversy is lacking at any point during litigation, "the action can no longer proceed and must be dismissed as moot."[50] The "mootness [doctrine] has two aspects: 'when the issues presented are no longer "live" or the parties lack a legally cognizable interest in the outcome.'"[51] The purpose of this doctrine is to ensure that the "Federal Judiciary confines itself to its constitutionally limited role of adjudicating actual and concrete disputes, the resolutions of which have direct consequences on the parties

46. U.S. CONST. art. III, § 2; *see also* Genesis Healthcare Corp. v. Symezyk, 133 S. Ct. 1523, 1528 (2013); Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326, 332 (1980); U.S. Parole Comm'n v. Geraghty, 445 U.S. 388, 395 (1980).

47. *Genesis Healthcare*, 133 S. Ct. at 1528 (quoting Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, 454 U.S. 464, 471 (1982)).

48. *Genesis Healthcare*, 133 S. Ct. at 1528 (citing Camreta v. Greene, 131 S. Ct. 2020, 2028 (2011)); *accord Geraghty*, 445 U.S. at 396–97. It is interesting to note that at least one circuit has interpreted the Supreme Court's earlier opinion in *Geraghty* as dispensing with the personal stake requirement, in favor of a single-pronged test. *See* Satterwhite v. City of Greenville, 634 F.2d 231 (5th Cir. 1981), *cited by* Berry v. Pierce, 98 F.R.D. 237, 244 (E.D. Tex. 1983); *see also* Note, *Class Standing and the Class Representative*, 94 HARV. L. REV. 1637, 1647 (1981) (noting that "Geraghty is an abandonment of the personal stake requirement").

49. *Genesis Healthcare*, 133 S. Ct. at 1528 (quoting Arizonans for Official English v. Arizona, 520 U.S. 43, 67 (1997) (quotation mark omitted)); *accord* Sosna v. Iowa, 419 U.S. 393, 402 (1975); *Geraghty*, 445 U.S. at 397.

50. *Genesis Healthcare*, 133 S. Ct. at 1528 (citing Lewis v. Cont'l Bank Corp., 494 U.S. 472, 477–78 (1990)); *accord Geraghty*, 445 U.S. at 396 (citing Powell v. McCormack, 395 U.S. 486, 496 (1969)). The Court noted: "[O]ne commentator has defined mootness as 'the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of litigation (standing) must continue throughout its existence (mootness).'" *Geraghty*, 445 U.S. at 397 (quoting Henry P. Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363, 1384 (1973)).

51. *Geraghty*, 445 U.S. at 396 (quoting *Powell*, 395 U.S. at 496).

involved."[52]

In TCPA actions, where damages are set by statute and limited to $500 per violation ($1500, if willful), the plaintiff's damages usually are not difficult to ascertain.[53] As a result, when a defendant in a TCPA class action tenders a Rule 68 offer of judgment that affords complete relief to the named plaintiff, *before the class is certified*, the question that arises is whether there is a plaintiff remaining with a "legally cognizable interest" or "personal stake" in the outcome of the litigation.[54] May a plaintiff refuse such an offer and continue to litigate? The answer to this question is not an easy one and creates a conflict between Rule 68 and Article III of the Constitution. As discussed later in the Article, this conflict has split the circuits.[55]

Some courts have stated that after the plaintiff receives the offer, an actual controversy no longer exists, and the plaintiff has no legally cognizable interest or personal stake in the outcome of the litigation.[56] As a result, Article III compels dismissal.[57] Stated another way, "[F]ederal courts do not sit simply to bestow vindication in a vacuum."[58] Some courts have gone a step further and stated the "plaintiff's 'refusal of the relief [s]he initially sought suggests an attempt to use the judicial system in a manner in which it was not intended to be employed.'"[59] For these courts, a plaintiff's refusal of the offer is an attempt to "manipulate the judicial system" which

52. *Genesis Healthcare*, 133 S. Ct. at 1528; *accord Geraghty*, 445 U.S. at 396.

53. 47 U.S.C. § 227(b)(3) (2012).

54. *See* discussion *infra* Part V.

55. *See* discussion *infra* Part IV.

56. *See, e.g.*, Bank v. Spark Energy Holdings LLC, No. 4:11-CV-4082, 2013 WL 5724507, at *1–2 (S.D. Tex. Oct. 18, 2013).

57. *See, e.g.*, *id.* at *2 (citing Murray v. Fid. Nat'l Fin., Inc., 594 F.3d 419, 421 (5th Cir. 2010)) ("[I]n a class action when the personal claims of all named plaintiffs have been satisfied and no class has yet been certified, the putative class action becomes moot because there is no plaintiff, named or unnamed, that can assert a justiciable claim against a defendant and thus there is no case or controversy within the scope of Article III of the Constitution to provide the court with jurisdiction."); Masters v. Wells Fargo Bank S. Cent., N.A., No. A-12-CA-376-SS, 2013 WL 3713492, at *6 (W.D. Tex. July 11, 2013) (holding plaintiff's individual TCPA claim and the putative class's claims moot based on the lack of a controversy and dismissing the action pursuant to Federal Rule of Civil Procedure 12(b)(1)).

58. Zimmerman v. Bell, 800 F.2d 386, 390 (4th Cir. 1986).

59. Perez v. Pinon Mgmt., Inc., No. 12-CV-00653-RM-MEH, 2013 WL 9853508, at *13 (D. Colo. July 1, 2013), *report and recommendation adopted in part*, No. 12-CV-00653-RM-MEH, 2014 WL 5596261 (D. Colo. Nov. 4, 2014) (quoting Scott v. Westlake Servs., LLC, 948 F. Supp. 2d 898, 913 (N.D. Ill. 2013) (alteration in original)).

should not be tolerated.[60]

However, as courts on the other side of the split have pointed out, it is the defendant who arguably is using Rule 68 to manipulate the judicial system and frustrate the goals of Rule 23, by buying off named representatives in order to moot class actions.[61] Similarly, these courts point out that such conduct would invite a "waste of judicial resources by stimulating successive suits."[62] Arguably, courts should not permit defendants to engage in such tactics because of "the responsibilities of [the] district court to protect both the absent class and the integrity of the judicial process by monitoring the actions of the parties before it."[63] Both sides raise legitimate concerns. However, resolution of the circuit split will require the Supreme Court to determine whether, after the Rule 68 offer is made, the lawsuit has a plaintiff with a personal stake or some other legally cognizable interest.[64]

III. RELEVANT SUPREME COURT PRECEDENT INVOLVING THE MOOTNESS DOCTRINE

After the defendant in a Rule 23 class action makes a Rule 68 offer of judgment to the named plaintiff, before a plaintiff has moved to certify the

60. *Perez*, 2013 WL 9853508, at *13 (quoting *Scott*, 948 F. Supp. 2d at 913).

61. Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326, 339 (1980). *But see* Geismann v. ZocDoc, Inc., 60 F. Supp. 3d 404, 406 (S.D.N.Y. 2014) (citing Genesis Healthcare Corp. v. Symezyk, 133 S. Ct. 1523, 1531 (2013)) (ruling that pick-off concerns do not apply prior to certification because putative class members remain free to file their own suits); Lary v. Rexall Sundown, Inc., 74 F. Supp. 3d 540, 556–57 (E.D.N.Y 2015) (same). Courts also have ruled that the buy-off problem is permitted under the confines of Article III because other solutions exist, such as filing for certification of the class when the suit is filed. *See, e.g.*, Keim v. ADF MidAtlantic, LLC, No. 12-80577-CIV, 2013 WL 3717737, at *6 (S.D. Fla. July 15, 2013).

62. *Roper*, 445 U.S. at 339. *But see* Krzykwa v. Phusion Projects, LLC, 920 F. Supp. 2d 1279, 1283 (S.D. Fla. 2012) (ruling that concerns regarding a waste of judicial resources are not relevant, "because considerations of judicial resources should not permit courts to circumvent or ignore the limitations Article III places on the federal judiciary").

63. *Roper*, 445 U.S. at 331. Nevertheless, scholars have recognized the benefits of defense counsels' use of Rule 68 as an offensive tool, not only a defensive one. *See, e.g.*, DAVID F. HERR, ROGER S. HAYDOCK & JEFFREY W. STEMPEL, MOTION PRACTICE BEFORE TRIAL § 13.05 *Offers of Judgment as Offensive Defensive Pleadings* (Aspen 6th ed. 2015) ("Although an offer of judgment is not technically a pleading, it can be every bit as effective as the best counterclaim or crossclaim.").

64. *See Genesis Healthcare*, 133 S. Ct. at 1528–29.

class, is there a plaintiff remaining who has a "personal stake" or some other "legally cognizable interest"? If such a plaintiff remains, what is the nature of that stake or interest? Although the Supreme Court has not specifically answered these questions, several decisions of the Court are instructive and provide insight into the Court's possible resolution of the circuit split.

A. *Leading Supreme Court Decisions Involving Mootness in Rule 23 Class Actions*

1. Sosna v. Iowa[65]

In *Sosna v. Iowa*, the United States Supreme Court considered whether a class action was rendered moot, *after the class had been certified*, when the controversy became moot as to the plaintiff class representative.[66] Plaintiff and appellant Carol Sosna sought a divorce from Michael Sosna in Iowa, although Carol Sosna had not been a resident of Iowa for at least one year prior to the filing of her divorce petition, as required by the Iowa Code.[67] Michael Sosna was not a resident of Iowa.[68] The Iowa court dismissed the petition for lack of jurisdiction based on the state's residency requirement.[69] Following the dismissal, Carol Sosna filed suit in the United States District Court for the Northern District of Iowa, seeking certification of her suit as a class action under Rule 23.[70] Although Carol Sosna argued that Iowa's residency requirement violated the United States Constitution, a three-judge panel ruled the residency requirement was constitutional.[71] The Supreme Court noted probable jurisdiction and accepted review; however, before the Court could rule, Carol Sosna had satisfied the Iowa one-year residency requirement, and the Iowa Code no longer prevented her from filing her divorce petition.[72]

The Supreme Court held that the Iowa residency requirement was constitutional[73] and addressed the issue of mootness as it applied both to

65. Sosna v. Iowa, 419 U.S. 393 (1975).
66. *Id.* at 399.
67. *Id.* at 395.
68. *Id.*
69. *Id.*
70. *Id.* at 395–97.
71. *Id.* at 396.
72. *Id.* at 396, 398–99.
73. *Id.* at 396.

class representative Carol Sosna's claim and the putative class's claims.[74] The Court held that the case was not moot, despite the fact that class representative Carol Sosna's claim was moot.[75] The Court noted that, if Carol Sosna had not filed a class action, the fact that she now meets the one-year residency requirement would have mooted the entire action and required dismissal.[76] However, the Court held that the mootness determination was "significantly affect[ed]" by the fact the district court had certified the class prior to the point in time when Carol Sosna's claim became moot.[77] The Court stated: "When the District Court 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 Appellant."[78] The Court noted that although the controversy was "no longer alive as to appellant Sosna, it remains very much alive for the class of persons she has been certified to represent."[79] Key to the Court's holding was the Court's determination that the controversy was "capable of repetition, yet evading review."[80] The Court recognized that Iowa would continue to enforce its residency requirement, yet no plaintiff challenger would "remain subject to its restrictions for the period necessary to see such a lawsuit to its conclusion."[81]

The Court stated that its holding fully comported with the Article III requirement that its judicial power only extend to "cases and controversies."[82] The Court held that there must be a named plaintiff with a live case or controversy both at the time the case is filed and also at the time the trial court certifies the class.[83] Also, "there must be a live controversy at

74. *Id.* at 398–99.

75. *Id.* at 399–400.

76. *Id.* at 401.

77. *Id.* at 399; *see also id.* at 403 ("A litigant must be a member of the class which he or she seeks to represent at the time the class action is certified by the district court.").

78. *Id.* at 399.

79. *Id.* at 401. However, the Court noted that the focus now would shift from the question of justiciability to the question of whether the named representative may still "fairly and adequately protect the interests of the class." *Id.* at 403.

80. *Id.* at 403.

81. *Id.* at 400.

82. *Id.* at 402.

83. *Id.* However, in dictum contained in a footnote, the Court noted

> [t]here may be cases in which the controversy involving the named plaintiffs is such that it becomes moot as to them before the district court can reasonably be expected to rule on a certification motion. In such instances, whether the

the time [the] [c]ourt reviews the case."[84] In *Sosna*, these requirements were met.[85] The plaintiff had a live controversy when she filed suit and at the time of certification.[86] Finally, the controversy was live at the time of review because the class of unnamed persons acquired its own legal status separate from the plaintiff when it was certified, and the claim was capable of repetition, yet evading review.[87] However, the Court noted "[i]n cases in which the alleged harm would not dissipate during the normal time required for resolution of the controversy, the general principles of Art. III jurisdiction require that the plaintiff's personal stake in the litigation continue throughout the entirety of the litigation."[88]

2. Deposit Guaranty National Bank v. Roper[89]

In *Roper*, the United States Supreme Court addressed the question of whether the defendant's rejected offer of full relief to the named plaintiffs in a class action moots the entire action and prevents plaintiffs from appealing the denial of certification, when the trial court entered judgment in the named plaintiffs' favor, over their objections, in the amount of the rejected offer.[90] In *Roper*, the plaintiffs filed a Rule 23 class action lawsuit against Deposit Guaranty National Bank alleging that "usurious finance charges" had been imposed on their accounts and approximately "90,000 other Mississippi credit card holders."[91] The district court denied certification of the class, and the proceedings were stayed for thirty days to

> certification can be said to 'relate back' to the filing of the complaint may depend upon the circumstances of the particular case and especially the reality of the claim that otherwise the issue would evade review.

Id. at 402 n.11. As Justice White noted in his dissent, this statement implies that the timing of class certification is not the key to determining mootness of an action. *Id.* at 416 n.4 (White, J., dissenting). Indeed, the Court admitted that the timing of class certification is not crucial for Article III purposes when the claim is capable of repetition, yet evading review. U.S. Parole Comm'n v. Geraghty, 445 U.S. 388, 398–99 (1980) ("Some claims are so inherently transitory that the trial court will not have even enough time to rule on a motion for class certification before the proposed representative's individual interest expires.").

84. *Sosna*, 419 U.S. at 402.
85. *See id.* at 401–02.
86. *Id.* at 396–98.
87. *Id.* at 400–01.
88. *Id.* at 402.
89. Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326 (1980).
90. *Id.* at 327.
91. *Id.* at 328.

permit an interlocutory appeal of the court's denial.[92] The Fifth Circuit denied the interlocutory appeal, and the bank offered each named plaintiff "the maximum amount that each could have recovered."[93] The plaintiffs rejected the offer and "made a counteroffer in which they attempted to reserve the right to appeal the [denial of certification.]"[94] The bank rejected the counteroffer, and the court entered judgment in favor of the named plaintiffs in the amount of the bank's original offer, over the plaintiffs' objections, and dismissed the case.[95] Roper sought review of the denial of certification in the Fifth Circuit Court of Appeals.[96] Although the bank argued the appeal was improper because the entry of judgment mooted the entire action, the Fifth Circuit reversed the denial of certification and remanded the action, ordering the district court to certify the class and to allow the lawsuit to proceed.[97] The U.S. Supreme Court granted certiorari limited to the question of mootness.[98]

Although the Court noted that several interests are involved "when questions touching on justiciability are presented in the class-action context,"[99] the Court concluded that resolution of the mootness question only required consideration of the private interests of the named plaintiffs.[100] Although a plaintiff may have a right to bring suit as a class action under Rule 23, the Court noted that this was a "procedural right only, ancillary to the litigation of substantive claims."[101] In fact, the Court ruled: "Should these substantive claims become moot in the Art. III sense, by settlement of all personal claims for example, the court retains no jurisdiction over the

92. *Id.* at 329.
93. *Id.*
94. *Id.*
95. *Id.* at 329–30.
96. *Id.* at 330.
97. *Id.* at 330–31.
98. *Id.* at 331.
99. *Id.* These interests include: The plaintiffs' personal stake in the substantive controversy; plaintiffs' related rights as litigants to use the procedural mechanism of Rule 23 to pursue their lawsuit; the separate responsibility (not a private interest) of plaintiffs to represent the interests of the putative class; the rights of the putative class as potential intervenors; and the responsibility of the "district court to protect both the absent class and the integrity of the judicial process by monitoring the actions of the parties before it." *Id.*
100. *Id.* at 332.
101. *Id.*

controversy of the individual plaintiffs."[102] However, the Court stated that even though "[a] party who receives all that he has sought generally is not aggrieved by the judgment affording the relief and cannot appeal from it," the plaintiffs are permitted to appeal the denial of class certification "so long as [they] retain[] a stake in the appeal satisfying the requirements of Art. III."[103] Here, the Court found that the plaintiffs maintained continuing *individual* interests sufficient to permit them to appeal, separate from any responsibilities they owed to the putative class, based on 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."[104] The Court acknowledged that Rule 23 motivates the plaintiffs to bring actions that perhaps would not be pursued individually for economic reasons.[105] In fact, the Court admittedly found the plaintiffs' argument compelling when the plaintiffs stated they desired to spread "attorney's fees and expenses among more claimants and thus reduc[e] the percentage that would otherwise be payable by them."[106] The Court noted: "For better or worse, the financial incentive that class actions offer to the legal profession is a natural outgrowth of the increasing reliance on the 'private attorney general' for the vindication of legal rights; obviously this development has been facilitated by Rule 23."[107] Finally, the Court stated that it would be "contrary to sound judicial administration" to allow defense counsel to "buy off" the named plaintiffs in class actions "before an

102. *Id.*

103. *Id.* at 333–34.

104. *See id.* at 336, 340. However, *Roper*'s continued vitality has been questioned. In the Court's recent *Genesis Healthcare* opinion, Justice Scalia, writing for the majority, noted:

> Because *Roper* is distinguishable on the facts, we need not consider its continuing validity in light of our subsequent decision in *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 110 S. Ct. 1249, 108 L. Ed. 2d 400 (1990). *See id.* at 480, 110 S. Ct. 1249 ("[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").

Genesis Healthcare Corp. v. Symezyk, 133 S. Ct. 1523, 1532 n.5 (2013).

105. *Roper*, 445 U.S. at 338.

106. *See id.* at 351 n.7 (quoting Plaintiffs-Appellants' Brief in Opposition to Motion to Dismiss Appeal and Reply Brief, Roper v. Consurve, Inc., No. 76-3600 (5th Cir. Jan. 10, 1977)).

107. *Id.* at 338. "Where it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the class-action device." *Id.* at 339.

affirmative ruling on class certification."[108] Such buy-offs would "frustrate the objectives of class actions" and "would invite waste of judicial resources by stimulating successive suits."[109] The Court remanded the action to the district court, whose judgment had been set aside by the court of appeals, and took no clear position on whether the named representatives' *individual* claims on the merits would survive the offer of complete relief made by the bank.[110]

In his concurring opinion, Justice Rehnquist noted that the distinguishing feature of the case was that the bank made an *unaccepted* settlement offer which only satisfied the named representative's claims.[111] According to Justice Rehnquist, "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."[112] Because the bank's settlement offer did not include the putative class, Rehnquist concluded that the offer was not one of full relief, i.e., the bank "has not offered all that has been requested in the [class-action] complaint."[113] In his separate concurring opinion, Justice Stevens stated that the existence of a case or controversy under Article III does not depend on the answer to the certification question, but instead "it depends on the plaintiffs' right to have a class certified."[114] In other words, the absent class members remain party to the suit until "a final determination has been made that the action may not be maintained as a class action."[115] This remains true even if the class representative no longer has a personal stake in the action.[116] In that situation, the focus simply shifts to determine whether the named plaintiff is the proper person to represent the putative class "for the purpose

108. *Id.*

109. *Id.*

110. *Id.* at 337 ("We cannot say definitively what will become of Respondents' continuing personal interest in their own substantive controversy with the Petitioner when this case returns to the District Court . . . . The judgment of the District Court accepting Petitioner's tender has now been set aside by the Court of Appeals. We need not speculate on the correctness of the action of the District Court in accepting the tender in the first instance, or on whether petitioner may now withdraw its tender.").

111. *Id.* at 341 (Rehnquist, J., concurring).

112. *Id.*

113. *Id.*

114. *Id.* at 342 (Stevens, J., concurring).

115. *Id.*

116. *Id.* at 343.

of appealing the adverse class determination."[117]

Justice Powell's dissenting opinion, joined by Justice Stewart, argued that the plaintiffs' interest in sharing litigation costs with the putative class was too speculative to create a personal stake for Article III purposes.[118] The dissent also stated that the desire to spread attorney's fees "relate[d] to no present obligation" and was only "an expectation"; as such, that expectation could not create an existing controversy between the plaintiffs and the defendant.[119] Because Rule 23 is procedural in nature, and the named plaintiffs already were offered all damages requested, the dissent noted the case became moot at the moment of the tender itself.[120] The dissent concluded by noting "the Court directs a remand in which this federal action will be litigated by lawyers whose only 'clients' are unidentified class members who have shown no desire to be represented by anyone."[121]

3. United States Parole Commission v. Geraghty[122]

In *United States Parole Commission v. Geraghty*, which was decided on the same day as *Roper*,[123] the U.S. Supreme Court addressed the question of whether a plaintiff class representative retains a personal stake or some other legally cognizable interest that would permit him to appeal a trial court's decision to deny class certification, despite the fact that the plaintiff's personal claim on the merits had become moot after he filed the appeal.[124] The respondent, John Geraghty, filed a Rule 23 class action in the United States District Court for the District of Columbia to challenge the validity of the United States Parole Commission's Parole Release Guidelines.[125] The district court denied class certification and entered summary judgment in

117. *Id.* at 343–44 (citations omitted).

118. *Id.* at 345 (Powell, J., dissenting). The dissent also warned that "far reaching consequences" could result from such a holding, not the least of which would be that "a person who has accepted full settlement of his individual claim [would be] entitled to file suit on behalf of an unrecompensed class," simply arguing that the fees "ultimately might be shared with a prevailing class." *Id.* at 351 n.10.

119. *Id.* at 351. The dissent also noted that "unadorned speculation will not suffice to invoke the federal judicial power." *Id.*

120. *Id.* at 345–47.

121. *Id.* at 353.

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

123. Both cases were decided on March 19, 1980. *Id.* at 388; *Roper*, 445 U.S. at 326.

124. *Geraghty*, 445 U.S. at 390.

125. *Id.* at 393.

favor of the Parole Commission.[126] Geraghty, individually and "on behalf of a class," filed an appeal in the U. S. Court of Appeals for the Third Circuit.[127] In the meantime, another prisoner, Becher, who was also represented by Geraghty's counsel, filed a petition to intervene after judgment.[128] The district court denied the petition, and Becher also appealed to the Third Circuit; the appeals were consolidated.[129]

Before Geraghty could file his appellate brief with the Third Circuit, he was released from prison.[130] The Parole Commission asked the Third Circuit to dismiss the appeals as moot.[131] The court of appeals ruled the action was not moot, reversed the denial of class certification, and remanded Becher's motion for intervention.[132] The court also ruled the district court's entry of summary judgment in the Commission's favor was error, and remanded the dispute on the merits for further factual development.[133] On appeal, the Supreme Court held the action did not become moot upon expiration of the class representative's claim after class certification was denied.[134] Instead, the Court held the class representative retains a "personal stake" in obtaining class certification that allows him to appeal the denial of certification.[135] The Court described the representative's personal stake in obtaining class certification to be more akin to a "right," and noted that the right was "more analogous to the private attorney general concept than to the type of interest traditionally thought to satisfy the 'personal stake' requirement."[136] The Court expressly limited its holding to the appeal of a denial of class certification. In other words, "A named Plaintiff whose claim expires may not continue to press the appeal *on the merits* until a class has been properly certified."[137] If the denial of class certification is reversed on

126. *Id.*
127. *Id.* at 394.
128. *Id.*
129. *Id.*
130. *Id.*
131. *Id.*
132. *Id.* (citing Geraghty v. U.S. Parole Comm'n, 579 F.2d 238 (3d Cir. 1978)).
133. *Id.* at 395 (citing *Geraghty*, 579 F.2d at 254).
134. *Id.* at 404.
135. *Id.*
136. *Id.* at 403.
137. *Id.* at 404 (emphasis added). When later interpreting its own decision in *Geraghty*, the Court noted the case was an example of the "relation back" doctrine and stated: "[W]e have held that where a certification motion is denied and a named plaintiff's claim subsequently becomes moot, an appellate reversal of the certification

appeal and the class ultimately is certified, then the court may consider the underlying merits of the class action.[138] In reaching its holding, the Court noted the Article III mootness doctrine had a "flexible character" and stated "Art. III justiciability is 'not a legal concept with a fixed content or susceptible of scientific verification.'"[139]

Justice Powell's dissent, joined by Justices Stewart and Rehnquist, criticized the majority's finding that respondent had a personal stake in his procedural claim, i.e., the appeal of the lower court's denial of certification, despite the fact that his personal claim on the merits, had become moot.[140] First, the dissent argued that private-attorney-general status cannot provide a personal stake, because the plaintiff who acts as private attorney general must have a stake of his own on the merits.[141] Here, the named plaintiff no longer had any interest in the injuries alleged in his complaint because he was released from prison.[142] Remarking that "the only persons before this Court who appear to have any interest are the defendants and a lawyer who no longer has a client,"[143] the dissent noted "even Congress may not confer federal-court jurisdiction when Art. III does not."[144] Second, the plaintiff had not mentioned any desire to share costs with the putative class, as was the case in *Roper*, and "affirmatively denie[d] that he retain[ed] any stake or personal interest in the outcome of his appeal."[145] Therefore, the dissent argued he could not meet the case or controversy requirements of Article III.[146] The dissent concluded by noting that although Rule 23 has value as a procedural device, "it cannot provide a plaintiff when none is before the Court."[147]

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decision may relate back to the time of the denial." Genesis Healthcare Corp. v. Symczyk, 133 S. Ct. 1523, 1528 n.2 (2013) (citing *Geraghty*, 445 U.S. at 404).

138. *Geraghty*, 445 U.S. at 404. The Court noted that the focus then would shift from the question of justiciability to the question of whether the named class representative could continue litigating to "fairly and adequately protect the interests of the class." *Id.* at 406.

139. *Id.* at 400–01.

140. *Id.* at 419–20 (Powell, J., dissenting).

141. *Id.* at 421 (citing Warth v. Seldin, 422 U.S. 490, 501 (1975); Sierra Club v. Morton, 405 U.S. 727, 737–738 (1972)).

142. *See id.* at 424.

143. *Id.*

144. *Id.* at 421 (citations omitted).

145. *Id.* at 417.

146. *Id.* at 424.

147. *Id.* at 423–24.

B. *The Court's* Genesis Healthcare Corp. v. Symczyk[148] *Decision Involving Mootness in a Collective Action*

Genesis Healthcare Corp. v. Symczyk is an important, recent case from the Supreme Court which addresses Article III mootness in a regulatory collective action.[149] In *Genesis Healthcare*, the Court addressed the issue of whether a collective action under the Fair Labor Standards Act (FLSA) remained justiciable after plaintiff Symczyk ignored the defendant's Rule 68 offer of full relief and when no plaintiffs other than Symczyk joined the action.[150] In other words, was there a plaintiff who retained a personal stake or some other legally cognizable interest?[151] The plaintiff, a nurse, brought a collective action[152] for various alleged violations of the FLSA.[153] At the same time the defendants answered the complaint, they also served a Rule 68 offer of judgment on the plaintiff; the offer stipulated that it would be "deemed withdrawn" in ten days if it was not accepted before that time.[154] When the ten days had passed without a response from the plaintiff, the defendants filed a motion to dismiss for lack of subject matter jurisdiction, arguing the action was moot and the plaintiff lacked a personal stake because she was offered full relief.[155] The plaintiff countered that the defendants simply were using the motion as a tactic to thwart the collective action process by "pick[ing] off" the named plaintiff before other plaintiffs could opt-in to the action.[156] The district court granted the defendants' motion and ruled the entire action was moot because the plaintiff was offered full relief and there were no other plaintiffs in the action.[157] The court of appeals reversed and

148. Genesis Healthcare Corp. v. Symczyk, 133 S. Ct. 1523 (2013).

149. *Id.* However, the Supreme Court recently granted a writ of certiorari in *Gomez v. Campbell-Ewald Co.*, 768 F.3d 871 (9th Cir. 2014), *cert. granted*, 135 S. Ct. 2311 (2015). The case is discussed *infra* at Part IV.A. *Gomez* involves Article III mootness in the context of a TCPA action where plaintiff never moved for class certification, and the Supreme Court's opinion most likely will address many of the concerns raised in this article. *See id.*

150. *Genesis Healthcare*, 133 S. Ct. at 1527–28.

151. *See id.* at 1528–29.

152. The FLSA permits employees not only to sue on their own behalf, but also to bring an action on behalf of "other employees similarly situated." 29 U.S.C. § 216(b) (2012). When the suit is brought on behalf of others similarly situated, it is referred to as a "collective action." *Genesis Healthcare*, 133 S. Ct. at 1527.

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

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.*

held that, although the named plaintiff's substantive claim on the merits was moot, the collective action was not moot.[158] The court of appeals reasoned that defendants' tactic of buying off the named plaintiff using Rule 68 offers would frustrate the goals of collective actions if the tactic were permitted to moot the entire action.[159] The court of appeals ordered the case to be remanded to enable the plaintiff to seek "conditional certification" of the collective action which, if successful, would relate back to the date of the filing of the complaint.[160]

The Supreme Court accepted certiorari and addressed the question of whether the entire action remained justiciable despite the fact that the named plaintiff's claim on the merits was moot.[161] For purposes of review, the Court "assume[d], without deciding," that the named plaintiff's individual claim was moot because of the Rule 68 offer of complete relief.[162] The Court held: "A straightforward application of well-settled mootness principles compels our answer. 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."[163] According to the Court, "respondent has no personal interest in representing putative, unnamed claimants, nor any other continuing interest that would preserve her suit from mootness."[164] Therefore, the Court reversed the decision of the Third Circuit.[165]

The plaintiff relied on *Sosna*, *Geraghty*, and *Roper* to argue the entire collective action was not moot, arguing that she had a personal stake "based

158. *Id.*

159. *Id.*

160. *Id.* at 1527–28.

161. *Id.* at 1529.

162. *Id.* The Court noted that the circuits were split on the issue of whether an unaccepted offer of full relief moots a plaintiff's claim, but they declined to address the split, stating: "[W]e do not reach this question, or resolve the split, because the issue is not properly before us." *Id.* at 1528–29. However, the issue is currently pending before the Court. *See* Gomez v. Campbell-Ewald Co., 768 F.3d 871 (9th Cir. 2014), *cert. granted*, 135 S. Ct. 2311 (May 18, 2015); *see also* discussion *infra* Part IV.A.

163. *Genesis Healthcare*, 133 S. Ct. at 1529. Undoubtedly, one key fact was that no other plaintiff opted-in to join the named plaintiff's collective action. *Id.* The Court stated: "[W]e do not resolve the question whether a Rule 68 offer that fully satisfies the Plaintiff's claims is sufficient *by itself* to moot the action . . . ." *Id.* at 1529 n.4 (emphasis added).

164. *Id.* at 1532.

165. *Id.*

on a statutorily created collective-action interest [under the FLSA] in representing other similarly situated employees."[166] The Court noted that these cases were "inapposite" factually and stated that "Rule 23 actions are fundamentally different from collective actions under the FLSA."[167] The Court found *Sosna* to be inapposite because, in *Sosna*, the plaintiff's individual claim became moot *after* certification of the class.[168] Similarly, in *Geraghty*, the Court noted that the named plaintiff's claim remained live at the time the District Court denied class certification.[169] In contrast, here, the Court noted the plaintiff never moved for "conditional certification" of the collective action, and "[t]here is simply no certification decision to which respondent's claim could have related back."[170]

The plaintiff also argued that the defendant's buy-off strategy, in effect, would make collective actions "inherently transitory" if the Court were to hold the entire collective action was moot.[171] The Court disagreed and noted that the inherently transitory doctrine focuses on the "fleeting nature of the challenged conduct" and "not on the defendant's litigation strategy."[172] Also, the Court held that claims for damages, including the plaintiff's claim for statutory damages, could never be transitory and evade review.[173] Instead, the Court noted that damage claims remain live until "settled, judicially resolved, or barred by a statute of limitations."[174] The Court also noted that

166. *Id.* at 1530.

167. *Id.* at 1529 (citing Hoffmann-La Roche, Inc. v. Sperling, 493 U.S. 165, 177–78 (1989) (Scalia, J., dissenting)). One key distinction noted by the Court is the fact that a Rule 23 class obtains a legal status separate from plaintiff when the class is certified; however, "conditional certification" of a collective action under the FLSA "does not produce a class with an independent legal status." *Id.* at 1530. Instead, it simply permits plaintiff to send notice of suit to employees who must opt-in by filing written consent with the court. *Id.* The Court noted that the independent legal status of a certified class under Rule 23 was "essential to our decisions in *Sosna* and *Geraghty*." *Id.*

168. *Id.* This timing is crucial because a certified class acquires a legal status distinct from plaintiff. *Id.* (citing Sosna v. Iowa, 419 U.S. 393, 399–402 (1975)). Therefore, the action was not moot as to the certified class. *See id.*

169. *Id.*

170. *Id.*

171. *Id.* at 1531 (citations omitted). For a recent discussion of this point, see Diane Myers, Note, *Mooting the Fair Labor Standards Act: How Offers of Judgment Are Eliminating the FLSA Collective Action*, 53 HOUS. L. REV. 303 (2015).

172. *Genesis Healthcare*, 133 S. Ct. at 1531.

173. *Id.*

174. *Id.* The Court noted that the "inherently transitory" doctrine typically is applied to claims for injunctive relief that involve ongoing conduct. *See id.*

putative plaintiffs who never joined the collective action are not prejudiced by a finding of mootness, because they remain free to file their own suits.[175]

The Court also rejected the plaintiff's argument, based on *Roper*, that a finding of mootness based on the defendant's buy-off attempt would frustrate the purposes behind the collective action provisions of the FLSA.[176] The Court noted that the holding in *Roper* was based on the Court's "specific factual finding that the plaintiffs' possessed a continuing personal economic stake" in the action after the offer of judgment was made.[177] That personal economic stake, in *Roper*, was the plaintiffs' desire to shift a portion of the costs and expenses to the putative class members who would ultimately succeed.[178] Here, the Court stated the plaintiff has never indicated any desire to shift costs and expenses to others.[179]

In a strongly worded dissent, Justice Kagan (joined by Justices Ginsburg, Breyer, and Sotomayor) criticized the majority for assuming, without deciding, that the plaintiff's individual claim on the merits was moot.[180] First, the dissent argued that the plaintiff's individual claim was *not* moot.[181] According to the dissent, the plaintiff's refusal to accept the Rule 68 offer simply made the offer a nullity, and the case should continue as usual.[182] Second, the dissent noted that the language of Rule 68 states an unaccepted

175. *Id.*

176. *Id.* at 1531–32. The Court also noted that the language in *Roper* that stated that buy-offs "would frustrate the objectives of class actions" was dictum. *Id.* at 1532 (quoting Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326, 339 (1980)).

177. *Genesis Healthcare*, 133 S. Ct. at 1532.

178. *Id.*

179. *Id.* The Court also noted that collective actions are different from Rule 23 class actions and ruled "*Roper*'s dictum [regarding buy-offs frustrating the objectives of class actions] was tethered to the unique significance of certification decisions in class action proceedings." *Id. But see* Lary v. Rexall Sundown, Inc., 74 F. Supp. 3d 540, 556 (E.D.N.Y 2015) (noting that pick off concerns do not apply to precertification TCPA class actions because "members of the proposed class may file individual lawsuits to recover their damages." (citing Geismann v. ZocDoc, Inc., 60 F. Supp. 3d 404, 406–07 (S.D.N.Y. 2014))).

180. *Genesis Healthcare*, 133 S. Ct. at 1534 (Kagan, J., dissenting). The dissent noted that the question of whether the plaintiff's individual claim is moot is "inextricably intertwined" with the question of whether the entire collective action is moot. *Id.*

181. *Id.* at 1533–34.

182. *Id.* Justice Kagan noted "every first-year law student learns the recipient's rejection of an offer 'leaves the matter as if no offer had ever been made.'" *Id.* at 1533 (quoting Minneapolis & St. Louis Ry. Co. v. Columbus Rolling-Mill Co., 119 U.S. 149, 151 (1886)).

offer "is considered withdrawn."[183] As a result, the effect of the plaintiff's refusal to accept the Rule 68 offer is to restore the status quo ante, as if no offer had been made.[184] Third, the dissent stated that the individual plaintiff's claims could *never* become moot based on an unaccepted Rule 68 offer, because, quoting the majority opinion, the plaintiff's damages claim "remains live until it settled [or] judicially resolved."[185] Fourth, the dissent argued that permitting such buy-offs would thwart the purpose of collective actions under the FLSA.[186] Finally, the dissent noted that Rule 68 prohibits a court from imposing a judgment against the plaintiff's will.[187] "The Rule provides no appropriate mechanism for a court to terminate a lawsuit without the plaintiff's consent."[188] The dissent concluded, stating: "No more in a collective action brought under the FLSA than in *any other class action* may a court, prior to certification, eliminate the entire suit by acceding to a defendant's proposal to make only the named plaintiff whole."[189]

C. *Summary of Relevant Supreme Court Precedent*

In order to avoid mootness in a Rule 23 class action, the Court held that there must be a named plaintiff with a live case or controversy both at the time the case is filed and also at the time the trial court certifies the

183. *Genesis Healthcare*, 133 S. Ct. at 1534.

184. *Id.*

185. *Id.* at 1535. The dissent found it "preposterous" that the end result of the unaccepted offer of judgment, according to the majority's holding, is that plaintiff walks away with no money whatsoever. *Id.*

186. *Id.* at 1536 (quoting Hoffman-LaRoche, Inc. v. Sperling, 493 U.S. 165, 170 (1989)).

187. *Id.*

188. *Id.* The dissent also stated the courts lack "inherent authority" to enter judgment in plaintiff's favor against her will, unless the defendant completely surrenders, offering plaintiff all she requested. *Id.* Here, according to the dissent, plaintiff did not receive all she requested because the offer of judgment was for plaintiff's claim only, and did not include others similarly situated as demanded in the complaint. *Id.*

189. *Id.* (emphasis added). This statement arguably predicts the dissenting justices' likely future conclusions in the case of *Gomez v. Campbell-Ewald Co.*, 768 F.3d 871 (9th Cir. 2014), *cert. granted*, 135 S. Ct. 2311 (May 18, 2015). *Gomez* addressed whether a Rule 68 offer to satisfy in-full the named representatives claim only, prior to Rule 23 class certification, (1) moots the named representative's claim and (2) moots the claims of the uncertified putative class. *See Gomez*, 768 F.3d at 874–75; *see also* discussion *infra* Part IV.A. The dissenting Justices' likely answer to both of these questions will be "no," based on this dictum. *See Genesis Healthcare*, 133 S. Ct. at 1536.

class.[190] Also, there must be a live controversy at the time the court reviews the case.[191] In short, the Court held that the live controversy must be "extant at all stages of review."[192] The problem of mootness was addressed in several contexts. First, in situations where the named plaintiff's claim on the merits becomes moot *after the class has been certified*, the Court held the entire action does not become moot because the putative class of unnamed persons acquires its own legal status separate from the plaintiff when the class is certified, thus meeting Article III requirements.[193] A basic consequence of this is that any Rule 68 offer of judgment made after the class is certified, which does not include the entire class, is not an offer of complete relief.[194] Such an incomplete offer cannot moot the entire action.[195] Second, if the named plaintiff's claim on the merits becomes moot *after denial of class certification*, the Court held the class representative retains a "personal stake" in obtaining class certification, analogous to the private-attorney-general concept, which allows him to appeal the denial of certification.[196] The named plaintiffs also have continuing *individual* interests sufficient to permit them to appeal a denial of certification, separate from any responsibilities they owe to the putative class, based on 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."[197] When the class representative appeals a denial of class certification, the appellate court's reversal of the erroneous denial of certification will "relate back" to the time of the original denial, preventing the action from becoming moot.[198] If, however, the denial of certification is upheld on appeal, then the entire case must be dismissed as moot.[199] Third,

190. Sosna v. Iowa, 419 U.S. 393, 402 (1975).

191. U.S. Parole Comm'n v. Geraghty, 445 U.S. 388, 399 (1980) ("Some claims are so inherently transitory that the trial court will not have even enough time to rule on a motion for class certification before the proposed representative's individual interest expires.").

192. *Genesis Healthcare*, 133 S. Ct. at 1528.

193. *Id.* at 1530; *Sosna*, 419 U.S. at 399–402.

194. *See Sosna*, 419 U.S. at 399–402.

195. *See id.*

196. *Geraghty*, 445 U.S. at 404. The court described the representative's "personal stake" in obtaining class certification as more akin to a "right," and noted that the right was "more analogous to the private attorney general concept than to the type of interest traditionally thought to satisfy the 'personal stake' requirement." *Id.* at 403 (citing Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326, 338 (1980)).

197. *See Roper*, 445 U.S. at 336–37; *supra* text accompanying note 104.

198. *Geraghty*, 445 U.S. at 404 n.11; *Genesis Healthcare*, 133 S. Ct. at 1530.

199. *Geraghty*, 445 U.S. at 404; *Genesis Healthcare*, 133 S. Ct. at 1530.

inherently transitory claims which are capable of repetition yet evading review do not become moot when the named plaintiff's claim becomes moot.[200] Instead, where the named plaintiff's underlying claim becomes moot "before the district court has an opportunity to rule on the certification motion, *and the issue would otherwise evade review*, the certification might 'relate back' to the filing of the complaint."[201] The Court limited this doctrine to cases where the challenged conduct was "effectively unreviewable, because no plaintiff possessed a personal stake in the suit long enough for the litigation to run its course." [202] Fourth, in collective actions (distinct from Rule 23 class actions) such as actions brought under FLSA on behalf of the plaintiff and others similarly situated, the Court held that the entire action became moot when the named plaintiff's underlying claim became moot, if no other plaintiffs had opted-in to the action prior to that time and the plaintiff had not yet sought conditional certification of her collective action.[203] According to the Court, "respondent has no personal interest in representing putative, unnamed claimants, nor any other continuing interest that would preserve her suit from mootness."[204]

Finally, and most significantly, at the present time there is no decision from the Supreme Court in a Rule 23 class action which provides guidance to lower courts on the question of mootness when the named plaintiff is

200. *Genesis Healthcare*, 133 S. Ct. at 1530–31 (citing *Sosna*, 419 U.S. at 402 n.11; Cnty. of Riverside v. McLaughlin, 500 U.S. 44, 52 (1991)); *see also Geraghty*, 445 U.S. at 399.

201. *Genesis Healthcare*, 133 S. Ct. at 1530 (emphasis added) (citing *Sosna*, 419 U.S. at 402 n.11).

202. *Genesis Healthcare*, 133 S. Ct. at 1531 (quoting *McLaughlin*, 500 U.S. at 52) (noting the inherently transitory doctrine applies when it is "certain that other persons similarly situated" will be subjected to the challenged conduct, and the claims are "so inherently transitory that the trial court will not have even enough time to rule on a motion for class certification before the proposed representative's individual interest expires").

203. *Genesis Healthcare*, 133 S. Ct. at 1529–30.

204. *Id.* at 1532. However, the Court noted that "Rule 23 actions are fundamentally different from collective actions under the FLSA." *Id.* at 1529. This leaves open the question of whether the *Genesis* holding applies in the Rule 23 context. Many courts have held that it does not. *See, e.g.*, Gomez v. Campbell-Ewald Co., 768 F.3d 871, 875 (9th Cir. 2014) ("[C]ourts have universally concluded that the *Genesis* discussion does not apply to class actions."), *cert. granted*, 135 S. Ct. 2311 (May 18, 2015). The *Gomez* decision also stated, "At least ten courts had expressly stated that the *Genesis* analysis does not bind courts with respect to class action claims." *Id.* at 875 n.2 (citations omitted).

offered full relief *prior to moving for class certification*.[205] The Court noted: "Difficult questions arise as to what, if any, are the named plaintiffs' responsibilities to the putative class *prior* to certification."[206]

IV. THE CIRCUIT SPLIT REGARDING OFFERS BEFORE THE PLAINTIFF MOVES TO CERTIFY THE CLASS

At the present time, in spite of (or perhaps because of) the Supreme Court's recent decision in *Genesis Healthcare*, the circuits remain divided on the questions of whether, prior to the plaintiff's filing of a motion for class certification, a rejected or ignored Rule 68 offer which affords the plaintiff complete relief moots (1) the named plaintiff's individual claim, and (2) the entire Rule 23 class action.[207] After all, the *Genesis Healthcare* majority "assume[d], without deciding," that the named plaintiff's individual claim on the merits was moot.[208] Similarly, although the *Genesis Healthcare* Court found that the entire collective action "became moot when her individual claim became moot" prior to conditional certification, the Court's decision made it clear that "Rule 23 actions are fundamentally different from collective actions under the FLSA."[209] This has led lower courts to ignore the *Genesis Healthcare* decision completely when confronted by the question of whether a rejected or ignored Rule 68 offer of complete relief moots the named plaintiff's claim or the entire Rule 23 class action.[210]

205. *See supra* note 22 and accompanying text. Although the Supreme Court issued its opinion in *Gomez* as this article was in final production, *Gomez* does not definitively resolve the circuit split. Instead, the decision provides little guidance and raises even more questions. For the Author's criticism of the decision, see the "Author's Addendum" provided at the end of this Article.

206. Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326, 340 n.12 (1980).

207. *See supra* note 22 and accompanying text; *see also Genesis Healthcare*, 133 S. Ct. at 1528–29, 1537.

208. *Genesis Healthcare*, 133 S. Ct. at 1529. Indeed, the Court itself noted: "[W]e do not resolve the question whether a Rule 68 offer that fully satisfies the plaintiff's claims is sufficient by itself to moot the action." *Id.* at 1529 n.4; *see also id.* at 1537 (Kagan, J., dissenting) ("The Court could have resolved this case [] along with a Circuit split . . . by correcting the Third Circuit's view that an unaccepted settlement offer mooted Symczyk's individual claim. Instead, the Court chose to address an issue predicated on that misconception, in a way that aids no one, now or ever.").

209. *Id.* at 1529 (citing Hoffmann-La Roche, Inc. v. Sperling, 493 U.S. 165, 177–78 (1989) (Scalia, J., dissenting)).

210. *See, e.g.*, *Gomez*, 768 F.3d at 875, *cert. granted*, 135 S. Ct. 2311 (May 18, 2015) ("[C]ourts have universally concluded that the *Genesis* discussion does not apply to class actions."); *see also* Weitzner v. Sanofi Pasteur, Inc., 7 F. Supp. 3d 460, 467–468 (M.D. Pa.

A. *Circuit Courts of Appeal Finding Claims Are Not Moot*

Several Circuit Courts of Appeal—the First,[211] Fifth,[212] Seventh,[213] Ninth,[214] and Eleventh[215]—have held a Rule 68 offer of judgment made before a plaintiff files a motion to certify the class, which affords complete relief to the named plaintiff only, will *not* moot the plaintiff's individual claim or the putative class action. In the First Circuit, a recent opinion followed the dissent in *Genesis Healthcare*.[216] The court held that a rejected Rule 68 offer in a TCPA class action, before the plaintiff moved to certify the class, did not moot the plaintiff's TCPA claim or the class action.[217] The

2014) (listing cases that hold *Genesis* is limited to FLSA collective actions, and holding *Genesis* does not apply to TCPA class action when Rule 68 offer made to the named plaintiff only and no motion to certify the class has been filed).

211. Yaakov v. ACT, Inc., 798 F.3d 46, 55 (1st Cir. 2015) (noting that "ACT's unaccepted and withdrawn Rule 68 offer did not moot this litigation because Bais Yaakov has not 'received complete relief'").

212. Hooks v. Landmark Indus., Inc., 797 F.3d 309, 314–15 (5th Cir. 2015).

213. Chapman v. First Index, Inc., 796 F.3d 783, 788–89 (7th Cir. 2015).

214. *Gomez*, 768 F.3d at 874–75, *cert. granted*, 135 S. Ct. 2311 (May 18, 2015) (No. 14-857) (holding that neither plaintiff's TCPA claim nor the class action were mooted by a Rule 68 offer of complete relief made to the named plaintiff, although no motion to certify the class had been filed); Chen v. Allstate Ins., No. C 13-0685 PJH, 2013 WL 2558012, at *8–9 (N.D. Cal. June 10, 2013), *amended by* No. C 13-0685 PJH, 2013 WL 3973798 (N.D. Cal. July 31, 2013); Craftwood II, Inc. v. Tomy Int'l, Inc., No. SA CV 12-1710 DOC (ANx), 2013 WL 3756485, at *4 (C.D. Cal. July 15, 2013) (treating the defendant's motion for summary judgment as a motion to dismiss for lack of subject matter jurisdiction and ruling neither plaintiff's TCPA claim nor the class action were mooted by a Rule 68 offer of complete relief made to the named plaintiff, even though no motion to certify the class had been filed); Knutson v. Schwan's Home Serv., Inc., No. 3:12-cv-0964-GPC-DHB, 2013 WL 4774763, at *11 (S.D. Cal. Sept. 5, 2013) (rejected offer of judgment in TCPA class action does not moot the case, despite the plaintiff's failure to move for class certification); Aderhold v. Car2go N.A., LLC, No. C13-489RAJ, 2014 WL 794805, at *2 (W.D. Wash. Feb. 27, 2014) (plaintiff's claim and class action are not mooted by rejected Rule 68 offer affording the named plaintiff full relief).

215. Stein v. Buccaneers Ltd., 772 F.3d 698, 709 (11th Cir. 2014) (an unaccepted Rule 68 offer of judgment moots neither plaintiff's TCPA claim nor the class action, even when plaintiff has not moved to certify the class.); *see* Barr v. Harvard Drug Grp., 591 F. App'x 928 (11th Cir. 2015)*; see also* Daisy, Inc. v. Pollo Operations, Inc., No. 2:14-cv-564-SPC-CM, 2015 WL 4635114, at * 6 (M.D. Fla. Aug. 3, 2015) (holding action not moot because further discovery is needed to determine whether the defendant's offer, which was not made under Rule 68, provides complete relief in TCPA action).

216. *Yaakov*, 798 F.3d at 55.

217. *Id.*

Fifth Circuit had a recent change of heart[218] and sided with the dissent in *Genesis Healthcare*. The Fifth Circuit held that a rejected Rule 68 offer[219] made before the plaintiff moved to certify the class is simply a "legal nullity" and did not moot the plaintiff's claim or the class action.[220] The court noted

218. *See* Hooks v. Landmark Indus., Inc., 797 F.3d 309, 314–15 (5th Cir. 2015) (holding that neither the plaintiff's claim nor the class's claims are mooted by a Rule 68 offer). In the past, the Fifth Circuit has held that an offer that affords the named plaintiff full relief renders the plaintiff's individual claim moot. *See* Sandoz v. Cingular Wireless LLC, 553 F.3d 913, 921, 921 n.6 (5th Cir. 2008) (remanding FLSA action to determine whether certification motion was filed "without undue delay" so as to make relation-back doctrine applicable to class claims, but ruling that the named plaintiff's claim was mooted by offer of complete relief made before filing motion to certify class); *see also* Fontenot v. McCraw, 777 F.3d 741, 747–48 (5th Cir. 2015) (recognizing that controversy as to named plaintiffs is moot when their demands are met); Masters v. Wells Fargo Bank S. Cent., N.A., No. A-12-CA-376-SS, 2013 WL 3713492, at *4 (W.D. Tex. July 11, 2013) (noting the Fifth Circuit's position that "an unaccepted offer fully satisfying a claim does moot the claim."). The Fifth Circuit also has suggested that the entire class action would be moot if plaintiff's individual claim became moot before plaintiff filed a motion for class certification. *Fontenot*, 777 F.3d at 750–51. The Fifth Circuit refused to use the "relation-back" doctrine to save such suits from mootness, noting that plaintiff simply could have filed a motion to certify the class with the filing of the class action complaint. *Id.* at 751. The latter holding confirmed the propriety of earlier district court decisions in the circuit, which found that Rule 68 offers in TCPA actions mooted both the plaintiff's individual claim and the entire class action. *See, e.g.*, Bank v. Spark Energy Holdings LLC, No. 4:11-CV-4082, 2013 WL 5724507, at *11 (S.D. Tex. Oct. 18, 2013) (finding the plaintiff's claim and the entire action moot when the defendant made Rule 68 Offer and plaintiff had not moved to certify the class); Masters v. Wells Fargo Bank S. Cent., N.A., No. A-12-CA-376-SS, 2013 WL 3713492, at *6 (W.D. Tex. July 11, 2013) (finding TCPA class action and the plaintiff's individual claim mooted by the defendant's Rule 68 offer).

219. The court assumed the offer was complete, and noted that their "decision does not hinge on the completeness of the offer." *Hooks*, 797 F.3d at 313.

220. *Id.* at 315. The district court determined that the offer mooted the plaintiff's claim because a motion to certify the class had not been filed when the defendant made its Rule 68 offer. *Id.* at 311–12. The procedural history of this case is quite interesting. The defendant made its Rule 68 offer to the plaintiff on June 18, 2012, even though the court gave plaintiff until September 7, 2012 to file a class certification motion. *Id.* at 311. Hooks moved to strike the Rule 68 offer on June 28, 2012, and on September 7, 2012 (while to motion to strike was pending) Hooks sought additional time to certify the class. *Id.* The court denied the motion to strike on September 28, 2012. *Id.* On October 5, 2012, Hooks filed a motion for class certification, and the defendant filed a motion to dismiss for lack of subject matter jurisdiction. *Id.* The court certified the class and denied the defendant's motion to dismiss on July 30, 2013. *Id.* Approximately seven months later, on March 25, 2014, the defendant again moved to dismiss based on its earlier Rule 68 offer, arguing its offer mooted the entire action. *Id.* at 311–12. The court vacated its

that a plaintiff should be permitted to "reject the offer and proceed with the class action."[221] The court voiced its concern regarding plaintiff buy-offs and reasoned that a contrary approach would give defendants the power to moot class actions and send the plaintiffs away without relief.[222]

Although the Seventh Circuit had ruled that both the plaintiff's claim and the entire class action were mooted by a Rule 68 offer made before the plaintiff moved for certification,[223] the Seventh Circuit recently overruled its earlier decisions and issued an opinion suggesting that estoppel or waiver could perhaps be used to end the litigation, rather than the mootness doctrine.[224] In its recent case, a TCPA class action where certification was denied and only the representative remained as a plaintiff, the Seventh Circuit held the defendant's offer of full compensation did not "moot[] the litigation or otherwise end[] the Article III case or controversy."[225] Although the court reaffirmed its position that "[y]ou cannot persist in suing after you've won,"[226] the court stated that "[r]ejecting a fully compensatory offer may have consequences other than mootness" and perhaps the rejected offer could be used as an affirmative defense "in the nature of an estoppel or waiver."[227] The court found mootness was not the appropriate doctrine to use for dismissal, in part, because the court would have the power to enter judgment or fashion injunctive relief.[228] However, the court's dictum clearly indicated that they believed continuing the litigation would be a waste of

earlier order and dismissed the action. *Id.* at 312.

221. *Id.* at 315 (quoting Yaakov v. ACT, Inc., 987 F. Supp. 2d 124, 128 (D. Mass. 2014)).

222. *Hooks*, 797 F.3d at 315; *see also* Suttles v. Specialty Graphics, Inc., No. A-14-CA-505 RP, 2015 WL 590241, at *6 (W.D. Tex. Feb. 11, 2015) (holding that *neither* the named plaintiff's individual TCPA claim *nor* the uncertified class's claims were mooted by the Rule 68 offer).

223. *See, e.g.*, Damasco v. Clearwire Corp, 662 F.3d 891, 896 (7th Cir. 2011) (dismissing plaintiff's TCPA claim and entire class action, stating: "To allow a case, not certified as a class action and with no motion for class certification even pending, to continue in federal court when the sole plaintiff no longer maintains a personal stake defies the limits on federal jurisdiction expressed in Article III."), overruled by Chapman v. First Index, Inc, 796 F.3d 783, 787 (7th Cir. 2015); Webster v. Bayview Loan Servicing LLC, No. 1:13-cv-01975-TWP-DML, 2015 WL 470523, at *3 (S.D. Ind. Feb. 3, 2015) (continued litigation defies Article III).

224. Chapman v. First Index, Inc, 796 F.3d 783, 787 (7th Cir. 2015).

225. *Id.*

226. *Id.* (quoting Greisz v. Houshold Bank, 176 F.3d 1012, 1015 (7th Cir. 1999)).

227. *Id.*

228. *Id.* at 786.

judicial resources, and stated, "Opinions are supposed to be the byproducts of real disputes."[229] Nevertheless, because only mootness was before the court, the court ruled these questions should "be left for another day, when the parties have addressed them."[230]

The Fifth, Seventh, and Eleventh Circuits' rejection of mootness in these circumstances is now aligned with that of the Ninth Circuit, whose recent decision in *Gomez v. Campbell-Ewald Co.*[231] will be reviewed by the U.S. Supreme Court, with a decision expected in mid-2016. In *Gomez*, a consumer sued an advertiser in a Rule 23 class action, based on the advertiser's alleged violations of the TCPA.[232] The advertiser contracted with the Navy to assist in a multimedia recruiting campaign, designed to target 18- to 24-year-olds.[233] The plaintiff, a 40-year-old, received an unsolicited text on his cell phone, and argued the text violated the TCPA.[234] After the defendant's 12(b)(6) motion was denied, the defendant made a Rule 68 offer of judgment to the plaintiff for $1503 per violation, plus reasonable costs, which the plaintiff ignored and let expire.[235] Afterward, the defendant filed a motion to dismiss for lack of jurisdiction under Rule 12(b)(1), arguing that its Rule 68 offer mooted the plaintiff's claim and the entire action.[236] The trial court denied the motion.[237] However, the court later entered summary judgment in the defendant's favor based on derivative immunity, and the plaintiff appealed.[238] The defendant filed a motion to dismiss the appeal for lack of jurisdiction, which the Ninth Circuit denied.[239]

The Ninth Circuit vacated the district court's order and remanded.[240]

229. *Id.* at 788.

230. *Id.*

231. Gomez v. Campbell-Ewald Co., 768 F.3d 871, 875 (9th Cir. 2014), *cert. granted*, 135 S. Ct. 2311 (May 18, 2015) (No. 14-857). *See supra* note 22 and accompanying text. The Supreme Court issued its decision in *Gomez* as this Article was in final production. Please see the "Author's Addendum" at the end of this Article for a discussion of the Supreme Court's decision in *Gomez*.

232. *Gomez*, 768 F.3d at 874.

233. *Id.* at 873.

234. *Id.* at 874.

235. *Id.*

236. *Id.*

237. *Id.*

238. *Id.*

239. *Id.*

240. *Id.* at 882.

The court began by addressing jurisdiction.[241] The court held that a Rule 68 offer of judgment which afforded the named plaintiff full relief did not moot his individual claim.[242] The court also held the putative class members' claims were not mooted by the offer.[243] The court reasoned, "Gomez rejected the offer before he moved for class certification. Gomez's rejection therefore does not affect any class claims."[244] The Ninth Circuit noted that the Supreme Court's decision in *Genesis Healthcare* does not apply to Rule 23 class actions and is not "clearly irreconcilable" with earlier Ninth Circuit opinions on the mootness question.[245]

B. *Circuit Courts of Appeal Finding Claims Are Moot*

Several circuits—the Second, Third, and Sixth—have found that a Rule 68 offer of complete relief will moot a named plaintiff's claim.[246] The Second Circuit's approach, which was clarified in a recent decision, is that a rejected or ignored Rule 68 offer of complete relief will moot a named plaintiff's claim, but not until the court enters judgment.[247] The Second Circuit expressly declined to address the legal effect of mootness on the putative class's claims.[248] However, several district courts within the Second Circuit

241. *Id.* at 874.

242. *Id.* at 874–75 (citing Diaz v. First Am. Home Buyers Prot. Corp., 732 F.3d 948, 950 (9th Cir. 2013)).

243. *Gomez*, 768 F.3d at 875.

244. *Id.*

245. *Id.* at 875–76. The Ninth Circuit also ruled derivative immunity did not apply and stated that the defendant did not meet its burden under Rule 56 to prove it is entitled to judgment. *Id.* at 882.

246. *E.g.*, O'Brien v. Ed Donnelly Enters., Inc., 575 F.3d 567, 575 (6th Cir. 2009); Weiss v. Regal Collections, 385 F.3d 337, 342 (3d Cir. 2004); Geismann v. Zocdoc, Inc., 60 F. Supp. 3d 404, 406 (S.D.N.Y. 2014).

247. Tanasi v. New All. Bank, 786 F.3d 195, 200 (2d Cir. 2015). However, the court muddied the waters by adding the following language:

> If the parties agree that judgment should be entered against the defendant, then the district court should enter such a judgment. Then *after* judgment is entered, the plaintiff's individual claims will become moot for purposes of Article III. Absent such agreement, the district court should not enter judgment against the defendant if it does not provide complete relief.

Id. (citations omitted). In other words, although the court seems to require the parties to agree to the entry of judgment, this requirement is negated when the court implicitly acknowledges that "absent such agreement" the court may enter judgment anyway, if the offer "provide[s] complete relief." *See id.*

248. *Id.* at 197 ("[W]e refrain from reaching the certified question of whether

have found both a plaintiff's TCPA claim and the entire class action were mooted by a Rule 68 offer made when a class certification motion was pending, but had not been resolved.[249] The Third Circuit has held that such an offer will moot a named plaintiff's individual claim[250] but not necessarily the putative class's claims.[251]

The Sixth Circuit has ruled that an individual plaintiff's claim may be mooted, but only when the Rule 68 offer is complete and satisfies the plaintiff's "entire demand."[252] Also, the Sixth Circuit follows the approach of the Second Circuit and requires judgment to be entered in the plaintiff's favor in order to moot the plaintiff's claim.[253] However, the Sixth Circuit has

putative class action claims brought under Rule 23 of the Federal Rules generally provide an independent basis for Article III Justiciability.").

249. *Geismann*, 60 F. Supp. 3d at 406–07 (holding although motion to certify the class was filed on the same day as class action complaint, the defendant's Rule 68 offer mooted the action and the court entered judgment for the plaintiff); *see also* Lary v. Rexall Sundown, Inc., 74 F. Supp. 3d 540, 557 (E.D.N.Y. 2015) (judgment entered for the named plaintiff while motion to certify class is pending, based on the defendant's Rule 68 offer of relief). *But see* Mey v. Frontier Commc'ns Corp., No. 3:13-CV-01191-MPS, 2014 WL 6977746, at *4–6 (D. Conn. Dec. 9, 2014) (noting the split in the Second Circuit prior to *Tanasi* and, based on that split, ruling that the plaintiff's TCPA claim and the class claims are not mooted by a Rule 68 offer made while a motion to certify the class is pending).

250. *Weiss*, 385 F.3d at 342. The Fifth, Ninth, and Eleventh Circuits hold that *neither* the named plaintiff's individual claims *nor* the putative class's claims are mooted. *See, e.g.*, Gomez v. Campbell-Ewald Co., 768 F.3d 871, 874–75 (9th Cir. 2014), *cert. granted*, 135 S. Ct. 2311 (May 18, 2015) (No. 14-857) (ordering plaintiff's individual TCPA claim and class action remain live); *see also, e.g.*, Hooks v. Landmark Indus., Inc., 797 F.3d 309, 314–15 (5th Cir. 2015); Stein v. Buccaneers Ltd. P'ship, 772 F.3d 698, 709 (11th Cir. 2014).

251. *See, e.g.*, *Weiss*, 385 F.3d at 342, 348 (holding the Rule 68 offer, made *before* plaintiff moved to certify the class, mooted the individual plaintiff's FDCPA claim but not the class claims because "the appropriate course is to relate the certification motion back to the filing of the class complaint" where plaintiff did not engage in undue delay); *see also* Weitzner v. Sanofi Pasteur, Inc., 7 F. Supp. 3d 460, 468 (M.D. Pa. 2014) (ruling that the "relate back doctrine" saved TCPA class action from mootness when Rule 68 offer of complete relief was made to the named plaintiff only and no motion to certify the class has been filed).

252. O'Brien v. Ed Donnelly Enters., Inc., 575 F.3d 567, 574 (6th Cir. 2009) ("We agree with the Seventh Circuit's view that an offer of judgment that satisfies a plaintiff's entire demand moots the case."); *see also* Hrivnak v. Portfolio Mgmt., Inc, 719 F.3d 564, 567–68 (6th Cir. 2013) (acknowledging a plaintiff's individual claim may be mooted by a Rule 68 offer of complete relief, but ruling that the defendant's offer was incomplete and required the court to address the underlying merits of the plaintiff's claim).

253. *O'Brien*, 575 F.3d at 575 ("[W]e believe the better approach is to enter judgment in favor of the plaintiffs in accordance with the defendants' Rule 68 offer of judgment, as the district court did in this case."); *see also* Compressor Eng'g Corp. v. Mfs.

not directly addressed the question of whether a Rule 68 offer moots the putative class's claims, when the offer is made before the plaintiff has moved to certify the class.[254] In the absence of clear guidance from the Sixth Circuit, the district court decisions in that circuit are conflicting. One recent district court opinion held that the "relation back doctrine" saved a TCPA class action from mootness when the plaintiff filed a motion for class certification several weeks *after* receiving a Rule 68 offer that provided relief for his individual claim.[255] District courts within the circuit also have refused to moot TCPA class actions when certification motions were pending.[256] However, several TCPA actions were dismissed as moot after certification motions were denied.[257] Finally, one recent district court opinion involving a

Fin. Corp., No. 09-14444, 2014 WL 3420482, at *2 (E.D. Mich. July 14, 2014) (same). *But see* Charvat v. Nat'l Holdings Corp., No. 2:14-cv-2205, 2015 WL 3407657, at *6 (S.D. Ohio May 26, 2015), *appeal filed*, June 4, 2015 (recognizing the "logical fallacy" that the court would lack the power to enter judgment if the Rule 68 offer mooted plaintiff's claim and deprived the court of jurisdiction).

254. *Hrivnak*, 719 F.3d at 567 (noting "we need not reach the class claims argument" when ruling on whether a Rule 68 offer mooted FDCPA plaintiff's individual claim and class action). *But see* Compressor Eng'g Corp. v. Thomas, No. 10-10059, 2015 WL 730081, at *4 (E.D. Mich. Feb. 19, 2015) (noting that the Sixth Circuit "has spoken on this issue" and held when "the named plaintiff's claim becomes moot *before* certification, dismissal of the action is required") (quoting Brunet v. City of Columbus, 1 F.3d 390, 399 (6th Cir. 1993)). On a related note, the Sixth Circuit also has not ruled on the effect of a Rule 68 offer made when certification is pending. Rhea Drugstore, Inc. v. Smith & Nephew, Inc., No. 2:15-02060-JPM, 2015 WL 3649061, at *3 (W.D. Tenn. June 10, 2015), *motion to certify appeal denied*, No. 2:15-02060-JPM, 2015 WL 3892139 (W.D. Tenn. June 24, 2015) ("The Sixth Circuit has yet to determine the effect of an offer of judgment that is made after a motion for class certification has been filed.").

255. Am. Copper & Brass, Inc. v. Lake City Indus. Prods., Inc., No. 1:09-CV-1162, 2012 WL 3027953, at *2 (W.D. Mich. July 24, 2012), *aff'd*, 757 F.3d 540 (6th Cir. 2014) ("The Court considers American Copper's motion for class certification to 'relate back' to the filing of the class complaint. Thus, since the offer of judgment did not provide for class-wide relief while a motion for class certification had effectively been filed, it does not moot the class complaint.").

256. *Rhea Drugstore, Inc*., 2015 WL 3649061, at *4, *motion to certify appeal denied*, No. 2:15-02060-JPM, 2015 WL 3892139 (W.D. Tenn. June 24, 2015) ("The Court follows the guidance of *Geraghty*, and of the Third, Fifth, Seventh, Ninth, and Tenth Circuits, and holds that once a motion for class certification has been filed, class certification relates back to the date of the filing of the complaint."); *see also* Compressor Eng'g Corp. v. Thomas, No. 10-10059, 2015 WL 730081, at *8 (E.D. Mich. Feb. 19, 2015) (denying the defendant's motion to dismiss TCPA action for lack of subject matter jurisdiction because the defendant's Rule 68 offer, made when motion for certification was pending, failed to afford plaintiff complete relief).

257. Compressor Eng'g Corp. v. Mfrs. Fin. Corp., No. 09-14444, 2014 WL 3420482,

TCPA class action held that an offer that excludes the uncertified class, and is made to the named plaintiff only, is always incomplete and, therefore, can never moot the plaintiff's claim or the TCPA class action, *regardless of the timing of the certification motion*.[258]

C. *Circuits Where the Court of Appeals Has Not Directly Addressed the Issue*

Several Circuit Courts of Appeal—the Fourth, Eighth, and Tenth—have not addressed the specific question of whether a Rule 68 offer of complete relief, made before the plaintiff moves for class certification, renders the class action moot. However, a district court within the Fourth Circuit[259] held that a rejected Rule 68 offer in a TCPA class action, before the plaintiff moved to certify the class, did not moot the plaintiff's TCPA claim or the class action, noting "there is not a substantial likelihood that the Fourth Circuit will rule in Defendant's favor."[260]

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at *1, *3 (E.D. Mich. July 14, 2014); Machesney v. Lar-Bev of Howell, Inc., No. 10-10085, 2014 WL 3420486, at *1, *3 (E.D. Mich. July 14, 2014); APB Assocs., Inc. v. Bronco's Saloon, Inc., No. 09-14959, 2014 WL 4145344, at *1–2, *3 (E.D. Mich. Aug. 20, 2014).

258. *Charvat*, 2015 WL 3407657, at *7–8, *appeal filed* June 4, 2015 (holding offer under Rule 68 in TCPA class action that satisfied named plaintiff's claim was nevertheless incomplete because it did not provide relief for the putative class; therefore, the offer could not moot the entire action, regardless of the timing of the certification motion).

259. The Fourth Circuit has not considered whether a Rule 68 offer of complete relief to a named plaintiff moots a class action. However, it has held that a Rule 68 offer of full relief would moot an individual plaintiff's claim. *See* Warren v. Sessoms & Rogers, P.A., 676 F.3d 365, 372 (4th Cir. 2012), *as amended* (Feb. 1, 2012) ("[H]ad Warren made a specific demand in the amended complaint for actual damages and the defendants offered that amount or more, the offer of judgment would have mooted Warren's action."). *But see* Simmons v. United Mortg. & Loan Inv., LLC, 634 F.3d 754, 767 (4th Cir. 2011) ("Defendants' offer to settle the plaintiffs' FLSA claims . . . did not offer for judgment to be entered against the defendants, was ambiguous as to the amounts of actual and liquidated damages to be recovered, and was conditioned upon an agreement by the plaintiffs to keep the settlement confidential, prevented the mooting of the plaintiffs' FLSA claims."); Kensington Physical Therapy, Inc. v. Jackson Therapy Partners, LLC, 974 F. Supp. 2d 856, 863–64 (D. Md. 2013) (denying motion to dismiss, or in the alternative to certify the issue for interlocutory appeal, and holding TCPA class was not mooted by the defendant's offers of judgment, despite plaintiff's failure to file motion to certify the class); Mey v. Monitronics Int'l, Inc., No. 5:11CV90, 2012 WL 983766, at *5 (N.D. W. Va. Mar. 22, 2012) (refusing to strike precertification Rule 68 offer made to the named plaintiff in TCPA class action, but ruling the rejected offer was of no consequence because suit proceeded as usual after offer was rejected).

260. *Kensington Physical Therapy Inc.*, 974 F. Supp. 2d at 865.

The Eighth Circuit also has not yet addressed the question.[261] Several district court decisions within the circuit have noted that the Eighth Circuit "would likely not allow a defendant to pay off the named representative to preemptively force dismissal of a putative class action."[262] As a result, these district courts have granted motions to strike Rule 68 offers made to the named plaintiffs before a motion to certify the class had been filed.[263] However, when the plaintiff engaged in undue delay before filing for certification, at least one district court within the Eighth Circuit dismissed a TCPA class action as moot.[264]

Finally, several district courts have noted the Tenth Circuit has never directly addressed whether an unaccepted or rejected Rule 68 offer moots a class action prior to the filing of a motion for certification.[265] The Tenth Circuit's most recent on-point opinion was issued in 2011, prior to the Supreme Court's ruling in *Genesis Healthcare*.[266] However, in its 2011

261. *See* Buchholz v. Valarity, Inc., No. 4:13-CV-362 (CEJ), 2015 WL 1781397, at *2 (E.D. Mo. Apr. 10, 2015) ("The Eighth Circuit 'has not decided whether a Rule 68 offer that includes all the relief sought moots an action.'") (quoting Norris v. ARS Nat. Serv. Inc., No. CIV. 11-3579 PAM/TNL, 2013 WL 1760422, at *2 (D. Minn. Apr. 24, 2013)); *see also* Jenkins v. Pech, 301 F.R.D. 401, 406 (D. Neb. 2014) (discussing the Eighth Circuit's precedent related to this issue, and noting that the Eighth Circuit has "not ruled squarely on the issue").

262. March v. Medicredit, Inc., No. 4:13-CV-1210 TIA, 2013 WL 6265070, at *3 (E.D. Mo. Dec. 4, 2013) (citing Liles v. Am. Corrective Counseling Servs., Inc., 201 F.R.D. 452, 455 (S.D. Iowa 2001)); *see* Alpern v. UtiliCorp United, Inc., 84 F.3d 1525, 1539 (8th Cir. 1996) ("Judgment should be entered against a putative class representative on a defendant's offer of payment only where class certification has been properly denied and the offer satisfies the representative's entire demand for injuries and cost of the suit."); *see also* Prater v. Medicredit, Inc., 301 F.R.D. 398, 400 (E.D. Mo. Aug. 14, 2014) (same).

263. *See Prater*, 301 F.R.D. at 401 (striking Rule 68 offer in TCPA action made before plaintiff moved to certify the class, and ruling that such offers tend to thwart class actions and create conflict between plaintiff and the putative class); *see also March*, 2013 WL 6265070, at *4 (same, but in FDCPA action); Lafollette v. Liberty Mut. Fire Ins. Co., No. 2:14-CV-04147-NKL, 2015 WL 132670, at *3–4 (W.D. Mo. Jan. 9, 2015) (same, but in homeowners' insurance dispute class action).

264. Goans Acquisition, Inc. v. Merch. Solutions, LLC, No. 12-00539-CV-S-JTM, 2013 WL 5408460, at *7 (W.D. Mo. Sept. 26, 2013).

265. *See, e.g.*, Martinez v. Red's Towing, No. 14-CV-00458-KLM, 2015 WL 1345383, at *3 (D. Colo. Mar. 23, 2015) (noting the Tenth Circuit has not addressed the "mootness-by-unaccepted-offer doctrine"); Delgado v. Castellino Corp., 66 F. Supp. 3d 1340, 1344 (D. Colo. 2014) ("[T]he 10th Circuit has itself chosen to carefully avoid deciding the question.").

266. Lucero v. Bureau of Collection Recovery, Inc., 639 F.3d 1239 (10th Cir. 2011).

opinion, the Tenth Circuit ruled that the putative class's interest attaches when the complaint is filed, so that a Rule 68 offer, made before the motion to certify class was filed, does not moot a class action.[267] Of importance, the court also noted that the Rule 68 offer was made "before the court [could] reasonably be expected to rule on the class certification motion."[268] Recent district court decisions within the Tenth Circuit have followed Justice Kagan's dissent in *Genesis Healthcare*, ruling that an unaccepted Rule 68 offer will not moot the plaintiff's individual claim or the class action.[269]

V. WHAT INTERESTS OF PLAINTIFF SURVIVE AN OFFER OF COMPLETE RELIEF UNDER RULE 68 TO SATISFY THE CASE OR CONTROVERSY REQUIREMENT OF ARTICLE III?

If the class action lawsuit is permitted to continue after a defendant makes an offer of complete relief to the named plaintiff, before the plaintiff moves to certify the class, then the court must find a plaintiff remains in the action who has a personal stake or some other legally cognizable interest in the outcome. However, is such a plaintiff present after the offer, so as to maintain a case or controversy within the meaning of Article III? The two potential answers are: (1) the class representative who received an offer of full relief, nevertheless, maintains an interest, or (2) the putative, uncertified class has an interest sufficient to satisfy Article III concerns. Each of these possibilities will be examined, and ultimately rejected, below.

267. *Id.* at 1249 ("[W]e conclude that a nascent interest attaches to the proposed class upon the filing of a class complaint such that a rejected offer of judgment for statutory damages and costs made to a named plaintiff does not render the case moot under Article III.").

268. *Id.* at 1250.

269. *See, e.g.*, Perez v. Pinon Mgmt., Inc., No. 12-CV-00653-RM-MEH, 2014 WL 5596261, at *7 (D. Colo. Nov. 4, 2014) (holding FLSA collective action not moot, because "the Court shares the *Symczyk's* dissent's doubt that an unaccepted Rule 68 offer of judgment, even affording full relief, can operate to render an individual's claim moot"); Michaels v. City of McPherson, No. 12-1372-CM, 2013 WL 3895343, at *3 (D. Kan. July 29, 2013) ("While plaintiff's timely-filed motion for conditional certification is pending, a fully satisfactory Rule 68 offer does not moot plaintiff's case.") (FLSA collective action); *see also, e.g.*, *Delgado*, 66 F. Supp. 3d at 1345 (holding Rule 68 offer does not moot plaintiff's claim or FLSA collective action).

A. *Does the Class Representative Retain a Personal Stake or Other Interest in the Outcome Sufficient to Satisfy Article III and Continue the Lawsuit, When the Representative Receives the Offer for Full Relief Pursuant to Rule 68 Before Filing for Class Certification?*

1. *After a Plaintiff Receives a Rule 68 Offer Affording Complete Relief, Do the Plaintiff's Original Interests Remain? Does a Rejected or Ignored Rule 68 Offer Simply Restore the Status Quo Ante?*

One possibility which could potentially satisfy Article III concerns is to hold that the Rule 68 offer simply is a "nullity" after it is rejected or ignored.[270] As a result, a plaintiff must still prove the case, and the original controversy is present. This is the position taken by the four dissenting Justices in *Genesis Healthcare*.[271] As Justice Kagan noted, writing for the dissent, "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.'"[272] Indeed, this position arguably is strengthened by the wording of Rule 68 itself, which states that "[a]n unaccepted offer is considered withdrawn."[273] Although this

270. *See* Genesis Healthcare Corp. v. Symczyk, 133 S. Ct. 1523, 1533 (2013) (Kagan, J., dissenting) (noting that the offer "is a legal nullity, with no operative effect"); *see also* Hooks v. Landmark Indus., 797 F.3d 309, 315 (5th Cir. 2015) (same).

271. *Genesis Healthcare*, 133 S. Ct. at 1533–34 (Kagan, J., dissenting); *see also* Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326, 341 (1980) (Rehnquist, J., concurring) (noting that an offer which excludes the putative class is not an offer of complete relief).

272. *Genesis Healthcare*, 133 S. Ct. at 1533 (Kagan, J., dissenting) (quoting Minneapolis & St. Louis R. Co. v. Columbus Rolling Mill, 119 U.S. 149, 151 (1886)).

273. FED. R. CIV. P. 68(b), *quoted in Genesis Healthcare*, 133 S. Ct. at 1534 (Kagan, J., dissenting). Justice Kagan also notes that Rule 68 contains no language which would allow a court to dismiss the action, and that Rule 68 "precludes a court from imposing judgment." *Genesis Healthcare*, 133 S. Ct. at 1536. However, the authority to dismiss comes from the Constitutional limits of the Court's Article III jurisdiction, not the language of Rule 68. *See* Mansfield, C & L.M. Ry. Co. v. Swan, 111 U.S. 379, 382–84 (1884). The Court needs no authority from a Rule of Procedure to dismiss an action when there is no case or controversy as required by Article III of the Constitution. *Id.* The action may be dismissed sua sponte when the Court determines subject matter jurisdiction is lacking. *Id.* (challenging a federal court's subject matter jurisdiction may be made at any stage of the proceedings, and the court should raise the question sua sponte), *cited with approval in* Kontrick v. Ryan, 540 U.S. 443, 455 (2004); *see also* Lary v. Rexall Sundown, 74 F.3d 540, 554 (E.D.N.Y. 2015) (noting that dismissal is proper at the time the court learns it lacks subject-matter jurisdiction); Berry v. Pierce, 98 F.R.D. 237, 245 (E.D. Tex. 1983) (noting that a court's finding that a case is moot under Article III requires sua sponte dismissal); Jones-Bartley v. McCabe, Weisberg & Conway, P.C., 59 F. Supp. 3d 617, 631 (S.D.N.Y. 2014) (noting that the terms of Rule 68 need not be

position seems reasonable, based on the law of contracts and the language of Rule 68, the approach is flawed. First, neither the intent nor the language of Rule 68 supports the position that a rejected or ignored Rule 68 offer "leaves the matter as if no offer had ever been made."[274] In fact, the contrary is true.[275] The purpose of Rule 68, as explained earlier, is to encourage settlement.[276] Rule 68 does this by shifting costs, *based on the rejected or ignored offer*: "If the judgment that the offeree finally obtains is not more favorable than the unaccepted offer, the offeree must pay costs incurred after the offer was made."[277] If the rejected or ignored offer were a complete "nullity" and left the matter "as if no offer had ever been made," then how could the offer have the legal effect of cost shifting? How could Rule 68 *ever* work if the offer is treated as if it were never made? To treat the offer as if it were never made, the offer must have no legal effect whatsoever. The language in Rule 68 which states that an "unaccepted offer is considered withdrawn"[278] offers the dissent's view no support, because the rule contemplates that the withdrawn offer still has legal effect. Although the unaccepted offer is considered "withdrawn," *the unaccepted or rejected offer is used as the basis for cost shifting*, as Rule 68 intended.[279] The offer is not treated as if it were "never made."[280] Withdrawal is not synonymous with

strictly adhered to; instead, courts should focus on the terms of the offer rather than the procedure employed). Finally, it is the tender of the offer itself which deprives the court of jurisdiction. *Roper*, 445 U.S. at 347 (Powell, J., dissenting) (citations omitted). As the Court has noted, subject matter jurisdiction cannot be waived, and parties "may not by stipulation invoke the jurisdictional power of the United States in litigation which does not present an actual 'case or controversy.'" Sosna v. Iowa, 419 U.S. 393, 398 (1975). In any event, should the Court wish to cite a Rule of procedure to sanction such dismissal, Federal Rule of Civil Procedure 12(h)(3) also acknowledges the Court's inherent authority to dismiss when subject matter jurisdiction is lacking. FED. R. CIV. P. 12(h)(3) ("If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.").

274. *Genesis Healthcare*, 133 S. Ct. at 1533 (quoting Minneapolis & St. Louis R. Co. v. Columbus Rolling Mill, 119 U.S. 149, 151 (1886)); *see also* FED. R. CIV. P. 68(b) advisory committee's note to 1946 amendment ("Rule 68 has been altered to make clear that evidence of an unaccepted offer is admissible in a proceeding to determine the costs of the action . . . .").

275. *See id.*

276. Marek v. Chesny, 473 U.S. 1, 5 (1985), *quoted by Lary*, 74 F. Supp. 3d at 545.

277. FED. R. CIV. P. 68(d).

278. FED. R. CIV. P. 68(b).

279. FED. R. CIV. P. 68(d) ("[T]he offeree must pay the costs incurred after the offer was made.").

280. *See* FED. R. CIV. P. 68(b) ("Evidence of an unaccepted offer is . . . admissible . . .

nullity. Rule 68 requires the rejected or ignored offer have legal effect for the rule to operate.[281] If the dissent's interpretation of a rejected or ignored Rule 68 offer is correct, and the offer is treated as if it were "never made," then Rule 68 is fatally flawed, internally inconsistent, and makes no sense.[282]

Second, the assertion that the plaintiff's "original interest" in the action remains after the Rule 68 offer is rejected or ignored[283] conveniently avoids the central question: what live controversy existed between the parties *after the plaintiff was offered the maximum she could possibly recover under the statute*? Why should the lawsuit continue—arguably wasting judicial resources—when Article III limits the court's jurisdiction to cases or controversies and requires that "an actual controversy must be extant" at every stage of litigation, from the moment the complaint is filed throughout all stages of review?[284] As discussed above, it is no answer to assert that the law of contracts and the language of Rule 68 lead to the conclusion that the plaintiff's "original interest" remains.[285] Even if this were true, it is no solution. The central question remains. Namely, what *is* that interest, especially after the plaintiff was offered the maximum she could possibly recover under the statute? Even the dissenting Justices in *Genesis* acknowledged that a lawsuit should end "when the defendant unconditionally surrenders and only the plaintiff's obstinacy or madness

in a proceeding to determine cost.").

281. *See id.*

282. *See id.*

283. *See* Genesis Healthcare Corp., v. Symczyk, 133 S. Ct. 1523, 1533 (2013) (Kagan, J., dissenting) ("When a plaintiff rejects such an offer—however good the terms—her interest in the lawsuit remains just what it was before.").

284. *See Genesis Healthcare*, 133 S. Ct. at 1528 (quoting Arizonans for Official English v. Arizona, 520 U.S. 23, 67 (1997)); *see also* U.S. Parole Comm'n v. Geraghty, 445 U.S. 388, 397 (1980); Sosna v. Iowa, 419 U.S. 393, 402 (1975).

285. Also, to the extent the dissent's position would, in effect, imply the law of contracts and the language of Rule 68 control the issue and provide an answer to the question, their focus is misplaced. Neither a rule of civil procedure nor the law of contracts can trump the Constitution's limits on the jurisdiction of the federal courts. *See* United States v. Armstrong, 517 U.S. 456, 475 (1996) ("Because *Brady* is based on the Constitution, it overrides court-made rules of procedure.") (quoting CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 254, 81 & n.60 (2d ed. 1982)). In fact, "even Congress may not confer federal court jurisdiction when Art. III does not. Far less so may a rule of procedure which 'shall not be construed to extend . . . the jurisdiction of the United States district courts.'" *Geraghty*, 445 U.S. at 421 (Powell, J., dissenting) (internal citations omitted). Therefore, it is no answer to simply assert that the language of Rule 68, the law of contracts, or both would resolve the matter in plaintiff's favor.

prevents her from accepting total victory."[286] An offer which satisfies the named plaintiff's individual claim in its entirety, when made before the plaintiff has moved to certify the class, in effect, is a surrender by the defendant. Therefore, what live controversy exists? Where is the plaintiff who has a personal stake or some other legally cognizable interest in the outcome?

One way to avoid this quandary and still find an extant controversy would be to rule that a Rule 68 offer made prior to class certification is incomplete when the offer is made to the named representative only and excludes the putative class.[287] However, that approach also is no solution because it fails to answer the question of what legally cognizable interest remains, and it distorts the personal stake requirement under Article III as interpreted by Supreme Court precedent. The Court has held, repeatedly, that the putative class has no legal status or interest in the suit separate from the plaintiff *until the class has been certified*.[288] In *Sosna*, the Court held that "this factor [i.e. the putative class's lack of a separate legal status prior to certification] significantly affects the mootness determination."[289] If the uncertified class is not present and has no separate legal status, then why should the defendant's Rule 68 offer provide them relief? It should not. The fact that the unnamed putative class has no legal status separate from the plaintiff before the class is certified makes sense because certification has important legal consequences for a putative class. Once a suit reaches judgment on the merits, the decision will generally bind all members of the certified class, but a judgment reached prior to certification will not bind an uncertified class; those putative class members are free to file suit.[290]

286. *Genesis Healthcare*, 133 S. Ct. at 1536 (Kagan, J., dissenting).

287. *See, e.g.*, *id.* (quoting Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326, 341 (1980) (Rehnquist, J., concurring)) (noting that an offer to the named plaintiff alone is not an offer of complete relief, because it does not give the plaintiff all she requested, i.e. relief for the class).

288. *Sosna*, 419 U.S. at 399; *Genesis Healthcare*, 133 S. Ct. at 1530. *But see Roper*, 445 U.S. at 342 (Stevens, J., concurring) ("[T]he continued viability of the case or controversy, as those words are used in Art. III, does not depend on the district judge's initial answer to the certification question; rather it depends upon the plaintiff's right to have a class certified."). In his dissent, Justice Powell strongly criticized Justice Stevens's suggested approach, which would recognize the putative class as being present prior to class certification for the limited purpose of Article III jurisdiction. *See Roper*, 445 U.S. at 358 n.21 (Powell, J., dissenting).

289. *Sosna*, 419 U.S. at 399; *see also Genesis Healthcare*, 133 S. Ct. at 1530.

290. FED. R. CIV. P. 23(c)(3); 28 U.S.C. App. at 159–60 (advisory committee note to 2003 amendment); Amendments to the Rules of Civil Procedure Supplemental Rules

Similarly, after the class is certified, the class action cannot be settled or dismissed without court approval.[291] Either the uncertified class is present before certification or they are not. The Court already has ruled they are not present; the uncertified class has no legal status separate from the named plaintiff.[292] Therefore, to rule that the defendant's Rule 68 offer, made prior to certification, is incomplete unless it also provides relief for the uncertified putative class is a thinly veiled attempt to have it both ways.[293] It defies logic. Such a ruling also would conflict with standing Supreme Court precedent by implicitly granting precertification legal status to the putative class.[294] Such an approach should be avoided.[295] It simply allows litigation to continue without a live controversy and contravenes Article III.

2. *Can a Plaintiff's "Right to Have the Class Certified" so as to Act as a Private Attorney General Provide the Named Plaintiff with a "Personal Stake" or "Continuing Interest in the Outcome?"*

The Supreme Court has recognized that a named plaintiff's interest in representing a class is distinct from her interest on the merits.[296] The named plaintiff's interest in representing a class is not a private or individual interest but instead is "more analogous to the private attorney general concept than to the type of interest traditionally thought to satisfy the 'personal stake' requirement."[297] Although, as discussed earlier, the Court has held that the

for Certain Admiralty and Maritime Claims Rules of Criminal Procedure, 39 F.R.D. 69, 96–107; *see also Genesis Healthcare*, 133 S. Ct. at 1531 (noting that in collective actions prior to "conditional certification," "putative plaintiffs remain free to vindicate their rights in their own suits. They are no less able to have their claims settled or adjudicated following respondent's suit than if her suit had never been filed at all.").

291. FED. R. CIV. P. 23(e).

292. *Genesis Healthcare*, 133 S. Ct. at 1530; *Sosna*, 419 U.S. at 399.

293. *See Roper*, 445 U.S. at 342 (Stevens, J., concurring).

294. *See Genesis Healthcare*, 133 S. Ct. at 1530; *Sosna*, 419 U.S. at 399.

295. For a discussion regarding why the putative, uncertified class should not receive such status, see *infra* Part V.B. Also, such an interest cannot be based on plaintiff's "right to represent a class" or on Rule 23, as discussed *infra* Parts V.A.2, V.A.3.

296. *Roper*, 445 U.S. at 331–32; U.S. Parole Comm'n v. Geraghty, 445 U.S. 388, 401–03 (1980); *see also* Pitts v. Terrible Herbst, Inc., 653 F.3d 1081, 1089 (9th Cir. 2011).

297. *Geraghty*, 445 U.S. at 403 (citing *Roper*, 445 U.S. at 338). As discussed *supra* Part III A.3., the Supreme Court has held that this "right" as a "private attorney general" provides the necessary adversary requirement for Article III jurisdiction *for the limited purpose of appealing the lower court's denial of certification. Geraghty*, 445 U.S. at 403 (citing *Roper*, 445 U.S. at 338). However, the Court's more recent decision in *Genesis Healthcare* has questioned the continuing vitality of *Roper*. *See Genesis Healthcare*, 133

named plaintiff's private-attorney-general status can satisfy Article III concerns in certain limited circumstances,[298] the right to proceed as a private attorney general cannot provide the necessary personal stake in a TCPA action, before the plaintiff has moved to certify the class for several reasons:

First, as discussed earlier, the necessary adversary requirement of the case or controversy doctrine of Article III must be extant at every moment of litigation.[299] Although the Court found that the private-attorney-general concept was sufficient to meet Article III concerns in *Geraghty*, the fact that the named plaintiff's case was moot when the lower court denied class certification was central to the *Geraghty* Court's holding.[300] In other words, the controversy remained live at the time the certification issue was addressed.[301] Because the named plaintiff's case was not moot, he retained a personal stake, which enabled him to appeal the denial of certification.[302] In situations where the named plaintiff's case becomes moot before the plaintiff has moved to certify the class, the result should be that the entire action is moot. As the Court noted in *Genesis*, when discussing a similar scenario involving a collective action under the FLSA:

> 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 resort to *Geraghty*. There is simply no certification decision to which respondent's claim could have related back.[303]

Therefore, when a named plaintiff receives a Rule 68 offer affording

S. Ct. at 1532 n.5. Also, it is interesting to note that both courts and commentators have stated the Supreme Court's decision in *Roper* was an abandonment of the personal stake requirement of Article III. *See* Satterwhite v. City of Greenville, 634 F.2d 231 (5th Cir. 1981), *interpreted in* Berry v. Pierce, 98 F.R.D. 237, 244 (E.D. Tex. 1983); *see also* Note, *Class Standing*, *supra* note 48 (noting that "*Geraghty* is an abandonment of the personal stake requirement").

298. *See* cases cited *supra* note 297.

299. *Genesis Healthcare*, 133 S. Ct. at 1528 (citing Arizonans for Official English v. Arizona, 520 U.S. 23, 67 (1997)); *see also Geraghty*, 445 U.S. at 397; *Sosna*, 419 U.S. at 402.

300. *Genesis Healthcare*, 133 S. Ct. at 1530 (interpreting *Geraghty*, 445 U.S. at 404 n.11, 407).

301. *See Geraghty*, 445 U.S. at 403–04.

302. *Id.*; *Genesis Healthcare*, 133 S. Ct. at 1530.

303. *Genesis Healthcare*, 133 S. Ct. at 1530.

complete relief, and the plaintiff has not yet moved to certify the class, *Geraghty* is inapposite, and the entire action should be declared moot.[304]

Second, unlike the FLSA, which permits a plaintiff to sue "on behalf of others similarly situated" as a private attorney general,[305] Congress included no such provision in the TCPA.[306] The question arises whether it is for the courts to create and insert such a provision into the Act. Practical concerns exist that would support a finding that a named plaintiff should retain an Article III personal stake prior to class certification, as a "private attorney general," despite the fact that the plaintiff's personal claim is moot.[307] For example, in *Roper*, the Court noted that goals of class actions could be frustrated if defense counsel is permitted to "pick[] off" named representatives.[308] Similarly, such conduct would invite a "waste of judicial resources by stimulating successive suits."[309] Finally, it could be argued that the court should not permit defendants to engage in such tactics because of "the responsibilities of a district court to protect both the absent class and the integrity of the judicial process by monitoring the actions of the parties before it."[310] These concerns are genuine. Arguably, the Court has discretion to use the private-attorney-general doctrine as a suitable vehicle to address these practical concerns, especially when the Court has, in the past described

304. *See id.*

305. The FLSA permits employees not only to sue on their own behalf, but also to bring an action on behalf of "other employees similarly situated." 29 U.S.C. § 216(b) (2012). When the suit is brought on behalf of others similarly situated, it is referred to as a "collective action." *Genesis Healthcare*, 133 S. Ct. at 1527.

306. *See* 47 U.S.C. § 227(b)(3) (2012).

307. *See, e.g.*, Girard, *supra* note 21, at 745–47 (discussing the public's interest in adjudication on the merits).

308. Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326, 339 (1980). *But see* Lary v. Rexall Sundown, Inc., 74 F. Supp. 3d 540, 556–57 (E.D.N.Y. 2015) (citing Geisman v. ZocDoc, Inc., 60 F. Supp. 3d 404, 406–07 (S.D.N.Y. 2014) (ruling that picking off concerns do not apply prior to certification because putative class members remain free to file their own suits). Courts also have ruled that the buy-off problem is permitted under the confines of Article III because other solutions exist, such as filing for certification of the class when the suit is filed. *See, e.g.*, Keim v. ADF MidAtlantic, LLC, No. 12-80577-CIV, 2013 WL 3717737, at *6 (S.D. Fla. July 15, 2013), *rev'd*, 586 F. App'x 573 (11th Cir. 2014).

309. *Roper*, 445 U.S. at 339. *But see Keim*, 2013 WL 3717737, at *7 (citations omitted); Krzykwa v. Phusion Projects, LLC, 920 F. Supp. 2d 1279, 1283 (S.D. Fla. 2012) (ruling that concerns regarding a waste of judicial resources are not relevant, because "considerations of judicial resources should not permit courts to circumvent or ignore the limitations Article III places on the federal judiciary").

310. *Roper*, 445 U.S. at 331.

Article III as "flexible" and stated that Article III justiciability is "not a legal concept with a fixed content or susceptible of scientific verification."[311] However, these practical concerns should not justify running afoul of Article III. The question is "whether the *Constitution* confers jurisdiction on the federal courts. . . . And the Court fails to recognize that allowing this action to proceed without an interested plaintiff will itself generate practical [concerns]."[312] Once the named plaintiff's claim has been fully satisfied, a ruling that Article III is satisfied by permitting him to proceed as a private attorney general would distort the "personal stake" requirement in such a way that "the judicial process [would become] no more than a vehicle for the vindication of the value interests of concerned bystanders."[313] In effect, permitting the named plaintiff to continue as private attorney general when he or she lacks a claim of his or her own, would permit the public's interest *in an issue* to replace "the necessary individual interest in the outcome."[314]As

311. U.S. Parole Comm'n v. Geraghty, 445 U.S. 388, 400–01 (1980) (quoting Poe v. Ullman, 367 U.S. 497, 508 (1961)).

312. *Roper*, 445 U.S. at 353 (Powell, J., dissenting).

313. *Geraghty*, 445 U.S. at 413 (Powell, J., dissenting) (quoting United States v. SCRAP, 412 U.S. 669, 687 (1973)); *see also id.* at 404 n.11 (majority opinion) ("The dissent is correct that once exceptions are made to the formalistic interpretation of Art. III, principled distinctions and bright lines become more difficult to draw. We do not attempt to predict how far down the road the Court will eventually go toward premising jurisdiction 'upon the bare existence of a sharply presented issue in a concrete and vigorously argued case.'").

314. *Geraghty*, 445 U.S. at 411–12 (Powell, J., dissenting). Such a decision also would be contrary to long-standing precedent. Class representatives must have suffered their own, individual injury; it is insufficient that "injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent." Warth v. Seldin, 422 U.S. 490, 502 (1975); *see also* O'Shea v. Littleton, 414 U.S. 488, 494 (1974) ("[I]f none of the named plaintiffs purporting to represent a class establishes the requisite of a case or controversy with the defendants, none may seek relief on behalf of himself or any other member of the class."); Sosna v. Iowa, 419 U.S. 393, 403 (1975) (noting that "[a] litigant must be a member of the class which he or she seeks to represent at the time the class action is certified by the district court"); *see also Geraghty*, 445 U.S. at 411–12 (Powell, J., dissenting) ("Nor can public interest in the resolution of an issue replace the necessary individual interest in the outcome.") (citing DeFunis v. Odegaard, 416 U.S. 312, 316 (1974)); *see also Geraghty*, 445 U.S. at 413 (Powell, J., dissenting) ("Art. III contains no exception for class actions."); 13C CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3533.9 (3d ed. 2008) (noting "[a]lthough a few cases have come tantalizingly close to recognizing a 'public interest' exception to *individual* mootness, the exception has not yet been achieved" (emphasis added)); *see also Geraghty*, 445 U.S. at 419 (Powell, J., dissenting) ("[N]o one has a personal stake in

Justice Powell recognized, because the named plaintiff would no longer have an individual, concrete injury or stake in the outcome, the constitutional limitations that apply to standing and mootness would, in effect, improperly be eliminated and replaced by "prudential considerations."[315]

When the named representative's personal claim is moot and no motion for class certification has been filed, private-attorney-general status should not be used artificially to create the named plaintiff's personal stake in the class action lawsuit. Instead, the private-attorney-general doctrine should be limited to permit litigation *by a party who has a stake of his own* but otherwise might be barred by prudential standing rules.[316] Finally, if the Court were to permit the personal stake requirement to be satisfied by private-attorney-general status, despite the mootness of the named plaintiff's claim, the Court would essentially be forced to decide (presumably, on a case-by-case basis) which types of claims are worthy of protection from mootness using private-attorney-general status and which claims are not worthy of such protection. How will the Court make such decisions? What principles will guide such a decision? As Justice Powell noted in his dissent in *Roper*, "predicating a judgment on these [private-attorney-general] concerns amounts to judicial policymaking with respect to the adequacy of compensation and enforcement available for particular substantive claims. Such a judgment ordinarily is best left to Congress."[317]

obtaining relief for third parties."); *see also In re* Deepwater Horizon, 732 F.3d 326, 343 (5th Cir. 2013) ("While a 'welcome byproduct' of deciding cases or controversies on a class-wide basis, the goal of global peace does not trump Article III or federal law.") (quoting Sullivan v. DB Invs., Inc., 667 F.3d 273, 355–56 (3d Cir. 2011) (Jordan, J., dissenting)).

315. *See Geraghty*, 445 U.S. at 420 (Powell, J., dissenting); *see also id.* at 420 n.15.

316. Warth v. Seldin, 422 U.S. 490, 501 (1975) ("Congress may grant an express right of action to persons who otherwise would be barred by prudential standing rules. Of course, Art. III's requirement remains: the plaintiff still must allege a distinct and palpable injury to himself, even if it is an injury shared by a large class of other possible litigants."); *see also Geraghty*, 445 U.S. at 421 (Powell, J., dissenting) (citing *Warth*, 422 U.S. at 501) ("It serves only to permit litigation by a party who has a stake of his own but otherwise might be barred by prudential standing rules."); *see also* Sierra Club v. Morton, 405 U.S. at 737–38 (1972).

317. *Roper*, 445 U.S. at 354–55 (Powell, J., dissenting).

3. *Can Rule 23 Provide the Named Plaintiff's "Personal Stake" or "Other Interest in the Outcome" When the Plaintiff's Personal Claim is Mooted Prior to Moving for Class Certification?*

Rule 23 cannot be used to manufacture a plaintiff's "personal stake" or "other interest in the outcome" because the right to represent a class is merely a procedural right.[318] The Court stated:

> [T]he right of a litigant to employ Rule 23 is a procedural right only, ancillary to the litigation of substantive claims. Should these substantive claims become moot in the Art. III sense, by settlement of all personal claims for example, the court retains no jurisdiction over the controversy of the individual plaintiffs.[319]

Similarly, because the putative class is not legally present until the class is certified,[320] once the named plaintiff's claim is moot, there are no adverse parties before the court and thus the entire action is moot.

A rule of procedure such as Rule 23 should not be used to "manufacture" an interest, even if doing so were in the public's interest, to save the named plaintiff's class action from mootness. This conclusion is in accord with the Rules Enabling Act.[321] The Supreme Court has held that "Rule 23's requirements must be interpreted in keeping with Article III constraints, and with the Rules Enabling Act, which instructs that rules of procedure 'shall not abridge, enlarge or modify any substantive right.'"[322] In

318. *Roper*, 445 U.S. at 332 (majority opinion); *Geraghty*, 445 U.S. at 402–03; *see also* Bonanno v. Quizno's Franchise Co., LLC, No. 06-cv-02358-CMA-KLM, 2009 WL 1068744, at *11 (D. Colo. Apr. 20, 2009) (discussing class actions as a procedural tool and not a substantive right).

319. *Roper*, 445 U.S. at 332.

320. Sosna v. Iowa, 419 U.S. 393, 399 (1975) (ruling that it is "[w]hen the District Court 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 appellant").

321. 28 U.S.C. § 2072(b) (2012); *see also* FED. R. CIV. P. 82 ("These rules do not extend or limit the jurisdiction of the district courts . . . .").

322. Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 613 (1997) (quoting 28 U.S.C. § 2072(b)); *see also id.* (quoting Federal Rules of Civil Procedure 82 for the point that the federal "rules shall not be construed to extend . . . the [subject-matter] jurisdiction of the United States district courts" (alterations in original)); Broussard v. Meineke Disc. Muffler Shops, Inc., 155 F.3d 331, 345 (4th Cir. 1998) ("It is axiomatic that the procedural device of Rule 23 cannot be allowed to expand the substance of the claims of class members.").

this light, "[t]he Federal Rules of Civil Procedure cannot expand the subject matter jurisdiction of the federal courts beyond the limits of the U.S. Constitution."[323] The case or controversy doctrine under Article III of the Constitution limits the subject matter jurisdiction of the federal courts to actions in which the named plaintiff retains a personal stake or some other legally cognizable interest in the outcome at every stage of litigation.[324] Thus, when the named plaintiff receives an offer of complete relief, prior to filing a motion for class certification,[325] which moots his individual claim, Rule 23 cannot be used to keep the controversy "live." Under those circumstances, when the named plaintiff's individual claim becomes moot, his right to use the class action *procedural mechanism* to pursue his individual claim also dies, rendering the entire action moot.[326]

4. *Can the Plaintiff's Interest in Spreading Litigation Costs and Fees Amongst the Putative Class, or the Interest in Recovering Attorney's Fees, Provide the Named Plaintiff with a Personal Stake or Other Interest in the Outcome?*

Another argument made by named representatives is that their interest

323. Zurich Ins. Co. v. Logitrans, Inc., 297 F.3d 528, 531 (6th Cir. 2002) (citing 28 U.S.C. § 2072(b)); *see also* Sweet v. Liberty Mut. Grp., Inc., No. 14-11155, 2015 WL 3440859, at *3 (E.D. Mich. May 28, 2015); *In re* Deepwater Horizon, 732 F.3d 326, 341 (5th Cir. 2013).

324. *See, e.g.*, Genesis Healthcare Corp. v. Symczyk, 133 S. Ct. 1523, 1528 (2013) (quoting Camreta v. Greene, 131 S. Ct. 2020, 2028 (2011)); *see also* U.S. Parole Comm'n v. Geraghty, 445 U.S. 388, 396 (1980).

325. This is a key factual distinction which, arguably, makes both *Roper* and *Geraghty* inapposite. In those cases, the named plaintiff's individual claim became moot *after* the court had ruled on class certification. Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326, 329–30 (1980); *Geraghty*, 445 U.S. at 393–94; *see also Genesis Healthcare*, 133 S. Ct. at 1530 (noting that this fact was key to the Court's holding); *Sosna*, 419 U.S. at 403 ("A litigant must be a member of the class which he or she seeks to represent at the time the class action is certified by the district court."). However, the Court acknowledged that the timing of class certification is not crucial for Article III purposes *when the claim is capable of repetition, yet evading review*. *Geraghty*, 445 U.S. at 398–99 ("Some claims are so inherently transitory that the trial court will not have even enough time to rule on a motion for class certification before the proposed representative's individual interest expires.").

326. Of course, in situations where a court has ruled on and denied class certification *before the named plaintiff's claim became moot*, the named plaintiff retains a personal interest in appealing the denial of class certification. *Geraghty*, 445 U.S. at 404. In that situation, the existence of a case or controversy is limited solely to the question of whether the court's denial of certification was proper. *Id.* at 404–05.

under Rule 23 in spreading costs and fees amongst the putative class, and their interest in recovering attorney's fees, provide the "personal stake" or "other interest in the outcome" necessary to save the class action from mootness.[327] One of the purposes of a Rule 23 class action is, admittedly, to permit "the spreading of litigation costs among numerous litigants with similar claims."[328] However, this interest does not apply to TCPA claims before the plaintiff has moved for class certification for several reasons. First, when the named plaintiff's individual claim becomes moot before a motion to certify the class, the controversy is no longer "live," and the plaintiff arguably has no interest in spreading costs and fees amongst the putative class that would prevent the action from becoming moot.[329] The putative class not only is unnamed and absent, but there is no decision pending regarding whether a class ever will exist.[330] The class is no more than a speculative figment of the imagination before a motion to certify has been filed.[331] Further, the Supreme Court's decision in *Roper* offers no help in this situation. Although *Roper* held that the named plaintiffs maintained continuing individual interests sufficient to permit them to appeal—separate from any responsibilities they owed to the putative class—based on 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,"[332] the named plaintiffs already had moved to certify the class and their individual claims remained live at the time the trial court denied certification of the class.[333]

327. *See, e.g.*, *Roper*, 445 U.S. at 336 ("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."). "Neither the rejected tender nor the dismissal of the action over Plaintiffs' objections mooted the Plaintiffs' claim on the merits so long as they retained an economic interest in class certification." *See id.* at 332–33.

328. *Geraghty*, 445 U.S. at 403 (citations omitted); *see also Roper*, 445 U.S. at 338–39 (discussing economic benefits of class actions).

329. *See Geraghty*, 445 U.S. at 396.

330. *See Genesis Healthcare*, 133 S. Ct. at 1530.

331. *See id.*

332. *See Roper*, 445 U.S. at 336–37, 340; *supra* text accompanying note 104; *see also Roper*, 445 U.S. at 350–52 (Powell, J., dissenting) (noting that sharing of costs and fees is speculative, relates to no current obligation, and is improper because respondent is now merely a bystander). *But see Geraghty*, 445 U.S. at 403 (acknowledging that "spreading of litigation costs among numerous litigants with similar claims" is one of the purposes of Rule 23).

333. *Roper*, 445 U.S. at 329–30.

Thus, in *Roper*, there was never any point in time prior to the certification decision where the court lost subject matter jurisdiction under Article III.[334] In contrast, in situations where the plaintiff has not filed a motion to certify the class before his individual claim becomes moot, the live controversy is no longer extant.[335] A live controversy "must be extant at all stages of review, not merely at the time the complaint is filed."[336] The plaintiff therefore cannot argue, before filing a motion to certify the class, that a "live" controversy continues because the plaintiff wishes to spread costs amongst putative class members.[337] The plaintiff's individual claim was satisfied, and there was no certification decision to appeal.[338] The entire action is moot.[339]

Second, unlike regulatory actions under the FLSA which permit an award of costs or fees,[340] the TCPA contains no provision for such an award.[341] Although such fees can be negotiated by the parties as a part of

334. *See id.* at 333–35.

335. *Genesis Healthcare*, 133 S. Ct. at 1528.

336. *Id.* at 1528 (quoting Arizonans for Official English v. Arizona, 520 U.S. 43, 67 (1997)). There must be a named plaintiff with a live case or controversy at the time the trial court certifies the class. Sosna v. Iowa, 419 U.S. 393, 403 (1975).

337. *See id.*

338. *See Genesis Healthcare*, 133 S. Ct. at 1530 (noting that mootness cannot be prevented using the "relate back" doctrine because "[t]here is simply no certification decision to which respondent's claim could have related back"); *see also Roper*, 445 U.S. at 343 n.2 (Stevens, J., concurring) (noting the uncertified class is not present for the merits, and "I would not find them *present for purposes of sharing costs* or suffering an adverse judgment") (emphasis added).

339. *See Genesis Healthcare*, 133 S. Ct. at 1530.

340. *See* 29 U.S.C. § 216(b) (2012) ("The court in such [FLSA] action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action."); *see also* Lary v. Rexall Sundown, Inc., 74 F. Supp. 3d 540, 550 n.5 (E.D.N.Y. Feb. 10, 2015).

341. Chapman v. First Index, Inc., 796 F.3d 783, 786 (7th Cir. 2015) ("§ 227 is not a fee shifting statute"); Webster v. Bayview Loan Servicing, LLC, No. 1:13-cv-01975-TWP-DML, 2015 WL 470523, at *5 (S.D. Ind. Feb. 3, 2015) ("[T]he TCPA does not provide for recovery of attorney fees."); *Lary*, 74 F. Supp. 3d at 557 (E.D.N.Y. 2015) (noting that there is no interest in shifting a portion of costs and fees amongst the putative class in TCPA actions because the TCPA does not provide for awards of costs or fees); Compressor Eng'g Corp. v. Mfrs. Fin. Corp., No. 09-14444, 2014 WL 3420482, at *3 (E.D. Mich. July 14, 2014) ("[T]he TCPA does not authorize an award of attorney fees or expenses."); Reid v. I.C. Sys., Inc., 304 F.R.D. 253, 256 (D. Ariz. 2014) ("The TCPA does not provide for awards of attorneys' fees."); Haley v. Hughes Network Sys., LLC, No. 12-CV-1079JTC, 2013 WL 5937007, at *3 (W.D.N.Y. Nov. 1, 2013) ("The TCPA makes no provision for attorney fees or costs."); Bank v. Spark Energy Holdings LLC, No. 4:11-CV-4082, 2013 WL 5724507, at *4 (S.D. Tex. Oct. 18, 2013) ("[T]he TCPA does not

settlement,[342] a successful TCPA plaintiff has no right to recover costs and fees from the defendant under the federal statute.[343] Therefore, the plaintiff's interest, if any, in an award of such costs or fees, is illusory.[344]

Finally, notwithstanding the fact that attorney's fees are not recoverable from the defendant under the provisions of the federal TCPA, as discussed above, the Supreme Court recently reaffirmed its position that a plaintiff's desire to recover attorney's fees cannot create a case or controversy under Article III.[345] Also, the Court questioned the "continuing vitality" of its earlier decision in *Roper*, to the extent *Roper* supports a

provide a statutory mechanism for recovery of fees."); Dennis v. Syndicated Office Sys., Inc., No. 09-61345-CIV, 2010 WL 3632478, at *1 (S.D. Fla. Sept. 14, 2010) ("The [TCPA] statute does not authorize the awarding of fees for such claims."); Klein v. Visionlab Telecomms., Inc., 399 F. Supp. 2d 528, 542–43 (S.D.N.Y. 2005) (dismissing claim for attorneys' fees under the TCPA because the statute makes no provision for such fees or costs). *But see In re* Portfolio Recovery Assocs., LLC, Tel. Consumer Prot. Act Litig., No. 11MD2295 JAH (BGS), 2014 WL 223557, at *4 (S.D. Cal. Jan. 8, 2014) (acknowledging that the TCPA does not provide for an award of costs and fees but holding costs and fees may be awarded pursuant to California Civil Code section 1021.5 based on vindication of a federal right); Shah v. Racetrac Petroleum Co., No. 3:99-CV-410, 2005 WL 2417059, at *5–6 (E.D. Tenn. Sept. 30, 2005) (awarding costs and fees under the Tennessee TCPA which states: "Upon a finding by the court that a provision of [the TCPA] has been violated, the court may award to the person bringing such action reasonable attorney's fees and costs." (citing Tenn. Code Ann. § 47-18-109(e)(1))). Also, several courts have awarded fees for the attempted removal of TCPA cases. *See, e.g.*, Gold Seal Termite & Pest Control Co. v. DirectTV, Inc., 1:03-CV-00367, 2003 WL 21508177, at *6 (S.D. Ind. June 10, 2003); *see also* Dun-Rite Constr., Inc. v. Amazing Tickets, Inc., No. 1:03 CV 2310, 2004 WL 440387, at *2 (N.D. Ohio Jan. 16, 2004).

342. *See, e.g.*, Craftwood Lumber Co. v. Interline Brands, Inc., No. 11-CV-4462, 2015 WL 1399367, at *2, *4 (N.D. Ill. Mar. 23, 2015) (discussing an award of attorney's fees as a part of TCPA class action settlement); *see also* Vandervort v. Balboa Capital Corp., 8 F. Supp. 3d 1200, 1203 (C.D. Cal. 2014) (same).

343. *See* 47 U.S.C. § 227 (2012). However, some state statutes do allow for recovery of attorney's fees. *See, e.g.*, Pasco v. Protus IP Sols., Inc., 826 F. Supp. 2d 825, 829 (D. Md. 2011) ("[T]he Maryland TCPA provides that a person may not violate the federal TCPA and allows for $500 per violation and reasonable attorney's fees.").

344. *See* Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326, 351 (1980) (Powell, J., dissenting) (noting that costs and fees should not be sufficient to create a case or controversy under Article III because "unadorned speculation will not suffice to invoke the federal judicial powe") (quoting Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 44 (1976)).

345. Genesis Healthcare Corp. v. Symczyk, 133 S. Ct. 1523, 1532 n.5 (2013) ("[An] interest in attorney's fees is, of course, insufficient to create an Article III case or controversy where none exists on the underlying claim.") (quoting Lewis v. Cont'l Bank Corp., 494 U.S. 472, 480 (1990)).

contrary conclusion.[346]

5. *Does the Named Plaintiff Retain a Personal Stake or Other Interest in the Outcome Because the Plaintiff's TCPA Action is, in Effect, "Inherently Transitory"?*

An argument can be made that TCPA claims are, *in effect*, inherently transitory, if defendants are permitted to buy-off the named representatives' claims in order to moot the class action prior to certification.[347] The Supreme Court has explained the "inherently transitory" exception to the mootness doctrine as follows:

> [W]here a named plaintiff's individual claim becomes moot before the district court has an opportunity to rule on the certification motion, *and the issue would otherwise evade review*, the certification might "relate back" to the filing of the complaint. . . . [T]he relation-back doctrine may apply in Rule 23 cases where it is "certain that other persons similarly situated" will continue to be subject to the challenged conduct and the claims raised are "so inherently transitory that the trial court will not have even enough time to rule on a motion for class certification before the proposed representative's individual interest expires."[348]

346. In the Court's recent *Genesis Healthcare* opinion, Justice Scalia, writing for the majority, noted:

> Because *Roper* is distinguishable on the facts, we need not consider its continuing validity in light of our subsequent decision in *Lewis v. Continental Bank Corp.*, [citations omitted] ("[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").

Genesis Healthcare, 133 S. Ct. at 1532 n.5.

347. Such an argument was made by the plaintiff in *Genesis Healthcare* regarding collective actions under the FLSA. *Id.* at 1531; *see also Roper*, 445 U.S. at 339 (ruling that it would be "contrary to sound judicial administration" to allow defendants to buy-off the named representative using a "tender of judgment before an affirmative ruling on class certification could be obtained"); *Id.* at 341 (Rehnquist, J., concurring) (discussing the "reality" that an issue would otherwise evade review, if the court were to adopt a rule requiring the named plaintiff to accept "a tender of only his individual claims"); Pitts v. Terrible Herbst, Inc., 653 F.3d 1081, 1091 (9th Cir. 2011) (finding plaintiff's FLSA claim was inherently transitory based on the defendant's tactic of buying off the named plaintiff, although the claim was not transitory in the technical time-sensitive way); Weiss v. Regal Collections, 385 F.3d 337, 347 (3d Cir. 2004) (same, as to FDCPA claim).

348. *Genesis Healthcare*, 133 S. Ct. at 1530–31 (emphasis added) (citations omitted)

In *Genesis Healthcare*, the Court refused to apply the inherently transitory doctrine to a plaintiff's collective action under the FLSA, ruling "this doctrine has invariably focused on the fleeting nature of the challenged conduct giving rise to the claim, not on the defendant's litigation strategy."[349] The Court also noted that claims for damages, unlike claims for injunctive relief, cannot evade review.[350] Such claims remain live until "settled, judicially resolved, or barred by a statute of limitations."[351] Therefore, the question is whether the Court's view regarding the inapplicability of the inherently transitory doctrine to collective actions also applies to class actions under Rule 23.

Many circuit courts have refused to apply the *Genesis Healthcare* holding, which involves a "collective action" under the FLSA, to class actions under Rule 23.[352] Some of these courts use the inherently transitory doctrine to preserve Rule 23 class actions from mootness.[353] This approach makes practical sense when considering that a defendant who makes

(internal quotations marks omitted).

349. *Id.* at 1531 (citing Swisher v. Brady, 438 U.S. 204, 214 n.11 (1978); Spencer v. Kemna, 523 U.S. 1, 17–18 (1998)); *see also* Lary v. Rexall Sundown Inc., 74 F. Supp. 3d 540, 556 (E.D.N.Y. 2015) (citation omitted) (noting that the relate back doctrine is unnecessary in precertification Rule 68 situations to prevent mootness in TCPA actions because "members of the proposed class may file individual lawsuits to recover their damages") (citing Geismann v. ZocDoc, Inc., 2014 WL 6601024, at *2 (S.D.N.Y. Sept. 26, 2014)).

350. *Genesis Healthcare*, 133 S. Ct. at 1531.

351. *Id.* The Court also noted that unnamed putative plaintiffs remain free to file their own action, and therefore they are not prejudiced by a finding plaintiff's collective action is moot. *Id.*

352. *See, e.g.*, Gomez v. Campbell-Ewald Co., 768 F.3d 871, 875 (9th Cir. 2014), *cert. granted*, 135 S. Ct. 2311 (May 18, 2015) (No. 14-857) ("[C]ourts have universally concluded that the *Genesis* discussion does not apply to class actions."); *see also id.* at 875 n.2 ("At least ten courts had expressly stated that the *Genesis* analysis does not bind courts with respect to class action claims.") However, as noted earlier the Supreme Court has granted certiorari and undoubtedly will decide this question to resolve the circuit split. *Id.*, *cert. granted*, 135 S. Ct. 2311 (May 18, 2015).

353. *See, e.g.*, Pitts v. Terrible Herbst, Inc., 653 F.3d 1081, 1091 (9th Cir. 2011) (finding plaintiff's FLSA claim was inherently transitory based on the defendant's tactic of buying off the named plaintiff, although the claim was not transitory in the technical time-sensitive way); Weiss v. Regal Collections, 385 F.3d 337, 347 (3d Cir. 2004) (same, as to FDCPA claim); Kensington Physical Therapy, Inc., v. Jackson Therapy Partners, LLC, 974 F. Supp. 2d 856, 863 (D. Md. 2013) (holding the defendant's interlocutory appeal in TCPA action is not warranted because the *Genesis* opinion's statements limiting the inherently transitory doctrine are dictum and also do not apply to Rule 23 class actions).

thousands of illegal robo-calls, and who repeatedly uses such buy-offs, could effectively stave off large class actions for months, if not years.[354] Indeed, in *Roper*, the Supreme Court noted that it would be "contrary to sound judicial administration" to allow defendants to buy off named representatives;[355] the court stated that such a practice "obviously would frustrate the objectives of class actions" which are frequently used in regulatory actions "[w]here it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages."[356] However, although application of the inherently transitory doctrine to TCPA actions, before the plaintiff moves to certify the class, may save class actions from mootness and have practical appeal, a close reading of *Genesis Healthcare* reveals the inherently transitory doctrine should not apply to save Rule 23 TCPA class actions from mootness.[357]

A TCPA claim is not inherently transitory for several reasons: First, in many TCPA actions, the court has had more than ample time to rule on a motion for class certification.[358] There is nothing inherent in the claim itself or the plaintiff's individual interests that would cause the plaintiff's claim to expire before the court has time to rule on certification.[359] Instead, it is the *litigation strategy of the defendant*, who uses a Rule 68 offer as a defense tactic, which causes the plaintiff's interest to expire. As the Supreme Court recognized, the inherently transitory doctrine focuses on the defendant's conduct in the *underlying claim*, "not on the defendant's litigation

354. *See, e.g.*, Damasco v. Clearwire Corp., 662 F.3d 891, 895 (7th Cir. 2011) (observing that in the 7th Circuit, "a defendant cannot moot a case by making an offer *after* a plaintiff moves to certify a class, . . . [because] 'the defendant could delay the action indefinitely by paying off each class representative in succession'"), *overruled on other grounds by* Chapman v. First Index, Inc, 796 F.3d 873, 787 (7th Cir. 2015).

355. Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326, 339 (1980).

356. *Id.* The Court also noted that "aggrieved persons may be without any effective redress unless they may employ the class–action device." *Id.*

357. *See Genesis Healthcare*, 133 S. Ct. at 1531.

358. The mere fact that classes have been certified in TCPA class action lawsuits proves that there is nothing inherent in TCPA claims themselves that makes such claims transitory. *See, e.g.*, Kaye v. Amicus Mediation & Arbitration Grp., Inc., 300 F.R.D. 67, 73 (D. Conn. 2014) (plaintiff had approximately five months to certify the class before the defendant served its Rule 68 offer in September 2013, and the court granted certification); *see also* Lary v. Rexall Sundown Inc., 74 F. Supp. 3d 540, 543 (E.D.N.Y. 2015) (TCPA class action complaint was filed Oct. 22, 2013 and Rule 68 offer was not made until June 26, 2014, illustrating plaintiff had at least seven months to obtain class certification before court denied certification and ruled action was moot).

359. *See* cases cited *supra* note 358.

strategy."[360] As a result, just as the doctrine is unavailable to shield a plaintiff from defense tactics in a collective action, the inherently transitory doctrine also should not be used to shield a plaintiff from defendant's litigation tactics in a Rule 23 action.

Second, to the extent that a TCPA claim involves statutory damages, it cannot evade review. The Supreme Court has noted that claims for damages are quite different from claims that request injunctive relief to halt continuing harmful conduct.[361] "Unlike claims for injunctive relief," the Court stated, "a claim for damages cannot evade review; it remains live until it is settled, judicially resolved, or barred by a statute of limitations."[362] Under the TCPA, statutory damages are set at $500 per violation,[363] or $1,500 per violation if willful.[364] Therefore, according to the Court, such claims cannot be inherently transitory.[365] The claims will remain "live until settled, judicially resolved, or barred by the statute of limitation."[366] Further, if the named plaintiff's action is dismissed, the unnamed plaintiffs remain free to file their own suits and are not prejudiced by the dismissal.[367]

Third, TCPA claims that request injunctive relief cannot, *ipso facto*, be saved from mootness by the inherently transitory doctrine.[368] The TCPA

360. *Genesis Healthcare*, 133 S. Ct. at 1531; *see also* Fontenot v. McCraw, 777 F.3d 741, 750 (5th Cir. 2015) (recognizing that *Genesis Healthcare* rejected the "analogy between the 'inherently transitory' exception to mootness and the strategic "picking off" of named plaintiffs' claims"). For an interesting discussion of the use of Rule 68 offers as a litigation strategy by defendants, see HERR ET AL., *supra* note 63 ("Although an offer of judgment is not technically a pleading, it can be every bit as effective as the best counterclaim or crossclaim.").

361. *Genesis Healthcare*, 133 S. Ct. at 1531.

362. *Id.*

363. 47 U.S.C. § 227(b)(3)(B) (2012).

364. *Id.* § 227(b)(3)(C).

365. *Genesis Healthcare*, 133 S. Ct. at 1531.

366. *Id.* One key aspect of the dispute between the majority and the dissent in *Genesis* involves the legal effect of an ignored or refused Rule 68 offer. Although the majority side-stepped this question and "assume[d], without deciding" that such an offer mooted the named plaintiff's claim, *id.* at 1529, the dissent notes that the offer is never one for full relief unless it includes the uncertified, putative class of unnamed plaintiffs. *Id.* at 1536 (Kagan, J., dissenting).

367. *Id.* at 1531 ("[S]uch putative plaintiffs remain free to vindicate their rights in their own suits. They are no less able to have their claims settled or adjudicated following respondent's suit than if her suit had never been filed at all.").

368. However, an offer under Rule 68 that *fails to address* plaintiff's request for injunctive relief is an incomplete offer, and such an offer should not moot plaintiff's claim

provides for injunctive relief, as permitted by the individual states.[369] Although the inherently transitory doctrine traditionally comes into play when injunctive relief is requested to halt continuing, wrongful conduct, the doctrine only applies "where it is 'certain that other persons similarly situated' will continue to be subject to the challenged conduct."[370] Assuming defendants planned to continue calling "other persons similarly situated" in violation of the TCPA, defendants may negate this requirement by including in their Rule 68 offer a promise not to violate the TCPA, or by agreeing to an injunction prohibiting them from violating the TCPA.[371] Similarly, a TCPA plaintiff's request for injunctive relief also is immediately undermined by the defendant's promise never to call the plaintiff again, even if a similar promise is not made regarding future calls to others similarly situated. The Supreme Court has held, "Past exposure to illegal conduct

for that reason. *See, e.g.*, Compressor Eng'g Co. v. Thomas, No. 10-10059, 2015 WL 730081, at *6 (E.D. Mich. Feb. 19, 2015) (holding TCPA action not mooted by Rule 68 offer of judgment which failed to address plaintiff's request for injunctive relief); Goans Acquisition, Inc. v. Merch. Sols., LLC, 2013 WL 5408460, at *4 (W.D. Mo. Sept. 26, 2013) ("Goans correctly argues that the offer of judgment does not address this request for injunctive relief and, thus, the TCPA claim is not mooted by the Rule 68 offer."); Buslepp v. B & B Entm't, LLC, No. 12–60089-CIV, 2012 WL 4761509, at *3 (S.D. Fla. Oct. 5, 2012) (finding that an offer of judgment that was silent as to whether it included the requested injunctive relief did not constitute "the full relief sought by Plaintiff" and accordingly did not moot the plaintiff's TCPA claims); Valencia v. Affiliated Grp., Inc., No. 07–61381, 2008 WL 4372895, at *2 (S.D. Fla. Sept. 24, 2008) (holding that an offer of judgment did not satisfy the plaintiff's entire demand because "defendant did not offer to satisfy Plaintiff's demand for declaratory and injunctive relief"). *But see* Masters v. Wells Fargo Bank S. Cent., N.A., No. A-12-CA-376-SS, 2013 WL 3713492, at *3, *3 n.2 (W.D. Tex. July 11, 2013) (Ruling that it was "probably unnecessary" for the defendant's Rule 68 offer in TCPA action to stipulate to an injunction, because "there is no reasonable basis to believe Wells Fargo will simply resume autodialing Masters cell phone in the future").

369. 47 U.S.C. § 227 (b)(3)(A).

370. *Genesis Healthcare*, 133 S. Ct. at 1530–31.

371. *See*, *e.g.*, *Masters*, 2013 WL 3713492, at *3, *3 n.2 (ruling that promise not to call was sufficient to moot TCPA injunctive claim, and noting that promise was "probably unnecessary" because "there is no reasonable basis to believe Wells Fargo will simply resume autodialing Masters cell phone in the future"); Martin v. PPP, Inc., 719 F. Supp. 2d 967, 977 (N.D. Ill. 2010) (holding where the defendant made promise not to call, reoccurrence of conduct directed at plaintiff was extremely unlikely, rendering action moot); *see also* Alliance to End Repression v. City of Chi., 820 F.2d 873, 877 (7th Cir. 1987) ("[D]iscontinuation of a practice usually does not make a case moot, but it will end the 'case or controversy' when recurrence of the dispute among these parties is very unlikely."). *But see* Chapman v. First Index, Inc., 796 N.W.2d 783, 787 (7th Cir. 2015) (recognizing court lacks power to enter injunction if case is moot).

does not in itself show a present case or controversy regarding injunctive relief . . . if unaccompanied by any continuing, present adverse effects."[372] The plaintiff must show an immediate danger of sustaining some direct injury exists.[373] Therefore, even if the defendant's Rule 68 offer only promises not to call the plaintiff in the future, there is no case or controversy regarding injunctive relief. The likelihood that the plaintiff is in immediate danger of sustaining some direct injury by the defendant is dramatically decreased by the defendant's promise.[374]

Based on the discussion of the interests above, the named plaintiff retains no "personal stake or [other] legally cognizable interest in the outcome"[375] when he or she receives a Rule 68 offer of complete relief before he or she moves to certify the class. For the reasons stated above, the named plaintiff's individual claim is mooted by the defendant's Rule 68 offer of judgment. Therefore, if the action is to survive, the putative, uncertified class must have a personal stake or other legally cognizable interest in the outcome.

B. *Does the Putative, Uncertified Class Maintain an Interest Sufficient to Satisfy Article III and Continue the Lawsuit?*

The Supreme Court has held the putative class has no legal status or interest in the outcome of the suit separate from the named plaintiff until the class is certified.[376] Logically, this leads to the conclusion that, if the named plaintiff's claim is mooted before the plaintiff files a motion for class certification, then the uncertified class, which does not have an existence or

372. O'Shea v. Littleton, 414 U.S. 488, 495–96 (1974).

373. *Id.* at 494 (citing Mass. V. Mellon, 262 U.S. 447, 488 (1923)); *accord* Feit v. Ward, 886 F.2d 848, 857 (7th Cir. 1989).

374. It also should be noted that, even if one were to assume the named plaintiff's claim for injunctive relief could survive, serious doubts remain as to whether the named plaintiff adequately could represent the putative unnamed class after his or her individual claim for damages has expired. *See Martin*, 719 F. Supp. 2d at 976–77.

375. *Genesis Healthcare*, 133 S. Ct. at 1528.

376. *Id.* at 1530; Sosna v. Iowa, 419 U.S. 393, 399 (1975) (class not present separate from the named plaintiff until class is certified); *see also Masters*, 2013 WL 3713492, at *5 (holding that *Genesis* compels conclusion that TCPA putative class has no surviving interest and case is moot when plaintiff's claim is mooted before class is certified); Bank v. Spark Energy Holdings, LLC, No. 4:11-CV-4082, 2013 WL 5724507, at *2, *11 (S.D. Tex. Oct. 18, 2013) (holding that uncertified putative class TCPA claims are mooted when the named plaintiff's individual claim is mooted; court refusing to apply the relation back doctrine).

interest separate from the plaintiff, cannot supply a personal stake or interest in the outcome sufficient to satisfy Article III. Nevertheless, some have advocated that the putative class be accorded a legal status separate from the plaintiff prior to certification.[377] For example, in his concurring opinion in *Roper*, Justice Stevens stated:

> In my opinion, when a proper class-action complaint is filed, the absent members of the class should be considered parties to the case or controversy at least for the limited purpose of the court's Art. III jurisdiction. If the district judge fails to certify the class, I believe they remain parties until a final determination has been made that the action may not be maintained as a class action. Thus, the continued viability of the case or controversy, as those words are used in Art. III, does not depend on the district judge's initial answer to the certification question; rather it depends upon the Plaintiff's right to have a class certified.[378]

Some lower courts have echoed this view.[379] For example, in a class action filed under the Fair Debt Collection Practices Act,[380] the Tenth Circuit Court of Appeals held that a Rule 68 offer of judgment affording full relief for the named representative's individual claim, made prior to the filing of a motion for class certification,[381] did not moot the class action: "[W]e conclude that a nascent interest attaches to the proposed class upon the filing of the class complaint such that a rejected offer of judgment for statutory damages and costs made to a named plaintiff does not render the case moot under Article

377. *See, e.g.*, Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326, 342 (1980) (Stevens, J., concurring); Lucero v. Bureau of Collection Recovery Inc., 639 F.3d 1239, 1245, 1249 (10th Cir. 2011) (citing *Sosna* as support for the notion that "the personal stake of the indivisible class may inhere prior to a definitive ruling on class certification," and holding that "a nascent interest attaches to the proposed class upon the filing of a class complaint such that a rejected offer of judgment for statutory damages and costs made to a named plaintiff does not render the case moot under Article III"); Berry v. Pierce, 98 F.R.D. 237, 243 (E.D. Tex. 1983) ("It would be illogical and ironic, if the rights of members of a class not yet certified were less worthy of judicial vigilance than those of members of a class that had already been judicially found a nullity [the latter remark referencing the class denied certification in *Roper*].").

378. *Roper*, 445 U.S. at 342 (Stevens, J., concurring). In his dissent, Justice Powell strongly criticized Justice Steven's suggestion. *See id* at 358 n.21.

379. *See, e.g.*, *Lucero*, 639 F.3d at 1249 (finding putative class has a nascent interest at the time the complaint is filed); *Berry*, 98 F.R.D. at 243 (declaring members of uncertified class are not less worthy of judicial protection).

380. 15 U.S.C. §§ 1692–1692p (2012).

381. *Lucero*, 639 F.3d at 1240–41.

III."[382] The court declined to describe the nature of the "nascent interest."[383]

Granting the uncertified putative class a separate, limited existence solely for the purpose of retaining Article III jurisdiction is unwise and will create more problems than it solves. First, any attempts to limit the putative class's presence to the question of Article III jurisdiction alone (as advocated by Justice Stevens)[384] are doomed to failure. Once the class is deemed present for jurisdictional purposes, other questions will inevitably arise, for which there are no easy answers or clear rules.[385] One such example is the issue raised by this Article, involving the intersection of Article III and Rule 68. If the putative class is deemed present for Article III purposes before the plaintiff moves for certification, then must the uncertified class also be included in a defendant's Rule 68 offer of judgment? Many courts have answered this question in the affirmative, holding that offers made to the named representative alone are incomplete.[386] However, prior to

382. *Id.* at 1249 (citations omitted).

383. *See id.* However, the Tenth Circuit did cite to *Geraghty* for the point that "for Article III purposes, the timing of the class certification decision 'is not crucial.'" *Id.* at 1249 (citing U.S. Parole Comm'n v. Geraghty, 445 U.S. 388, 398 (1980)). The Tenth Circuit also cited commentators to support its point that the court retains jurisdiction of the class action in the absence of a certification decision. *Id.* (citing Richard K. Greenstein, *Bridging the Mootness Gap in Federal Court Class Actions*, 35 STAN. L. REV. 897, 903 (1983); Mathew I. Hall, *The Partially Prudential Doctrine of Mootness*, 77 GEO. WASH. L. REV. 562, 608 (2009); Mary Kay Kane, *Standing, Mootness, and the Federal Rule 23—Balancing Perspectives*, 26 BUFF. L. REV. 23, 104 (1977)). However, as the author noted earlier in Part III.C. of this Article, the timing of the certification decision may not be crucial in situations where the plaintiff's claim is inherently transitory because the court will use the relate-back to save the action from mootness. *See* discussion *supra* Part III.C. However, in other situations, the Court has indicated the timing of certification is very important to the mootness question. *See* Sosna v. Iowa, 419 U.S. 393, 399 (1975) (ruling that the certification decision "significantly affects the mootness determination").

384. *See* Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326, 342 (1980) (Stevens, J., concurring).

385. *See, e.g.*, U.S. Parole Comm'n v. Geraghty, 445 U.S. 338, 404 n.11 (1980) ("The dissent is correct that once exceptions are made to the formalistic interpretation of Art. III, principled distinctions and bright lines become more difficult to draw.").

386. *See* discussion *supra* Part V.A.1. This was the view expounded by the dissent in *Genesis Healthcare*. Genesis Healthcare Corp. v. Symczyk, 133 S. Ct. 1523, 1536 (2013) (Kagan, J., dissenting) (noting that an offer to the named plaintiff alone is not an offer of complete relief, because it does not give plaintiff all she requested, i.e. relief for the class). Although the circuits are split, some courts have obligated defendants to include the uncertified class in their Rule 68 offers, deeming the offers "incomplete" if the uncertified class is excluded. *See, e.g.*, Charvat v. Nat'l Holdings Corp., No. 2:14-cv-2205,

certification, the Court has not yet determined whether the action can be maintained as a class action. As a result, why obligate the defendant to include relief for these unnamed plaintiffs who, ultimately, may have been found unable to constitute a proper class under Rule 23?[387] Any attempt to limit the putative class's precertification presence to Article III jurisdiction alone will simply raise more questions, like this one, which will require the Court's response.

Second, how will recognition of the uncertified class, for Article III jurisdiction purposes, square with the Court's precedent that the putative class has no legal status or interest in the suit separate from the plaintiff *until the class is certified*?[388] As Justice Powell noted, "If their presence is to be limited to the satisfaction of the Art. III case-or-controversy requirement, then the rule of party status would have no content apart from Art. III and could only be described as a legal fiction."[389] This is yet another concern that the Court will be forced to address.

Third, because the Court's precedent establishes that the uncertified

2015 WL 3407657, at *7–8 (S.D. Ohio May 26, 2015) (holding that an offer under Rule 68 in TCPA class action that satisfied the named plaintiff's claim only was incomplete and could not moot entire action, regardless of the timing of the certification motion); Sandusky Wellness Ctr., LLC v. Medtox Sci., Inc., Civil No. 12-2066 (DSD/SER), 2013 WL 3771397, at * 2 (D. Minn. July 18, 2013) (holding, in TCPA action, "[t]o moot the claim of a putative class representative, a Rule 68 offer must provide complete relief for both the individual and class claims"); *see also, e.g.*, Weitzner v. Sanofi Pasteur, Inc., 7 F. Supp. 3d 460, 467–68 (M.D. Pa. 2014) (ruling TCPA class action was not moot when Rule 68 offer was made to the named plaintiff only and no motion to certify the class had been filed); Mey v. Frontier Commc'ns Corp., No. 3:13-CV-01191-MPS, 2014 WL 6977746, at *3–4 (D. Conn. Dec. 9, 2014) (refusing to moot TCPA class action while certification motion is pending, when Rule 68 offer is made to the named plaintiff only).

387. Requiring the uncertified class to be included in the Rule 68 offer, rather than simply permitting it, is likely to decrease settlements, especially at the early stages of litigation. It also should be noted that substantial costs will be expended to identify the members of the uncertified class in order to compensate them, despite the fact that they technically may not meet the requirements to be certified as a class. A requirement that defendants include relief for the uncertified class also may give defendants pause when they assess whether to make a Rule 68 offer of judgment. Although one goal of Rule 68 is to encourage settlement, the adoption of a rule that requires such offers to include relief for the uncertified class will arguably have the opposite effect.

388. Sosna v. Iowa, 419 U.S. 393, 399 (1975) (finding class not present separate from the named plaintiff until class is certified); *see also Genesis Healthcare*, 133 S. Ct. at 1530 (same).

389. Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326, 358 n.21 (1980) (Powell, J., dissenting).

class is not present for the merits and cannot be bound by any adverse judgment,[390] it is contradictory and inequitable to require them to share in a favorable judgment.[391] How will the Court explain this inconsistency? How is this equitable? How does it square with the language and intent of Rule 23?

Fourth, if the uncertified putative class is deemed present when a Rule 68 offer is made to the named class representative, then the uncertified class's presence creates a conflict of interest between the named representative and the putative class,[392] which is unnecessary. For example, as one court has noted, "The plaintiff faces a conflict between accepting the amount offered to satisfy his individual claim or continuing to represent the putative class to obtain relief for the entire class."[393] Although some argue

390. *Genesis Healthcare*, 133 S. Ct. at 1531 (noting that in collective actions prior to conditional certification "putative plaintiffs remain free to vindicate their rights in their own suits. They are no less able to have their claims settled or adjudicated following respondent's suit than if her suit had never been filed at all"); *see* FED. R. Civ. P. 23(c)(3); FED R. CIV. P. 23(c)(3) advisory committee's note to A66 amendment, 28 U.S.C. app. at 158.

391. *See Roper*, 445 U.S. at 354 (Powell, J., dissenting) (noting that allowing "putative class members to take advantage of a favorable judgment on the issue of liability without assuming the risk of being bound by an unfavorable judgment" is improper). *But see id.* at 342 n.1 (Stevens, J., concurring) (noting the uncertified class is not present for the merits so the Court should "find them not present for sharing costs or suffering an adverse judgment").

392. *E.g.*, Johnson v. U.S. Bank Nat'l Ass'n, 276 F.R.D. 330, 334 (D. Minn. 2011); Lamberson v. Fin. Grimes Servs., LLC, Civil No. 11-98 (RHK/JJG), 2011 WL 1990450, at *4 (D. Minn. Apr. 13, 2011); *cf.* Alpern v. Utilicorp United, Inc., 84 F.3d 1525, 1539 (8th Cir. 1996) (citations omitted).

393. Prater v. Medicredit, Inc., 301 F.R.D. 398, 401 (E.D. Mo. 2014) (quoting March v. Medicredit, Inc., No. 4:13CV1210 TIA, 2013 WL 6265070, at * 4 (E.D. Mo. Dec. 4, 2013)). The *Prater v. Medicredit, Inc.* court, which was addressing a Rule 68 offer in a TCPA action, ultimately ruled that this conflict should make all precertification offers of judgment ineffective when the offers are made to the named plaintiff alone. *Id.* (quoting *March*, 2013 WL 6265070, at *4). Thus, the *Prater* court struck the defendant's offer of judgment, *id.*, and found the action was not moot. *See id.* In the Author's view, the conflict only becomes real when the class is deemed present before it is certified, and the potential conflict can be avoided by adhering to Supreme Court precedent which finds the putative class has no presence or interest distinct from the representative prior to certification. Sosna v. Iowa, 419 U.S. 393, 399 (1975) (class not present separate from the named plaintiff until class is certified); *see also Genesis Healthcare*, 133 S. Ct. at 1530. As the *Genesis* majority noted, the members of the putative class remain free to file their own actions. *Genesis Healthcare*, 133 S. Ct. at 1531. However, if the putative class is deemed present and, in particular, if the defendant must include them in a Rule 68 offer

that this conflict is present when a Rule 68 offer is made prior to certification of the class,[394] the conflict is merely a potential one at that time. The class is not present before it is certified.[395] Further, the court has not yet ruled whether a class action is possible or whether the named plaintiff is a suitable representative. The mere fact that the plaintiff has filed a class action complaint is insufficient to create a class action.[396] For these reasons, the conflict is not real and is only a possibility before the plaintiff moves to certify the class. [397] However, if the courts rule the putative uncertified class is present for Article III purposes prior to certification, the conflict will move from the realm of possibility and become a concrete reality. Such a conflict can be avoided simply by adhering to Supreme Court precedent which holds that the uncertified class has no legal existence or interest separate from the plaintiff before the class is certified.

Fifth, under Rule 23(c) a class member is permitted to "opt-out" of the action at the time of certification.[398] If the unnamed putative class members are deemed present prior to certification, may they also "opt-out" of the Rule 68 offer of judgment? How will this question be resolved?[399] How will

of judgment before certification, then the putative class's legal status extends beyond a limited presence for Article III purposes and the waters are needlessly muddied.

394. *See supra* text accompanying note 393.

395. *Sosna*, 419 U.S. at 399 (class not present separate from the named plaintiff until class is certified); *see also Genesis Healthcare*, 133 S. Ct. at 1530.

396. *See, e.g.*, Weathers v. Peters Realty Corp., 499 F.2d 1197, 1200 (6th Cir. 1974) ("[A]n action is not maintainable as a class action merely because it is designated as such in the pleadings.") (citing 3B JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE, §§ 23.02-2, 230.5 (2d ed. 1969)); *see also* Pegues v. Bakane, 445 F.2d 1140, 1142 (5th Cir. 1971); Ross v. Abercrombie & Fitch Co., 257 F.R.D. 435, 440 (S.D. Ohio 2009) (citing Cash v. Swifton Land Corp., 434 F.2d 569, 571 (6th Cir.1970)).

397. *See, e.g.*, Keim v. ADF MidAtlantic, LLC, No. 12-80577-CIV, 2013 WL 3717737, at *7 (S.D. Fla. July 15, 2013) (ruling Rule 68 offer to the named plaintiff in TCPA class action does not place him in conflict with the putative class because prior to certification "the putative class never acquired an independent legal status that would give rise to responsibilities on the plaintiff's part").

398. FED. R. CIV. P. 23(c)(2)(B)(v).

399. Of course, the putative members are unknown and therefore would be unable to opt-out unless the court preliminarily certifies the class for settlement purposes. *See, e.g.*, Ritchie v. Van Rue Credit Corp., No. CV-12-1714-PHX-SMM, 2014 WL 956131 at *2–3 (D. Ariz. 2014) (discussing class certification for settlement purposes only in TCPA action where parties agreed to settlement amount prior to certification). However, such certification is not a true solution. Instead, preliminary certification for settlement purposes would become a required step, necessary to remedy a needless problem created by an approach (such as the Ninth Circuit's approach) which fails to moot the class action

this process work?

Sixth, if the uncertified class is deemed present for Article III purposes and is included in a Rule 68 offer of judgment, must the court approve of the judgment in addition to the parties? After a class is certified, the class action cannot be settled or dismissed without court approval.[400] Should the same be true of Rule 68 offers, if the uncertified class now has a "nascent presence" for Article III purposes?

These are but a few of the many questions that will be raised if the Court deems the uncertified class present for purposes of establishing Article III jurisdiction. Attempts to limit the uncertified class's presence solely to the question of jurisdiction will not avoid these questions to the extent they are intertwined with Rule 68 offers of judgment that will be made in Rule 23 class actions.

Because the putative class before certification has no legal status or interest in the outcome of the suit separate from the plaintiff, the entire class action becomes moot when the named plaintiff's individual claim is mooted by a Rule 68 offer of judgment,[401] and the action should be dismissed.[402] The uncertified, putative class has no personal stake or other legally cognizable interest in the outcome necessary to maintain a case or controversy under Article III of the Constitution. For the reasons stated above, the uncertified putative class should not be granted such status. Neither the named plaintiff nor the uncertified class retain a personal stake or other legally cognizable interest in the outcome when the defendant's Rule 68 offer is made to the named plaintiff before that plaintiff moves to certify the class. Nevertheless, solutions, which do not run afoul of Article III, are available to address the concerns that mootness will lead to an increase in buy-offs, a multiplicity of suits, and an inability of plaintiffs to use Rule 23 as an effective procedural mechanism in small regulatory actions.

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when the named plaintiff's claim becomes moot before he files for class certification.

400. FED. R. CIV. P. 23(e).

401. Sosna v. Iowa, 419 U.S. 393, 399 (1975) (class not present separate from the named plaintiff until class is certified); *see also Genesis Healthcare*, 133 S. Ct. at 1530.

402. *Genesis Healthcare*, 133 S. Ct. at 1530. The circuits also are split regarding the proper procedure to dispose of such cases. *See* Kaye v. Amicus Mediation & Arbitration Grp., Inc., 300 F.R.D. 67, 74 (D. Conn. 2014) (noting an additional circuit split exists regarding the proper procedural mechanism to use for disposal of such cases). However, the proper procedural method to dispose of the action is not the focus of this article. This Author maintains that the Court has the authority to dismiss sua sponte. *See supra* text accompanying note 273.

VI. POSSIBLE SOLUTIONS

Although it may appear harsh to hold the entire action is moot and to send the plaintiff away without relief,[403] there are ways to avoid this result which do not run afoul of Article III or distort the personal stake requirement entrenched in Supreme Court jurisprudence.

A. *Amend Rule 68 to Prohibit Offers in Rule 23 Class Actions for a Specific Time Period After the Complaint is Filed*

One strategy defendants use in TCPA actions, as well as other lawsuits, is to make a Rule 68 offer of judgment at the initial stages of litigation—either when they are served with the class action complaint, or soon thereafter.[404] Such an offer usually catches the plaintiff off-guard because the plaintiff typically has not completed the necessary discovery to support a motion for certification at such an early stage in the litigation process.[405]

403. This is the typical result. In *Genesis Healthcare*, the dissent found it "preposterous" that the end result of the unaccepted offer of judgment, according to the majority's holding, was that the plaintiff walks away with no money whatsoever. *Genesis Healthcare*, 133 S. Ct. at 1535 (Kagan, J., dissenting). Of course, the dissent also opposed compensating plaintiff by entering judgment for plaintiff against plaintiff's will. *Id.* at 1536. The Author agrees that forced entry of judgment in the amount of the Rule 68 offer is improper. When a defendant makes a Rule 68 offer of complete relief before a plaintiff has moved to certify the class, the court no longer has Article III jurisdiction to enter judgment. *See, e.g.*, Charvat v. Nat'l Holdings Corp., No. 2:14-cv-2205, 2015 WL 3407657, at *6 (S.D. Ohio May 26, 2015) (citations omitted) (recognizing the "logical fallacy" that the court would lack the power to enter judgment if the Rule 68 offer mooted plaintiff's claim and deprived the court of jurisdiction), *appeal docketed*, *In re* Nat'l Holdings Corp., No. 15-303 (6th Cir. Filed June 4, 2015). *But see* O'Brien v. Ed Donnelly Enters., 575 F.3d 567, 575 (6th Cir. 2008) ("[W]e believe the better approach is to enter judgment in favor of the plaintiffs in accordance with the defendants' Rule 68 offer of judgment, as the district court did in this case."); *see also* Compressor Eng'g Corp. v. Mfrs. Fin. Corp., No. 09-14444, 2014 WL 3420482, at *2 (E.D. Mich. July 14, 2014) (quoting *O'Brien*, 575 F.3d at 575) (same).

404. *See, e.g.*, Stein v. Buccaneers L.P., 772 F.3d 698, 700–01 (11th Cir. 2014) (plaintiffs served process on August 1, 2013; the defendant removed the action to federal court on August 16, 2013, made Rule 68 offer on August 19, 2013, and moved to dismiss on August 21, 2013); Chen v. Allstate Ins. Co., No. C 13-0685 PJH, 2013 WL 2558012, at *1 (N.D. Cal. June 10, 2013) (complaint filed on February 14, 2013; Rule 68 offer made on April 10, 2013), *amended by* No. C 13-0685 PJH, 2013 WL 3973798 (N.D. Cal. July 31, 2013).

405. *See, e.g.*, *Stein*, 772 F.3d at 701 (noting the offer of judgment followed by the motion dismiss for lack of jurisdiction because of the unaccepted offer "stirred the plaintiffs to action" to prematurely "move[] to certify a class").

Most would agree that a solution is needed to avoid mooting the action at such an early stage when the plaintiff has not yet had ample time to conduct discovery and move for certification.[406] This problem can be solved by amending Rule 68 to prohibit offers of judgment in Rule 23 class actions during the first 90 days after a complaint has been filed (or some other suitable time frame). Admittedly, an earlier attempt to amend Rule 68 proved unsuccessful.[407] However, that lack of success was due, in part, to the fact that the proposed amendment was extreme and sought a complete prohibition of offers of judgment in Rule 23 class actions.[408] A less restrictive prohibition, such as barring offers of judgment during a specific time period at the onset of litigation, should serve to address the concerns of plaintiffs, defendants, and the courts. Such an amendment will produce a balance and give the courts the tool they need to "protect both the absent class and the integrity of the judicial process."[409] The prohibition would dramatically reduce the number of precertification buy-offs and the number of cases mooted before the plaintiff has had sufficient time to move for certification. Fears that mootness will lead to a needless multiplication of duplicative suits, wasting judicial resources, also will be put to rest. Further, many courts already have local rules which require plaintiffs to file motions to certify the

406. *See* 1 MCLAUGHLIN ON CLASS ACTIONS § 4:28 & n.169 (12th ed.), WestlawNext (database updated Dec. 2015) (citations omitted) (noting the First, Second, Fifth, Seventh, Ninth, Tenth, and Eleventh Circuits all "reason that the district court should have a reasonable opportunity to consider whether a class may be certified and permitting a defendant to 'pick off' putative class plaintiffs would frustrate a central class action objective").

407. *See, e.g.*, COMM. ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE U.S., PROPOSED AMENDMENT TO RULE 68, 102 F.R.D. 407, 433 (1984).

408. *Id.* ("This rule shall not apply to class or derivative actions under rules 23, 23.2, and 23.2."); *see also* Kaye v. Amicus Mediation & Arbitration Grp., Inc., 300 F.R.D. 67, 74 (D. Conn. 2014) (quoting 12 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3001.1 (2d ed. 1997)) ("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."); *id.* (quoting 13 JAMES WILLIAM MOORE et al., MOORE'S FEDERAL PRACTICE § 68.04[3]) ("The language of Rule 68 contains no exception for particular kinds of actions. However, it is questionable whether the offer-of-judgment rule should apply to cases such as class or derivative actions that require judicial approval of a settlement.").

409. *See* Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326, 331 (1980) (discussing this responsibility of the courts).

class under Rule 23 within 90 days of filing the class action complaint.[410] As a result, a similar limit, prohibiting Rule 68 offers of judgment during that time frame, makes sense.

B. *Encourage Plaintiffs to File a Motion to Certify the Class at the Same Time the Complaint is Filed*

Another potential solution that does not run afoul of Article III or distort the personal stake requirement is to encourage plaintiffs to file their class certification motions at the same time as they file their class action complaint.[411] This solution should prove effective at staving off defendants' attempts to buy off the named class representatives while, at the same time, avoiding a conflict with Article III.[412] Many plaintiffs have done so, in an attempt to protect the action from being ruled moot.[413] Admittedly, most plaintiffs are not prepared to have the class certified when the complaint is filed because discovery is typically necessary to support the class certification motion. However, as courts have recognized, the plaintiff may ask the court

410. *See, e.g.*, E.D. PA. CIV. P. R. 23.1(c); C.D. CAL. CIV. P. R. 23-3.

411. Yet another proposed solution is that the courts should permit the substitution of a new class representative to "preserve the energy invested in the original action." 13C CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE, *Jurisdiction and Related Matters* § 3533.9 (3d ed. 2008). Although that same article noted the courts are powerless to do so, based on the lack of Article III jurisdiction, the authors found that approach "unnecessarily rigid." *Id.* (citing Fox v. Bd. of Trs. of State Univ. of N.Y., 42 F.3d 135, 144 (2d Cir. 1994), *cert. denied*, 515 U.S. 1169 (1995) (ruling that Article III prevents substitution of new representative after named representative's claim was mooted)).

412. Although this solution should prove effective in the vast majority of jurisdictions, the author is aware that it will not work everywhere, at least at this point in time. *See, e.g.*, Geismann v. ZocDoc, Inc., 60 F. Supp. 3d 404, 407 (S.D.N.Y. 2014) (mooting entire action despite fact that motion to certify class was filed with the complaint). In *Geismann*, the court focused on the fact the class had not yet been certified, even though the motion for certification was pending. *Geismann*, 60 F. Supp. 3d at 406–07. Although the circuits are split regarding mootness when certification motions are pending, the majority of circuits will not moot the action under those circumstances. *See* Bank v. Spark Energy Holdings LLC, No. 4:11-CV-4082, 2013 WL 5724507, at *6 (S.D. Tex. Oct. 18, 2013) (discussing split on mootness effect of Rule 68 offer made when motion to certify class is pending); *see also* Lary v. Rexall Sundown Inc., 74 F. Supp. 3d 540, 549 (E.D.N.Y. 2015) (same).

413. *See, e.g.*, *Geismann*, 60 F. Supp. 3d at 405; Jackson v. Caribbean Cruise Line, Inc., 88 F. Supp. 3d 129, 133–34 (E.D.N.Y. 2015). Ironically, this solution did not work in *Geismann*, 60 F. Supp. 3d at 407. The court found the entire action moot because the class had not yet been certified, even though the motion was pending. *Id.* at 406–07.

to delay ruling on the motion until sufficient discovery has taken place.[414] The language of Rule 23 does not prohibit this approach.[415] Instead, it states, "At an early practicable time after a person sues or is sued as a class representative, the court must determine by order whether to certify the action as a class action."[416] Therefore, the federal rules already encourage early certification,[417] and this solution to the mootness problem might have the added benefit of promoting early discovery and early certification, as contemplated by the rules.

VII. CONCLUSION

Article III of the Constitution limits the jurisdiction of the federal courts to actual cases or controversies. In a TCPA class action, before a plaintiff moves to certify the class, a Rule 68 offer of judgment that gives the plaintiff everything he or she is entitled to under the statute moots the plaintiff's individual claim. Because the putative, uncertified class has no legal existence separate from the plaintiff until the class is certified (and should not be granted such a presence), the entire action also is moot. Therefore, no plaintiff remains who has a "personal stake" or "other interest in the outcome of the action." Instead, the "only persons before [the] Court who appear to have any interest are the defendants and a lawyer who no longer has a client."[418] Under those circumstances, Article III jurisdiction is lacking, and the action is moot. The solution to this mootness lies in amending the Rules or encouraging plaintiffs to file for certification at the same time as they file their complaint—not with overruling existing precedent and ignoring the constraints imposed by Article III.

414. *See* Keim v. ADF MidAtlantic, LLC, No. 12-80577-CIV, 2013 WL 3717737, at *6 (S.D. Fla. July 15, 2013). *But see* Charvat v. Nat'l Holdings Corp., No. 2:14-cv-2205, 2015 WL 3407657, at *8 (S.D. Ohio May 26, 2015) (noting that requiring plaintiff to move for class certification when he files his complaint "'is an invitation to procedural gamesmanship' that encourages premature motion practice" (quoting Hrivnak v. NCO Portfolio Mgmt., Inc., No. 1:10-CV-646, 2010 WL 5392709 (N.D. Ohio Dec. 22, 2010), *aff'd*, 719 F.3d 564 (6th Cir. 2013))).

415. However, it should be noted that some courts have local rules that would not permit the filing of a class certification motion at such an early stage. *See Charvat*, 2015 WL 3407657, at *8 (citing S.D. OHIO L. CIV. R. 23.3).

416. FED. R. CIV. P. 23(c)(1)(A).

417. Many local rules of court actually require certification early in the litigation process. *See, e.g.*, E.D. PA. R. CIV. P. 23.1(c); C.D. CAL. R. CIV. P. 23-3.

418. U.S. Parole Comm'n v. Geraghty, 445 U.S. 338, 424 (1980) (Powell, J., dissenting).

AUTHOR'S ADDENDUM: THE SUPREME COURT'S RECENT DECISION IN *CAMPBELL-EWALD V. GOMEZ*

As this article was in final production, the Supreme Court rendered its decision in *Campbell-Ewald v. Gomez*,[419]which should have resolved the circuit split[420] and addressed the concerns discussed in this Article. However, the Court's decision did neither. As a result, this Article's criticisms remain sound and apply with equal force after the Court's decision in *Gomez*.

The *Gomez* majority failed to address the elephant in the room: namely, what *specific interest* remains when the named plaintiff is offered full relief prior to moving for certification of the class?[421] The *Gomez* majority simply adopted the position taken by Justice Kagan in her dissent in *Genesis Healthcare*: that an unaccepted Rule 68 offer is a "legal nullity, with no operative effect."[422] The majority noted that because the unaccepted offer "had no continuing efficacy" the parties "retained the same stake in the litigation they had at the outset."[423] As addressed in Part V.A.1 of this Article, the assertion that the plaintiff's "original interest" in the action remains after the Rule 68 offer is rejected or ignored[424] conveniently avoids the central question: what live controversy exists between the parties *after the plaintiff is offered the maximum she could possibly recover under the statute*? What *is* the plaintiff's adverse interest? Article III limits the court's jurisdiction to cases or controversies and requires that "an actual controversy must be extant" at every stage of litigation, from the moment the complaint is filed throughout all stages of review.[425] As discussed in

419. See Cambell-Ewald Co. v. Gomez, 136 S. Ct. 663, 672 (2016) (holding an unaccepted Rule 68 offer does not moot a case, but noting "[w]e 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").

420. *See supra* Part IV.

421. *Gomez*, 136 S. Ct. at 678 (J. Roberts, Scalia & Alito, dissenting) ("[T]he federal courts exist to resolve real disputes, not to rule on a plaintiff's entitlement to relief already there for the taking.").

422. *Id.* at 669–71.

423. *Id.*

424. *See id.* at 670 ("An unaccepted settlement offer—like any unaccepted contract offer—is a legal nullity, with no operative effect. . . . [R]ejection of an offer leaves the matter as if no offer had ever been made." (quoting Genesis Healthcare Corp., v. Symczyk, 133 S. Ct. 1523, 1533 (2013) (Kagan, J., dissenting) (internal quotation marks omitted))).

425. *See id.* at 669; *see also Genesis Healthcare*, 133 S. Ct. at 1528 (quoting Arizonans

Section V.A. of this article, the plaintiff no longer has an adverse interest to support Article III jurisdiction. No controversy remains. The *Gomez* majority sidesteps this point by referring to the plaintiff's "original interest" and, as the dissenting Justices in *Gomez* noted, the majority's holding takes the Article III personal stake determination away from the courts and places it in the hands of the plaintiff, who may now decide to continue litigating, even after the plaintiff was offered all he could hope to obtain from his suit.[426]

The *Gomez* majority also failed to provide cogent reasoning to support its holding.[427] It is no answer to assert that the language of Rule 68 and the law of contracts lead to the conclusion that the plaintiff's "original interest" remains.[428] As addressed in Part V.A.1 of this Article, the *Gomez* majority's approach requires a tortured and inaccurate interpretation of Rule 68. Rule 68 contemplates that a rejected or ignored offer *does* have legal effect.[429] It is not a nullity. *An unaccepted or rejected offer is used as the basis for cost shifting*, as Rule 68 intended.[430] The offer is not treated as if it were "never made."[431] Rule 68 requires the rejected or ignored offer have legal effect for the rule to operate.[432] If the *Gomez* majority's interpretation of a rejected or ignored Rule 68 offer is correct, and the offer is treated as if it were "never made," then Rule 68 is fatally flawed, internally inconsistent, and makes no sense.[433] In addition, to the extent the *Gomez* majority's position would, in effect, imply the law of contracts and the language of Rule 68 control the issue and provide an answer to the question, its focus is misplaced. Neither a rule of civil procedure nor the law of contracts can trump the Constitution's limits on the jurisdiction of the federal courts.[434]

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for Official English v. Arizona, 520 U.S. 43, 67 (1997)); U.S. Parole Comm'n v. Geraghty, 445 U.S. 388, 397 (1980); Sosna v. Iowa, 419 U.S. 393, 402 (1975). As the dissent in *Gomez* noted, once the plaintiff loses his personal stake in the outcome, "[a] federal court that decides the merits of such a case runs afoul of the prohibition on advisory opinions." *Gomez*, 136 S. Ct. at 679 (Roberts, C.J., dissenting).

426. *Gomez*, 136 S. Ct. at 680.

427. Justice Thomas noted this point in his concurring opinion. *Id.* at 676–77 (Thomas, J., concurring).

428. *Id.* at 671–72.

429. *See* FED. R. CIV. P. 68.

430. FED. R. CIV. P. 68(d) ("[T]he offeree must pay the costs incurred after the offer was made.").

431. *See* FED. R. CIV. P. 68(b) ("Evidence of an unaccepted offer is . . . admissible . . . in a proceeding to determine costs.").

432. *See id.*

433. *See id.*

434. *See* United States v. Armstrong, 517 U.S. 456, 475 (1996) (quoting CHARLES

Finally, the questions and concerns addressed in this Article remain post-*Gomez*, because the majority merely postponed a definitive resolution to the circuit split. The *Gomez* majority noted: "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."[435] In other words, if the defendant had not merely offered to give the plaintiff full relief, but instead took steps to actually make the funds available to plaintiff, the majority may have reached a different conclusion. Perhaps, under those circumstances, the plaintiff's claim (and possibly the entire action) would have been mooted.[436] The dissent acknowledged the question has not been resolved: "Today's decision thus 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."[437] Therefore, confusion is bound to remain in the lower courts, and the issue of whether a lawsuit is mooted by a Rule 68 offer of complete relief made to a named plaintiff, before a plaintiff moves to certify the class, will be revisited by the Supreme Court on another day. Hopefully, when that day arrives, the Court will acknowledge the constraints imposed upon its jurisdiction by Article III of the Constitution.

ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 254, 81 & n.60 (2d ed. 1982)) ("Because *Brady* is based on the Constitution, it overrides court-made rules of procedure."). In fact, "even Congress may not confer federal court jurisdiction when Art. III does not. Far less so may a rule of procedure which 'shall not be construed to extend . . . the jurisdiction of the United States district courts.'" U.S. Parole Comm'n v. Geraghty, 445 U.S. 388, 421 (1980) (Powell, J. dissenting) (citations omitted).

435. Campbell-Ewald Co. v. Gomez, 136 S. Ct. 663, 672 (2016).

436. Apparently, this statement was included to appease Justice Thomas and to persuade him to concur with the majority. Justice Thomas concurred with the majority based on the common law history of tenders because the defendant did not actually tender payment. *See id.* at 674–75 (Thomas, J., concurring). Justice Thomas disagreed with the majority's reliance on the law of contracts and the language of Rule 68 to support its opinion and noted that the majority did "not advance a sound basis for [its] conclusion." *Id.*

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