Predicated on a Misconception: Analyzing the Problems with the Mootness by Unaccepted Offer Theory

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What happens when a plaintiff rejects a defendant's settlement offer? Common sense seems to dictate that the case continues. In certain circumstances, however, many courts dismiss the case, finding that the defendant's willingness to settle means that there is no dispute to litigate. The judge might not even order the defendant to pay the offered amount. A majority of circuits currently adhere to a mootness by unaccepted offer approach, holding that if a defendant makes a Rule 68 offer providing complete relief for all the damages to which the plaintiff is entitled, the offer moots the plaintiff's claim regardless of whether the plaintiff accepts. As Justice Kagan articulated in her Genesis Healthcare Corp. v. Symczyk *dissent, there is a fundamental problem with this logic: unaccepted offers do not by themselves extinguish a plaintiff's legal interest in a case. Furthermore, many plaintiffs have nonmonetary interests, such as planning to file for class action certification, that are not addressed by an ostensibly complete settlement offer. This Note analyzes the legal and normative problems surrounding mootness by unaccepted offer and proposes that courts adopt the Second Circuit's approach and reject mootness by unaccepted offer. Under this approach, if a defendant unequivocally offers the plaintiff all the damages she is legally entitled to, the court must still consider whether the plaintiff has legitimate nonmonetary interests that the settlement offer fails to satisfy. If there are no other nonmonetary interests that the plaintiff is entitled to and that the offer does not satisfy, then the court may enter default judgment pursuant to the offer's terms.*

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I. INTRODUCTION

Imagine that you are suing someone. You acknowledge that the maximum damages you can receive is $X. While the case is ongoing, the defendant approaches you with a settlement offer for exactly $X. If you accept, the case settles. If, however, you reject the offer, common sense dictates that there is no settlement. You do not agree to it. Perhaps you hope to bring in other plaintiffs who share your injuries,[1] or perhaps you hope that the court will find the defendant liable for wrongdoing at trial.[2] Regardless of your motives, the last thing you expect is for the court to wash its hands of your case, finding that you "lose[ ] outright" because the defendant was willing to give you $X. Your case is dismissed. The judge never even orders the defendant to pay you $X.[3]

This outcome might be hard to imagine. Even so, the majority of circuit courts adhere to a "mootness by unaccepted offer" ("MUO") approach, taking the position that a defendant's Rule 68 offer to provide complete relief for all damages and costs moots the plaintiff's claim, regardless of whether the plaintiff accepts.[4]

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1. Oftentimes, defendants who extend offers of complete relief to plaintiffs are attempting to "pick off" plaintiffs before they file petitions for Rule 23 class action certification or collective action certification under the Fair Labor Standards Act ("FLSA"). *See* Nantiya Ruan, *Facilitating Wage Theft: How Courts Use Procedural Rules to Undermine Substantive Rights of Low-Wage Workers*, 63 VAND. L. REV. 727, 729 (2010) ("[O]ffers of judgment are being used with increased frequency by employers attempting to avoid liability for wage theft in cases involving numerous plaintiffs."); David Hill Koysza, Note, *Preventing Defendants from Mooting Class Actions by Picking Off Named Plaintiffs*, 53 DUKE L.J. 781, 782 (2003) (arguing that courts should not allow defendants to pick off named plaintiffs in putative class actions).

2. *See* McCauley v. Trans Union, LLC, 402 F.3d 340, 341 (2d Cir. 2005) ("On appeal, McCauley argues that he is seeking not just his actual damages of $240 but, more importantly, the precedential value of a judgment against Trans Union").

3. Among the circuit courts, only the Federal and Seventh Circuits have explicitly stated that dismissal without ordering the defendant to pay offered damages is the proper outcome. *See* Samsung Elect. Co. v. Rambus, Inc., 523 F.3d 1374, 1381 (Fed. Cir. 2008) (holding that district court improperly failed to dismiss case when settlement offer mooted plaintiff's claim); Greisz v. Household Bank (Illinois), N.A., 176 F.3d 1012, 1016 (7th Cir. 1999) (dismissing case and finding that plaintiff is not entitled to damages or attorney's fees because class action could not proceed and defendant's settlement offer mooted plaintiff's claim). District courts interpret Third Circuit law as requiring dismissal without ordering defendant to pay. *See* Genesis Healthcare Corp. v. Symczyk, 133 S. Ct. 1523, 1533 (2013) (Kagan, J., dissenting) ("Relying on Circuit precedent, the District Court agreed; it dismissed the case for lack of jurisdiction — without awarding Symczyk any damages or other relief — based solely on the unaccepted offer.").

4. The Third, Fourth, Fifth, Sixth, Seventh, Tenth, and Federal Circuits all accept this logic. *See* Diaz v. First Am. Home Buyers Prot. Corp., 732 F.3d 948, 953 n.5 (9th Cir. 2013). *See also infra* Part III.A. However, in light of Justice Kagan's dissent, the Seventh Circuit has expressed a willingness to reconsider its stance. *See* Scott v. Westlake Servs.

Normally, a case becomes moot only when the parties no longer have any legal interest in the outcome.[5] Of course, a plaintiff's acceptance of a settlement offer naturally extinguishes her legal interest in the case.[6] Under MUO, however, the plaintiff's claims are deemed moot as soon as the defendant extends the offer and demonstrates her willingness to give the plaintiff complete monetary relief.[7] The court then grants the defendant's motion to dismiss for lack of subject matter jurisdiction because the offer allegedly extinguishes the Article III case or controversy, regardless of the plaintiff's response.[8]

As Justice Kagan recently argued in her vigorous dissent in *Genesis Healthcare Corp. v. Symczyk*, there are at least two fundamental problems with MUO. First, Rule 68's text establishes that unaccepted offers of judgment have no legal effect outside of proceedings to determine costs.[9] Second, this approach is inconsistent with mootness doctrine and conventional understandings of how offer and acceptance function because an unaccepted offer is a "legal nullity" that cannot extinguish a plaintiff's legal interest in a case.[10] Writing for a 5–4 minority, Justice Kagan emphasized that the MUO theory was "wrong, wrong, and wrong again,"

LLC, 740 F.3d 1124, 1126 n.1 (7th Cir. 2014) ("The circuit split remains, but there are reasons to question our approach to the problem.").

5. *See, e.g.*, Chafin v. Chafin, 133 S. Ct. 1017, 1023 (2013).

6. *See* FEDERAL PRACTICE & PROCEDURE: JURISDICTION AND RELATED MATTERS § 3533.2 (Charles Alan Wright et al. eds., 3d ed. 2014) (explaining that when parties agree to settlement, settlement moots the case).

7. *See* Rand v. Mansato Co., 926 F.2d 598 (7th Cir. 1991) (explaining that settlement offer means there is no longer a dispute to litigate); Weiss v. Regal Collections, 385 F.3d 337, 340 (3d Cir. 2004) ("An offer of complete relief will generally moot the plaintiff's claim, as at that point the plaintiff retains no personal interest in the outcome of the litigation.") (citations omitted); Lucero v. Bureau of Collection Recovery, Inc., 639 F.3d 1239, 1243 (10th Cir. 2011) ("As Rule 68 operates, if an offer is made for a plaintiff's maximum recovery, his action may be rendered moot."); *see also* FEDERAL PRACTICE & PROCEDURE, *supra* note 6 at § 3533.2 ("Even when one party wishes to persist to judgment, an offer to accord all of the relief demanded may moot the case.").

8. *See, e.g.*, *Rand*, 926 F.2d at 598 ("Once the defendant offers to satisfy the plaintiff's entire demand, there is no dispute over which to litigate and a plaintiff who refuses to acknowledge this loses outright, under Fed. R. Civ. P. 12(b)(1), because he has no remaining stake.") (citations omitted).

9. *See* Genesis Healthcare Corp. v. Symczyk, 133 S. Ct. 1523, 1536 (2013) (Kagan, J., dissenting) ("For starters, Rule 68 precludes a court from imposing judgment . . . based on an unaccepted settlement offer made pursuant to its terms. The text of the Rule contemplates that a court will enter judgment only when a plaintiff accepts an offer.").

10. *See id.* at 1533 ("An unaccepted settlement offer — like any unaccepted contract offer — is a legal nullity, with no operative effect.").

told the Third Circuit to "[r]ethink" its approach, and advised the other circuits: "Don't try this at home."[11]

The *Genesis Healthcare* majority acknowledged the circuit split regarding whether "an unaccepted offer that fully satisfies a plaintiff's claim is sufficient" to moot the claim. However, it did not decide the issue, because it was not properly before the Court.[12] Justice Kagan argued that the majority opinion was therefore rendered meaningless because it was "predicated on a misconception," namely MUO.[13] Since *Genesis Healthcare*, the circuit split has deepened. The Ninth and Eleventh Circuits have adopted Justice Kagan's reasoning,[14] joining the Second Circuit in holding that Rule 68 offers cannot, by themselves, moot a plaintiff's claims.[15] Instead, if a defendant is truly offering complete relief, the court may resolve the case by entering judgment in the plaintiff's favor and ordering the defendant to pay the offered damages.[16]

Some might argue that this is an unimportant problem that does not warrant extended analysis.[17] All that appears to be at stake is whether a court must enter judgment for a plaintiff despite her seemingly irrational unwillingness to accept settlement — a question worth (at most) a few thousand dollars to the plain-

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11. *Id.* at 1533–34.

12. *Id.* at 1528–29 (discussing how "respondent's waiver of" the mootness by unaccepted offer issue prevents the majority from reaching it).

13. *Id.* at 1536.

14. *See* Stein v. Buccaneers Ltd. P'ship, 772 F.3d 698, 703 (11th Cir. 2014) ("We agree with the *Symczyk* dissent."); Diaz v. First Am. Home Buyers Prot. Corp., 732 F.3d 948, 954–55 (9th Cir. 2013) ("We are persuaded that Justice Kagan has articulated the correct approach. We therefore hold that an unaccepted Rule 68 offer that would have fully satisfied a plaintiff's claim does not render that claim moot.").

15. *See Diaz*, 732 F.3d at 954–55; *see also* McCauley v. Trans Union, LLC, 402 F.3d 340, 342 (2d Cir. 2005) (holding that defendant's settlement offer for complete monetary relief was insufficient to moot plaintiff's claim).

16. *See Diaz*, 732 F.3d at 954–55 (holding that courts may enter default judgment when plaintiff refuses settlement offer for complete relief out of "obstinacy" or "madness"); *McCauley*, 402 F.3d at 342 (allowing courts to enter default judgment in accordance with terms of settlement offer if such judgment satisfies plaintiff's claims).

17. As of the writing of this Note, there is no extended scholarly analysis of this problem. One scholar considered the question on his blog, finding that Justice Kagan's "snarky" language was unnecessary. *See* Michael C. Dorf, *Was Justice Kagan's Snarkiness in Genesis Healthcare v. Symczyk Justified?*, DORF ON LAW (July 22, 2013, 6:30 AM), http://www.dorfonlaw.org/2013/07/was-justice-kagans-snarkiness-in.html (arguing that "it's not at all clear that Justice Kagan is making anything but a semantic point" because she and the majority would both agree that a plaintiff's claim is moot if there are no representative claims, making her reasoning "just another way of answering the same question that the majority answers").

tiff and her attorney.[18] A court need not reject MUO to enter judgment according to the terms of the Rule 68 offer.[19] Either way, judges retain their rightful discretion to thwart plaintiffs' seemingly unreasonable desires to continue litigating.

Such dismissive responses, however, fail to account for plaintiffs' rational non-monetary reasons for rejecting ostensibly complete settlement offers. For instance, defendants generally extend settlement offers as a strategy to "pick off" representative plaintiffs and avoid potential certification of collective actions.[20] *Genesis Healthcare* arguably cast doubt on whether Rule 23 class actions could survive the mootness of a representative plaintiff's claim.[21] In that light, MUO takes on renewed importance because it determines whether a class action can proceed after a defendant extends a Rule 68 offer to the named plaintiffs. Appeals regarding MUO and its effect on Rule 23 class actions are pending in the First, Second, Third and Ninth Circuits.[22]

Moreover, MUO has larger normative implications. Dismissing cases simply because a defendant extended an offer purporting to give complete relief implicates larger concerns regarding fairness between parties, plaintiffs' rights to control their cases, and the value of trial on the merits.[23] Rejecting MUO has significant normative advantages. It addresses power imbalances be-

18. Because these cases are generally collective actions, individual plaintiffs are entitled to very small amounts. For example, the highest value dollar offer in the mootness by unaccepted offer case, *Genesis Healthcare v. Symczyk*, was $75,000 plus cost. 133 S. Ct. 1523, 1527 (2013). In one unusual instance involving a loss of consortium tort claim with no potential collective action component, a plaintiff rejected a $150,000 statutory maximum offer from the defendant's employer because she hoped for the defendant employee to "accept[ ] responsibility" and apologize for his involvement in an accident that killed the plaintiff's husband. Boucher v. Rioux, No. 14-CV-141-LM, 2014 WL 4417914, at *1, *8 (D.N.H. Sept. 8, 2014).

19. While Sixth Circuit law holds that a defendant's offer of complete relief moots the case, it allows the judge to enter judgment "in favor of the plaintiffs in accordance with" the defendant's offer. *See* O'Brien v. Ed Donnelly Enter., Inc., 575 F.3d 567, 575 (6th Cir. 2009).

20. *See, e.g.*, Ruan, *supra* note 1 at 729 (describing the picking off problem in the FLSA collective action context); Koysza, *supra* note 1 at 782 (explaining the picking off problem in Rule 23 class action context).

21. *Genesis Healthcare Corp.*, 133 S. Ct. at 1532 (stating that earlier Supreme Court cases criticizing the use of settlement offers to pick off class action representatives were merely dicta).

22. *See* Diane M. Saunders, *To Be or Not to Be: Mooting Rule 23 Class Actions Through Rule 68 Offers of Judgment*, OGLETREE DEAKINS BLOG (Nov 25, 2014), http://blog.ogletreedeakins.com/to-be-or-not-to-be-mooting-rule-23-class-actions-through-rule-68-offers-of-judgment/ (listing MUO appeals that are pending in various circuits following *Genesis Healthcare*).

23. *See* discussion *infra* Part IV.A.

tween plaintiffs and defendants and prevents defendants from using settlement offers to frustrate plaintiffs' rights to pursue collective actions. It also partially addresses the problems caused by prioritizing efficient case management and promoting settlement, and is more attentive to the normative values of allowing parties to obtain a trial on the merits and the importance of plaintiff choice in settlement.[24]

This Note argues that courts should follow Justice Kagan's reasoning that a defendant's unaccepted offer of complete relief can never moot a plaintiff's claim. Instead, if a court finds that a defendant is genuinely offering the plaintiff all the relief to which she is entitled, the court may enter judgment based on the offer's terms. Part II of this Note describes the legal background to this issue by discussing Rule 68, mootness doctrine, and how MUO interacts with potential collective actions. Part III examines the different approaches circuits use to address the issue. Part IV explores this problem's normative implications. Part V concludes that rejection of MUO is ultimately the most fair and reasonable approach.

II. MOOTNESS BY SETTLEMENT OFFER: RULE 68, MOOTNESS DOCTRINE, AND EXCEPTIONS TO MOOTNESS IN THE COLLECTIVE ACTION CONTEXT

This Part discusses Rule 68, mootness doctrine, and how courts have created an exception to mootness doctrine to preserve the right to pursue collective actions. Each of these legal components plays a role in the MUO problem.

A. A RULE TO ENCOURAGE SETTLEMENT: THE TEXT AND PURPOSE OF RULE 68

On its surface, Rule 68 appears to be a simple rule governing settlement offers. Of particular note, it provides that "[a]n unaccepted offer is considered withdrawn" and that "[e]vidence of an unaccepted offer is not admissible except in a proceeding to determine costs."[25] Additionally, "[i]f the judgment that the offeree finally obtains is not more favorable than the unaccepted offer,

24. *See* discussion *infra* Part IV.B.
25. FED. R. CIV. P. 68.

the offeree must pay the costs incurred after the offer was made."[26]

The conventional understanding of Rule 68 is that its "plain purpose" is "to encourage settlement and avoid litigation" by imposing cost-shifting consequences on plaintiffs who reject an offer that ultimately proves to be more favorable than the litigation outcome.[27] Scholars generally agree with this interpretation,[28] though some confusion remains about various aspects of Rule 68's operation.[29] Moreover, there is a newly emerging argument that settlement promotion is not Rule 68's true purpose.[30]

Professor Robert Bone argues that Rule 68 was modeled on state rules "designed to prevent plaintiffs from imposing costs unfairly when the defendant offered what the plaintiff was entitled to receive from trial."[31] Rule 68 should therefore penalize plaintiffs and compensate defendants when "liability and judgment are both relatively clear" and the defendant is willing to "offer the plaintiff the maximum judgment she is legally entitled to receive from trial," but the plaintiff rejects the offer because of an unreasonable assessment of what she is legally entitled to or "spite or a desire to gamble on [a] trial in the hope that she can convince the jury to award even more."[32]

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26. FED. R. CIV. P. 68.

27. Marek v. Chesny, 473 U.S. 1, 5 (1985). The advisory committee's note on the 1946 amendments to Rule 68 states that "[t]hese provisions should serve to encourage settlements and avoid protracted litigation." *Id.*

28. *See* Robert G. Bone, *"To Encourage Settlement": Rule 68, Offers of Judgment, and the History of the Federal Rules of Civil Procedure*, 102 NW. U. L. REV. 1561, 1562 (2008) [hereinafter Bone, *Encourage Settlement*] ("It is universally accepted that Rule 68 is meant to encourage settlements by forcing plaintiffs to think hard before rejecting an offer."); Lesley S. Bonney et al., *Rule 68: Awakening A Sleeping Giant*, 65 GEO. WASH. L. REV. 379, 394 (1997); Jay Horowitz, *Rule 68: The Settlement Promotion Tool That Has Not Promoted Settlements*, 87 DENV. U. L. REV. 485, 489 (2010) ("But, with one notable exception, all commentators, the Supreme Court itself and all lower federal courts agree that Rule 68's function is to bring about the settlement of cases.").

29. *See* Roy D. Simon, Jr., *The Riddle of Rule 68*, 54 GEO. WASH. L. REV. 1, 6–9 (1985) (arguing that Rule 68 fails to encourage settlement because it can only be used by defendants and because its time limits do not give plaintiffs time to evaluate an offer's reasonableness). *Compare* Horowitz *supra* note 28 at 489–90 (describing the "mystery" of Rule 68 that arises from its arguably poor design) *with* Bonney et al. *supra* note 28 at 379–95 (describing various unanswered questions regarding the mechanics of Rule 68).

30. *See* Bone, *Encourage Settlement*, *supra* note 28, at 1562 (arguing that conventional understandings of Rule 68 are wrong because it was modeled on state rules with the narrow purpose of "prevent[ing] plaintiffs from imposing costs unfairly" by rejecting reasonable settlement offers).

31. *Id.* at 1562–63.

32. *Id.* at 1574–75.

B. THE CONSTITUTIONAL BASIS OF MOOTNESS DOCTRINE

Under Article III of the United States Constitution, federal judicial power extends to "cases" and "controversies."[33] If, while a case is pending, events develop such that the issues presented by a case are no longer "live," then the suit becomes moot because there is no longer a "case or controversy."[34] Once there is no Article III case or controversy, a federal court no longer has subject matter jurisdiction,[35] which typically obliges it to dismiss the case as moot.[36]

There is some disagreement regarding whether mootness doctrine is constitutionally mandated or whether it is better understood as a prudential doctrine that allows for exceptions.[37] The Supreme Court recently articulated an Article III based conception of mootness in *Chafin v. Chafin*, emphasizing that there is

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33. U.S. CONST. art. III, § 2.

34. Already, LLC v. Nike, Inc., 133 S. Ct. 721, 726 (2013) (internal quotations omitted).

35. *See* Weiss v. Regal Collections, 385 F.3d 337, 340 (3d Cir. 2004) ("When the issues presented in a case are no longer 'live' or the parties lack a legally cognizable interest in the outcome, the case becomes moot and the court no longer has subject matter jurisdiction.") ("But jurisdiction, properly acquired, may abate if the case becomes moot").

36. *See* Daniel A. Zariski et al., *Mootness in the Class Action Context: Court-Created Exceptions to the "Case or Controversy" Requirement of Article III*, 26 REV. LITIG. 77, 78–79 (2007) (arguing that "case or controversy" requires disputes between parties to remain live throughout action and if requirement is no longer met because of "involuntary dismissal occasioned by a full and complete offer of judgment," court must find case moot and dismiss "due to a lack of jurisdiction"); Henry P. Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363, 1384–85 (1973) (explaining conventional understanding that "dismissal is required because there is no 'case or controversy' once the private rights of the litigants are no longer at stake" and that parties' personal interest must exist throughout action).

37. One scholar argues that mootness doctrine "lacks a coherent theoretical foundation" because courts sometimes see it as "a limitation on federal court jurisdiction, mandated by Article III of the United States Constitution," yet also "routinely hear moot cases where strong prudential reasons exist to do so." *See* Matthew I. Hall, *The Partially Prudential Doctrine of Mootness*, 77 GEO. WASH. L. REV. 562, 563–66 (2009) He argues that recognition of prudential exceptions to mootness "cannot be reconciled with the belief that mootness is a mandatory jurisdictional bar." *See id.* Other sources explain the different prudential exceptions to mootness that courts recognize. *See* Honig v. Doe, 484 U.S. 305, 331 (1988) ("[W]hile an unwillingness to decide moot cases may be connected to the case or controversy requirement of Art. III, it is an attenuated connection that may be overridden where there are strong reasons to override it."). *See also* David H. Donaldson, Jr., Note, *A Search for Principles of Mootness in the Federal Courts Part One — The Continuing Impact Doctrines*, 54 TEX. L. REV. 1289, 1292 (1976) (explaining the capable of repetition yet evading review prudential exception to mootness); Corey C. Watson, Note, *Mootness and the Constitution*, 86 NW. U. L. REV. 143, 144–46 (1991) (describing disagreement within Supreme Court over whether courts should recognize prudential exceptions to mootness doctrine in *Honig v. Doe*, 484 U.S. 305 (1988)).

"no case or controversy, and a suit becomes moot, when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome," though if "the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot."[38] Thus, a case becomes moot if it becomes "impossible for a court to grant any effectual relief whatever to the prevailing party."[39] Nonetheless, the Court continues to recognize prudential exceptions to mootness, particularly in the class action context.[40] In applying MUO, courts implicitly assume that mootness is a constitutionally based "mandatory jurisdictional bar"[41] through their willingness to dismiss when a defendant extends a settlement offer conceding full damages despite the dismissal's potential unfairness to a plaintiff who never accepted.[42]

C. EXCEPTIONS TO MOOTNESS PRINCIPLES IN THE COLLECTIVE ACTION CONTEXT

Because courts normally dismiss cases once a plaintiff's claim becomes moot, the application of mootness principles (particularly if courts believe they are constitutionally based and therefore less amenable to exceptions) to class or collective actions could logically require courts to dismiss the entire suit when representative plaintiffs no longer have a stake in the case.[43] Howev-

38. Chafin v. Chafin, 133 S. Ct. 1017, 1023 (2013) (internal quotation marks omitted).

39. *Id.* at 1023.

40. *See, e.g.*, Genesis Healthcare Corp. v. Symczyk, 133 S. Ct. 1523, 1530 (2013) (recognizing prudential exceptions to mootness in class action context due to either separate interests of the class or "inherently transitory" nature of some claims which are moot as to named plaintiffs but could recur as to class members).

41. Hall, *supra* note 37, at 563.

42. In most mootness by unaccepted offer cases, remaining issues of class certification keep the case in court though the plaintiff's individual claim is moot because the defendant's settlement offers did not account for class interests. These cases would be dismissed if the class certification dispute was no longer live. *See, e.g.*, Lucero v. Bureau of Collection Recovery, Inc., 639 F.3d 1239, 1243 (10th Cir. 2011); Weiss v. Regal Collections, 385 F.3d 337, 340 (3d Cir. 2004); Rand v. Monsanto Co., 926 F.2d 596, 598 (7th Cir. 1991); Thus, the courts arguably recognize prudential exceptions with regards to class certification questions, but apply mootness doctrine strictly to the mootness by unaccepted offer component of the question.

43. *See* Zariski et al., *supra* note 36, at 79 ("Because the mootness doctrine is derived directly from the Constitution, it applies not only to individual litigants but also with equal force to litigants in a class action context."); ALBA CONTE & HERBERT B. NEWBERG, NEWBERG ON CLASS ACTIONS § 2:9 (5th ed., 2014) ("The mootness difficulty arises when there is a disjuncture between the status of the class representative's claims and the class's claims . . . if the class representative's claims are moot but class members still have live claims, courts have struggled with how to proceed.").

er, class actions involve claims by both named plaintiffs litigating the case as well as those of absent class members who share the plaintiffs' injuries.[44] Even if the representative plaintiff's claim is moot, the legal dispute might remain live as to the interests of absent class members. Thus, it seems incorrect to dismiss just because the representative plaintiff's claim is moot.[45]

When a representative plaintiff's claim is moot, Article III principles seem to require the substitution of a new representative plaintiff whose claim remains live. However, many courts find that class certification is a prerequisite to the substitution of a new named plaintiff, making substitution impossible when the class has yet to be certified.[46] Perhaps another plaintiff with live claims may file her own putative class action, but this contravenes one major policy goal of the class action device, which is to ensure greater efficiency by rendering successive litigation of substantially similar claims unnecessary.[47]

Assuming that the class action device serves important policy purposes, those purposes are easily undermined if class actions necessarily become moot when the named plaintiff's claims are moot. Many class actions involve large classes of individuals with small claims.[48] If courts accept MUO in the class action context, then defendants know that extending a settlement offer to the plaintiff could moot her claims and short circuit the class action. Because each individual claim is small, settlement offers sufficient to moot a named plaintiff's claim are cheap. Defendants can ensure that no class action survives and, in so doing, frustrate

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44. *See* Sosna v. Iowa, 419 U.S. 393, 401 (1975); CONTE & NEWBERG, *supra* note 43, at § 1:5 (explaining that representative plaintiffs in class actions have duty to represent absent class member interests).

45. *See* Zariski et al., *supra* note 36, at 80 ("[S]trict application of the mootness doctrine in the class action context may raise public policy concerns not present in an individual lawsuit due to, among other things, the potential for abuse of the doctrine in order to avoid class certification.").

46. *See* JOSEPH MCLAUGHLIN, 1 MCLAUGHLIN ON CLASS ACTIONS § 4:36 (10th ed., 2013) ("If the claims of the putative class representative of an uncertified class are dismissed, it usually is not an abuse of discretion to refuse class counsel permission to identify a proposed alternative class representative."); Koysza, *supra* note 1, at 798–99. The mootness by unaccepted offer question is only at issue in class or collective actions that have yet to be certified.

47. *See* CONTE & NEWBERG, *supra* note 43, at § 1:9 (explaining that policy goals of class action include making "multiplicity of actions" unnecessary).

48. *See* Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 161 (1974) (explaining that when plaintiff's claim for damages is "inconsequential" relative to costs of litigation "[e]conomic reality dictates that petitioner's suit proceed as a class action or not at all"); CONTE & NEWBERG *supra* note 43, at § 1:7.

plaintiffs' rights to employ the class action device and the other policy goals of class actions.[49] This picking off problem also exists in the Fair Labor Standards Act ("FLSA") collective action context.[50] Upholding the policy goals of collective actions requires courts to create exceptions to mootness doctrine to allow cases to proceed after a representative plaintiff's claim becomes moot.[51]

To address this difficulty, the Supreme Court recognizes that absent class members have a legal interest "separate and distinct from the individual claims of the named class representatives."[52] A properly certified class action may proceed even after the named plaintiff's individual claim is moot because of the class's separate legal interest.[53] Named plaintiffs with moot individual claims may still appeal denials of class certifications either because of their ongoing economic interest in sharing litigation expenses with the class[54] or because putative class action plaintiffs have both individual merits claims as well as separate claims as class representatives.[55] Furthermore, the Court has recognized that allowing defendants to pick off individual named plaintiffs through settlement offers prior to class certification would be "contrary to sound judicial administration" and "frustrate the objectives of class actions."[56]

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49. *See* Koysza, *supra* note 1, at 792–98 (arguing that picking off plaintiffs: (a) deprives them of ability to employ class action device; (b) creates multiplicity of suits, which class actions are meant to avoid; (c) creates unnecessary race to courthouse because timing is important; and (d) depends on arbitrary questions of timing).

50. *See* Ruan, *supra* note 1, at 737–38 (explaining that picking off problem is increasingly common in wage theft cases under FLSA).

51. *See* CONTE & NEWBERG, *supra* note 43, at § 2:9 (emphasizing that because class actions may sometimes proceed when plaintiffs' claims are moot but class claims are not, "there is — though no court has put it this starkly — *a class action exception to mootness*."); Hall, *supra* note 37, at 582–84 (explaining that through *Sosna v. Iowa*, 419 U.S. 393 (1975), and subsequent related cases, the Court created a "class action exception" to mootness doctrine).

52. Zariski et al., *supra* note 36, at 79–80.

53. *See, e.g.*, *Sosna*, 419 U.S. at 402 (holding that controversy may remain live as to class members even when named plaintiff's claim is moot).

54. *See* Deposit Guar. Nat. Bank, Jackson, Miss. v. Roper, 445 U.S. 326, 336–37 (1980) (agreeing that plaintiffs have individual interest in "shift[ing] part of the costs of litigation to those who will share in its benefits if the class is certified and ultimately prevails").

55. *See* U.S. Parole Comm'n v. Geraghty, 445 U.S. 388, 402 (1980) (arguing that mootness of plaintiff's substantive claim "does not mean that all the other issues in the case are mooted" because class action plaintiffs "present[ ] two separate issues for judicial resolution," claims on the merits and "the claim that he is entitled to represent a class.").

56. *Roper*, 445 U.S. at 339. The *Genesis Healthcare* Court interprets this part of *Roper* as being dicta. *See* Genesis Healthcare Corp. v. Symczyk, 133 S. Ct. 1523, 1532 (2013).

The circuit courts have developed additional doctrines to prevent defendants from prematurely halting collective actions by picking off plaintiffs,[57] but defendants continue to litigate on the claim that MUO moots the entire class action.[58] In many instances, the question of whether plaintiffs may continue to pursue class certification depends on timing. Defendants may still halt the potential class action prior to plaintiffs' filing the class certification motion.[59] Some circuits address this problem by allowing petitions for class certification filed after the defendant made the settlement offer to "relate back" to the date the plaintiff initially filed her complaint.[60] If settlement offers are "sufficient to moot the action" regardless of the plaintiff's response,[61] defendants have considerable power to derail class actions.

Moreover, some circuits extend relation back doctrine to petitions for collective action certification in FLSA suits.[62] However, in *Genesis Healthcare*, the Court held that, unlike in Rule 23 class actions, plaintiffs in potential FLSA collective actions do not have a separate individual interest in the certification of the collective action.[63] Frustration of the policy goals of FLSA collective

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57. *See, e.g.*, Weiss v. Regal Collections, 385 F.3d 337, 348 (3d Cir. 2004) (applying relation back doctrine allowing plaintiffs to file for class certification after defendants mooted plaintiff's claim with a settlement offer).

58. *See* Saunders, *supra* note 22 (arguing that Genesis Healthcare "breathed new life into the defense strategy of picking off the named plaintiff in a Rule 23 class action with a Rule 68 offer of judgment").

59. *See* Koysza, *supra* note 1, at 790–92 (explaining that the success of the picking off strategy hinges on timing); Jack Starcher, Note, *Addressing What Isn't There: How District Courts Manage the Threat of Rule 68's Cost-Shifting Provision in the Context of Class Actions*, 114 COLUM. L. REV. 129, 140–41 (2014) (explaining that circuit courts primarily disagree on how to deal with settlement offers made prior to the filing of class certification motions).

60. *See Weiss*, 385 F.3d at 348 ("[W]here a defendant makes a Rule 68 offer to an individual claim that has the effect of mooting possible class relief asserted in the complaint, the appropriate course is to relate the certification motion back to the filing of the class complaint"); Zeidman v. J. Ray McDermott & Co., 651 F.2d 1030, 1047–48 (5th Cir. 1981) (applying relation back doctrine).

61. Koysza, *supra* note 1, at 782.

62. *See* Symczyk v. Genesis HealthCare Corp., 656 F.3d 189, 200–01 (3d Cir. 2011); Sandoz v. Cingular Wireless LLC, 553 F.3d 913, 920–21 (5th Cir. 2008) ("The proper course, therefore, is to hold that when a FLSA plaintiff files a timely motion for certification of a collective action, that motion relates back to the date the plaintiff filed the initial complaint.").

63. Because the Court explicitly did not address the mootness by unaccepted offer question, but it was a logical antecedent to their holding, a change to mootness by unaccepted offer would cancel out the main holding on the FLSA question. *See* Genesis Healthcare Corp. v. Symczyk, 133 S. Ct. 1523, 1532 (2013) (holding that because conditional certification of FLSA collective actions "is not tantamount to class certification

actions will be an increasingly common problem going forward because *Genesis Healthcare* precludes courts from extending relation back doctrine to FLSA collective action certification.[64]

III. THE CONFUSION REGARDING MOOTNESS BY UNACCEPTED OFFER

There is considerable confusion regarding whether unaccepted settlement offers can, by themselves, moot a plaintiff's claim.[65] The circuits have taken three different approaches to the MUO question. Part III.A describes the majority approach, in which courts are willing to dismiss a case once the defendant extends a settlement offer for complete monetary relief. Part III.B discusses the Second, Ninth, and Eleventh Circuits' rejection of MUO. Part III.C briefly explores the Sixth Circuit's middle of the road approach. Part III.D considers why plaintiffs reject settlement offers that ostensibly give them full relief, finding that in most instances, plaintiffs have rational reasons for rejecting the defendant's offer.

A. ACCEPTING MOOTNESS BY UNACCEPTED OFFER: THE MAJORITY APPROACH

A majority of circuits hold, at least implicitly, that it is appropriate for a court to dismiss a case when a defendant's settlement offer includes all the damages and costs to which the plaintiff is entitled. However, mootness exceptions unique to the collective action context often prevent dismissal.[66] This strict adherence to MUO is the law in the Third, Fourth, Fifth, Seventh, Tenth, and

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under Rule 23" the plaintiff "has no personal interest in representing putative, unnamed claimants, nor any other continuing interest that would preserve her suit").

64. *See Genesis Healthcare*, 133 S. Ct. at 1532 (preventing courts from extending relation back doctrine to FLSA collective actions); *see also* Anjum v. J.C. Penney Co., No. 13 CV 0460 RJD RER, 2014 WL 5090018, at *8 (E.D.N.Y. Oct. 9, 2014) (explaining that *Genesis Healthcare* rejects the use of relation back doctrine in the FLSA collective action context).

65. *See Genesis Healthcare*, 133 S. Ct. at 1528–29 (noting the circuit split regarding this question); Diaz v. First Am. Home Buyers Prot. Corp., 732 F.3d 948, 953–55 (9th Cir. 2013) (explaining the disagreement among circuits).

66. *See* Sandoz v. Cingular Wireless LLC, 553 F.3d 913, 919 (5th Cir. 2008) (allowing plaintiff's case to proceed because of FLSA collective action claims); Weiss v. Regal Collections, 385 F.3d 337, 348 (3d Cir. 2004) (explaining that plaintiff's case would be moot were it not for class certification issue).

Federal Circuits,[67] though the Seventh Circuit has expressed a willingness to reconsider its position in light of Justice Kagan's *Genesis Healthcare* dissent.[68] In the absence of class or collective action certification issues, courts in these circuits find that such an offer moots the plaintiff's claim and thus requires dismissal of the case, often resulting in a total loss for the plaintiff.[69]

The general reasoning behind MUO is simple and remains consistent across circuits that have adopted it. Courts generally do not explicitly articulate every logical step because they perceive the mootness issue as straightforward.[70] Furthermore, the mootness issue is often incidental to the more complex question of whether the mooting of the plaintiff's claim halts a potential class action.[71]

A case becomes moot when a plaintiff no longer has a "legally cognizable interest" in the outcome.[72] When a defendant extends a settlement offer that purports to give a plaintiff all the relief to which she is entitled based on her cause of action and complaint, there is "no dispute over which to litigate."[73] This is likely because the defendant has demonstrated that she does not contest that the plaintiff is entitled to her entire demand.[74] The plaintiff

67. *See Diaz*, 732 F.3d at 953 n.5; Payne v. Progressive Fin. Servs., Inc., 748 F.3d 605, 608 n.1 (5th Cir. 2014) ("Because we find Progressive's offer incomplete, we need not decide whether a complete offer of judgment would have rendered Payne's claims moot.").

68. *See* Scott v. Westlake Servs. LLC, 740 F.3d 1124, 1126 (7th Cir. 2014) (stating that Justice Kagan's dissent articulated good reasons to reconsider the Circuit's acceptance of mootness by unaccepted offer).

69. *See* Samsung Elecs. Co. v. Rambus, Inc., 523 F.3d 1374, 1381 (Fed. Cir. 2008) (explaining that, in a non-class action, "the offer of the full amount in dispute brought an end to the case and controversy" so the district court no longer had subject matter jurisdiction); Rand v. Monsanto Co., 926 F.2d 596, 598 (7th Cir. 1991) (arguing the plaintiff loses outright but for the class certification dispute).

70. *Cf.* Brief for the United States in Affirmance at 12, Genesis Healthcare Corp. v. Symczyk, 133 S. Ct. 1523 (2013) (No. 11-1059), 2012 WL 4960359 (explaining the usual rationale for mootness by unaccepted offer).

71. The typical case involves class or collective action certification. *See Sandoz*, 553 F.3d at 919 (examining mootness by unaccepted offer in a FLSA collective action); *Weiss*, 385 F.3d at 342 (discussing mootness by unaccepted offer in a class action).

72. Already, LLC v. Nike, Inc., 133 S. Ct. 721, 726 (2013).

73. *Rand*, 926 F.2d at 598.

74. In mootness by unaccepted offer cases, courts generally do not give any explanation beyond arguing that the offer alone is sufficient to demonstrate that there is no longer a legal dispute. The most logical inference is that, in courts' eyes, a settlement offer that gives the plaintiff all they ask for amounts to a concession. The Seventh Circuit comes the closest to articulating this point by explaining that "[y]ou cannot persist in suing after you've won." Thus, if a plaintiff rejects a settlement offer for complete relief, the court should dismiss. Greisz v. Household Bank (Illinois), N.A., 176 F.3d 1012, 1015 (7th Cir. 1999).

no longer has the requisite "legally cognizable interest" in the outcome.[75] Her case is now moot. Because Article III only allows courts to adjudicate actual "cases and controversies," the court no longer has subject matter jurisdiction.[76] The loss of subject matter jurisdiction requires the court to dismiss the case in the absence of remaining class certification issues.[77] Knowing this, the defendant files, and the court grants, a Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction.[78] The court may dismiss without first ordering the defendant to make good on the terms of her offer.[79]

Mootness occurs only if the defendant's Rule 68 offer clearly satisfies the plaintiff's claims in full. At the most fundamental level, the offer must include "the full amount of damages to which the plaintiff claimed entitlement."[80] The offer must be unequivocal in giving the plaintiff the specific amount of damages and

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75. *Weiss*, 385 F.3d at 340.

76. *See id.*

77. *See* Genesis Healthcare Corp. v. Symczyk, 133 S. Ct. 1523, 1532 (2013) (assuming without deciding that mootness by unaccepted offer is correct and holding that it is proper to dismiss case after defendant extends an offer of complete relief in collective action); Samsung Elecs. Co. v. Rambus, Inc., 523 F.3d 1374, 1381 (Fed. Cir. 2008) (dismissing non class action case after settlement offer mooted plaintiff's claim).

78. *See, e.g.*, *Samsung*, 523 F.3d at 1381 (remanding with instructions that district court dismiss plaintiff's complaint because settlement offer "brought an end to the case and controversy" and court then "lacked subject matter jurisdiction").

79. The Federal and Seventh Circuits are the only circuit courts that explicitly declare that dismissal without ordering defendant to pay offered amounts is appropriate once a settlement offer moots a case and no class certification issues remain. *See id.* at 1381 ("[T]he offer of the full amount in dispute brought an end to the case and controversy. . . . The case became moot. . . . [It] is remanded to the district court with the instruction that the court dismiss Samsung's complaint."); Damasco v. Clearwire Corp., 662 F.3d 891, 896 (7th Cir. 2011) ("After Clearwire made its offer, Damasco's federal case was over."); *Greisz*, 176 F.3d at 1015 (holding that defendant's offer for damages exceeding possible recovery "eliminates a legal dispute upon which federal jurisdiction can be based" and that plaintiff attorney's spurning of offer meant "[h]e lost his claim to attorney's fees by turning down the defendant's offer to pay them, and [plaintiff] lost $1,200."). The Third Circuit implies that dismissal is the proper course, but has yet to explicitly articulate this. *See Weiss*, 385 F.3d at 340 (explaining that settlement offer mooted plaintiff's claims but case remains live because class claims remain). Thus, district courts in its jurisdiction also dismiss cases when defendants extend settlement offers for complete relief. *See* Symczyk v. Genesis Healthcare Corp., CIV. A. 09-5782, 2010 WL 2038676 (E.D. Pa. May 19, 2010) *rev'd*, 656 F.3d 189 *rev'd sub nom. Genesis Healthcare*, 133 S. Ct. 1523 (concluding that defendant's offer mooted claim and collective action should therefore be dismissed). Other mootness by unaccepted offer circuits have yet to explicitly address this question, though the logic of the approach strongly implies that lack of jurisdiction following a settlement offer requires courts to dismiss without continued involvement in the case.

80. Warren v. Sessoms & Rogers, P.A., 676 F.3d 365, 370 (4th Cir. 2012), *as amended* (Feb. 1, 2012) (internal quotation marks omitted).

costs to which she is entitled.[81] Sometimes, the maximum damages are clearly defined by statute.[82] Otherwise, the parties may clarify the exact amounts through interrogatories or other communications.[83] If any dispute remains about whether the offer truly includes the entire amount that the plaintiff is entitled to, the offer will not be complete and cannot moot the claim.[84] Disputes about the form of payment or the attorney's fees amount could prevent an offer from being complete.[85] Thus, under this doctrine, the completeness of the defendant's offer of relief is generally a question of monetary value. There might also be questions of how closely need to adhere to Rule 68's procedural requirements if they wish to rely on MUO.[86]

Many plaintiffs, however, also have interests in their cases that are not strictly monetary. In the class action context, for instance, such offers cannot satisfy all claims because an offer to individual representative plaintiffs cannot account for the interests of absent class members.[87] Moreover, plaintiffs might have

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81. *See* Hrivnak v. NCO Portfolio Mgmt., Inc., 719 F.3d 564, 567 (6th Cir. 2013) ("To moot a case or controversy between opposing parties, an offer of judgment must give the plaintiff *everything* he has asked for as an individual. . . . An offer limited to the relief the *defendant* believes is appropriate does not suffice.").

82. *See, e.g.*, *Weiss*, 385 F.3d at 340 (explaining that the defendant's award was based on the maximum damages plaintiff could receive under the Fair Debt Collections Practices Act ("FDCPA")).

83. *See, e.g.*, Rand v. Monsanto Co., 926 F.2d 596, 597 (7th Cir. 1991) ("Monsanto offered $1,135, the full amount by which answers to interrogatories assert that Rand was injured, plus the costs of the suit.").

84. *See* ABN Amro Verzekeringen BV v. Geologistics Americas, Inc., 485 F.3d 85, 96 (2d Cir. 2007) (explaining that the "district court's ruling that the plaintiff had no entitlement to any amount exceeding what the defendants had tendered" did not eliminate the "justiciable case or controversy" regarding whether "defendants' liability was limited by the contract" and the total amount that plaintiffs were entitled to).

85. Cabala v. Crowley, 736 F.3d 226, 229 (2d Cir. 2013) ("Because the parties continued to dispute the form and extent of the relief [i.e., attorney's fees] to which Cabala was entitled, the case never became moot.").

86. Most circuits addressing this question hold that an offer need not perfectly comply with Rule 68 to moot a plaintiff's claim. *See, e.g.*, Doyle v. Midland Credit Mgmt., Inc., 722 F.3d 78, 81 (2d Cir. 2013) (finding that oral offer disallowed by text of Rule 68 still mooted claim); Damasco v. Clearwire Corp., 662 F.3d 891, 895–96 (7th Cir. 2011) (holding that non–Rule 68 offer extended prior to class certification motion can moot plaintiff's claim alone with entire class action).

87. *See* Sosna v. Iowa, 419 U.S. 393, 401 (1975) (explaining that the legal interests of representative plaintiffs and absent class members are separate); Genesis Healthcare Corp. v. Symczyk, 133 S. Ct. 1523, 1536 (2013) (Kagan, J., dissenting) (arguing that the satisfactions of a plaintiff's individual claim does not satisfy all her claims if it fails to include class relief).

legitimate non-monetary interests outside of the class action context.[88]

Despite the apparent simplicity of the logic behind mootness by unaccepted offer, additional questions remain. When is a settlement offer actually complete, particularly if the plaintiff has nonmonetary interests? Furthermore, assuming an offer gives the plaintiff all the relief she can possibly obtain, how does the offer end the dispute if she has not accepted? Why does the plaintiff not retain her legal interest in actually obtaining relief up until the moment when the court orders the defendant to pay or when the defendant actually pays? The law is silent regarding these dilemmas.[89]

Some might argue that acceptance of mootness by unaccepted offer does not require courts to dismiss cases without ordering the defendant to make good on the offer. However, federal judges generally accept that the Constitution prevents them from handling a case in the absence of subject matter jurisdiction.[90] The idea that the plaintiff "loses outright" for failing to accept the settlement offer follows naturally from mootness by unaccepted offer doctrine.[91] Thus, even if the Federal and Seventh Circuits are the only ones to explicitly call for dismissal without ordering the defendant to pay offered damages,[92] dismissal is logically necessary in other circuits as well.

B. REJECTING MOOTNESS BY UNACCEPTED OFFER: THE GROWING CIRCUIT SPLIT

The Second, Ninth, and Eleventh Circuits all reject mootness by unaccepted offer doctrine.[93] Prior to *Genesis Healthcare*, the

88. Courts have explicitly recognized this possibility in both the collective action context and one other type of situation. *See* McCauley v. Trans Union, LLC, 402 F.3d 340, 342 (2d Cir. 2005) (recognizing a plaintiff's legitimate interest in a judgment being on public record). *See also* discussion *infra* Part III.D.

89. Justice Kagan's *Genesis Healthcare* dissent is the first to articulate these questions. *See Genesis Healthcare*, 133 S. Ct. at 1536 (Kagan, J., dissenting).

90. *See* Monaghan, *supra* note 36, at 1384 (explaining the conventional argument for dismissal of moot cases is that lack of jurisdiction prevents federal courts from hearing the case); *see also* Church of Scientology of Cal. v. United States, 506 U.S. 9, 12 (1992) (explaining that if a pending case becomes moot, it must be dismissed for lack of subject matter jurisdiction).

91. Rand v. Monsanto Co., 926 F.2d 596, 598 (7th Cir. 1991).

92. *See supra* note 79 and accompanying text.

93. There is currently some confusion in the Second Circuit case law. One panel ruled that a plaintiff's refusal to settle and accept defendant's offer for the "full amount of

Second Circuit was the only one to explicitly reject the doctrine. In *McCauley v. Trans Union*, it held that a rejected settlement offer cannot "by itself" moot the plaintiff's claim.[94] Instead, "in the absence of an obligation" for the defendant to pay the offered damages to a plaintiff, the controversy remains live.[95] A court must therefore enter judgment in the plaintiff's favor and require the defendant to fulfill the terms of the settlement offer before the plaintiff's interest in the case is extinguished.[96] The Ninth Circuit then adopted Justice Kagan's *Genesis Healthcare* reasoning in *Diaz v. First American Home Buyers*, agreeing that mootness by unaccepted offer is inconsistent with both Rule 68's text and mootness doctrine.[97] Most recently, the Eleventh Circuit adopted Justice Kagan's reasoning and followed the Second Circuit in requiring that a court enter judgment based on the terms of the offer before a case can be dismissed.[98]

Even when a court rejects mootness by unaccepted offer, certain circumstances may still warrant disposal of a case despite a plaintiff's wish to continue litigating. In *McCauley*, which did not involve a class action, the defendant's Rule 68 offer included a confidentiality clause.[99] McCauley rejected the offer because of his interest in the "precedential value of a judgment against Trans Union," which would be frustrated if the settlement remained under seal.[100] The *McCauley* court recognized that he was not entitled to a finding of Trans Union's wrongdoing because a defendant may always concede to default judgment with-

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relief," "was sufficient ground to dismiss this case for lack of subject matter jurisdiction." Doyle v. Midland Credit Mgmt., Inc., 722 F.3d 78, 81 (2d Cir. 2013). This case did not cite *McCauley v. Trans Union, LLC*, 402 F.3d 340, 342 (2d Cir. 2005). A subsequent Second Circuit panel reaffirmed that the *McCauley* rejection of mootness by unaccepted offer was still the law of the circuit, distinguishing *Doyle*. Cabala v. Crowley, 736 F.3d 226, 230 (2d Cir. 2013) (distinguishing the *Doyle* defendant's offer of judgment "resolving all points in dispute and leaving no conflict over the 'nature and form' of settlement" from an "offer of an informal settlement without judgment" insufficient to moot a plaintiff's claim.).

94. *McCauley*, 402 F.3d at 342.

95. *Id.*

96. *See id.* ("*Chathas* points the way to a better resolution: entry of a default judgment against Trans Union for $240 plus reasonable costs. Such a judgment would remove any live controversy from this case and render it moot.").

97. *See* Diaz v. First Am. Home Buyers Prot. Corp., 732 F.3d 948, 954 (9th Cir. 2013) ("We are persuaded that Justice Kagan has articulated the correct approach.").

98. *See* Stein v. Buccaneers Ltd., 772 F.3d 698, 703 (11th Cir. 2014) ("We agree with the *Symczyk* dissent. But even if we did not, we would be unable to affirm the dismissal of the plaintiffs' claims without the entry of judgment for the amount of the Rule 68 offers.").

99. *See McCauley*, 402 F.3d at 341.

100. *See id.* at 341.

out admitting liability.[101] That being said, the best resolution was entering default judgment on the "public record" against Trans Union based on the terms of its offer, satisfying McCauley's desire for a non-confidential disposition.[102] The *Diaz* court reversed the district court's mootness by unaccepted offer dismissal of Diaz's individual claim, agreeing that a court "may have discretion to halt a lawsuit by entering judgment for the plaintiff when the defendant unconditionally surrenders and only the plaintiff's obstinacy or madness prevents her from accepting total victory."[103] This high standard was not met when Diaz refused First American's settlement offer, however, despite the district court's finding that the offer "fully satisfied" her individual claims.[104]

Although still a minority view, more courts are beginning to acknowledge the problems with MUO doctrine.[105] In the absence of a Supreme Court decision rejecting MUO, however, many courts remain bound by Circuit precedent dictating that it is the correct approach.[106]

C. IS A MIDDLE OF THE ROAD APPROACH POSSIBLE? THE SIXTH CIRCUIT APPROACH

The Sixth Circuit is currently alone in articulating an approach that attempts to find the middle ground between rejection of MUO and its full acceptance through the dismissal of cases

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101. *See id.* ("[A] party [cannot] force his opponent to confess to having violated the law, as it is always open to a defendant to default and suffer judgment to be entered against him without his admitting anything.").

102. *Id.* at 342.

103. Diaz v. First Am. Home Buyers Prot. Corp., 732 F.3d 948, 955 (9th Cir. 2013) (quoting Genesis Healthcare Corp. v. Symczyk, 133 S. Ct. 1523, 1536 (2013) (Kagan, J., dissenting)) (internal quotation marks omitted).

104. *Id.* at 951 (explaining that offer for $7,019.32 plus costs satisfied plaintiff's claims); *see also* Aderhold v. Car2go N.A., LLC, No. C13-489RAJ, 2014 WL 794805, at *2 (W.D. Wash. Feb. 27, 2014) (reaffirming that the "obstinacy or madness" standard is a demanding one that is not met when a plaintiff "hoping to represent a class" rejects an offer "more favorable than she could have obtained on her *individual* claim").

105. *See, e.g.*, Scott v. Westlake Servs. LLC, 740 F.3d 1124, 1126 n.1 (expressing the Seventh Circuit's willingness to reconsider mootness by unaccepted offer doctrine); Boucher v. Rioux, No. 14-CV-141-LM, 2014 WL 4417914, at *7 (D.N.H. Sept. 8, 2014) (finding that the vast majority of district courts that have considered the issue agree with Justice Kagan).

106. *See Boucher*, 2014 WL 4417914 at *5–*7 (listing the various district courts that acknowledge the validity of Justice Kagan's dissent while remaining bound by circuit precedent requiring application of mootness by unaccepted offer).

without ordering defendants to pay offered damages. On the one hand, the Sixth Circuit agrees "that an offer of judgment that satisfies a plaintiffs' entire demand" moots the case.[107] But on the other hand, it believes that the Second Circuit is correct that the "better approach" is to enter judgment "in accordance with the defendants' Rule 68 offer of judgment" rather than have plaintiffs lose outright.[108]

Although this approach is an improvement over full acceptance of MUO in that it accounts for the plaintiff's legal interest in actually receiving the damages the defendant offered, it does not seem fully compatible with the idea that the offer is sufficient to extinguish the case or controversy. Because Article III limits federal court jurisdiction, courts generally avoid issuing advisory opinions in the absence of a plaintiff's individual stake in an actual case or controversy.[109] If mootness is constitutionally based, it is less amenable to exceptions that allow a court's continued involvement, regardless of the reason.[110] Thus, there is at least some logical inconsistency to simultaneously adopting MUO and the Second Circuit's approach to disposing of cases by entering judgment.

Admittedly, any logical contradiction is minor. The Sixth Circuit still disposes of the case by entering judgment in accordance with the offer. Their involvement in the case after loss of subject matter jurisdiction is minimal. The Supreme Court has also recognized that prudential exceptions to mootness doctrine exist in some circumstances,[111] which should allow a court to order a defendant to pay offered damages for fairness reasons before disposing of a case.[112] Nevertheless, these justifications for the Sixth Circuit's approach do not address the logical inconsistency that

107. O'Brien v. Ed Donnelly Enterprises, Inc., 575 F.3d 567, 574 (6th Cir. 2009).

108. *Id.* at 575.

109. *See* Chafin v. Chafin, 133 S. Ct. 1017, 1023 (2013) (describing mootness doctrine).

110. *See* Hall, *supra* note 37, at 565–66 (explaining that mootness as constitutional bar cannot be reconciled with any prudential exceptions to mootness).

111. *Id.* at 563 (explaining that courts recognize various prudential exceptions to mootness); Watson, *supra* note 377, at 149–50 (explaining Court's recognition of the capable of repetition yet evading review prudential exception).

112. Courts recognize prudential exceptions to mootness when fairness, efficiency and other considerations appear to demand such an exception, such as when the claim is short lived but the wrong is likely to recur or because of "discretionary factors" such as "evidence of gamesmanship by a party in taking action that appears calculated to moot the case." Hall, *supra* note 37, at 563.

arises from court involvement in a case without jurisdiction, which limits its appeal as a solution to the MUO problem.

D. RATIONAL MOTIVATIONS FOR REJECTING OSTENSIBLY COMPLETE SETTLEMENT OFFERS?

A major unstated assumption underlying MUO is that plaintiffs have no reasonable motivations for rejecting Rule 68 offers that give them all the damages and costs to which they are entitled. This irrational-plaintiff assumption is particularly apparent in the Seventh Circuit's reasoning. In *Rand v. Monsanto*, Judge Easterbrook wrote that when the defendant's offer satisfying the plaintiff's monetary claims demonstrates that "there is no dispute over which to litigate," the plaintiff who rejects the offer is "refus[ing] to acknowledge" the lack of dispute and should "lose[ ] outright," making it proper for the district court to dismiss the case without ordering the defendant to pay.[113] In *Griesz v. Household Bank*, Judge Posner argued that a defendant's settlement offer of complete monetary relief amounts to a plaintiff's victory and that plaintiffs simply "cannot persist in suing after [they]'ve won."[114] A plaintiff's decision to reject the offer is inherently unreasonable[115] and requires both dismissal of her claim and the loss of offered attorney's fees and damages.[116]

When taken in the context of dismissing the case and denying the plaintiff the benefit of promised damages, dismissal of MUO cases appears to punish plaintiffs for intransigency and unreasonable behavior in refusing to settle.[117] Regardless of courts' intent, the dismissal of cases as moot without ordering defendants to pay has the practical effect of punishing plaintiffs for their refusal to settle.

In actuality, plaintiffs that reject Rule 68 offers for seemingly complete relief may have rational motivations separate from their

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113. Rand v. Monsanto Co., 926 F.2d 596, 598 (7th Cir. 1991) (internal citations omitted).

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

115. *See id.* ("Once a party has won his suit and obtained the attorney's fees that were reasonably expended on winning, additional attorney's fees would not be *reasonably* incurred.").

116. *See id.* ("[B]y spurning the defendant's offer, [lawyer] shot both himself and his client in the foot. He lost his claim to attorney's fees by turning down the defendant's offer to pay them, and [plaintiff] lost $1,200.").

117. *See id.* (explaining that plaintiff cannot reasonably incur more litigation expenses after refusing settlement offer).

monetary interest in the case. Often, the plaintiffs have pursued, or plan to pursue, class or collective action certification.[118] Sometimes they hope that the court will find on the record that the defendants were liable for wrongdoing.[119] The plaintiffs are not always entitled to the fulfillment of these nonmonetary interests,[120] but the interests themselves are generally justifiable and hardly abusive.[121] The idea that there is a serious risk of irrational plaintiffs holding defendants hostage to protracted, purposeless litigation appears to be a red herring.[122] It certainly does not reflect the reality in mootness by unaccepted offer cases.[123]

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118. *See* Koysza, *supra* note 1, at 789 (arguing that there was a "growing trend" of class action defendants "embrac[ing] the Rule 68 mechanism" to thwart class actions); Saunders, *supra* note 22, at 2 (describing pre-certification motion Rule 68 offers as an "important defense tool in fending off class actions").

119. *See* Samsung Elecs. Co. v. Rambus, Inc., 523 F.3d 1374, 1377 (Fed. Cir. 2008) (explaining that Samsung rejected settlement offer satisfying attorney's fees claim in order to seek judgment finding that Rambus engaged in spoliation of evidence); McCauley v. Trans Union, LLC., 402 F.3d 340, 341 (2d Cir. 2005) (discussing plaintiff's interest in a judgment on public record and finding of defendant's liability); Boucher v. Rioux, No. 14-CV-141-LM, 2014 WL 4417914, at *8 (D.N.H. Sept. 8, 2014) (describing plaintiff's stated interest in the defendant employee's accepting responsibility and apologizing for role in fatal accident).

120. *See McCauley*, 402 F.3d at 341–42 (explaining that plaintiff is not entitled to finding of defendant's liability).

121. Wanting a court to find a defendant liable for wrongdoing and for such a ruling to have precedential effect is arguably part of most plaintiffs' motives when they bring suit. Thus, it seems unlikely that courts would see such motives as inherently irrational or abusive. Because of Rule 68's cost-shifting mechanism and the substantive law surrounding plaintiff's claims, there are times when plaintiff's refusal to settle could still prove to be irrational in purely financial terms. *See Boucher*, 2014 WL 4417914 at *8 (explaining that state tort law and Rule 68 could operate to make it extremely costly for plaintiff to refuse to settle).

122. Even if Rule 68 is designed to protect defendants from unreasonable plaintiffs, only one of the mootness by unaccepted offer cases cited in this Note arguably involved a situation where the court considered the plaintiff to be behaving unreasonably. *See* Greisz v. Household Bank (Illinois), N.A., 176 F.3d 1012, 1014 (7th Cir. 1999); Bone, *Encourage Settlement*, *supra* note 28, at 1562–63 (explaining the unreasonable plaintiff model of Rule 68).

123. The one possible exception is *Greisz v. Household Bank*, where an attorney with a reputation amongst both federal and state judges for incompetence in filing class actions urged a plaintiff to reject a settlement offer in hopes of pursuing a class action and receiving attendant attorney's fees. *See Greisz*, 176 F.3d at 1015. Even then, the court denied class certification on the basis of the plaintiff's attorney's suitability as a representative and not on the merits of the case. *See id.* at 1013 ("The principal ground on which the district court denied class certification was the proved incapacity of the lawyer for the class, Joseph A. Longo, to litigate a class action.").

IV. THE NORMATIVE IMPLICATIONS OF MOOTNESS BY UNACCEPTED OFFER

Some might argue that the practical implications of resolving the MUO question are quite limited, both because judges retain discretion to dispose of cases prior to trial and because the settlement offers are often for relatively small amounts.[124] However, MUO takes on greater significance when considered in light of the various normative problems that the increasing prevalence of settlement[125] and the vanishing civil trial raise.[126] It also contributes to the decline of class actions as a viable mechanism,[127] particularly for plaintiffs with small claims such as those arising under consumer protection statutes.[128] These trends are well documented by recent scholarship and show no signs of abating.[129] Because MUO contributes to increased settlement and

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124. As most of these cases are class actions, individual plaintiffs are generally entitled to very little. The settlement offers in question range from $240 plus costs to $7,500 plus costs. *See* Genesis Healthcare Corp. v. Symczyk, 133 S. Ct. 1523, 1527 (2013); *McCauley*, 402 F.3d at 341.

125. *See* Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1075 (1984).

126. *See* Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. REV. 286, 296 (2013) [hereinafter Miller, *Simplified Pleading*] (arguing that judges face increasing pressure to use discretion to engage in judicial management that prevents cases from reaching trial on the merits); Arthur R. Miller, *The Pretrial Rush to Judgment: Are the "Litigation Explosion," "Liability Crisis," and Efficiency Cliches Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. REV. 982, 984 (2003) [hereinafter Miller, *Pretrial Rush*] (arguing that "litigation explosion" argument is a myth but nonetheless is highly influential).

127. Language adopted from the title of Robert H. Klonoff, *The Decline of Class Actions*, 90 WASH. U. L. REV. 729, 731 (2013). *See also* Linda S. Mullenix, *Aggregate Litigation and the Death of Democratic Dispute Resolution*, 107 NW. U. L. REV. 511, 517–31 (2013) (summarizing history of class actions and identifying several events constituting "deaths" of class actions including passage of the Class Action Fairness Act, *Wal-Mart v. Dukes*, 131 S. Ct. 2541 (2011) and disallowance of class wide arbitration in *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740 (2011)); Myriam Gilles, *Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action*, 104 MICH. L. REV. 373, 375–76 (2005) (arguing that class actions could become "extinct" because courts will uphold class action waivers requiring arbitration of claims against corporate entities).

128. John L. Ropiequet, Nicole Frush Munro & Laurie A. Lucas, *Introduction to the 2014 Annual Survey of Consumer Financial Services Law*, 69 BUS. LAW 521, 524 (2014) (describing recent trend of using Rule 68 offers to try to moot FDCPA and TCPA class actions).

129. *See* E. Donald Elliott, *Managerial Judging and the Evolution of Procedure*, 53 U. CHI. L. REV. 306, 308 (1986) ("Originally created as a set of techniques to narrow issues for trial, managerial judging has recently become a set of techniques for inducing settlements."); Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 460 (2004) (arguing that data demonstrates ongoing decline in both absolute number and rate of civil trials);

judicial management trends that raise procedural obstacles to trial on the merits, the widespread acceptance of the doctrine leads to the same significant normative implications as the vanishing civil trial and the prioritization of efficiency at the expense of other values.

A. MOOTNESS BY UNACCEPTED OFFER AS A CONTRIBUTING FACTOR TO LARGER TRENDS TOWARDS INCREASED SETTLEMENT AND DECREASED TRIAL ON THE MERITS

Acceptance of MUO arguably forces plaintiffs to accept settlement offers.[130] Because plaintiffs know that their cases will be dismissed regardless of their response to the defendant's offer of complete monetary relief, there is coercive pressure to accept. Rejection could leave the plaintiff empty-handed.[131] Even if the judge enters judgment and orders defendants to pay offered damages while accepting mootness by unaccepted offer as in the Sixth Circuit, judgment is imposed on the unwilling plaintiff without the court evaluating whether further litigation would truly serve no purpose.[132] Insofar as plaintiffs have the right to make their own strategic litigation decisions, it is discomfiting that the defendant and judge may act in a way that deprives plaintiffs of any meaningful choice regarding whether to settle.

Furthermore, MUO presents an obstacle to trial on the merits because it gives judges an additional basis for disposing of a case

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John Lande, *How Much Justice Can We Afford?: Defining the Courts' Roles and Deciding the Appropriate Number of Trials, Settlement Signals, and Other Elements Needed to Administer Justice*, 2006 J. DISP. RESOL. 213, 224 (2006) (describing how litigants increasingly rely on alternative dispute resolution measures that lead to settlement as opposed to relying on trial). *See also* Klonoff, *supra* note 127, at 731 (describing how law is becoming increasingly unfavorable to class action certification); Miller, *Simplified Pleading*, *supra* note 126, at 295–96 (stating problems he identified in 2003 with decreasing access to civil trial have only increased).

130. If parties "lose[ ] outright" once the defendant's offer removes their stake in the case, then the case is over and will be dismissed regardless of what the plaintiff does. Rand v. Monsanto Co., 926 F.2d 596, 598 (7th Cir. 1991). The defendant has ended the case through their unilateral decision to extend a settlement offer that purports to give the plaintiff all the relief to which they are entitled.

131. The Federal and Seventh Circuits have explicitly approved dismissal without ordering the defendant to pay offered damages. District courts in the Third Circuit's jurisdiction also believe this is the correct outcome under the circuit's precedents. *See supra* note 79 and accompanying text.

132. *See* O'Brien v. Ed Donnelly Enter., Inc., 575 F.3d 567, 576 (6th Cir. 2009) (accepting mootness by unaccepted offer while entering default judgment pursuant to defendant's offer).

prior to discovery or trial.[133] The same interests in efficiency and judicial economy that influence the use of judicial management techniques[134] arguably make judges more willing to dismiss a case on the basis of an unaccepted settlement offer without seriously considering the plaintiff's possibly rational reasons for refusal.[135] Thus, MUO logically connects to the trend of increased judicial case management and thus contributes to the vanishing trial.[136]

While dismissal for mootness might more properly be considered part of a judge's traditional adjudicatory functions rather than as one of the newer techniques normally considered to be part of managerial judging,[137] dismissal can be a management decision in the sense that it removes a case from the judge's docket, allowing the court to turn to more deserving cases. While dismissal for mootness appears to be based solely on legal rules rather than efficiency concerns, Arthur Miller has argued that judges increasingly respond to broad pressure to value manage-

133. In the mootness by unaccepted offer circuits, courts would dismiss the case after the settlement offer moots the plaintiff's claim were it not for remaining issues of collective action certification. *See* Zariski et al., *supra* note 36, at 78–80.

134. *See* Miller, *Simplified Pleading*, *supra* note 126, at 292–96 (explaining that judges increasingly look to judicial management to streamline heavy caseloads and handle increasingly complex litigation); Michael E. Tigar, *Pretrial Case Management Under the Amended Rules: Too Many Words for A Good Idea*, 14 REV. LITIG. 137, 152–53 (1994) (arguing that one main motivation for judicial case management is efficiency and speed, possibly at expense of other values if management is applied unwisely); Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 378 (1982) (recognizing that judges increasingly engage in "case management" to facilitate moving cases towards resolution and possible settlement rather than trial). *See also* Elliott, *supra* note 129, at 408.

135. Justice Kagan argued in *Genesis Healthcare* that in collective action situations, "[i]t is our plaintiff Smith's choice, and not the defendant's or the court's, whether satisfaction of her individual claim, without redress of her viable classwide allegations, is sufficient to bring the lawsuit to an end," making it problematic for courts to dismiss cases because of mootness by unaccepted offer. Genesis Healthcare Corp. v. Symczyk, 133 S. Ct. 1523, 1536 (2013) (Kagan, J., dissenting). Additionally, while the proposed approach still allows judges to intervene when the plaintiff's "obstinacy or madness" motivates their refusal to accept settlement, this has only occurred in *Griesz*. There, the denial of class certification (that rendered plaintiff's refusal unreasonable) was not itself related to the merits of the case. *Id.* *See also* discussion *supra* Part III.D.

136. See Miller, *Pretrial Rush*, *supra* note 126, at 1006 (arguing that the "[case management's] aggressive use clearly facilitates pretrial disposition"); Miller, *Simplified Pleading*, *supra* note 126, at 296 (describing scholarly debate regarding whether judicial case management "impair[s] the ability to secure a trial on the merits" and "dilute[s] the stature of jury trials").

137. *See* Resnik, *supra* note 134, at 378–80 (summarizing managerial judging as including negotiations with parties about course, timing, and scope of litigation, schemes for speeding up resolution of cases, and potentially encouraging parties to settle rather than try cases).

ment, efficiency, and settlement over traditional adjudication.[138] Such considerations lie in the background as judges consider whether to apply MUO.

Finally, because MUO generally arises in class actions, it contributes to the decline of the class action mechanism. The decreasing viability of the class action mechanism frustrates the mechanism's policy goals of allowing groups of plaintiffs to bring small claims and equalize power between parties by pooling claims.[139]

Class actions do, however, have many vehement critics. Some argue that class actions are an unfair procedural device that coerces settlement,[140] incentivizes profiteering by plaintiffs' attorneys,[141] and has undemocratic implications.[142] Whether or not class actions are ultimately desirable, collective action devices remain necessary because they might be the only economically feasible means for litigating certain claims.[143] Thus, any move that undermines class actions makes it more difficult for plaintiffs to bring suit in some contexts and will therefore contribute to reduced enforcement of some laws, particularly consumer protection laws that provide for small damages claims.[144]

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138. *See* Miller, *Simplified Pleading*, *supra* note 126, at 295 (describing general shift in judicial orientation towards management rather than traditional adjudication). *See also id.* at 357–58 (arguing that a settlement culture and dismissal culture now pervades federal litigation practice).

139. *See* Alexandra D. Lahav, *Symmetry and Class Action Litigation*, 60 UCLA L. REV. 1494, 1497 (2013) [hereinafter Lahav, *Symmetry*] (summarizing traditional policy goals of the class action device).

140. *See, e.g.*, David Marcus, *The History of the Modern Class Action, Part i: Sturm Und Drang, 1953–1980*, 90 WASH. U. L. REV. 587, 611–12 (2013) (summarizing common criticisms of class actions throughout history including that they extort settlements and thus harm businesses).

141. *See* Gilles, *supra* note 127, at 373–74 (summarizing arguments regarding plaintiff's attorney manipulation of class action mechanism for profit and how class actions are inefficient from law and economics perspective); Marcus, *supra* note 140, at 611–12 (describing common criticisms of class actions).

142. *See* Mullenix, *supra* note 127, at 514–15 (quoting MARTIN H. REDISH, WHOLESALE JUSTICE: CONSTITUTIONAL DEMOCRACY AND THE PROBLEM OF THE CLASS ACTION LAWSUIT (2009)) (summarizing Professor Martin Redish's argument that many class actions do not cover real Article III cases or controversies and that settlement of classes under Rule 23 may be "an unconstitutional exercise of judicial authority").

143. *See* CONTE & NEWBERG, *supra* note 43 at § 2:9 (quoting Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 161 (1974)) (explaining that in complex cases where plaintiffs are only entitled to low damages awards "economic reality" dictates that suit proceeds "as a class action or not at all").

144. The vast majority of cases discussing MUO are putative class actions concerning the Fair Debt Collection Practices Act ("FDCPA") and the Telephone Consumer Protection

B. MOOTNESS BY UNACCEPTED OFFER'S LARGER NORMATIVE IMPLICATIONS: THE PROBLEM WITH SETTLEMENT, EQUALITY BETWEEN PARTIES, AND PLAINTIFF CHOICE

Given the manner in which MUO forces settlement, adds to the obstacles to trial on the merits by facilitating dismissal, and decreases the viability of collective action mechanisms,[145] the doctrine is necessarily bound up in many of the largest ongoing normative debates regarding civil procedure and the proper role of courts in American society. Settlement and decreasing access to trial on the merits implicates problems of inequality between parties.[146] Anything that contributes to the vanishing trial phenomenon is harmful because the Constitution,[147] the ideal that parties should have their day in court,[148] and Federal Rules of Civil Procedure all recognize that adjudication by trial has some inherent value and is an essential right.[149] While some might argue that changes to the MUO doctrine have minimal benefits and frustrate necessary goals of judicial economy, our society and laws recognize that judicial economy should generally not be valued at the expense of fairness.[150]

Act ("TCPA"), each of which entitles prevailing plaintiffs to small damages claims. Another segment of cases are putative FLSA collective actions.

145. *See supra* Part II.C (explaining how mootness by unaccepted offer allows picking off problem in collective actions).

146. *See* Fiss, *supra* note 125, at 1076–78 (discussing how settlement exacerbates economic inequalities between parties); Miller, *Simplified Pleading, supra* note 126, at 366–67 (arguing that decreased access to trial primarily benefits repeat player defendants like large businesses and governmental entities).

147. *See* U.S. CONST. amend. VII ("In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved.").

148. *See* Martin v. Wilks, 490 U.S. 755, 761–62 (1989) (acknowledging "deep-rooted historic[al] tradition that everyone should have his own day in court" while discussing non-party preclusion); Robert G. Bone, *Rethinking the "Day in Court" Ideal and Nonparty Preclusion*, 67 N.Y.U. L. REV. 193, 232 (1992) [hereinafter Bone, *Rethinking*]; Miller, *Pretrial Rush, supra* note 126, at 1134 ("Taking decisionmaking authority from juries runs counter to basic and long-cherished principles in our system."); Martin H. Redish & William J. Katt, *Taylor v. Sturgell, Procedural Due Process, and the Day-in-Court Ideal: Resolving the Virtual Representation Dilemma*, 84 NOTRE DAME L. REV. 1877 (2009) (arguing that the Supreme Court made clear that day in court ideal is law by articulating a procedural due process jurisprudence).

149. *See* FED. R. CIV. P. 1 ("These rules govern the procedure in all civil actions and proceedings in the United States district courts. . . . They should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding.").

150. *See* Miller, *Simplified Pleading, supra* note 126, at 367 (arguing that right to access courts has much less value if developments such as increased judicial management means access to courts is no longer meaningful); Resnik, *supra* note 134, at 430–31 (argu-

Some scholars express concern about the potential harms of settlement and thus of settlement promotion.[151] Owen Fiss's seminal article argued that settlement is problematic for several reasons. Settlement exacerbates existing economic and power imbalances between parties because judges have fewer opportunities to exercise their power to "lessen the impact of distributional inequalities" when cases rush to settlement.[152] Our civil procedure rules do not provide judges with adequate mechanisms for ensuring that settlement outcomes correspond with the merits of a case.[153]

Others might argue that the promotion of settlement is a neutral goal because both sides benefit from the earlier resolution of cases and plaintiffs in particular receive "compensation at an earlier date without the burdens, stress, and time of litigation" when they settle.[154] However, even staunch defenders of settlement would likely reject forced settlement. After all, settlement is meant to be a "voluntary mechanism" representing a choice by both sides to end a dispute on mutually acceptable terms just as any contractual agreement is predicated on mutual assent.[155]

Furthermore, our laws give some weight to the value of a plaintiff's autonomy in presenting the issues as they wish and having their own day in court through the nonparty preclusion doctrine.[156] Party choice is important, particularly in the settlement context because of its contract-like nature. Courts should view with suspicion any legal rule that presumes a plaintiff's irrationality and arguably coerces her to settle.

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ing that managerial judging in interests of efficiency could be harmful by contradicting due process ideals).

151. *See* Fiss *supra* note 125, at 1075. *See also* Simon, *supra* note 29, at 1–4 (commenting that ongoing debate over Rule 68 is essentially a debate over whether settlement promotion is a legitimate goal).

152. Fiss, *supra* note 125, at 1076–78.

153. *See* J. Maria Glover, *The Federal Rules of Civil Settlement*, 87 N.Y.U. L. REV. 1713, 1716–17 (2012) (arguing that FRCP does not adequately address settlement negotiations).

154. *Marek v. Chesny*, 473 U.S. 1, 10 (1985).

155. *See* Fiss, *supra* note 125, at 1073 (quoting Derek Bok, *A Flawed System of Law Practice and Training*, 33 J. LEGAL EDUC. 570, 582 (1983)). *See also* Brief for the United States, *supra* note 70 at 12 ("If a plaintiff has Article III standing . . . we are aware of no judicial power to force the plaintiff involuntarily to *accept* a defendant's post-suit settlement offer. Such compulsion would be inconsistent with the basic contract principle of mutual assent.").

156. *See* Bone, *Rethinking, supra* note 148, at 232 (summarizing how day in court ideal leads to an inference of freedom of strategic choice in the nonparty preclusion context).

Although it appears uncontroversial that judges must take efficiency considerations seriously and should be able to manage their dockets as they see fit, trends that affect how they do so naturally affect the functioning of our society's litigation system. The choices that judges make when managing cases implicate crucial questions regarding the role of the courts, the proper extent of judicial discretion, and how to address the increasing costs and delays associated with the litigation process.[157] Thus, the MUO problem implicates these larger normative questions as well. Especially insofar as the "litigation explosion" idea might well be a myth given vanishing trial statistics,[158] it seems problematic that trends of increased judicial management and other developments in civil procedure doctrine have created a settlement and dismissal culture that pervades federal litigation practice.[159]

Moreover, scholars have noted that the increasing focus on efficiency seen in the trend towards judicial case management could come at the expense of traditional due process and fairness ideals.[160] Efficiency-related trends that contribute to the disappearance of civil trials have favored defendants in general[161] and

157. *Id.* at 257–58. *See also* Steven S. Gensler, *Judicial Case Management: Caught in the Crossfire*, 60 DUKE L.J. 669, 672–73 (2010) (arguing that case management must be analyzed in context of our larger dispute-resolution system and implicates larger normative questions about role of courts and judges, the proper degree of judicial discretion, and solutions for litigation costs and delays).

158. *See* Miller, *Pretrial Rush*, *supra* note 126, at 1134 (explaining that the "litigation explosion" idea has been highly influential on policy-makers and judges but is likely a myth). *See also* Galanter, *supra* note 129, at 460 (arguing that data shows sharp decline in number and percent of civil trials.)

159. *See* Miller, *Simplified Pleading*, *supra* note 126, at 295 (describing general shift in judicial orientation towards management rather than traditional adjudication). *See also id.* at 357–58 (arguing that a settlement culture and dismissal culture now pervades federal litigation practice).

160. *See* Miller, *Pretrial Rush*, *supra* note 126, at 1134 (arguing that "today's rhetoric about the 'litigation explosion,' a 'liability crisis,' sham or frivolous litigation, and undue burdens on the business community" may cause judges "to justify resorting to pretrial disposition too readily because they believe that there is a need to alleviate overcrowded dockets"); Resnik, *supra* note 134, at 424–25 ("Judicial management has its own techniques, goals, and values, which appear to elevate speed over deliberation, impartiality, and fairness."). *But see* Elliott, *supra* note 129, at 335–36 (concluding that although case management techniques are not extremely well suited to solve the problems of increased caseloads and delays in litigation, there is some validity to judicial case management, particularly at pretrial stage).

161. *See* Miller, *Simplified Pleading*, *supra* note 126, at 366–67 (arguing that "procedural stop signs" inherently favors defendants because it allows them to escape moving forwards to trial on the merits). *See also* Jack B. Weinstein, *The Role of Judges in A Government of, by, and for the People: Notes for the Fifty-Eighth Cardozo Lecture*, 30 CARDOZO

more powerful entities like corporations in particular,[162] thus contributing to inequality between parties in the litigation process.

V. PROPOSING A SOLUTION: REJECTING MOOTNESS BY UNACCEPTED OFFER

This Note proposes that courts adopt the reasoning of Justice Kagan's *Genesis Healthcare* dissent and follow the Second Circuit's approach to disposing of cases when further litigation is unnecessary: Courts should find that unaccepted Rule 68 settlement offers are, by definition, insufficient to moot a plaintiff's claims regardless of whether the offers include all damages and costs to which the plaintiff is legally entitled. Because settlement offers cannot moot a plaintiff's individual claims and because collective action cases necessarily include both a plaintiff's individual claims as well as class-related ones, defendants should no longer be permitted to pick off representative plaintiffs and prevent putative collective actions from proceeding to the certification stage with Rule 68 offers.[163]

Courts may still dispose of a case against the plaintiff's wish to continue litigating in certain circumstances because a defendant's settlement offer may demonstrate that a live legal dispute no longer exists. Before ending a case by entering judgment in accordance with the terms of the defendant's offer, however, a court must take several steps. First, the court must find that the defendant's offer is indeed complete, unequivocally offering the plaintiff a concrete amount encompassing all the damages and

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L. REV. 1, 112–13 (2008) (arguing that procedural trends that decrease number of trials almost necessarily favor defendants by raising obstacles for plaintiffs).

162. Most notably, Professor Miller argues that many of the Supreme Court justices and others within the judiciary have arguably taken on a "predilection (perhaps subliminal) that favors business and governmental interests" and that many judges "are disenchanted with civil litigation and wish to limit it. This, however, "negatively impacts access and works against those in our lower and middle economic classes who want entre to the civil justice system" and exacerbates existing social and economic inequalities. Miller, *Simplified Pleading*, *supra* note 126, at 366–67.

163. *See* Genesis Healthcare Corp. v. Symczyk, 133 S. Ct. 1523, 1536 (2013) (Kagan, J., dissenting) (explaining that mooting of representative plaintiff claims cannot moot class actions or FLSA collective actions); Sosna v. Iowa, 419 U.S. 393, 402 (1975) (explaining that class interests are separate from those of individual plaintiffs in class actions).

costs that the plaintiff is legally entitled to obtain at trial.[164] The parties would be responsible for clarifying these dollar amounts through interrogatories or other communications if the sufficient amount is not defined by statute. Second, a court must consider whether the plaintiff has legitimate nonmonetary interests that the settlement offer fails to satisfy.[165] If the offer includes all damages and costs to which the plaintiff is legally entitled and there are no additional nonmonetary interests that the offer does not satisfy, then the court may enter default judgment pursuant to the offer's terms.

Finally courts should also consider both parties' motives. Are the defendants attempting to pick off representative plaintiffs to short circuit a potential collective action suit? Are the plaintiffs trying to persist in litigating their claims out of spite?[166] These factors could assist the court in making its decision as it decides whether further litigation would truly serve no purpose.[167] Part V.A further explains the factors that a court should take into account prior to disposing of a case under the proposed approach.

Although most circuits currently accept MUO, there are several reasons to reject this doctrine. Part V.B discusses the main advantages of the alternative proposal. Part V.C addresses the specific advantages of the proposal over the Sixth Circuit's approach. Part V.D concludes by addressing possible counterarguments against and shortcomings to the proposed approach.

A. WEIGHING A PLAINTIFF'S LEGITIMATE NONMONETARY INTERESTS AGAINST A POSSIBLE LACK OF LIVE LEGAL DISPUTE

Courts that adhere to the mootness by unaccepted offer approach generally believe that if a defendant's settlement offer includes the entire dollar amount of the damages and costs that the plaintiff is entitled to, then the offer satisfies all the plaintiff's claims. A settlement offer's monetary completeness is important

164. *See* Warren v. Sessoms & Rogers, P.A., 676 F.3d 365, 370–71 (4th Cir. 2012), *as amended* (Feb. 1, 2012) (requiring that settlement offers be unequivocal in offering specific amount to moot plaintiff's claims).

165. *See* McCauley v. Trans Union, LLC, 402 F.3d 340, 342 (2d Cir. 2005) (finding that defendant's settlement offer did not moot case and that entering judgment would account of plaintiff's interest in judgment on the record).

166. *See* Bone, *Encourage Settlement*, *supra* note 28, at 1574 (explaining when a plaintiff's motivations for rejecting settlement should be considered unreasonable).

167. *See* Brief for the United States, *supra* note 70, at 14 (arguing that "proper course" is to enter default judgment when "further litigation would serve no purpose").

because it indicates that the defendant is willing to pay and does not contest the amount of the damages.

Nonetheless, courts should recognize that plaintiffs might have other nonmonetary interests in their claims and evaluate whether a settlement would address those interests.[168] If a settlement adequately addresses those interests, then the proposal allows a court to enter judgment according to the terms of the defendant's settlement offer prior to ending the case.[169] Examples of reasonable nonmonetary plaintiff's interests that courts should respect include interests in class or collective action certification, and an interest in a judgment being on the public record.[170] Although a plaintiff is not entitled to findings of a defendant's wrongdoing, a plaintiff does not act abusively or unreasonably merely by having that interest.[171]

The Second Circuit's approach in *McCauley* is preferable to the Ninth Circuit's in *Diaz*. *McCauley* provides a clearer standard for when it is appropriate to dispose of a case. Under *McCauley*, courts may enter default judgment if an offer accounts for all claims (monetary and nonmonetary) to which the plaintiff is entitled.[172] This is a better course than making entry of judgment hinge primarily on the issue of the plaintiff's obstinacy or madness.[173] In contrast, the *Diaz* court fully adopted Justice Kagan's reasoning, reversing a district court dismissal based on mootness by unaccepted offer without clarifying whether the district court should enter judgment without a finding of the plaintiff's "obstinacy or madness."[174] This might excessively constrain district courts' discretion to enter judgment when a defendant offers a plaintiff complete relief.[175]

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168. In order for further litigation to be truly futile, which then justifies a court's disposal of the case through entry of default judgment, courts should take a broad view of a plaintiff's legal interests in their case. *See* Brief for the United States, *supra* note 70, at 13–14.

169. *See McCauley*, 402 F.3d at 342.

170. *See id.* at 342. *See also* Genesis Healthcare Corp. v. Symczyk, 133 S. Ct. 1523, 1536 (2013) (Kagan, J., dissenting).

171. *See* discussion *supra* Part III.D.

172. *See McCauley*, 402 F.3d at 342.

173. *See* Diaz v. First Am. Home Buyers Prot. Corp., 732 F.3d 948, 955 (9th Cir. 2013) (quoting *Genesis Healthcare*, 133 S. Ct. at 1536 (Kagan, J., dissenting)).

174. *See id.* at 955.

175. *See, e.g.*, Aderhold v. Car2go N.A., LLC, No. C13-489RAJ, 2014 WL 794805, at *2 (W.D. Wash. Feb. 27, 2014) (noting that plaintiff that rejects "an offer more favorable than she could have obtained on her *individual* claim" is "insufficiently obstinate or mad" to allow the district court to enter judgment under *Diaz*).

Although Justice Kagan was correct to emphasize that there should be a presumption against entry of default judgment, it is not entirely clear that entry of default judgment is only appropriate when a plaintiff is motivated by obstinacy or madness. The *Diaz* court referenced that standard without explaining whether the defendant's settlement offer was incomplete.[176] Diaz had already lost her class certification motion.[177] If the settlement offer gave her all that she was legally entitled to (taking into account both her monetary and nonmonetary interests), then a district court should enter default judgment according to the offer's terms.

B. ADVANTAGES OF REJECTING MOOTNESS BY UNACCEPTED OFFER

There are four primary reasons to reject MUO while following the Second Circuit's approach to dispose of cases through entry of default judgment in some circumstances. First, it is more consistent with the text and purpose of Rule 68, even if the rule's primary purpose is actually to protect defendants from irrational plaintiffs. Second, it is based on a better understanding of how current mootness doctrine and the legal effects of unaccepted offers interact. Third, it entirely prevents defendants from frustrating the policy goals of class and FLSA collective actions through the picking off of representative plaintiffs. Finally, the proposed approach has additional normative benefits in terms of protecting equality between parties and access to trial on the merits.

1. *Consistency with the Text and Purpose of Rule 68*

Rule 68's text provides no justification for allowing a defendant's settlement offer to moot an individual plaintiff's claims if

176. *Compare Diaz*, 732 F.3d at 955 (remanding case because court need not enter default judgment in absence of plaintiff's obstinacy or madness), *with McCauley*, 402 F.3d at 342 (entering default judgment because it would account for all legal interests plaintiff is entitled to), *and* Brief for the United States, *supra* note 70, at 14 (arguing that entry of default judgment is only appropriate when "further litigation would serve no purpose").

177. *See Diaz*, 732 F.3d at 949 (explaining that plaintiff lost her class certification motion).

the plaintiff does not accept.[178] The rule makes clear that an unaccepted offer is "considered withdrawn" and "not admissible except in a proceeding to determine costs."[179] Even the conventional understanding that Rule 68's purpose is settlement promotion does not justify reading the rule in a way that allows an unaccepted and thus "withdrawn" offer to automatically moot the plaintiff's case.[180] Rule 68 incentivizes settlement through a cost-shifting provision,[181] not through pressuring plaintiffs into forced settlements by threatening them with dismissal for rejecting the offer.[182]

Even if Rule 68 is designed to deter irrational and unfair plaintiff behavior in rejecting settlement offers,[183] courts that adhere to mootness by unaccepted offer do not determine whether the plaintiff is acting in bad faith before deeming the plaintiff's individuals claims moot.[184] Instead, MUO often allows defendants to engage in unfair strategic behavior to pick off collective action representative plaintiffs.[185] The irrational plaintiff model

178. *See Genesis Healthcare*, 133 S. Ct. at 1536 (2013) (Kagan, J., dissenting) ("For starters, Rule 68 precludes a court from imposing judgment for a plaintiff like Smith based on an unaccepted settlement offer made pursuant to its terms.").

179. FED. R. CIV. P. 68.

180. *See* Marek v. Chesny, 473 U.S. 1, 5 (1985) (holding that Rule 68's purpose is settlement promotion); Bone, *Encourage Settlement*, *supra* note 28 at 1562 (arguing that Rule 68 was actually modeled on state rules with narrow purpose of compensating defendants when plaintiffs unreasonably reject settlement offers).

181. FED. R. CIV. P. 68.

182. *See* Weiss v. Regal Collections, 385 F.3d 337, 340 (3d Cir. 2004) (implying that it would be proper to dismiss case in absence of class certification issues); Rand v. Monsanto Co., 926 F.2d 596, 597–98 (7th Cir. 1991) (arguing that plaintiffs would "lose[ ] outright" for rejecting settlement offer in absence of class certification questions).

183. *See* Bone, *Encourage Settlement*, *supra* note 28, at 1562 (arguing that Rule 68 was adopted from state rules designed to deter irrational plaintiffs).

184. Out of all the cases cited in this Note, only one involved a situation where the court believed that the plaintiff alone demonstrated unreasonable behavior by rejecting a settlement offer. Even then, the apparent unreasonableness stemmed partially from the idiosyncratic factor of the lawyer's incompetence rather than the merits of the plaintiff's claim. *See supra* notes 122–23 and accompanying text. Another case involved possible unreasonable behavior from both parties when they agreed to the amount of damages, but continued to dispute whether the attorney's fees would be paid in a lump sum and whether there should be a settlement or entry of judgment. *See* Cabala v. Crowley, 736 F.3d 226, 229 (2d Cir. 2013) ("It takes two to stage a useless litigation."). That court even found that "it was not per se unreasonable for [plaintiff] to continue to litigate the case." *Id.* at 230. That post-offer dispute resulted in almost $30,000 more in attorney's fees on top of a $1000 settlement offer and original attorney's fees of roughly $1242. Cabala v. Morris, No. 3:09-CV-651 VLB, 2012 WL 3656364, at *4–*8 (D. Conn. Aug. 24, 2012), *aff'd sub nom.*, Cabala v. Crowley, 736 F.3d 226 (2d Cir. 2013).

185. *See* Ruan, *supra* note 1, at 729 (explaining picking off problem in FLSA collective action context); Koysza, *supra* note 1, at 782 (discussing picking off problem in class action context).

of Rule 68 cannot justify an approach that both contradicts the text of Rule 68 and has the practical effect of forcing plaintiffs into settlements, especially when examples of irrational plaintiff behavior in mootness by unaccepted offer cases are extremely rare.[186]

2. *Consistency with Mootness Doctrine and Offer and Acceptance*

Under mootness doctrine, a case must be dismissed if it no longer presents a live case or controversy because federal courts no longer have subject matter jurisdiction.[187] A defendant's willingness to pay all the damages and costs to which a plaintiff is legally entitled can demonstrate that she concedes the damages, and that there is no longer a dispute as a result. However, the plaintiff still has a legal interest in receiving the promised damages. Logically, the plaintiff retains that interest until the moment when the judge orders the defendant to pay the offered damages.[188] An unaccepted offer cannot, by itself, satisfy the plaintiff's legal interest in getting what the defendant promised.

As Justice Kagan argues: "An unaccepted settlement offer — like any unaccepted contract offer — is a legal nullity, with no operative effect."[189] It is, after all, "well settled" under conventional understandings of offer and acceptance that an offer "imposes no obligation until it is accepted," and that a plaintiff's rejection "leaves the matter as if no offer had ever been made."[190] Unaccepted offers are therefore insufficient to extinguish a plaintiff's legal interest in their claims and moot her case.

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186. *See* discussion *supra* Part III.D.

187. *See, e.g.*, *Rand*, 926 F.2d at 598 (holding that it would be proper to dismiss case in absence of class certification issues).

188. *See* Brief for the United States, *supra* note 70, at 11–12 (explaining that plaintiff's legal interest cannot be extinguished until defendant pays offered damages); *Cabala*, 736 F.3d at 230 (explaining that it was rational for plaintiff to insist on entry of judgment when rejecting a settlement offer because unlike a "settlement agreement" that "must be interpreted and enforced by the state courts," a "judgment may be enforced using all the remedies available to a judgment creditor").

189. Genesis Healthcare Corp. v. Symczyk, 133 S. Ct. 1523, 1533 (2013) (Kagan, J., dissenting).

190. Brief for the United States, *supra* note 70, at 11 (quoting Minneapolis & St. Louis Ry. v. Columbus Rolling Mill, 119 U.S. 149, 151 (1886)).

3. *Foreclosing the Picking Off of Collective Action Plaintiffs*

Rejecting mootness by unaccepted offer ensures that the picking off strategy will no longer be viable for class or collective action defendants. If a settlement offer cannot automatically moot a plaintiff's claim, then a step that "is logically prior to" and necessary for successful picking off can no longer occur.[191] Keeping in mind that courts recognize class interests as separate from those of individual plaintiffs,[192] an offer to the individual plaintiff alone cannot, by definition, address those class interests.[193] If a settlement offer does not automatically extinguish a plaintiff's interest, it becomes doubly clear that a defendant's offer to the individual plaintiff fails to offer complete relief in a potential collective action case. Thus, Rule 68 offers to individual plaintiffs in potential collective action cases cannot provide truly complete relief and fail to meet the necessary precondition to a court's early disposal of a case under the proposed approach.[194]

Most circuits that allow settlement offers to moot a representative plaintiff's claims still protect the plaintiff's ability to pursue Rule 23 class certification, either by relation back or by preventing picking off whenever the plaintiff has already taken preliminary steps to initiate class certification.[195] However, such prudential exceptions to mootness generally hinge on questions of timing and additional findings such as whether the defendant is unfairly attempting to short circuit the class action or whether the plaintiff is filing for class certification motions in a timely fashion.[196] Furthermore, some courts explicitly reject relation

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191. *Genesis Healthcare*, 133 S. Ct. at 1534 (Kagan, J., dissenting).

192. *See* discussion *supra* Part II.C.

193. *See Genesis Healthcare*, 133 S. Ct. at 1536–37 (Kagan, J., dissenting) (arguing that settlement offer to representative cannot account for class member interests). *See also U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 402 (1980) (explaining that plaintiff "who brings a class action presents two separate issues for judicial resolution. One is the claim on the merits; the other is the claim that he is entitled to represent a class.").

194. *See* discussion *supra* Part IV.A. *See also* discussion *supra* Part IV.B.3.

195. *See* Sandoz v. Cingular Wireless LLC, 553 F.3d 913, 920–21 (5th Cir. 2008) (applying relation back); Weiss v. Regal Collections, 385 F.3d 337, 348 (3d Cir. 2004) (applying relation back doctrine). *See also* Lucero v. Bureau of Collection Recovery, Inc., 639 F.3d 1239, 1250 (10th Cir. 2011) (allowing district court to make decision on class certification where parties had agreed to schedule for class certification motions but before plaintiff filed for class certification); Rand v. Monsanto Co., 926 F.2d 596, 601 (7th Cir. 1991) (allowing plaintiff to appeal district court's earlier denial of class certification).

196. *See Lucero*, 639 F.3d at 1250 (allowing plaintiff to seek timely class certification); *Weiss*, 385 F.3d at 348 (finding no undue delay); Koysza, *supra* note 1, at 790–92 (explaining that the success of the picking off strategy hinges on timing).

back doctrine, even for Rule 23 class actions.[197] Additionally, some courts and litigants interpret *Genesis Healthcare* as questioning the validity of these prudential exceptions.[198]

Rejecting mootness by unaccepted offer therefore has at least three concrete benefits in the collective action context. First, it is a clearer and more efficient solution than the multiplicity of doctrines that courts currently rely on to continue hearing a collective action case after a plaintiff's individual claims are moot. Second, now that courts are beginning to question whether class actions can survive the mootness of a representative plaintiff's individual claims, rejecting MUO is a better way to prevent defendants from picking off class actions. Third, the Court's *Genesis Healthcare* ruling prevented lower courts from applying relation back doctrine to protect FLSA collective actions plaintiffs.[199] Unlike the majority or Sixth Circuit approaches, the proposed approach precludes defendants from picking off plaintiffs in FLSA collective actions.

Naturally, allowing the plaintiff to continue pursuing class certification does not by itself guarantee that she will be successful in obtaining it. Many scholars recognize that the overall trajectory of the laws surrounding class actions decreases the viability of the device.[200] Rejection of mootness by unaccepted offer doctrine would not solve this problem. Nevertheless, the proposed approach prevents defendants from using settlement offers to individual plaintiffs as another tool to halt class actions while giving additional protection to plaintiffs' ability to pursue FLSA collective actions.

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197. *See* Damasco v. Clearwire Corp., 662 F.3d 891, 896 (7th Cir. 2011) ("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.").

198. *See* Gomez v. Campbell-Ewald Co., 768 F.3d 871, 875 (9th Cir. 2014) (noting that Genesis Healthcare cast doubt on Roper's criticism of the picking off strategy); Saunders, *supra* note 22 (describing renewed trend of defendants attempting to pick off class action representatives).

199. *See* Genesis Healthcare Corp. v. Symczyk, 133 S. Ct. 1523, 1532 (2013).

200. *See* Gilles, *supra* note 127, at 375–76 (arguing that class actions could soon become "extinct" because courts will uphold class action waivers requiring arbitration of claims); Mullenix, *supra* note 127, at 516–31 (summarizing various statues and Supreme Court decisions that reduce the viability of class actions).

4. *Better Support of Certain Normative Values*

Because adherence to mootness by unaccepted offer acts as an obstacle to trial on the merits and exerts coercive pressure on plaintiffs to accept settlement, it connects to larger ongoing debates in civil procedure.[201] Furthermore, it is arguably an example of how assumptions regarding the "litigation explosion" have created a settlement and dismissal culture that has correlated with a trend towards judicial decisions that value efficiency at the possible expense of fairness and other normative values.[202] The proposed approach therefore better protects the normative values of equality between parties, plaintiff choice, and reaching trial on the merits than any available alternative.

Allowing settlement offers to moot plaintiffs' claims exacerbates inequalities between parties. By putting coercive pressure on plaintiffs to accept settlement offers that purport to offer them complete relief, it results in forced settlements. Involuntary settlement by unaccepted offer exacerbates inequality between the parties because it is a strategy that is available only to defendants.[203] Furthermore, the class action defendants that attempt to use MUO are generally corporate entities with considerably more economic resources than individual plaintiffs.[204]

Although rejection of MUO allows judges to enter default judgment in circumstances where plaintiffs are not legally entitled to anything more beyond what the defendants offer, this is only because the plaintiff truly cannot obtain more from trial.[205] The proposed approach better recognizes the importance of plain-

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201. *See* discussion *supra* Part IV.

202. *See* Miller, *Simplified Pleading*, *supra* note 126, at 302–07 (explaining that a strong public perception that a litigation explosion exists and needs to be controlled with reform has led into a trend towards "procedural changes that have resulted in the earlier and earlier disposition of litigation").

203. The nature of Rule 68 and settlement offers is such that defendants are, logically, the only ones who can extend settlement offers and moot a case by showing that they are willing to offer complete relief. Defendants derive strategic benefit from this. *See, e.g.*, Koysza, *supra* note 1, at 782 (discussing defendants' motives to pick off plaintiffs).

204. *See* CONTE & NEWBERG, *supra* note 43, at § 1:7 (explaining that class action defendants that have "harmed a large group of individuals" generally have "massive resources"). Because the vast majority of MUO cases involve individuals asserting small claims under the Fair Debt Collection Practices Act (FDCPA) or Telephone Consumer Protection Act (TCPA) in putative class actions, the defendant in question is normally a corporate entity that could have affected many individual plaintiffs with its conduct.

205. *See* Genesis Healthcare Corp. v. Symczyk, 133 S. Ct. 1523, 1536 (2013); Diaz v. First Am. Home Buyers Prot. Corp., 732 F.3d 948, 955 (9th Cir. 2013); McCauley v. Trans Union, LLC, 402 F.3d 340, 342 (2d Cir. 2005).

tiff choice in settlement by not assuming that a complete settlement offer allows dismissal of a plaintiff's claim. Entry of default judgment is only a safety valve for judges to use in limited instances rather than a general presumption that settlement can be required irrespective of a plaintiff's choice. Our society and litigation system value plaintiff choice by recognizing the importance of voluntariness in settlement and the potential problems with nonparty preclusion.[206] The proposed approach is more consistent with these normative values.

Rejecting MUO also removes one potential obstacle to trial on the merits because defendants can no longer unilaterally moot a plaintiff's case by merely extending a settlement offer. Our laws recognize that adjudication and trial on the merits have inherent value.[207] By recognizing that courts should only dispose of cases after confirming that further litigation would truly serve no purpose, the proposed approach provides better recognition of the value of trial on the merits and ensures that judicial management through entry of judgment should occur only if it accounts for all of the plaintiff's legitimate interests in a case.[208]

C. COMPARISON TO ALTERNATIVES

Because one major advantage of rejecting MUO is that it is better aligned with Rule 68's purpose and current mootness doctrine, none of the major alternatives are compelling. Following *Genesis Healthcare*, most courts to address MUO agree that Justice Kagan's reasoning is correct.[209] In comparison to the proposed approach, acceptance of MUO causes many normative problems. The Sixth Circuit's compromise between accepting mootness by unaccepted offer and allowing judges to enter default judgment based on settlement offers appears to lead to similar

206. *See* Brief for the United States, *supra* note 70, at 12 ("[W]e are aware of no judicial power to force the plaintiff involuntarily to *accept* a defendant's post-suit settlement offer. Such compulsion would be inconsistent with the basic contract principle of mutual assent."); Bone, *Rethinking*, *supra* note 148, at 231–32; Fiss, *supra* note 125, at 1073 (quoting Derek Bok, *A Flawed System of Law Practice and Training*, 33 J. LEGAL EDUC. 570, 582 (1983).

207. *See* U.S. CONST. amend. VII; FED. R. CIV. P. 1.

208. *See* discussion *supra* Part IV.A.

209. *See* Boucher v. Rioux, No. 14-CV-141-LM, 2014 WL 4417914, at *3 (D.N.H. Sept. 8, 2014) (analyzing how "[p]ost-*Genesis* jurisprudence in both the circuit courts and the district courts has taken a favorable view of Justice Kagan's dissent" with extensive examples).

practical outcomes as the proposed approach, but is ultimately still premised upon the same logical errors underlying mootness by unaccepted offer doctrine.

Furthermore, the proposal does have one important practical advantage over the Sixth Circuit approach. Rejecting mootness by unaccepted offer means that defendants are no longer able to pick off representative plaintiffs in order to prematurely halt potential collective action certification.[210] Because the Sixth Circuit still accepts the validity of mootness by unaccepted offer, such picking off strategies remain viable under its middle of the road approach.

D. ANTICIPATING PITFALLS AND SHORTCOMINGS

One main criticism of the proposal is that it does not give judges sufficient discretion to dismiss or end cases for efficiency reasons. Even if the "litigation explosion" is a myth, it is undeniable that judges in the federal court system must manage overly full dockets with limited time and resources.[211]

Surprisingly, adherence to MUO has no real efficiency advantages. Because most circuits recognize various mootness exceptions in class actions, MUO currently puts an end to very few cases and in fact leads to increased litigation of the more complex questions of whether the mooting of representative plaintiffs' claims ends a putative class action prior to litigation of the class certification question.[212] The proposed approach avoids the high volume of litigation that occurs over the question of class action exceptions to mootness and allows collective actions to be screened at the certification stage instead. Furthermore, the proposed approach is not inherently less efficient than MUO because the district court can still end a case by simply responding to the defendant's motion to dismiss with the entry of judgment instead of a dismissal.

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210. *See Genesis Healthcare Corp*, 133 S. Ct. at 1534 (Kagan, J. dissenting).

211. *See* Miller, *Simplified Pleading*, *supra* note 126, at 292–304 (explaining that courts face increasing caseloads of more complicated multiparty, multidistrict litigation but that the litigation explosion myth is overblown); Miller, *Pretrial Rush*, *supra* note 126, at 992–94 (arguing that litigation explosion idea does not accurately reflect actual data regarding proportion of cases going to trial).

212. *See* discussion *supra* Part II.C; Saunders, *supra* note 22 (describing increased litigation and pending appeals over MUO and class actions).

The proposed approach leaves judges with sufficient discretion to manage their caseloads. Courts' decisions regarding class or collective action certification petitions proceed as normal, facing the legal tests that these petitions normally would[213] and the courts retain their ability to dispose of cases when a defendant is truly offering everything to which a plaintiff is entitled.[214] If a plaintiff is truly acting out of "obstinacy or madness" or is trying to use the litigation system to hold the defendant hostage to continued proceedings, the court will end their case by entering default judgment.[215]

The other main counterargument to the proposed approach is that it does no better to promote normative values than the alternatives. The rejection of MUO still leads to court-imposed settlement in some circumstances because it allows courts to enter judgment according to the terms of the defendant's settlement over the plaintiff's objections.[216] However, the proposed approach is still preferable to the status quo because it asks courts to evaluate whether the defendant's offer is actually giving complete relief prior to disposing of the case. The proposal operates on a presumption that the plaintiff's refusal to accept an offer may be valid, and thus recognizes the importance of voluntariness in settlement. Imposing judgment on the plaintiff over her objections is only appropriate if the court makes an additional finding that the defendant is actually offering the plaintiff all they may legally obtain or if the plaintiff is truly refusing to settle out of "obstinacy or madness."[217]

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213. *See* Mullenix, *supra* note 127, at 517–31 (explaining trends decreasing vitality of class action device), Gilles, *supra* note 127, at 375–76 (explaining significant obstacles facing class action certification).

214. *See* Diaz v. First Am. Home Buyers Prot. Corp., 732 F.3d 948, 954–55 (9th Cir. 2013) (explaining when judges may enter default judgment); McCauley v. Trans Union, LLC, 402 F.3d 340, 342 (2d Cir. 2005) (holding that entry of default judgment pursuant to defendant's settlement offer is proper course).

215. *See* Bone, *Encourage Settlement, supra* note 28, at 1574–75; *Genesis Healthcare*, 133 S. Ct. at 1536 (Kagan, J. dissenting).

216. Both the Second and Ninth circuits acknowledge this possibility. *See Diaz*, 732 F.3d at 954–55; *McCauley*, 402 F.3d at 342.

217. *Genesis Healthcare*, 133 S. Ct. at 1536 (Kagan, J. dissenting) (explaining that courts may halt lawsuits when "defendant unconditionally surrenders" and only plaintiff's "obstinacy or madness prevents her from accepting total victory" although court may not do this "when the supposed capitulation in fact fails to give the plaintiff all the law authorizes and she has sought"); *see also McCauley*, 402 F.3d at 342 (allowing court to enter judgment for plaintiff on the record rather than forcing plaintiff to accept defendant's conditional settlement offer).

VI. CONCLUSION

Think back to the hypothetical in the introduction. You sue someone and agree that you are entitled to $X. You may plan to file a class action to bring in others who share your injuries or hope that a trial will result in a finding of the defendant's liability. The defendant makes you an offer for $X and you refuse. It would defy common sense if your mere refusal was enough for the judge to dismiss your case, citing a sudden absence of subject matter jurisdiction. Such an outcome is predicated on multiple misconceptions concerning the operation of Rule 68 and mootness doctrine.

Instead, courts should take the proposed approach, adhering to Justice Kagan's analysis of the mootness by unaccepted offer issue while utilizing the Second Circuit's framework for disposing of cases where a defendant's Rule 68 offer truly addresses a plaintiff's monetary and nonmonetary interests. By doing so, courts will better protect equality between parties, respect the value of trial on the merits, consider the importance of plaintiffs' autonomy in settlement, and prevent defendants from short circuiting collective actions through the picking off strategy.