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## **AN OFFER YOU CAN'T REFUSE: OFFERS OF JUDGMENT IN WAGE CLAIM CLASS AND COLLECTIVE ACTIONS**

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The vulnerability of restaurants, taverns and other cash-based small businesses to wage and hour litigation in the form of class or collective actions is well-documented. Such cases are often brought by one or a small number of current or former employees whose personal stake in the litigation is relatively small, but who assert claims on behalf of many others which can be potentially disastrous to the company. For employers reluctant either to litigate or to settle on plaintiffs' terms, this paper discusses the viability of a third option, the offer of judgment, under the Fair Labor Standards Act ("FLSA") and New York State Labor Law.

### **I. A Hypothetical Client's Exposure to Wage/Hour Litigation**

Small businesses may have a variety of incentives to terminate a putative class or collective wage and hour action at the earliest possible time. These motivations can be straightforward, such as a desire to avoid the legal fees that would otherwise be necessary to defend a case that it thinks can win. Or, they may be complex. Consider the following, hypothetical set of facts:

The owners of the B&T Restaurant have just asked you to represent them in an action brought as a (hybrid) collective and class action that is pending in the United States District Court for the Southern District of New York. The Complaint alleges failure to pay overtime wages in violation of the FLSA and Labor Law, and the claims are brought on behalf of all present and former employees of B&T for the last six years.

You have spoken to the owners in some detail. B&T is an established business, employing over 100 people at any given time, and has generally experienced a significant turnover in its workforce. B&T serves food and alcohol, and it handles a significant amount of cash on a daily basis. The owners insist that they "treat their workers well," paying them generously, including overtime. The problem, they tell you, is that they sometimes pay overtime in cash, and have not always recorded the payments (recordkeeping problems that they assure you have been corrected). The owners' fury is particularly directed at the four former employees

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who have sued them, assuring you that those employees were well-paid. The former employees were food and beverage servers, cooks and other non-exempt workers, whose base rates of pay were between \$9.00-\$11.00 per hour.

You promptly obtain the company's payroll records and you confirm that the company's books and records do not document overtime compensation for many employees (including the named plaintiffs). You also discover that the client has erroneously classified several employees as exempt and did not pay them overtime wages.

Most troubling, B&T may not have declared all of its income in its tax returns and it may not have made the required employer deductions from cash payments it made to employees. You promptly arrange a meeting for the owners with a forensic accountant and criminal defense counsel; after a consultation the owners determine that they simply cannot afford to amend the company's tax returns. Again, the owners assure you that they now understand and are in compliance with all applicable law.

With regard to the pending litigation, the owners understand that plaintiffs will be entitled to their reasonable attorneys' fees if they prevail in the action. They still insist that the employees were paid every cent of overtime; nonetheless their ardor for battle has cooled. Your marching orders are now to settle the lawsuit as quickly as you can. The owners do not want to engage in discovery, much less go to trial. Having dealt with plaintiffs' counsel before, you understand that they will not settle cheaply. You need leverage.

## **II. The Offer of Judgment Under Rule 68 of the Federal Rules of Civil Procedure**

### **A. Rule 68 in a Single-Plaintiff Case**

Under the terms of Rule 68 of the Federal Rules of Civil Procedure, a defendant may propose that judgment be taken against him for a certain amount of damages. Rule 68 provides:

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

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

(c) Offer After Liability Is Determined. When one party's liability to another has been determined but the extent of liability remains to be determined by further proceedings, the party held liable may make an offer of judgment. It must be

served within a reasonable time--but at least 14 days--before the date set for a hearing to determine the extent of liability.

(d) Paying Costs After an Unaccepted Offer. If the judgment that the offeree finally obtains is not more favorable than the unaccepted offer, the offeree must pay the costs incurred after the offer was made.

Under Rule 68, if a plaintiff rejects a properly drafted and tendered offer of judgment, and any subsequent recovery obtained is equal to or less than the amount that had been offered by the defendant, the plaintiff must bear the defendant's litigation costs as well as its own (incurred after the date of the offer), even where the underlying statute provides that a prevailing plaintiff is entitled to recover such fees.

Even in a single-plaintiff case, this "brake" on the shifting of fees can provide a powerful incentive to influence a plaintiff to accept an offer of judgment. In *Marek v. Chesny*, 473 U.S. 1 (1985), the Supreme Court held in a civil rights case that Rule 68 barred the recovery of plaintiff's attorney's fees otherwise available pursuant to 42 USC § 1988, because the plaintiff had not obtained a verdict greater than the offer of judgment. The Court emphasized its approval of the policy behind Rule 68 to make "plaintiffs [] 'think very hard' about whether continued litigation is worthwhile." *Id.* at 11. As we shall see, however, in the collective and class action context, this policy objective may conflict with other policy objectives of the federal rules.

#### **B. Rule 68 in the FLSA Collective Action Context**

To date, neither the Supreme Court nor the Second Circuit has addressed the application of Rule 68 to collective actions under the FLSA. However, a number of federal courts have held that defendants can successfully make offers of judgment in collective actions to end the case, even over the objections of plaintiff's counsel. Other courts, however, have expressed reluctance to dismiss FLSA collective actions even where an employer has tendered an offer of judgment in excess of the amount the named plaintiffs could recover as a matter of law.

To certify a collective action, Section 216(b) of the FLSA requires plaintiffs to bring a "timely" motion for "conditional certification," to notify potential plaintiffs that the case is pending and to provide them with an opportunity to opt in. *Damassia v. Duane Reade, Inc.*, No. 04 Civ. 8819 (GEL), 2006 U.S. Dist. LEXIS 73090, at \*9-10 (S.D.N.Y. Oct. 5, 2006); *Gjurovich v. Emmanuel's Marketplace, Inc.*, 282 F. Supp. 2d 101, 104 (S.D.N.Y. 2003). If the court, applying "a fairly lenient standard," determines that other employees are "similarly situated," it will grant "conditional certification." Conditional certification will usually be decided after minimal discovery, and a court may rely on employee affidavits. Later, after full discovery, the defendant may move for decertification. If the court concludes that the employees are not similarly situated, the court may decertify the collective action.

One commentator has taken the position that a properly drafted Rule 68 offer of judgment effectively terminates a collective action brought under the FLSA, summarizing the courts' position as follows:

[C]ourts readily dismiss § 216(b) collective action cases where a valid offer of judgment is made to the named plaintiffs. Because under § 216(b) no person can become a plaintiff or be bound by the litigation unless she has affirmatively opted into the action, courts reason that the named plaintiff has no right to represent similarly situated people. Therefore, when a defendant makes a valid Rule 68 offer of judgment that fully addresses the damages of the particular named plaintiffs, the named plaintiffs no longer have a stake in the action, and the case is dismissed as moot.

Nantiya Ruan, *Facilitating Wage Theft: How Courts Use Procedural Rules to Undermine Substantive Rights of Low-Wage Workers*, 63 Vand. L. Rev. 727 (2010). However, Professor Ruan probably overstates the point when cases across the country are considered.

Some decisions from the district courts—including those within the Second Circuit—have full-heartedly dismissed putative collective actions in the context of a valid offer of judgment to the named plaintiffs, absent any opt-in plaintiffs. See *Vogel v. Am. Kiosk Mgmt*, 371 F. Supp. 2d 122 (D. Conn. 2005), *Ward v. Bank of New York*, 455 F. Supp. 2d 262 (SDNY 2006), *Louisdor v. Am. Telecomm., Inc.*, 540 F. Supp. 2d 368 (E.D.N.Y. 2008), *Darboe v. Goodwill Indus.*, 485 F. Supp. 2d 221, 224 (E.D.N.Y. 2007), *Briggs v. Arthur T. Mott Real Estate LLC*, 2006 U.S. Dist. LEXIS 82891, No. 06-0468 (E.D.N.Y. Nov. 14, 2006), *Collins v. Sanderson Farms, Inc.*, 568 F. Supp. 2d 714 (E.D. La. 2008), *Tallon v. Lloyd & McDaniel*, 497 F. Supp. 2d 847 (W.D. Ky. 2007), *Taylor v. CompUSA, Inc.*, No. 1:04-CV-718, 2004 U.S. Dist. LEXIS 14492 (N.D. Ga. July 14, 2004).

The requirement that the employer submit a "valid" offer of judgment presents certain difficulties, however, since figuring out the maximum amount that the named plaintiffs can recover may not always be easy and other employees may opt into the case after the offer of judgment has been made. Indeed, in New York, courts that have denied dismissal have often done so on the basis that the Rule 68 offer did not sufficiently cover all potential recovery of the named plaintiffs. *Rubery v. Buth-Na-Bodhaige, Inc.*, 494 F. Supp. 2d 178, 181 (W.D.N.Y. 2007), *Davis v. Abercrombie & Fitch Co.*, No. 08 Civ. 1859, 2008 U.S. Dist. LEXIS 86577 (S.D.N.Y. Oct. 23, 2008), *Roble v. Celestica Corp.*, 627 F. Supp. 2d 1008 (D.Minn. 2007), *MacKenzie v. Kindred Hosps. E., LLC*, 276 F. Supp. 2d 1211, 1213 n.2 (M.D. Fla. 2003).

Courts have also declined to dismiss collective actions when opt-in plaintiffs joined a case *after* the Rule 68 offer of judgment had been made. In *Yeboah v. Cent. Parking Sys.*, No. 06 CV 0128, 2007 U.S. Dist. LEXIS 81256 (EDNY Nov. 1, 2007), the court held that the presence of even one opt-in plaintiff not party to an offer of judgment would foreclose dismissal upon defendant's Rule 68 offer to the named plaintiff. See also *Geer v. Challenge Fin. Investors Corp.*, No. 05-1109, 2006 U.S. Dist. LEXIS 10903 (D. Kan. Mar. 14, 2006) (denying dismissal where Rule 68 offer only covered two of three opt-in plaintiffs); *Reed v. TJX Cos.*, No. 04 C 1247, 2004 U.S. Dist. LEXIS 21605 (N.D. Ill. Oct. 26, 2004) (denying dismissal where plaintiff obtained written consents of similarly situated individuals joining in the lawsuit). Thus, courts have been willing to deny dismissal upon a Rule 68 offer of judgment which was valid at the time it was made, but is no longer "valid" at the time the motion to dismiss is decided because additional plaintiffs have opted-in after the Rule 68 offer of judgment had expired.

Even the presence of individuals “interested in joining” as plaintiffs, though they have not opted-in, may be sufficient. Thus, in *Bowens v. Atlantic Maint. Corp.*, 546 F. Supp. 2d 55 (E.D.N.Y. 2008), the Eastern District of New York reasoned that the “Court recognizes that plaintiff Bowens may be the lone plaintiff in this case, and that defendant made him an offer under Rule 68... However, ...there was clear evidence at the outset of this case that other individuals were interested in joining.” The Court denied dismissal of the action, even though other plaintiffs who had opted-in had accepted defendants’ offer and the named plaintiff had initially accepted plaintiff’s offer. It is unclear if an offer of judgment can be formulated to address such potential persons who might be interested in joining.

In *Simmons v. United Mortgage and Loan Investment, LLC*, 634 F.3d 754 (4th Cir. 2011), the defendant tendered an offer of settlement to all opt-in plaintiffs. While the court did not disapprove of this tactic, it did hold that the offer failed to comply with the requirements of Rule 68, as it did not include an offer of an actual judgment to be entered, and did not provide notice that it was made pursuant to Rule 68. Thus, *Simmons* deferred for another day the issue of whether a properly drafted and tendered Rule 68 offer of judgment would successfully moot an FLSA collective action in the Fourth Circuit.

Even where the technical requirements for a valid offer of judgment have been satisfied, some district courts outside of the Second Circuit have expressed hostility to the idea that defendant employers can moot a collective action by “picking off” the named plaintiffs with a valid Rule 68 offer of judgment. See *Reyes v. Carnival Corp.*, No. 04-21861, 2005 U.S. Dist. LEXIS 11948 \*10-11 (S.D. Fla. May 25, 2005) (holding that because “two other persons... have opted in to this suit, and [defendant] has not made offers of judgment to them” the case was not mooted.)<sup>2</sup> While arguably dicta, the *Reyes* court opined that “it is important to note that the defense strategy of providing an offer of judgment to the initial plaintiff in a FLSA collective action in order to bar the case from proceeding as to all similarly situated plaintiffs violates the very policies behind the FLSA.” *Reyes*, 2005 U.S. Dist. LEXIS 11948, at \*9-10.

It is difficult to predict with confidence how the lower courts will harmonize the requirements and policies underlying Rule 68 with the FLSA. It seems a reasonable guess, however, that they will do so with an understanding of the case law addressing the application of Rule 68 offers of judgment to class actions pursuant to Rule 23.<sup>3</sup> Indeed, two Courts of Appeals

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<sup>2</sup> *Reyes* raised, but did not resolve, the issue of identifying the precise moment when a court loses jurisdiction of a collective action pursuant to Rule 68. At some point after the defendant tendered an offer of judgment to the named plaintiffs (the court does not say when), two other persons opted-in. Rejecting the defendant’s motion to dismiss, the *Reyes* court reasoned that “it is unclear whether sufficient time had passed for Reyes to ascertain whether the offer of judgment was fair or complete. There is no Eleventh Circuit precedent regarding the exact moment a case becomes moot after the making of a qualified offer of judgment, but at the very least, a court cannot lose jurisdiction before the parties themselves can ascertain whether they retain a legally cognizable interest in the outcome of the litigation.” *Reyes*, 2005 U.S. Dist. LEXIS 11948, at \*6 (citing *City of Erie v. Pap’s A.M.*, 529 U.S. 277 (2000).) The court’s decision does not state whether the time provided by Rule 68 for the named plaintiffs to accept the offer of judgment (14 days now; 10 days at the time *Reyes* was decided) had elapsed.

<sup>3</sup> The *Geer* court ably framed the problem of determining constitutional standing on the basis of the precise sequence of events in a litigation:

Finally, the issue most troubling to the court is the procedural loop that Rule 68 creates for FLSA plaintiffs. It is possible for defendants to continue making offers of judgments to plaintiffs who

have now expressly borrowed from case law in the class action context, to hold that an FLSA collective action should not be dismissed upon a Rule 68 offer to the named plaintiffs even if the offer satisfies all the potential damages of the named and opt-in plaintiffs. *Sandoz v. Cingular Wireless LLC*, 553 F.3d 913 (5th Cir. 2008), *Symczyk v. Genesis Health Care Corp.*, 656 F.3d 189 (3d Cir. 2011). Some district courts are engaging in a similar analysis. *See, e.g., Nash v. CVS Caremark Corp.*, 683 F. Supp. 2d 195, 196-97 (D.R.I. 2010) (applying relation back doctrine to distinguish *Cruz v. Farquharson*, 252 F.3d 530, 533 (1<sup>st</sup> Cir. 2001).) These decisions will be revisited in Section IV.A, below, to determine whether their attempts to incorporate principles from cases discussing the interplay between Rule 68 and 23 are doctrinally sound.

### **III. Rule 68 in the Class Action Context**

To understand the operation of Rule 68 offers of judgment in collective actions and class actions, we must understand the principles that underlie the dismissal of such actions on principles of mootness. Courts that have permitted the dismissal of a collective or class action on the basis of a Rule 68 offer of judgment have done so on the ground that the offer of judgment moots the plaintiff's claims.

#### **A. Supreme Court Jurisprudence**

The doctrine of mootness arises from Article III of the U.S. Constitution, which limits the jurisdiction of the federal courts to "cases and controversies." U.S. Const. art. III § 2. "The constitutional power of federal courts cannot be defined, and indeed has no substance, without reference to the necessity 'to adjudge the legal rights of litigants in actual controversies.'" *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 471 (1982) (internal citation omitted). When parties cease to have a legally cognizable interest in the outcome of a case, the case becomes moot and the court does not have subject matter jurisdiction. *County of Los Angeles v. Davis*, 440 U.S. 625, 631(1979).

As noted, in the single-party context, an offer of judgment for the full amount in controversy generally moots the plaintiff's case. In the class action context, these principles must be reconciled with the text and policies of Rule 23. The principles determining the analysis whether a class action can be mooted revolve around the time that the claims of the named plaintiffs became moot and the timing of certification.

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opt in and then ask the court to consider dismissal based on the lack of subject matter jurisdiction. At the same time, plaintiffs may continue to introduce new plaintiffs whose presence will moot the issue of dismissal. Through the motion to dismiss, the court will be drawn into the parties' tussle over jurisdiction. Plaintiffs offer one alternative – that the conditional certification of this action should be the point at which the court will no longer consider the motion to dismiss based on offers of judgments.

However plaintiffs cite no authority for this assertion. Although nothing in the rules prevents the parties from engaging in tactics to moot the case early on, this court is reluctant to allow defendants to bar the courtroom doors so early in the litigation.

*Geer*, 2006 U.S. Dist. LEXIS 10903, at \*10-11. If defendants cannot "bar the courtroom doors so early in the litigation," it is unclear whether they will be able to use Rule 68 in collective actions to bar them at all.

After a class has been certified, the courts generally look to *Sosna v. Iowa*, 419 U.S. 393 (1975), to hold that mootness of the named plaintiff's individual claim does not render the action moot, if the mootness occurred after the action has been certified as a class.<sup>4</sup>

Before a class has been certified, the mootness of the named plaintiffs' claims generally moots the class action. *Bd. of Sch. Comm'rs of Indianapolis v. Jacobs*, 420 U.S. 128, 129-30 (1975); see also *Comer v. Cisneros*, 37 F.3d 775, 798 (2d Cir. 1994), *Cruz v. Farquharson*, 252 F.3d 530, 533 (1<sup>st</sup> Cir. 2001) However, no rule is without exceptions, and there is a prominent exception to the mooting of putative class actions.

This doctrine, providing an exception to the mooting of putative class actions, is generally referred to as the "relation back doctrine" and has its modern genesis in *Gerstein* and *Geraghty*. In *Gerstein v. Pugh*, 420 U. S. 103 (1975), pretrial detainees challenged a Florida statute permitting pretrial detention by information without a preliminary determination of probable cause. Applying *Sosna*, the Court held that "it is most unlikely that any individual could have his constitutional claim decided on appeal before he is either released or convicted," and therefore the plaintiffs had standing whatever their standing at the time of class certification. The court related the timing of the certification motion to before the mooting of the plaintiff's claims.

In *United States Parole Comm'n v. Geraghty*, 445 U.S. 388 (1980), the Court explained that "[a]lthough one might argue that *Sosna* contains at least an implication that the critical factor for Art. III purposes is the timing of class certification, other cases, applying a "relation back" approach, clearly demonstrate that timing is not crucial." *Geraghty*, 445 U.S. 397. In *Geraghty*, plaintiffs challenged aspects of the United States Parole Release Guidelines, but the named plaintiff was unconditionally paroled before the court of appeals heard his case. The Court considered "whether a trial court's denial of a motion for certification of a class may be reviewed

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<sup>4</sup> While generally followed, even this proposition is not entirely free from doubt. In *Kremens v. Bartley*, 431 U.S. 119 (1977), the Court distinguished *Sosna* on the grounds that the circumstances of the case had materially changed since the time the Court granted class certification, and therefore dismissal of the case as moot was appropriate:

In particular types of class actions this Court has held that the presence of a properly certified class may provide an added dimension to our Art. III analysis, and that the mootness of the named plaintiffs' claims does not "inexorably" require dismissal of the action. *Sosna*, supra, at 399-401. See also *Franks v. Bowman Transportation, Inc.*, supra, at 752-57; *Gerstein v. Pugh*, 420 U. S. 103, 110-111, n.11 (1975). But we have never adopted a flat rule that the mere fact of certification of a class by a district court was sufficient to require us to decide the merits of the claims of unnamed class members when those of the named parties had become moot. Cf. *Sosna*, supra, at 402. Here, the promulgation of the regulations materially changed, prior to class certification, the controverted issues with respect to a large number of unnamed plaintiffs; prior to decision by this Court, the controverted issues pertaining to even more unnamed plaintiffs have been affected by the passage of the 1976 Act. We do not think that the fragmented residual of the class originally certified by the District Court may be treated as were the classes in *Sosna* and *Franks*.

*Kremens*, 431 U.S. 129-30. However, it appears the holding of *Kremens* might be limited to its facts, such that where "the metes and bounds of the class certified by the District Court have been carved up" by changes in the applicable law, then the certified class action might become moot notwithstanding the prior certification. *Kremens*, 431 U.S. 132.

on appeal after the named plaintiff's personal claim has become 'moot.'" *Geraghty*, 445 U.S. at 390. The court answered this question in the affirmative, holding that the case was not moot even though the plaintiff no longer had a substantive claim because the plaintiff retained a "personal stake" in the class certification decision. The Court explained that "[t]he imperatives of a dispute capable of judicial resolution are sharply presented issues in a concrete factual setting and self-interested parties vigorously advocating opposing positions .... The question whether class certification is appropriate remains as a concrete, sharply presented issue ... [and] Respondent here continues vigorously to advocate his right to have a class certified." 445 U.S. at 403-04.

Noting that the plaintiff no longer had a stake in the litigation at the time the briefs were filed in the court of appeals, four justices dissented. In an opinion authored by Justice Powell, the concluding paragraph ably summarized the dissenting opinion:

In short, this is a case in which the putative class representative - respondent here - no longer has the slightest interest in the injuries alleged in his complaint. No member of the class is before the Court; indeed, none has been identified. The case therefore lacks a plaintiff with the minimal personal stake that is a constitutional prerequisite to the jurisdiction of an Art. III court. In any realistic sense, the only persons before this Court who appear to have an interest are the defendants and a lawyer who no longer has a client.

*Geraghty*, 445 U.S. at 424 (Powell, J., dissenting).

When class certification has been denied, the appeal of the certification decision is not mooted. This situation was addressed in *Deposit Guaranty Nat'l Bank of Jackson, Miss. v. Roper*, 445 U.S. 326 (1980),<sup>5</sup> which is a noteworthy case because it involved a Rule 68 offer of judgment. Decided the same day as *Geraghty*, it was a case in which holders of credit cards issued by a bank sought to represent a class of similarly situated credit card customers, alleging that usurious finance charges had been made against the accounts of the members of the putative class. The plaintiffs moved for class certification, which the district court denied. The bank then tendered to each named plaintiff an offer of judgment under Rule 68. The plaintiffs declined to accept the tender and made a counteroffer of judgment (reserving the right to appeal the adverse class certification ruling) that the bank declined. Based on the bank's offer, the district court dismissed the action. The plaintiffs then sought to appeal the denial of class certification. The Court considered whether the right to appeal the denial of class certification survived the district court's finding of mootness (a finding upon which the Supreme Court expressed no opinion).

The Supreme Court held that the right to appeal from the denial of class certification was not moot: "on this record the District court's entry of judgment in favor of named plaintiffs over their objections did not moot their private case or controversy, and that respondents' *individual* interest in the litigation - as distinguished from whatever may be their representative responsibilities to the putative class - is sufficient to permit their appeal of the adverse

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<sup>5</sup> The *Roper* decision contained numerous opinions. Chief Justice Burger delivered the opinion of the Court joined by Justices Brennan, White, Marshall, Rehnquist and Stevens. Justices Rehnquist, Stevens and Blackmun each filed a concurring opinion. Justice Powell, joined by Justice Stewart, dissented.

certification ruling." *Roper*, 445 U.S. at 441 (emphasis in original). The Court held that the plaintiffs retained a personal stake in sharing the expense of the litigation with the members of the putative class.

The Court carefully abstained from expressing any opinion on the district court's finding of mootness on the basis of the defendants' Rule 68 offer despite the plaintiffs' rejection of the offer and objections to the judgment. *Roper*, 445 U.S. at 439 (articulating that the Court "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"). In fact, the Court refused to say "what will become of respondents' continuing personal interest in their *own* substantive controversy with the petitioner when this case returns to the District Court." *Roper*, 445 U.S. at 439 (emphasis added). However, the Court acknowledged that normally, when substantive claims become moot in the Article III sense, such as by settlement of all personal claims, the court retains no jurisdiction over the controversy of the individual plaintiffs." *Roper*, 445 U.S. at 436.

Concurring in the judgment, Justice Rehnquist complained that the Court's ruling was not "successful in formulating any sound principles to replace... the muddled and inconsistent ones of the past." *Roper*, 445 U.S. at 441 (Rehnquist, J., concurring). Justice Rehnquist explained why, in his view, the offer of judgment did not moot the plaintiffs' claims:

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

*Roper*, 445 U.S. at 441-42 (Rehnquist, J., concurring).

Dissenting, Justice Powell advocated for the rule that Justice Rehnquist identified but did not endorse. Justice Powell noted that the bank "tendered everything" that the plaintiffs could have recovered, and the plaintiffs' "speculative interest" in sharing the cost of the litigation with members of the putative class "simply will not sustain the jurisdiction of an Art. III court under established and controlling precedents." *Roper*, 445 U.S. at 444 (Powell, J., dissenting). According to Justice Powell, "the law is clear that a federal court is powerless to review the abstract questions remaining in a case when the plaintiff has refused to accept a proffered settlement that fully satisfies his claims." *Roper*, 445 U.S. at 445 (Powell, J., dissenting). Further noting that "Mississippi law condemns the aggregation of usury claims," Justice Powell argued that "the Court's concern for compensation of putative class members in this case is at best

misplaced and at worst inconsistent with the command of the Rules Enabling Act."<sup>6</sup> *Roper*, 445 U.S. at 450 (Powell, J., dissenting).

## **B. The Divergent Approaches in the Lower Courts**

In 1983 and 1984 the Advisory Committee on Rules of Practice and Procedure of the Judicial Conference proposed a revision of Rule 68 that, if passed, would have resolved the problem by barring the application of Rule 68 to class actions. See *Weiss v. Regal Collections*, 385 F.3d 337, at 344 (3d Cir. 2004); *McDowall v. Cogan*, 216 F.R.D. 46, at 48 n.2 (E.D.N.Y. 2003). The proposals read in part that "this rule shall not apply to class or derivative actions under Rules 23, 23.1, and 23.2." The proposals failed to pass both times that they were proposed. *Proposed Amendment to Rule 68*, 102 F.R.D. 407, 433 (1984). See also *Weiss*, 385 F.3d at 344. One rationale for the proposed revision was that "a class representative's rejection of an offer of judgment would burden a named representative-offeree with the risk of potentially heavy liability that could not be recouped from unnamed class members." *Proposed Amendment to Rule 68*, 102 F.R.D. at 436 advisory committee's note; see also *Lucero v. Bureau of Collection Recovery, Inc.*, 639 F.3d 1239, 1244 (10<sup>th</sup> Cir. 2011). The proposed revision "received considerable attention from the bench and the bar," *McDowall*, 216 F.R.D. at 48 n.2, but did not pass.

In the absence of clear guidance from the Rules or the Supreme Court, courts and commentators have continued to debate how to resolve the tension between Rule 68 and Rule 23(e) and some of the problems that arise. For example, one court noted that "an offer of judgment to a named plaintiff presents him with a problematic conundrum" and "places the personal interests of the named plaintiff at loggerheads with his fiduciary responsibilities to the putative class members." *McDowall*, 216 F.R.D. at 48. Citing *McDowall*, another court took the approach that the proponents of revisions to Rule 68 were correct and offers of judgment were of no effect in a class action. *Schaake v. Risk Mgmt Alternatives, Inc.*, 203 F.R.D. 108, 111 (S.D.N.Y. 2001) ("[I]t has long been recognized that Rule 68 Offers of Judgment have no applicability to matters legitimately brought as class actions pursuant to Rule 23.")

To date, no approach has emerged as a viable alternative to making standing dependent on the precise sequence in which events occur in individual cases, notwithstanding express language in *Geraghty* disavowing such an approach. Perhaps as a consequence, the lower courts subsequent to *Geraghty* and *Roper* have looked to the timing of events as an important consideration for determining whether they have jurisdiction following the tender of a Rule 68 offer of judgment offering the named plaintiff(s) everything available to them in the litigation as a matter of law. The current weight of the case law in most circuits, however, is moving away from allowing offers of judgment to moot Rule 23 class actions.

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<sup>6</sup> The Rules Enabling Act provides, in pertinent part, that rules of procedure promulgated by the Supreme Court "shall not... enlarge or modify any substantive right." 28 U.S.C. § 2072. See also *Developments in the Law-Class Actions*, 89 Harv. L. Rev. 1318, 1358-59 (1976).

1. Case Law Within the Second Circuit

Three years after the *Roper* decision, the Second Circuit held that a class action alleging antitrust violations was subject to dismissal after class certification had been denied and the defendant had made a valid offer of judgment (three times the amount of the plaintiffs' purchases over the four years preceding the filing of the complaint, together with costs and reasonable attorneys' fees). *Abrams v. Interco Incorp.*, 719 F.2d 23 (2d Cir. 1983). Undoubtedly cognizant of the *Roper* decision, the defendant in *Abrams* drafted the Rule 68 offer to not "foreclose or limit the right of the plaintiffs to take an appeal from this Court's denial of class certification." *Abrams*, 719 F.2d at 33. After the *Abrams* court affirmed the district court's denial of class certification (and acknowledged the plaintiffs' right to seek Supreme Court review of that decision), the court held that the final judgment "fully satisf[ied] the named plaintiffs' private substantive claims" and affirmed the district court's entry of judgment.

In *Abrams*, the Second Circuit distinguished *Kline v. Wolf*, 702 F.2d 400 (2d Cir. 1983), decided just a few months earlier. In *Kline*, two individuals filed a putative class action for securities fraud based on allegedly false representations in a company's annual report. They moved to be designated as the class representatives, which the district court denied because the two putative class representatives' credibility was subject to serious attack, and therefore were subject to unique defenses not available against most members of the class. The district court then entered judgment in accordance with an offer by the defendants, but explained that this judgment did not waive any rights of any defendants in any other action. The Second Circuit affirmed the denial of class certification but reversed the entry of judgment in favor of plaintiffs against their will. Distinguishing *Kline*, the *Abrams* court explained:

Recognizing "the interest of the [district] court in avoiding the waste of judicial resources that would occur if the plaintiffs failed to establish liability in their individual suit or, if successful in that suit, nevertheless failed upon reconsideration to obtain certification as class representatives," 702 F.2d at 404, the *Kline* court considered this to be outweighed by other circumstances. One was the possibility of the plaintiffs' "obtaining reconsideration of their adequacy as class representatives, to which they would have been entitled if they had established the defendants' liability after trial of the present case." 702 F.2d at 404. The other was that "[u]nder the conditional judgment entered by the district court the plaintiffs would probably be forced to pay over most if not all of their recovery to their counsel for services and disbursements in the action." *Id.* Neither of these factors is present here. Even if we were to indulge in the unlikely assumption that Mr. and Mrs. Abrams would pursue their individual damage claims, which could hardly have amounted to more than \$300, even when trebled, and would succeed in that endeavor, there is no indication that such success would have supported certification of either of the classes they had proposed. While Fed.R.Civ.P. 23(c)(1) provides that an order with respect to class certification "may be altered or amended before the decision on the merits", a district court is not compelled to allow immensely burdensome pretrial and trial proceedings on individual claims which have themselves been mooted by a

defendant's offer of payment simply on the chance that the evidence will show the possibility of devising a manageable class which plaintiffs had never proposed.

*Abrams*, 719 F.2d at 33. The *Abrams* court concluded that *Roper* "somewhat supported" its holding, as the facts of the case "seem to have become the hypothetical described in [*Roper*] to wit, a "final judgment fully satisfying named plaintiffs' private substantive claims," and there is no justification for taking the time of the court and the defendant in the pursuit of minuscule individual claims which defendant has more than satisfied." *Abrams*, 719 F.2d at 32. At bottom, the *Kline* court concluded that the judgment entered by the district court in the case before it did not give the plaintiffs all the relief they could recover, whereas the *Abrams* court concluded that the plaintiffs in the case before it had received all the relief they could receive in the judgment. *C.f. Abrams*, in *Comer v. Cisneros*, 37 F.3d 775, 798 (2d Cir. 1994) ("in general, if the claims of the named plaintiffs become moot prior to class certification, the entire action becomes moot.")

Applying *Abrams* and *Comer*, district courts within the Second Circuit have often, although not always, granted dismissal so long as the Rule 68 offer was sufficiently large and made prior to the plaintiff's motion for class certification. *See, e.g., Greif v. Wilson, Elser, Maskowitz, Edelman & Dicker LLP*, 258 F. Supp. 2d 157, 159 (E.D.N.Y. 2003), *Edge v. C. Tech Collections, Inc.*, 203 F.R.D. 85, 88 (E.D.N.Y. 2001), *Tratt v. Retrieval Masters Creditors Bureau, Inc.*, No. 00 Civ. 4560, 2001 U.S. Dist. LEXIS 22401 (E.D.N.Y. May 23, 2001), *Wilner v. OSI Collection Servs., Inc.*, 198 F.R.D. 393, 395 (S.D.N.Y. 2001). Other district courts within the Second Circuit have focused on plaintiffs' delay in moving for class certification as a justification for dismissal following an offer of judgment. *See, e.g., Ambalu v. Rosenblatt*, 194 F.R.D. 451 (E.D.N.Y. 2000) (holding on the authority of *Abrams* and *Chesny*, that class actions could be mooted if the class representative had failed to move for certification after a year and the defendant made an appropriate offer of judgment to the class representative), *Greif*, 258 F. Supp. 2d at 159, *Edge*, 203 F.R.D. at 88, *Tratt*, 2001 U.S. Dist. LEXIS 22401 at \*2, *Wilner*, 198 F.R.D. at 395 (S.D.N.Y. 2001).

Nonetheless, some New York district courts have not granted dismissal. One decision, for example, introduced considerations of policy and the class representative's diligence in pursuing class certification to deny defendants' motions to dismiss. *See, e.g., McDowall*, 216 F.R.D. at 51. *See also Morgan v. Account Collection Tech., LLC*, No. 05 CV 2131, 2006 U.S. Dist. LEXIS 64528 (S.D.N.Y. 2003). Other district courts within the Second Circuit have concluded that Rule 68 is inapplicable to class actions. *See, e.g., Schaake*, 203 F.R.D. at 112, *White v. OSI Collection Servs.*, No. 01 Civ. 1343, 2001 U.S. Dist. LEXIS 19879 (E.D.N.Y. Nov. 5, 2001).

## 2. Circuit Court Case Law Outside the Second Circuit

Noting the absence of a uniform approach, the Tenth Circuit recently explained that "some courts conclude that an offer of judgment renders the [class action] claim moot, while others conclude that it does not." *Lucero v. Bureau of Collection, Inc.*, 639 F.3d 1239, 1243 (10<sup>th</sup> Cir. 2011). While the courts' approach varies by circuit, most of the more recent circuit court decisions do not find that an offer of judgment moots a class action. In *Lucero*, for example, the court came down squarely against permitting defendants to "pick off" class representatives:

So long as the claims of the unnamed plaintiffs are presented in a sufficiently adversarial relationship to sharpen the issues, the ability of the defendant to moot the claims of the named plaintiffs by favorable judgments should not prevent reexamination of the class certification issue.

*Lucero*, 639 F.3d at 1247 (quoting *Reed v. Heckler*, 756 F.2d 779, 786 (10<sup>th</sup> Cir. 1985).)

To trace the development of the case law following *Roper* and *Geraghty* more or less chronologically, in 1981 the Fifth Circuit explained that "[I]ike the named plaintiffs in *Roper*, [plaintiffs] have asserted an economic interest in certification. And, like *Geraghty*, these named plaintiffs have vigorously advocated their right to class certification, and have done so in a concrete factual setting capable of judicial resolution." *Zeidman v. J. Ray McDermott & Co.*, 651 F.2d 1030, 1043 (5<sup>th</sup> Cir. 1981).

Citing, among other cases, *Zeidman* a half-dozen years later, the Seventh Circuit held that a plaintiff may not proceed to trial if he has been offered all the relief that he demands. *Alliance to End Repression v. City of Chicago*, 820 F.2d 873, 878 (7<sup>th</sup> Cir. 1987) ("Appellate courts generally have treated *Roper* as establishing that a party must have an economic dispute with the defendant, one surviving the offer of settlement, to be allowed to press on in the face of the defendant's willingness to satisfy the plaintiff's initial demand") (also citing, *inter alia*, *Klein*, 702 F.2d at 404 in support of this proposition). See also *Winokur v. Bell Fed. Savings & Loan Assoc.*, 560 F.2d 271 (7<sup>th</sup> Cir. 1977) (affirming lower court's decision to dismiss the complaint following a sufficient offer of judgment). Some 22 years after *Winokur*, Judge Posner of the Seventh Circuit put the matter more simply: "You cannot persist in suing after you've won." *Greisz v. Household Bank (Illinois), N.A.*, 176 F.3d 1012, 1015 (7<sup>th</sup> Cir. 1999). See also *Holstein v. City of Chicago*, 29 F.3d 1145, 1147 (7<sup>th</sup> Cir. 1994) (prior to seeking class certification, a Rule 68 offer of judgment would moot the class action.) While less definitive, other circuit court decisions lend some support for this view. See *Cruz v. Farquharson*, 252 F.3d 530, 533 (1<sup>st</sup> Cir. 2001) (dismissing putative class action as moot because the claims of the named plaintiffs had become moot and no other plaintiffs had intervened), *Brunet v. City of Columbus*, 1 F.3d 390, 399-400 (6<sup>th</sup> Cir. 1993) ("[w]e do not read *Roper* and *Geraghty* as doing away with the requirement that the proposed class representative have standing at the time of class certification"). These decisions notwithstanding, since *Greisz* several Circuits to consider the same issue have reached very different conclusions.<sup>7</sup>

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<sup>7</sup> *Greisz* and *Holstein* notwithstanding, there is support within the Seventh Circuit for the proposition that an offer of judgment will not moot a class action once a motion for class certification has been filed:

the motion for certification, while pending [is] sufficiently, though provisionally, bringing the interests of class members before the court so that the apparent conflict between their interests and those of the defendant will avoid a mootness artificially created by the defendant by making the named plaintiff whole.

*Susman v. Lincoln Am. Corp.*, 587 F.2d 866, 869-70 (7<sup>th</sup> Cir. 1978).

In *Weiss*, the Third Circuit held that a Rule 68 offer of judgment to the named plaintiffs, made two months after the amended complaint was filed, does not moot a putative class action, even before any motion for class certification has been filed, so long as the class representatives do not unduly delay in filing the certification motion. The *Weiss* court explained that once a motion for class certification has been filed, the certification motion relates back to the filing of the complaint, and further, that the relation back doctrine may at times apply even before the certification motion is filed. *Weiss*, 385 F.3d at 346-49. See also *Sandoz v. Cingular Wireless LLC*, 553 F.3d 913, 920-21 (5<sup>th</sup> Cir. 2008).

Most recently, in *Pitts v. Terrible Herbst, Inc.*, 653 F.3d 1081 (9<sup>th</sup> Cir. 2011), the court explained that "we see no reason to restrict application of the relation-back doctrine only to cases involving *inherently* transitory claims. Where, as here, a defendant seeks to 'buy off' the small individual claims of the named plaintiffs, the analogous claims of the class - though not inherently transitory - become no less transitory than *inherently* transitory claims [and] are 'acutely susceptible to mootness' in light of [the defendant's] tactic of 'picking off' lead plaintiffs with a Rule 68 offer to avoid a class action." *Pitts*, 653 F.3d at 1091 (*quoting Weiss*, 385 F.3d at 347). A contrary ruling, the *Pitts* court opined, would "contravene Rule 23's core concern: the aggregation of similar, small, but otherwise doomed claims." *Pitts*, 653 F.3d at 1091.

#### **IV. Unsettled Areas Requiring Further Judicial Interpretation (or Legislative Reform)**

The jurisprudential evolution of the interplay between Rules 23 and 68 has left a substantial degree of uncertainty. Among the open areas are the following:

##### **A. Application of the Expanding Relation-Back Doctrine to the FLSA**

More than thirty years ago, one court of appeals cogently explained that the applicable Supreme Court jurisprudence permitted two alternative interpretations of the relation-back doctrine. *Zeidman*, 651 F.2d at 1047. One interpretation permitted relation-back "only in those cases in which the controversy is so transitory that no single named plaintiff could maintain a justiciable claim long enough to reach the certification stage of the litigation. *Id.* at 1047. A second holds that relation-back is appropriate where 'justiciability [is] adequately established by the live claims of the unnamed class members of the certified class.' *Id.* at 1047.

In *Sandoz*, 553 F.3d at 919-21, the Fifth Circuit not only came down squarely in favor of the second interpretation, but dramatically extended its application to the FLSA context. The *Sandoz* court acknowledged that "conceptually" the mootness principles would permit (and incentivize) employers "to use Rule 68 as a sword, 'picking off' representative plaintiffs and avoiding ever having to face a collective action." *Sandoz*, 553 F.2d at 919. The *Sandoz* court further recognized the Eleventh Circuit's holding that "the 1947 amendments to the FLSA, which added the opt-in requirement, "prohibit what precisely is advanced under Rule 23—a representative plaintiff filing an action that potentially may generate liability in favor of uninvolved class members."<sup>8</sup> *Sandoz*, 553 F.2d at 917 (*quoting Cameron-Grant v. Maxim*

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<sup>8</sup> The *Sandoz* court also recognized several district court decisions consistent with *Cameron-Grant*, including: *Rollins v. Systems Integration, Inc.*, No. 4:05-CV-408, 2006 U.S. Dist. LEXIS 87432 (N.D. Tex. Dec. 4, 2006), *Darboe v. Goodwill Indus. of Greater N.Y. & N. N.J., Inc.*, 485 F. Supp. 2d 221, 223-24 (E.D.N.Y. 2007), *Ward*,

*Healthcare Servs., Inc.*, 347 F.3d 1240, 1243-44 (11th Cir.2003) (per curiam).) The *Sandoz* court held that if the plaintiff "timely sought certification of her collective action" then "her motion relates back to the filing of her initial state court petition" and remanded the case to the district court "for a consideration of the timeliness and, if necessary, the merits of Sandoz's motion to certify." *Sandoz*, 553 F.2d at 921-922. The Third Circuit has followed *Sandoz*. *Symczyk v. Genesis Healthcare Corp.*, 656 F.3d 189 (3d Cir. 2011). There is some, albeit limited, support for this view from district courts within the Second Circuit. *Bowens v. Atlantic Maint. Corp.*, 546 F. Supp. 2d 55 (E.D.N.Y. 2008), *Davis v. Abercrombie & Fitch Co.*, No. 08 Civ. 1859, 2008 U.S. Dist. LEXIS 86577 (S.D.N.Y. Oct. 23, 2008).

#### **B. Strategic Considerations: The Mooting of FLSA Claims Only**

*Sandoz*, *Symczyk* and a few other decisions notwithstanding, counsel for employers within the Second Circuit could reasonably conclude that they have a substantially greater ability to obtain dismissal of a collective action than a class action. Should this strategy succeed, a court may remand the surviving state law class action to state court. See, e.g., *Ward*, 455 F. Supp. 2d at 272 (mooting FLSA cause of action and declining to exercise supplemental jurisdiction over state law claims), *Louisdor v. Am. Telecomm., Inc.*, 540 F. Supp. 2d 368 (E.D.N.Y. 2008) (same). The strategic options available in state court are discussed below.

#### **V. WHAT, WE HAVE TO MAKE ANOTHER OFFER?**

The owners of B&T Restaurants are appreciative that the Rule 68 offer has spared them the cost of discovery and trial in federal court. Now they have to be reminded that the same dangers of discovery confront them in State Court.

In our hypothetical, the District Court has dismissed the FLSA claims since the Rule 68 offer was greater than any amount recoverable by Plaintiffs, thus making the federal claims moot. Additionally, the District Court declined to exercise supplemental jurisdiction and remanded the State law claims. Plaintiffs have nonetheless decided to pursue remedies available to them pursuant to New York Labor Law §663:

Civil Actions. By employee. If any employee is paid by his or her employer less than the wage to which he or she is entitled under the provisions of this article, he or she shall recover in a civil action the amount of any such underpayments, together with costs all reasonable attorney's fees, prejudgment interest as required under the civil practice law and rules, and unless the employer proves a good faith basis to believe that its underpayment of wages was in compliance with the law, an additional amount as liquidated damages equal to one hundred percent of the total of such underpayments found to be due. Any agreement between the employee, and the employer to work for less than such wage shall be no defense to such action.

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*supra*, 455 F. Supp. 2d at 268-69 (S.D.N.Y. 2006), *Louisdor, supra*, 540 F. Supp. 2d 368, 373 (E.D.N.Y. 2008) and *Vogel v. Am. Kiosk Mgmt.*, 371 F. Supp. 2d 122, 127 (D. Conn. 2005).

The action, now stripped of its FLSA exposure, can still cause B&T serious tax liabilities based on B&T's acknowledged failure to report cash wages. And while New York has an offer of settlement that is nearly identical to the federal Rule 68, CPLR §3221,<sup>9</sup> there is an even more effective tool available to have the Labor Law claims limited to the named claimants: CPLR §901, which provides:

- a. One or more members of a class may sue or be sued as representative parties on behalf of all if:
  1. the class is so numerous that joinder of all members, whether otherwise required or permitted, is impracticable;
  2. there are questions of law or fact common to the class which predominate over any questions affecting only individual members;
  3. the claims or defenses of the representative parties are typical of the claims or defenses of the class;
  4. the representative parties will fairly and adequately protect the interests of the class;and
  5. a class action is superior to other available methods for the fair and efficient adjudication of the controversy.
- b. Unless a statute creating or imposing a penalty, or a minimum measure of recovery specifically authorizes the recovery thereof in a class action, **an action to recover a penalty, or minimum measure of recovery created or imposed by statute may not be maintained as a class action.** (Emphasis added)

Comparing CPLR §901 to its federal equivalent, Rule 23, one finds that the rules are substantially the same except that sub-section (b) of CPLR §901 prohibits a class action where a penalty is created by statute. *Ab initio*, plaintiffs are barred from expanding the scope of the action beyond themselves, and their own individualized damages. Since Labor Law §633 grants a penalty of liquidated damages in the amount of 100% of the unpaid wages, §901 precludes a class action. *Carter v. Frito-Lay, Inc.*, 1980, 74 A.D.2d 550, 425 N.Y.S.2d 115 (1st Dep't), *aff'd*, 1981, 52 N.Y.2d 994, 438 N.Y.S.2d 80, 419 N.E.2d 1079.

If, despite the limitations imposed on plaintiffs by CPLR §901(b), they persist, B&T can now further limit their exposure by making an offer of settlement authorized by CPLR §3221. While B&T has now had to offer real and timely proffers of settlement, by so doing, they have avoided the greater risk threatened by discovery/trial yet again.

It should be noted that the penalties provided by Labor Law §633 can be waived, thus allowing the certification of a class despite the proscription of CPLR §901(b). *See Cox v. Microsoft Corp.*, 2004, 8 A.D.3d 39, 778 N.Y.S.2d 147 (1st Dep't); *Ridge Meadows*

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<sup>9</sup> Except in a matrimonial action, at any time not later than ten days before trial, any party against whom a claim is asserted, and against whom a separate judgment may be taken, may serve upon the claimant a written offer to allow judgment to be taken against him for a sum or property or to the effect therein specified, with costs then accrued. If within ten days thereafter the claimant serves a written notice that he accepts the offer, either party may file the summons, complaint and offer, with proof of acceptance, and thereupon the clerk shall enter judgment accordingly. If the offer is not accepted and the claimant fails to obtain a more favorable judgment, he shall not recover costs from the time of the offer, but shall pay costs from that time. An offer of judgment shall not be made known to the jury.

*Homeowners' Ass'n, Inc. v. Tara Development Co.*, 1997, 242 A.D.2d 947, 665 N.Y.S.2d 361 (4th Dep't); *Super Glue Corp. v. Avis Rent A Car System, Inc.*, 1987, 132 A.D.2d 604, 606, 517 N.Y.S.2d 764, 767 (2d Dep't). This makes sense both as a matter of statutory interpretation and policy. CPLR 901(b) explicitly refers only to "an action to recover a [statutory] penalty [etc.]," not broadly to an action in which the relevant statute authorizes a penalty. In other words, CPLR 901(b), on its face, only applies when the plaintiff actually seeks to recover the penalty that a relevant statute allows. Rule 23 preempts CPLR §901 for a Labor Law claim brought in Federal Court. *Shady Grove Orthopedic Associates v. Allstate Ins.*, 130 S. Ct. 1431 (2010).

## VI. CONCLUSION

The enforceability of Rule 68 in the FLSA collective and class action context remains uncertain, although more likely in the collective action context. If an employer succeeds in having the FLSA claim dismissed on these grounds and the plaintiffs' Labor Law claims are remanded to State Court, the employer will receive the benefits of CPLR §901 that are unavailable to it in Federal Court.