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Can a Rule 68 offer of judgment that offers complete relief to the named plaintiff in a putative class action moot the entire case? While federal courts continue to reach different conclusions, the Supreme Court may finally weigh in

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One tactic often used with varying degrees of success to thwart putative class actions brought under various federal statutes is to file an early offer of judgment under Rule 68 that provides the named plaintiff or plaintiffs complete relief in an effort to moot the putative class claims at the inception of a class case. This tactic is often used in statutory actions with damages that are set by law, including putative class actions claims brought under the Telephone Consumer Protection Act (TCPA), which provides statutory damages of $500 to $1,500 per violation.

The background for this issue is well settled; the Case or Controversy Clause of Article III, Section 2 of the United States Constitution limits the subject matter jurisdiction of federal courts to matters in which the parties continue to have a personal stake in the outcome. When the issue in dispute between the parties is no longer live, a case becomes moot. This issue plays out under Rule 68 of the Federal Rules, which allows a party defending a claim to serve on the opposing party an offer to allow judgment on specified terms with costs then accrued. Fed. R. Civ. P. 68(a). If within 14 days of a party's offer, the offeree accepts, the clerk must enter judgment. *Id.* Rule 68 provides that an unaccepted offer is "considered withdrawn," and if the case proceeds to trial and the plaintiff obtains a judgment that is not more favorable than the unaccepted offer, the offeree must pay the costs incurred after the offer was made. *Id.*68(b)&(d). What remains unclear is what effect Rule 68 has, if any, of an unaccepted offer on the justiciability of a plaintiff's claim under the Constitution's Case or Controversy Clause. Also unclear is, if the individual claim of a named plaintiff in a putative class action is rendered moot, are the putative class action claims under Rule 23 also rendered moot or does Rule 23 provide an independent basis for justiciability for such claims?

Last week, the Second Circuit had occasion to address these questions in a non-TCPA context and left much in the air in *Tanasi v. New Alliance Bank, et al.*, No. 14-1389, 2015 WL 2251472 (2d Cir. May 14, 2015). As to the first question, whether an unaccepted offer of judgment under Rule 68 that offers complete relief to the plaintiff renders the plaintiff's claim moot, the Second Circuit noted that the federal courts of appeals are split on the issue: The Third, Fourth, Fifth, Seventh, Tenth and Federal Circuits have said yes – regardless of whether judgment is entered against the defendant. The Ninth and Eleventh Circuit have said no. Ultimately, the Second Circuit clarified its position that an unaccepted offer of judgment – even one that offers the plaintiff complete relief – does not moot the plaintiff's claims. To confuse matters further, the Second Circuit suggested that if the parties agree that a judgment should be entered or a defendant "unconditionally surrenders" such that only the plaintiff's "obstinacy or madness" prevents her from accepting, the district has discretion to enter judgment against the defendant. Accordingly, the plaintiff's claims in *Tanasi* were not rendered moot by the Rule 68 offer of judgment because the district court did not enter judgment in favor of the plaintiff. Because the Second Circuit did not find that the plaintiff's individual claims were mooted, it did not need to reach the question of whether the putative class claims were mooted.

Fortunately, clarity might be on its way. Yesterday (May 18, 2015) the United Sates Supreme Court granted certiorari in a putative TCPA class that includes the issue of whether putative class claims are rendered moot by a Rule 68 offer of judgment that renders complete relief to the named plaintiff. *Gomez v. Campbell-Ewald Co.*, 768 F.3d 871 (9th Cir. 2014), *cert. granted sub nom. Campbell-Ewald Co. v. Gomez*, 2015 WL 246885 (U.S. May 18,

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